

**CITY OF MARIANNA
COMMISSION AGENDA MEMO
REGULAR MEETING
June 7, 2022**

ADMINISTRATIVE STAFF REPORT

**Subject: New Market Tax Credits (NTC) & CDBG-HR
Engagement Letter – Davis Business Advisory Services, PLLC**

Subject Background: The City of Marianna has been approached to participate in a NTC transaction. If successful the City could benefit by being awarded approximately \$1 million.

Recommendation: Discussion by City Attorney

Potential Motion: TBD

Prepared by:

Marianna Office Supply Building Project Sources and Uses - Phase I
Prepared by Davis Business Advisory Services, LLC
Updated as of June 2, 2022

Sources

Federal New Markets Equity at \$.76	2,074,800	
Project Grant	<u>5,000,000</u>	
Total Sources		<u><u>7,074,800</u></u>

Uses

Project Uses

Project Construction and Related Costs	6,044,800	
Total Project Uses		6,044,800

Transaction Fees

Consultant's Fee	210,000	
Legal and Professional Fees	225,000	
CDE Allocation Fee and Reserves	<u>595,000</u>	
Total Transaction Fees		<u><u>1,030,000</u></u>

Total Uses		<u><u>7,074,800</u></u>
------------	--	-------------------------

Net NMTC Subsidy to City of Marianna		<u><u>1,044,800</u></u>
--------------------------------------	--	-------------------------



DAVIS BUSINESS ADVISORY SERVICES, PLLC

June 2, 2022

Jim Dean, City Manager
City of Marianna
2895 Jefferson Street
Marianna, FL 32446

Dear Jim:

Davis Business Advisory Services, PLLC is pleased to provide the City of Marianna with the professional services described below. This letter, and the attached Exhibit A and any other attachments incorporated herein, (collectively, "Agreement"), confirm our understanding of the terms and objectives of our engagement and the nature and limitations of the services we will provide. The engagement between you and our firm will be governed by the terms of this Agreement.

This Agreement is entered into as of June 7, 2022 ("Effective Date"), by and between Davis Business Advisory Services, PLLC, a Washington professional limited liability company with a principal place of business at 1913 27th Pl., Anacortes, WA 98221 ("Contractor") and the City of Marianna, a political subdivision of the State of Florida with a principal place of business at 2895 Jefferson Street, Marianna, FL 32446 ("Client"). Contractor and Client are collectively referred to herein as the "parties" or individually as a "party."

Contractor will perform services in accordance with the *Statement on Standards for Consulting Services* issued by the American Institute of Certified Public Accountants ("AICPA"). Such services do not constitute an audit, review, or any other attestation service as those services are defined in AICPA literature applicable to such engagements. Accordingly, these services will not result in the issuance of a written communication to third parties by Contractor regarding financial data or internal controls, expressing an opinion or conclusion or obtaining or providing any form of assurance. Contractor's engagement does not include any procedures designed to detect errors, fraud, or theft. Therefore, Contractor's engagement cannot be relied upon to disclose such matters.

Engagement Objectives and Scope

The Contractor and Client agree as follows:

1. **Term.** The term of this Contract shall begin on the Effective Date and shall terminate on the on the unwind date of the first New Markets Tax Credit ("NMTC") financing transaction, unless earlier terminated as provided herein (the "Term").
2. **Contractor's Duties.**
 - 2.1. **Duties.** Contractor will perform the services described on the scope of work attached as Exhibit A (the "Scope of Work"), including any subsequent amendment identified in a written change order signed in advance by the Contractor and Client ("Change Order"), which Change Order shall be subject to the terms and conditions hereof.
 - 2.2. **Performance of Duties.** Contractor will perform its duties during Clients' normal business hours and at all other times reasonably necessary to perform the duties. Contractor will devote sufficient time and attention to timely fulfill Contractor's contractual obligation hereunder.
3. **Fees.**
 - 3.1 Client shall pay Contractor as described in Exhibit A, except as otherwise indicated in a duly ordered and executed Change Order.
 - 3.2 Client acknowledges that compensation arrangement is classified as contingent fee by the AICPA Code of Professional Conduct. Contractor represents, warrants, and certifies to Client that it has disclosed to Client the nature of the contingent fee arrangement as described in Exhibit A.
4. **Expenses.** Client shall reimburse Contractor for required project travel expenses in excess of \$2,000. All eligible travel expenses require advanced written preauthorization from Client. Contractor shall provide client with all receipts for required project travel that are eligible for reimbursement. Routine expenses of Contractor associated with maintenance of an office and provision of basic services on behalf of Client are the Contractor's sole responsibility.
5. **Payment Schedule.**
 - 5.1. **Payment of Fee for Closing NMTC Investment.** Contractor shall submit an invoice for its fee prior to closing of the NMTC investment. Client shall authorize payment of the fee out of the closing escrow from the proceeds of financing for the Project.
6. **Ownership of Intellectual Property.** "Intellectual Property" means inventions (whether or not patentable), works of authorship, trade secrets, techniques, know-how, ideas, concepts, algorithms, software and other proprietary rights. Contractor and Client shall each retain ownership of, and all right, title and interest in and to, their respective, pre-existing Intellectual Property ("Pre-Existing Intellectual Property"), and no license therein is granted on an implied basis as a result of the services performed hereunder. Neither party shall own any Intellectual Property developed in relation to this Agreement, including all work, and both parties shall have an irrevocable license to use such ideas. Contractor represents and warrants to Client that Client's use or distribution of any Intellectual Property developed by Contractor in relation to the services provided in this Agreement, including all work, do not and will not violate rights of others, including rights relating to defamation, contract rights, copyrights, trade secret rights, patent rights, and rights of privacy or publicity.

7. **Indemnification.** Each party shall defend, hold harmless and indemnify each other and its directors, officers, agents and employees of and from all claims, loss, damage, injury, actions, causes of action and liability of every kind, nature and description directly or indirectly arising out of or connected with the performance of this Contract by the other party, and any of such other party's operations or activities related thereto, unless caused solely by the willful misconduct or the gross negligence of the person or entity seeking to be defended, indemnified or held harmless.
8. **Insurance.** Contractor shall procure and maintain for the duration of the Agreement insurance against claims of injuries to persons and damages to property which may arise from or in connection with the performance of the work under this Contract by Contractor, its agents, representatives, employees or subcontractors. Coverage types and amounts shall be consistent with commercially reasonable levels held by similar contractors in the State of Florida.
9. **Compliance with Laws.** Contractor hereby warrants that the services and work product provided by Contractor under this Agreement are and will be in compliance with all applicable local, Florida, and Federal laws, regulations and directives.
10. **Legal Services.** Client acknowledges, understands, and agrees that Contractor will not provide any legal services to Client and that Client is responsible to engage the services of qualified NMTC legal counsel including, but not limited to, any services related to the asset, compliance, and risk management associated with Client's involvement in the NMTC program. Contractor will assist Client with selection of qualified NMTC legal counsel.
11. **Accounting Services.** Client acknowledges that Contractor is a Certified Public Accountant and will assist with preparation of required financial projections related to this project on behalf of Client. Client also agrees that Client is responsible to engage the services of a qualified outside independent Public Accounting Firm that has expertise in New Markets Tax Credit transactions to issue an accountant's report. These services include, but are not limited to, any services related to the asset, compliance and risk management associated with Client's involvement in the NMTC program. Contractor will assist Client with selection of qualified independent Public Accounting Firm.
12. **Contractor Status.**
 - 12.1. **Independent Contractor.** Contractor hereby declares that it is engaged in an independent business and agrees to perform its services as an independent contractor and not as an agent or employee of Client. Contractor has and hereby retains the right to exercise full control and supervision of the services and work to be provided under this Contract and full control of the employment, direction, compensation and discharge of all persons assisting in the performance of the services and work hereunder. Contractor agrees to be solely responsible for all matters relating to payment of employees, including but not limited to compliance with all Federal, state and local payroll tax and withholding requirements, workers' compensation requirements and all regulations governing such matters. Contractor agrees to be solely responsible for its own acts and those of its subordinates and employees during the Term of this Agreement.
 - 12.2. **No Participation in Benefit Plans.** Contractor will not be eligible for, and will not be able to participate in, any health, pension, or other benefit of Client that exists for Client's employees during the Term.

12.3. **Taxes.** No payroll or employment taxes of any kind will be withheld or paid by Client on behalf of Contractor. Client will not treat Contractor as an employee with respect to the Contract services for any purpose, including federal and state tax purposes. Contractor understands and agrees that it is the Contractor's responsibility to pay all taxes required by law, including self-employment social security tax. Client will issue an IRS 1099 Form, or other appropriate tax-reporting document, to Contractor for the Contract services.

13. **Termination.** Either party may terminate this Contract at any time without cause upon thirty (30) days written notice of termination to the other party; provided, however, that in the event of such termination, Client shall reimburse Contractor for extraordinary expenses that were approved by Client as of the date of such notice or the date of termination specified in and directed by such notice.

14. **Confidentiality.** Contractor covenants that during and after the term of this Agreement, Contractor shall not disclose to anyone (except to the extent necessary for Contractor to perform duties hereunder or as required by law) any confidential or proprietary information concerning the business or affairs of Client or its clients which Contractor may acquire in the course of or incident to its engagement. It is anticipated that disclosures will be made to prospective NMTC allocatees, investors and lenders. It is not customary to obtain confidentiality agreements from such parties, but Contractor shall instruct such parties to treat Client information as they would their own confidential information. This covenant shall survive the termination of this Agreement.

15. **Conflict of Interest.** Contractor acknowledges and represents that it has no conflicts of interest that may interfere with its performance under this Agreement. Contractor further represents that it will immediately inform Client of any conflicts which arise or may rise during the term of this Contract by written notice to Client. Contractor and Client shall immediately address any such conflicts or potential conflicts as they may arise. If Contractor presently has any obligations or affiliations from which such a conflict might in the future arise, Contractor will provide written notice to this effect to Client on or before execution of this Agreement.

16. **Contractor's Performance Warranties.** Contractor represents and warrants to Client that:

16.1.1 Contractor has the skill and knowledge possessed by well-informed members of its profession, including specifically, skill and knowledge related to the NMTC program, and Contractor will apply that skill and knowledge with care and diligence so Contractor and Contractor's employees and any authorized subcontractors perform the Services described in this Agreement in accordance with the standards prevalent in Contractor's profession.

16.1.2 Except as otherwise provided in this Agreement, all work supplied by Contractor to Client shall be transferred to Client free and clear of any and all restrictions on or conditions of transfer, modification, licensing, sublicensing, direct or indirect distribution, or assignment, and free and clear of any and all liens, claims, mortgages, security interests, liabilities, and encumbrances of any kind.

16.1.3 When used as authorized by this Agreement, no work delivered by Contractor to Client infringes, nor will Client's use, duplication, or transfer of such work infringe, on any trademark, copyright, patent, trade secret, or other proprietary right of any third party.

16.1.4 Except as otherwise set forth in this Agreement, any subcontractors performing work for Contractor under this Agreement have assigned all of their rights in the work to

Contractor or Client and no third party has any right, title or interest in any work supplied to Client under this Agreement.

16.1.5 **WARRANTIES EXCLUSIVE; DISCLAIMERS.** THE WARRANTIES SET FORTH IN THIS AGREEMENT ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, WHETHER EXPRESS OR IMPLIED, AND CONTRACTOR EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE. THIS AGREEMENT DOES NOT CONSTITUTE A FINANCING COMMITMENT. CONTRACTOR WILL USE ITS BEST EFFORTS TO PERFORM THE SERVICES; HOWEVER, CLIENT UNDERSTANDS, ACKNOWLEDGES AND AGREES THAT (A) THERE IS NO GUARANTEE OF CLOSING A NMTC INVESTMENT TO SUPPORT THE PROJECT AND (B) IN NO EVENT WILL CONTRACTOR BE LIABLE TO CLIENT, UNDER ANY CAUSE OF ACTION, FOR FAILURE BY ANY PARTY TO CONSUMMATE A NMTC INVESTMENT.

17. General Provisions.

- 17.1. Assignability. Neither party may assign any portion of this Agreement at any time without the prior written consent of the other party.
- 17.2. Binding Effect. This Agreement and the transactions and other agreements contemplated hereby will be binding upon and inure to the benefit of the parties and their respective heirs, personal representatives, administrators, successors, and permitted assigns.
- 17.3. Governing Law. This Agreement will be governed by and construed in accordance with the laws of the State of Florida. For all disputes relating to this Contract, each party consents to the jurisdiction of the courts of the State of Florida and agrees that those courts have personal jurisdiction over each party. Venue for disputes shall be in Jackson County, Florida.
- 17.4. Dispute Resolution.
- 17.5. Prior to filing suit or initiating arbitration on any dispute that arises between the parties under or relating to this Agreement, the parties agree to attempt to resolve the dispute through good faith negotiation. If the dispute cannot be resolved through good faith negotiation, the parties may agree to hire an independent, trained and mutually acceptable mediator to mediate the dispute. The parties will share the cost of the mediator equally. The mediation is to be conducted in Marianna, Florida.
- 17.6. Entire Agreement. This Agreement contains the entire agreement with respect to the transactions contemplated by this Agreement and supersedes all prior and contemporaneous agreements among the parties with respect to such transactions.
- 17.7. Amendment. This Agreement may not be modified or amended except by the written agreement of the party entitled to the benefit of the provision against whom enforcement is sought.
- 17.8. Severability. If any term or provision of this Agreement is found by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement will not be affected thereby, and each term or provision of this Agreement will be valid and enforceable to the fullest extent permitted by law.

- 17.9. **Notices.** Any notice required or permitted to be given under this Agreement will be in writing and will be deemed duly given if delivered in person or by a courier, or if sent by facsimile or other electronic transmission or certified mail, postage prepaid and return receipt requested, addressed as indicated in Contractor's records.
- 17.10. **Waiver.** Failure of any party at any time to require performance of any provision of this Agreement will not limit such party's right to enforce such provision, nor will any waiver of any breach of any provision of this Agreement constitute a waiver of any succeeding breach of such provision or a waiver of such provision itself.
- 17.11. **Attorney's Fees.** If a suit, action, or other proceeding of any nature whatsoever (including any proceeding under the U.S. Bankruptcy Code) is instituted to enforce or interpret any provision of this Agreement or in connection with any dispute hereunder, the prevailing party will be entitled to recover such amount as the court may adjudge reasonable as attorney's fees and all other fees, costs, and expenses of litigation at trial or any appeal or review, in addition to all other amounts provided by law.
- 17.12. **Counterparts.** This Agreement may be executed in any number of counterparts, all of which together will constitute one and the same agreement. Facsimile copy or electronic signatures shall be valid as original signatures.
- 17.13. **Further Assurances.** From time to time, upon request of either party, the other party will execute, acknowledge, and deliver such documents and undertake such actions as may be reasonably requested in order to fulfill the transactions contemplated by this Agreement.

AGREED as of the Effective Date set forth above.

Contractor:

Client:

By: _____
Name: Eric Davis
Title: President, Davis Business Advisory
Services, PLLC

By: _____
Name: Jim Dean
Title: City Manager, City of Marianna

Exhibit A: Scope of Work

Exhibit A
SCOPE OF WORK

Scope of Work Summary

Contractor shall work with Jim Dean, City Manager, to assist with the sourcing and securing of an allocation of New Markets Tax Credits ("NMTCs") and closing of the financing for the Marianna Office Supply Project in Marianna, FL (the "Project").

Compensation

In consideration for the services to be performed, Client will pay Contractor a fee in an amount equal to Three Percent (3%) of the total NMTC qualified equity investment ("QEI") secured for the Project. ("Fee"). The Fee is contingent upon closing of the NMTC financing.

Services

The Contractor shall provide the following services to the Client:

1. Assist with preparation of materials (including development of NMTC investment memorandum, due diligence materials, and financial models).
2. Identify, structure, negotiate and secure NMTC allocation(s) with one or more Community Development Entities ("CDEs"), including securing letters of intent.
3. Identify, structure, negotiate and secure commitment and investment from tax equity investor(s).
4. Assist with structuring all available capital sources to be used as leverage debt for the NMTC investment and solving structure and business issues that arise related to NMTC financing.
5. Facilitate and coordinate due diligence efforts of CDE(s) and tax equity investor(s).
6. Assist in negotiation and documentation through the financial close with CDE(s), tax equity investor(s), and related parties.

CITY OF MARIANNA
COMMISSION AGENDA MEMO
REGULAR MEETING
June 7, 2022

ADMINISTRATIVE STAFF REPORT

Subject: New Market Tax Credits (NTC) & CDBG-HR
Engagement Letter – Davis Business Advisory Services, PLLC

Subject Background: The City of Marianna has been approached to participate in a NTC transaction. If successful the City could benefit by being awarded approximately \$1 million.

Recommendation: Discussion by City Attorney

Potential Motion: TBD

Prepared by: