

**AGREEMENT
BETWEEN TOWN OF WINDHAM
AND
T.Y. LIN INTERNATIONAL**

AGREEMENT made this _____ day of _____, 2015, by and between the **TOWN OF WINDHAM**, a body politic and corporate, located in the County of Cumberland and State of Maine (hereinafter the **“TOWN”**) and **T.Y. Lin International**, a California corporation with a principal place of business located at 12 Northbrook Drive, Falmouth, Maine (hereinafter **“Engineer”**).

WITNESSETH

WHEREAS, the **TOWN** has set out in the detail the objectives of its use of a Consulting Engineering Firm and the scope of the services that firm will be asked to provide in a Request for Proposals for **21st Century Downtown Master Plan Preliminary Engineering Services** dated September 4, 2015, a copy of which is hereby incorporated by reference into this Agreement (the **“RFP”**);

WHEREAS, **ENGINEER** submitted a written proposal dated October 2, 2015 in response to that RFP, a copy of which is hereby incorporated by reference into this Agreement (the **“ENGINEER Proposal”**); and

WHEREAS, the **TOWN** now wishes to engage **ENGINEER** pursuant to the terms of the RFP, the **ENGINEER** Proposal and the terms of this Agreement to serve as the **TOWN**’s primary engineering firm to provide such peer review civil engineering services and occasional **TOWN**-initiated project engineering services;

NOW, THEREFORE, the parties do hereby agree as follows:

1. SERVICES

ENGINEER agrees to serve as the **TOWN**’s engineering firm to provide such preliminary engineering services as outlined in the Scope of Services section of the RFP with the exception of Task 3b, which has been removed from this Scope of Services, and to do so as reasonably required under prevailing professional standards in the engineering, survey and planning community in Southern Maine and so to provide the **TOWN** with competent, timely and independent professional engineering, planning and survey advice and work product, and **ENGINEER** agrees to provide the same pursuant to the RFP, the **ENGINEER** Proposal and the terms of this Agreement. Any substantial change or addition to the Scope of Services shall be agreed upon in writing by the **TOWN** and **ENGINEER**, and **ENGINEER** agrees to perform additional services, if any, at rates to be determined based on the nature of the services involved. Authorization of performance of any additional services shall be in writing, in advance from the **TOWN**.

2. TERM OF AGREEMENT

The term of this Agreement shall be until completion of all tasks under the terms of the RFP and listed in Section 4 of the ENGINEER Proposal, currently anticipated to occur no later than March 31, 2016 , unless otherwise agreed by the parties in writing. Task 4 shall be completed by March 1, 2016.

3. PAYMENT

The total fee for services shall be \$76,155.00 (\$93,852 less \$17,697 for removal of Task 3b), as noted in Section 5 of the ENGINEER proposal. ENGINEER shall submit invoices to the TOWN based on the Tasks details in Section 4 of the ENGINEER proposal:

20% of the total fee upon execution of this agreement,

30% of the total fee upon the Concept Design submittal

30% of the total fee upon the Preliminary Design without costs submittal

15% of the total fee upon the Preliminary Design with costs submittal

5% of the total fee upon final completion

4. PERSONNEL, INDEPENDENT CONTRACTOR

ENGINEER represents that it has, or will secure at its expense, all personnel required in performing its services under this Agreement. Such personnel shall not be officers or employees of the **TOWN**, nor have any contractual relationship with the **TOWN**. **ENGINEER**'s Project Manager hereunder shall be Thomas Errico and any deletion or change in Project Manager shall be subject to the **TOWN**'s approval.

ENGINEER further agrees that, consistent with its status as an independent contractor, its personnel will not hold themselves out to be, nor claim to be, officers or employees of the **TOWN** by reason of this Agreement.

5. STANDARD OF PERFORMANCE

ENGINEER shall be, and remain, fully responsible to the **TOWN** for technical completeness, sufficiency and accuracy of all professional services furnished by or under this Agreement and shall, without additional cost or fee to the **TOWN**, correct and revise any errors or deficiencies in its performance and shall pay the **TOWN** for any loss, damages, or costs, including attorney's fees, resulting from **ENGINEER**'s breach of this Agreement or incurred by the **TOWN** for the replacement or correction of any part of the work hereunder that is deficient or defective.

The **TOWN** shall provide **ENGINEER** with prior written notice of any errors or deficiencies in its performance prior to replacement or correction of any work and shall give **ENGINEER** a reasonable time under the circumstances to correct said error or deficiency.

The standard of care for all professional services performed or furnished by Engineer pursuant to this Agreement shall be the care and skill ordinarily used by members of the design profession.

6. TOWN'S REPRESENTATIVE

The **TOWN**'s Planning Director, or his/her authorized designee, shall act as the **TOWN**'s representative in all dealings with **ENGINEER**.

7. DOCUMENTS

The **TOWN** agrees to furnish or provide access to **ENGINEER** to any information or material in its possession that is relevant to **ENGINEER**'s performance hereunder and **TOWN** staff will cooperate with **ENGINEER**. **ENGINEER** will not, without the **TOWN**'s written consent, disclose, or permit disclosure, by any officer, employee, or agent or subcontractor of **ENGINEER**, of any information or material furnished or generated under this Agreement.

All documents and reports developed under this Agreement shall become the property of the **TOWN** and be promptly delivered to the **TOWN** upon request. All working papers shall be and remain the property of **ENGINEER** but **ENGINEER** shall make said work papers available to the **TOWN** upon the **TOWN**'s request, and the **TOWN** shall be provided copies of any or all working papers upon request.

ENGINEER shall be responsible for the protection and/or replacement of any work or material in its possession, including materials provided to them by the **TOWN**.

8. INDEMNIFICATION

To the fullest extent permitted by law, **ENGINEER** shall defend, indemnify and hold harmless the **TOWN** and its officers, agents-and employees from and against all claims, damages, losses, and expenses, including but not limited to reasonable costs of defense and reasonable attorney's fees, arising out of or resulting from the negligent performance of professional services under this Agreement, provided that any such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property, including the loss of use therefrom, or (2) is caused in whole or part by any negligent or intentional act or omission of **ENGINEER**. In the event that **ENGINEER** hires any subcontractors for work, it shall require such subcontractors to have in place appropriate insurance that names the Town as additional insured in the case of any loss covered under this Agreement.

Such obligation of indemnification shall not be construed to negate or abridge any other obligation of indemnification running to the **TOWN** that otherwise exists. The extent of the indemnification provision shall not be limited by any insurance required under this Agreement.

9. INSURANCE

ENGINEER shall maintain and keep in full force and effect at all times during the term of this Agreement a policy of commercial general liability insurance and automotive liability insurance with an insurance company licensed to do business in the State of Maine, each in an amount not less than \$400,000, or such larger amount as needed to reflect changes in municipal liability exposure under the Maine Tort Claims Act, as amended from time to time and with the Town

named as additional insured on such coverage; workers' compensation liability insurance with an insurance company licensed to do business in the State of Maine in the statutory amount, as amended from time to time; and professional liability insurance coverage with an insurance company licensed to do business in the State of Maine in an amount no less than \$1,000,000 per occurrence and in the aggregate. **ENGINEER** shall provide the **TOWN** with a copy of the certificate evidencing such insurance upon the commencement date of this Agreement and upon the anniversary of the commencement date of this Agreement thereafter.

10. TERMINATION

The **TOWN** may terminate this Agreement for cause by written notice of default to **ENGINEER**. In the event of such termination, **ENGINEER** shall not be entitled to any further payment under this Agreement from the date of receipt of said Notice.

The **TOWN** shall have the right to terminate this Agreement at any time for its convenience on prior written notice to **ENGINEER**. If Agreement is terminated by the **TOWN** for convenience, the **TOWN** shall pay **ENGINEER** for all work performed pursuant to this Agreement prior to receipt of such notice.

11. NO ASSIGNMENT

Neither party to the Agreement shall assign the Agreement or sublet it as a whole without the written consent of the other, nor shall **ENGINEER** assign any moneys due or to become due to it hereunder, without the previous written consent of the **TOWN**.

This Agreement shall be binding upon and inure to the benefit of the parties hereto, their successors and permitted assigns.

12. NON-WAIVER

Except as expressly provided in this Agreement, the failure or waiver, or successive failures or waivers on the part of either party hereto, in the enforcement of any condition, the covenant, or section shall not render the same invalid, nor impair the right of either party hereto, their successors or permitted assigns, to enforce the same in the event of any subsequent breach thereof.

13. NOTICES

All notices required or permitted under this Agreement shall be in writing and shall be deemed sufficiently served if sent by First Class Mail addressed as follows, or such other address as they may designate in writing from time to time:

To **TOWN**: Planning Director
Town of Windham
8 School Road
Windham, ME 04062
cc: Finance Director

To ENGINEER: Thomas Errico
T.Y. Lin International
12 Northbrook Drive
Building A, Suite One
Falmouth, ME 04260

14. COMPLIANCE WITH LAW

In its performance under this Agreement, **ENGINEER** will comply with applicable federal, State of Maine, and local laws, including but not limited to all laws prohibiting discrimination in employment on the basis of race, color, religion, national origin, mental or physical handicap, age, gender or sexual orientation.

15. REMEDIES

Except as otherwise agreed by the parties in writing, all disputes, claims, counterclaims and other matters in question between the **TOWN** and **ENGINEER** arising out of or relating to this Agreement shall be decided by a Maine court of competent jurisdiction. This Agreement is made and shall be construed under the laws of the State of Maine except any law that purports to apply the substantive law of any other state or jurisdiction. Except as otherwise expressly agreed by the parties in writing, exclusive venue for any such civil action shall be in Maine Superior Court (Cumberland County).

IN WITNESS WHEREOF, the **TOWN OF WINDHAM** has caused this Agreement to be signed by Anthony T. Plante, its Town Manager, thereunto duly authorized, and T.Y. Lin International has caused this Agreement to be signed by Kevin S. Ducharme, its Vice President, thereunto duly authorized, the day and date first above written.

WITNESS:

TOWN OF WINDHAM

By: _____
Anthony T. Plante,
Its Town Manager

WITNESS:

T.Y. Lin International

Cathy A. Dolloff

By: _____
Kevin S. Ducharme
Vice President