

1 **BILL NO. S-12-01-27**

2 SPECIAL ORDINANCE NO. S-_____

3 AN ORDINANCE approving AUBURN ROAD:
4 CLINTON STREET TO COOK ROAD,
5 CONSTRUCTION CONTRACT - WORK ORDER
6 NO. 11937 between FLEMING EXCAVATING,
7 INC. and the City of Fort Wayne, Indiana, in
8 connection with the Board of Public Works.

9 **NOW, THEREFORE, BE IT ORDAINED BY THE COMMON**
10 **COUNCIL OF THE CITY OF FORT WAYNE, INDIANA:**

11 **SECTION 1.** That the AUBURN ROAD: CLINTON STREET TO
12 COOK ROAD, CONSTRUCTION CONTRACT - WORK ORDER NO. 11937
13 by and between FLEMING EXCAVATING, INC. and the City of Fort Wayne,
14 Indiana, in connection with the Board of Public Works, is hereby ratified, and
15 affirmed and approved in all respects, respectfully for:

16 All labor, insurance, material, equipment, tools, power,
17 transportation, miscellaneous equipment, etc., necessary for
18 widening of Auburn Road to provide four (4) travel lanes and turn
19 lanes at intersections; new curbs, new sidewalk on the west
20 side and trail on the east side; new traffic control signal at Cook
21 Road intersection; storm sewers; street lighting; and pavement
22 markings;

23 involving a total cost of TWO MILLION, TWO HUNDRED THIRTY-FOUR
24 THOUSAND, NINE HUNDRED FIVE AND 18/100 DOLLARS -
25 (\$2,234,905.18) - (FEDERAL - \$150,000.00; INDOT - \$2,054,905.00; CITY -
26 \$30,000.00).

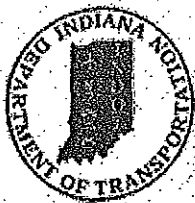
27 **SECTION 2.** Prior Approval has been requested from Common
28 Council on JANUARY 24, 2012. Said copy is on file in the Office of the City
29 Clerk and made available for public inspection, according to law.
30

SECTION 3. That this Ordinance shall be in full force and effect from and after its passage and any and all necessary approval by the Mayor.

Council Member

APPROVED AS TO FORM AND LEGALITY

Carol Helton, City Attorney



INDIANA DEPARTMENT OF TRANSPORTATION
Driving Indiana's Economic Growth

100 North Senate Avenue
Room IGC-N 749
Indianapolis, Indiana 46204-2216

INVOICE

Mitchell E. Daniels, Jr., Governor
Michael Cline, Commissioner

Bill To:

City of Fort Wayne
ATTN: Traffic Engineer
200 East Berry Street, Suite 210
Fort Wayne IN 46802

Customer No: CST000001835
Invoice: 000013452
Invoice Date: 1/13/2012
Invoice Type: LPA

AMOUNT DUE: \$2,084,905.18

***** Payment is Due Upon Receipt of Invoice *****

Line	Description	Quantity	Unit Amt	Net Amount
1	Contract # R-30444 Initial deposit (revised) for project #0710495, contract # R-30444; Added travel lanes on Auburn Road (see attached). Please cancel invoice #000013392 dated 01/11/12.	1.00	2,084,905.18	2,084,905.18
			Subtotal:	2,084,905.18
			AMOUNT DUE:	\$2,084,905.18

Please return this portion with your payment.

Department of Transportation
Attention: Agent Cashier
N749 IGCN
100 N. Senate
Indianapolis, IN 46204

Invoice: 000013452

Amount Paid: \$ _____

☐ Visa ☐ Mastercard ☐ Discover ☐ Diners Club ☐ Check/Money Order

Name on Card _____ Card Number _____
(Name must appear as exactly as on card)

CID (3 or 4 digit security code) _____ Expiration Date _____

Billing Address _____

Signature Required: _____ Date _____

For billing questions, please call: 317-232-5384

Invoice: 000013452

Indiana Department of Transportation, 100 North Senate Avenue, Indianapolis, Indiana 46204-2216

Amendment 1

This Amendment, made and entered into this 10th day of March, 2009, by and between State of Indiana, through the Indiana Department of Transportation (hereinafter referred to as INDOT) and the City of Fort Wayne, acting by and through its Board of Public Works (hereinafter referred to as CITY).

WHEREAS, on July 28, 2004 INDOT entered into an agreement (see attached copy) with the CITY for bridge replacement on Auburn Road over I-69, including approaches and intersection improvements at Cook Road and N. Clinton Street; and

WHEREAS, due to the delay of the construction of this project, budget and programming constraints may jeopardize the funding for the construction phase of this project in 2010. Therefore, to protect the funding, INDOT has determined that it would be in the best interests of INDOT and CITY that INDOT make a one time payment to the CITY and CITY takes over management and costs of the remaining phases of the project..

NOW THEREFORE, it has been determined by INDOT and the CITY that the agreement shall be amended as follows:

1. Article I – INDOT RESPONSIBILITIES,

- a. paragraph I.01. is deleted.
- b. paragraph I.03. is deleted and rewritten revised as follows: INDOT shall complete and pay for the design services (Preliminary Engineering) for improvements to Auburn Road through their consultant (DLZ Indiana) consisting of 4 lane approaches to the I-69 bridge, pavement channelization and traffic signal improvements at Cook Road and N. Clinton Street. (See attached drawing titled Signing and Pavement Marking Plan for geometric improvements.) The design services shall be limited to those in the original INDOT-consultant agreement dated April 20, 2004, and subsequent supplemental agreements 1 thru 5 approved by INDOT (See attached Supplementals). Any additional design services shall be paid for by the CITY.
- c. paragraph I.04. is deleted.
- d. paragraph I.07. is added as, and reads as follows: INDOT agrees to make a one- time payment to the CITY in the amount of two million four hundred sixty five thousand one hundred fifty dollars and no cents (\$2,465,150.00). This amount represents the two million five hundred sixty thousand dollars and no cents (\$2,560,000.00) currently listed in the project's budget, minus the amount for the remaining Preliminary Engineering on the project, which is ninety four thousand eight hundred fifty dollars and no cents (\$94,850.00). This will reduce delays and allow the design to move forward to final plans.

2. Article II – CITY RESPONSIBILITIES,

- a. paragraph II.01. is deleted and rewritten as follows: The CITY shall be the Lead Agency and will complete the project. The CITY shall be responsible for overseeing the final design, utility coordination, permits,

right-of-way acquisition, and final tracing documentation in preparation for an INDOT bid letting. The CITY shall also be responsible for construction engineering and inspection services. The CITY shall pay for these services with the funds provided in paragraph I.07. above. INDOT is not obligated to fund any amount over \$2,465,150.00).

b. paragraph II.02. is deleted.

3. ARTICLE III,

a. paragraph III.01. change the word "INDOT" to "CITY".

Modification/Entire Agreement. This Agreement may be amended from time to time hereafter in writing executed by both Parties, and submitted to the Attorney General of Indiana for approval as to form and legality. No verbal change, modification, or amendment shall be effective, unless in writing and signed by the Parties and approved by the Attorney General. The provisions hereof constitute the entire agreement between the Parties and supersede any verbal statements, representations or warranties stated or implied.

Governing Laws. This Agreement shall be construed in accordance with and governed by the laws of the State of Indiana and suit, if any, must be brought in the State of Indiana.

Drug-Free Workplace Certification. The City hereby covenants and agrees to make a good faith effort to provide and maintain a drug-free workplace. In that regard, if and when The City engages any contractor to perform any work under this Agreement, the City agrees to inform the contractor about any contractor's obligation to comply with the April 12, 1990 Indiana Governor Executive Order No. 90-5 concerning the contractor's obligation to maintain a drug free work place.

The City will give written notice to the State within ten (10) days after receiving actual notice that the City, Contractor or an employee of either has been convicted of a criminal drug violation occurring in the City's or Contractor's workplace.

False certification or violation of the certification may result in sanctions including, but not limited to, suspension of contract payments, termination of this Contract and/or debarment of contracting opportunities with the State of Indiana for up to three (3) years. In addition to the provisions of the above paragraphs, if the total contract amount set forth in this Contract is in excess of \$25,000.00, the City hereby further agrees that this Agreement is expressly subject to the terms, conditions, and representations of the following certification:

This certification is required by Executive Order No. 90-5, April 12, 1990, issued by the Governor of Indiana. Pursuant to its delegated authority, the Indiana Department of Administration is requiring the inclusion of this certification in all contracts and grants from the State of Indiana in excess of \$25,000.00. No award of a contract shall be made, and no contract, purchase order or agreement, the total amount of which exceeds \$25,000.00, shall be valid, unless and until this certification has been fully executed by

The City and Developer and made a part of the contract or agreement as part of the contract documents.

The City certifies and agrees that it will provide a drug-free workplace by:

- a. Publishing and providing to all of its employees a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in The City's workplace, and specifying the actions that will be taken against employees for violations of such prohibition;
- b. Establishing a drug-free awareness program to inform its employees of (1) the dangers of drug abuse in the workplace; (2) the City's policy of maintaining a drug-free workplace; (3) any available drug counseling, rehabilitation, and employee assistance programs; and (4) the penalties that may be imposed upon an employee for drug abuse violations occurring in the workplace;
- c. Notifying all employees in the statement required by subparagraph (a) above that as a condition of continued employment, the employee will (1) abide by the terms of the statement; and (2) notify the City of any criminal drug statute conviction for a violation occurring in the workplace no later than five (5) days after such conviction;
- d. Notifying in writing INDOT within ten (10) days after receiving notice from an employee under subdivision (c)(2) above, or otherwise receiving actual notice of such conviction;
- e. Within thirty (30) days after receiving notice under subdivision (c)(2) above of a conviction, imposing the following sanctions or remedial measures on any employee who is convicted of drug abuse violations occurring in the workplace: (1) taking appropriate personnel action against the employee, up to and including termination; or (2) requiring such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a federal, state or local health, law enforcement, or other appropriate agency; and
- f. Making a good faith effort to maintain a drug-free workplace through the implementation of subparagraphs (a) through (e) above.

Subsequent Acts. The Parties agree that they will, at any time and from time to time, from and after the execution of this Agreement, upon request, perform or cause to be performed such acts, and execute, acknowledge and deliver or cause to be executed, acknowledged and delivered, such documents as may be reasonably required for the performance by the Parties of any of their obligations under this Agreement.

Non-Waiver. No delay or failure by either Party to exercise any right hereunder, and no partial or single exercise of any such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

Headings. Headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

Severability. Wherever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement shall be prohibited by or invalid under applicable law, such provision shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

Term Funding Cancellation. When the Director of the State Budget Agency makes a written determination that funds are not appropriated or otherwise available to support continuation of performance of this Contract, this Contract shall be cancelled. A determination by the Director of the State Budget Agency that funds are not appropriated or otherwise available to support continuation of performance shall be final and conclusive.

Authorizations. Any person executing this Agreement in a representative capacity hereby warrants that he/she has been duly authorized by his/her principal to execute this Agreement on such principal's behalf.

Force Majeure, Suspension and Termination. In the event that either Party is unable to perform any of its obligations under this Agreement or to enjoy any of its benefits because of natural disaster, actions or decrees of governmental bodies or communication line failure not the fault of the affected Party (hereinafter referred to as a "Force Majeure Event"), the party which has been so affected shall immediately give notice to the other Party and shall do everything possible to resume performance. Upon receipt of such notice, all obligations under this Agreement shall be immediately suspended. If the period of nonperformance exceeds thirty (30) days from receipt of notice of the Force Majeure Event, the Party whose ability to perform has not been so affected may be given written notice to terminate this Agreement.

Substantial Performance. This Agreement shall be deemed to have been substantially performed only when fully performed according to its terms and conditions and any modification thereof.

Debarment and Suspension. The City certifies, by entering into this agreement, that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from entering into this agreement by any federal agency or department, agency or political subdivision of the State of Indiana.

Ethics. The City shall abide by all ethical requirements that apply to persons who have a business relationship with the State of Indiana, as set forth in Indiana Code § 4-2-6 et seq., the regulations promulgated thereunder, and Executive Order 04-08, dated April 27, 2004. If the Indiana LTAP is not familiar with these ethical requirements, the Indiana LTAP should refer any questions to the Indiana State Ethics Commission, or visit the Indiana State Ethics Commission website at <http://www.in.gov/ethics/>. If the Indiana LTAP or its agents violate any applicable ethical standards, the State may, in its sole discretion, terminate this contract immediately upon notice to Purdue. In addition, The Indiana LTAP may be subject to penalties under Indiana Code § 4-2-6-12.

As required by IC 5-22-3-7:

- (1) The Contractor and any principals of the Contractor certify that (A) the Contractor, except for de minimis and nonsystematic violations, has not violated the terms of (i) IC 24-4.7 [Telephone Solicitation Of Consumers], (ii) IC 24-5-12 [Telephone Solicitations] , or (iii) IC 24-5-14 [Regulation of Automatic Dialing Machines] in the previous three hundred sixty-five (365) days, even if IC 24-4.7 is preempted by federal law; and (B) the Contractor will not violate the terms of IC 24-4.7 for the duration of the Contract, even if IC 24-4.7 is preempted by federal law.
- (2) The Contractor and any principals of the Contractor certify that an affiliate or principal of the Contractor and any agent acting on behalf of the Contractor or on behalf of an affiliate or principal of the Contractor (A) except for de minimis and nonsystematic violations, has not violated the terms of IC 24-4.7 in the previous three hundred sixty-five (365) days, even if IC 24-4.7 is preempted by federal law; and (B) will not violate the terms of IC 24-4.7 for the duration of the Contract, even if IC 24-4.7 is preempted by federal law.

No Agency Relationship. Both Parties hereto, in the performance of this Agreement, shall act in an individual capacity and not as agents, employees, partners, joint venturers or associates of one another. The employees or agents of one party shall not be deemed or construed to be the employees or agents of the other party for any purposes whatsoever. Neither party will assume liability for any injury (including death) to any persons, or damage to any property, arising out of the acts or omissions of the agents, employees or subcontractors of the other party. Purdue shall be responsible for providing all necessary unemployment and workers' compensation insurance for its employees.

Non-Collusion and Acceptance

The undersigned attests, subject to the penalties of perjury, that he/she is the contracting party, or that he/she is the representative, agent, member or officer of the contracting party, that he/she has not, nor has any other member, employee, representative, agent or officer of the firm, company, corporation or partnership represented by him/her, directly or indirectly, to the best of his/her knowledge, entered into or offered to enter into any combination, collusion or agreement to receive or pay, and that he/she has not received or paid any sum of money or other consideration for the execution of this agreement other than that which appears upon the face of the agreement.

THE REST OF THIS PAGE LEFT INTENTIONALLY BLANK.

In Witness Whereof, CITY and INDOT have, through duly authorized representatives, entered into this Contract. The parties having read and understand the foregoing terms of this Contract do by their respective signatures dated below hereby agree to the terms thereof.

I
CITY OF FORT WAYNE
Board of Public Works

Approved

BY:

Regina A. Kostoff
Regina A. Kostoff, Chair

BY:

Kumar Menon
Kumar Menon, Member

BY:

John Suarez
John Suarez, Member

ATTEST:

Marilyn Huth
Marilyn Huth, Clerk

STATE OF INDIANA
Department of Transportation

Recommended for Approval

BY:

Robert D. Cales
Robert D. Cales, Director,
Contract Administration
Date: 3/9/2009

Executed By

Michael W. Reed
Michael W. Reed, Commissioner
Indiana Department of Transportation

Date: 3/10/09

State Budget Agency

Christopher A. Ruhl
Christopher A. Ruhl, Director

Date: 3/25/09

APPROVED AS TO FORM AND
LEGALITY:

Gregory F. Zoeller
Gregory F. Zoeller
Attorney General of Indiana
Date: March 24, 2009

Approved:

Mark W. Everson
Mark W. Everson, Commissioner
Department of Administration

Date: 3/16/09

DIGEST SHEET

Department: Transportation Engineering, Division of Public Works

Resolution Number: N/A (Work Order No. 11937)

Title of Ordinance: Auburn Road: Clinton Street to Cook Road,
Construction Contract

Awarded To: Fleming Excavating, Inc.

Amount of Contract: \$2,234,905.18

Funded: \$ 150,000 (Federal CMAQ) (6.7% of construction cost)
 \$2, 054,905 (INDOT) (92.0% of construction cost)
 \$ 30,000 (City) (1.3% of construction cost)

Number of Bidders: 5 contractors submitted bids through INDOT's
bidding process.

Description of Project (Be Specific):

Proposed improvements for this project include: Widening of Auburn Road to provide four (4) travel lanes and turn lanes at intersections; new curbs, new sidewalk on the west side and trail on the east side; new traffic control signal at Cook Road intersection; storm sewers; street lighting; and pavement markings.

This project was originally supposed to be built as part of INDOT's widening on I-69 and the replacement of the bridge on Auburn Road over I-69. However due to the delays in development of the intersection project created primarily by right-of-way acquisition, INDOT severed the intersection part of the project and built the bridge so that I-69 could be widened to six lanes. As a part of this project severance, INDOT agreed to pay a lump sum of \$2,465,150 which was submitted to the City in July, 2009. At the time it was agreed upon that any additional costs associated with this project would be borne by the City. The City further applied for and received \$150,000 in CMAQ funding. The overall project cost breakdown (including preliminary engineering, right-of-way, construction and construction inspection) is as follows:

Total Cost \$ 2,776,786
Federal \$ 216,376 (7.8% of total cost)
INDOT \$ 2,465,150 (88.8% of total cost)
City \$ 95,260 (3.4% of total cost)

Any costs above and beyond the above will be at 100% City expense.

What Are The Implications If Not Approved:

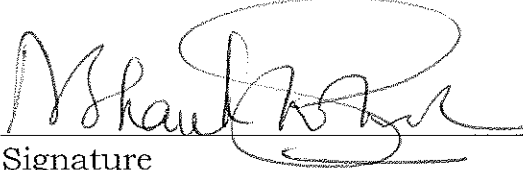
City will not be able to proceed with the contract as bid.

If Prior Approval Is Being Requested, Justify:

The contract was let on December 14, 2011. This contract is time sensitive per INDOT Contract Compliance. Original terms of the contract apply up to 30 days from when the contract was let (this 30 day period ended on January 14). After this period, if notice to proceed has not yet been issued, the contractor can request a time extension on the completion date. If notice to proceed is not issued within 60 days of letting, the contractor may terminate contract with no penalty. This 60 day period ends on February 14. Therefore Prior Approval is being requested to keep the contract from possibly having to be rebid.

Additional Comments:

Attached is the invoice submitted by INDOT for payment in the amount of \$2,084,905.18. This invoice covers the total bid amount of \$2,234,905.18 less \$150,000 in CMAQ federal funding applied towards this project. Also attached is the agreement between the City and INDOT which details the severance of the projects.


Signature

01/19/12
Date