



*Home of the Tualatin River National Wildlife Refuge*

## **RESOLUTION 2021-033**

### **AUTHORIZING THE CITY MANAGER PRO TEM TO ENTER INTO A PUBLIC IMPROVEMENT CONTRACT WITH MOORE EXCAVATION, INC. FOR CONSTRUCTION OF THE ROCK CREEK SANITARY SEWER TRUNK LINE UPSIZING PHASE 1**

**WHEREAS**, the Rock Creek Sanitary Sewer Trunk Line Upsizing Phase 1 project is listed in the City Sanitary Sewer Master Plan (SS MP#4) as a near term importance project; and

**WHEREAS**, this section of sanitary sewer trunk line is identified as having condition and capacity issues which require its replacement; and

**WHEREAS**, an additional driver for construction of the Phase 1 (SS MP#4) is the upcoming construction of Willamette Water Supply Project 66-inch diameter water trunk line down Tualatin-Sherwood Road, and the reconstruction of Tualatin-Sherwood Road by Washington County, both slated for commencing in FY21/22. Constructing the sanitary trunk line after these other WACO and WWSP project's construction would unnecessarily add design complications and construction costs; and

**WHEREAS**, the City completed the design and produced bid documents to solicit contractors using a competitive bidding process meeting the requirements of local and state contracting statutes and rules (ORS 279C, OAR 137-049); and

**WHEREAS**, the City opened bids on April 12, 2021 and issued the Notice of Intent to Award with the mandatory seven (7) day protest period; and

**WHEREAS**, Moore Excavation, Inc. was the only responsive bidder with a bid of \$1,929,226; and

**WHEREAS**, the Engineer's Estimate of Construction Cost was between \$1.5 million and \$1.7 million, and the project budget was approved for \$1.75 million, meaning the Bid far exceeded the approved project budget; and

**WHEREAS**, City staff entered into negotiations with Moore Excavation, Inc. for a reduction of the Scope of Work in the attempt to bring the bid amount to within the approved budgetary limits; and

**WHEREAS**, the negotiations with Moore Excavation, Inc. reduced the bid amount to \$1,510,326, with the caveat that the unit prices quoted may be significantly understated to when the actual unit price is determined by the manufacturer, due to the extreme market fluctuations brought on by the Covid-19 pandemic and associated market impacts to manufacturers and suppliers; and

**WHEREAS**, negotiations settled on using Section 00195.12 – Material Price Escalation & De-Escalation Clause of the ODOT/APWA Standard Specifications for Construction, 2021 Edition, to establish the final material unit price for a) Steel Casing Pipe, b) PVC/HDPE Pipe, c) Asphalt Cement Pavement; and

**WHEREAS**, in using the Escalation & De-Escalation criteria, a contingency amount 10% of the Bid Amount is estimated as being needed to cover the estimated escalated material unit price costs.

**NOW, THEREFORE, THE CITY OF SHERWOOD RESOLVES AS FOLLOWS:**

**Section 1.** The City Manager Pro Tem is hereby authorized to execute a construction contract in a form substantially similar to the attached Exhibit A with the lowest responsive bidder (Moore Excavation, Inc.) in the Contract Amount of \$1,510,326, and is further authorized to approve construction contract changes for unit price escalation and unforeseen conditions within a Construction Contingency amount of \$151,033 (10%) of the Contract Amount for the Rock Creek Sanitary Sewer Trunk Line Upsizing Phase 1 project (408SS).

**Section 2.** This Resolution shall be effective upon its approval and adoption.

**Duly passed by the City Council this 15<sup>th</sup> day of June, 2021.**

  
Keith Mays, Mayor

Attest:

  
Sylvia Murphy, MMC, City Recorder

**EXHIBIT A**

**PUBLIC IMPROVEMENT CONTRACT FOR USE WITH  
OREGON STANDARD SPECIFICATIONS FOR CONSTRUCTION**

**BETWEEN:** The City of Sherwood,  
an Oregon Municipal Corporation

**AND:** Moore Excavation, Inc.

**JOB NO.:** 408SS

**PROJECT:** Rock Creek Sanitary Trunk Line Upsizing Phase 1

**RECITALS**

Contractor was the successful Bidder for the contract construction of the improvement ("Project") described in this Public Improvement Contract for use with Oregon Standard Specifications for Construction and Clean Water Services Design & Construction Standards (R&O 19-5 as amended by R&O 19-22) as supplemented by the City. (this "Document")

**AGREEMENT TERMS AND CONDITIONS**

- The Contract.** The Contract between the City and Contractor (the "Contract") includes this Document and its exhibits, the 2021 Oregon Standard Specifications for Construction issued by the Oregon Department of Transportation (ODOT) and Design & Construction Standards (R&O 19-5 as amended by R&O 19-22), as issued by Clean Water Services, together with all of the documents and materials included in the definition of the "Contract" under the 2021 ODOT Standard Specifications for Construction, as modified by the Technical Specifications and project Special Provisions. In addition, the Contract between the City and Contractor shall be deemed to incorporate all reports, records, laws, rules and orders referenced in the Contract Documents.

This Document also includes and incorporates the following exhibits:

Exhibit A – CITY OF SHERWOOD – STANDARD CONTRACT PROVISIONS  
Exhibit B – Certification of Bidder/Contractor Employee Drug Testing Program  
Exhibit C – Certification of Compliance with Oregon Tax Law  
Exhibit D – Certification of Registration with Contractors Board  
Exhibit E – Certification of Workers' Compensation Coverage

- Definitions.** Unless otherwise specifically defined in this Document, all capitalized terms which are not proper nouns shall have the meanings assigned thereto in the specifications.
- Work to be Performed.** Contractor agrees to furnish, as the "Work" all services, labor, materials and equipment which are described as the Contractor's responsibility in the plans and specifications, or as reasonably inferred therefrom, as the same may be modified in accordance with the Contract, and to construct the improvement described therein (the Project), all according to the provisions of the Contract. All parts of the Work are the sole responsibility of Contractor.

4. **Time of Commencement and Completion.** Time is of the Essence of the Contract. The time in which Contractor shall commence, prosecute and complete the Work is described in the specifications, as modified by any Addenda or subsequent Contract Change Order.
5. **Contract Sum.** The Contract sum is \$1,510,326.00\* and consists of unit prices bid by Contractor multiplied by estimated quantities, together with lump sum amounts for portions of the Work, as described on the Contractor's Bid attached hereto.

The following bid items are eligible for Material Price Escalation/De-escalation unit price adjustments per Section 00195 of the ODOT /APWA Standard Specifications for Construction manual, 2021 Edition:

- a) Steel Pipe Casing
- b) PE/PVC Pipe
- c) Asphalt Concrete Pavement

\*The per unit price escalation/de-escalation value shall be determined at the time the final material unit cost is established by the material supplier. This value shall be carried over to the final lump sum bid unit amount used in the final Contract amount.

Unless the Contract states otherwise, the actual sum payable to Contractor for the Work shall be based on lump sum amounts and actual quantities, as modified by Change Orders and adjustments made in accordance with the specifications. Payment will be made as provided in the specifications.

6. **Indemnification.** Contractor's duty to indemnify is described in Section 00170.72 of the General Conditions in ODOT's 2021 Standard Specifications, as modified by the Special Provisions. Contractor's indemnity obligations survive acceptance of the Work and completion of the Contract.
7. **Insurance.** Contractor shall maintain in force for the duration of this contract the insurance coverages specified below and in specification Section 00170.70(a). Each policy required by these provisions shall be written as a primary policy, not contributing with or in excess of any coverage which City may carry. In accordance with the Special Provisions, a copy of each policy or a Certificate of Insurance satisfactory to City shall be delivered to City prior to commencement of the Work. Unless otherwise specified, each policy shall be written on an "occurrence" form with an admitted insurance carrier licensed to do business in the state of Oregon and shall contain an endorsement entitling City to not less than 30 days prior written notice of any material change, nonrenewal or cancellation. In the event the statutory limit of liability of a public body for claims arising out of a single accident or occurrence is increased above the combined single limit coverage requirements specified below, City shall have the right to require Contractor to increase the Contractor's coverages by the amount of the statutory limit increase for such claims and to increase the aggregate coverage by an amount that is twice as large as the statutory increase. The adequacy of all insurance required by these provisions shall be subject to approval by City's Risk Manager. Unless otherwise allowed by City, Contractor shall require all subcontractors to carry insurance at least equal to that required under this section. Failure to maintain any insurance coverage required by this contract shall be cause for immediate termination of this Contract by City.
  - 7.1 **Commercial General Liability.** Contractor shall maintain a broad form Commercial General Liability Insurance policy with coverage of not less than \$1,000,000 combined single limit per occurrence, with an annual aggregate of not less than

\$2,000,000.00, for bodily injury, personal injury or property damage. Such policy shall contain a contractual liability endorsement to cover Contractor's indemnification obligations under the Contract and products/completed operations liability. The policy shall also contain an endorsement naming City and others as appropriate as an additional insured, in a form satisfactory to City, and expressly providing that the interest of City shall not be affected by Contractor's breach of policy provisions. The policy shall be endorsed to state that the general aggregate limit of liability shall apply separately to the Contract.

7.2 **Commercial Automobile Liability.** Contractor shall maintain a Commercial Automobile Liability Insurance policy with coverage of not less than \$1,000,000.00 combined single limit per occurrence, with an annual aggregate limit of not less than \$1,000,000.00, for bodily injury, personal injury or property damage. The coverage shall include both hired and non-owned auto liability. The policy shall also contain an endorsement naming City and others as appropriate as an additional insured, in a form satisfactory to City, and expressly providing that the interest of City shall not be affected by Contractor's breach of policy provisions.

7.3 **Workers' Compensation Insurance.** All employers, including the Contractor and its Subcontractors, if any, that employ subject workers who are performing Work or providing labor or materials under the Contract in the State of Oregon shall comply with ORS 656.017 and provide the required Workers' Compensation Coverage, unless such employers are exempt under ORS 656.126. The Contractor shall ensure that each of its Subcontractors complies with these requirements. Contractor shall provide City with such further assurances as City may require from time to time that Contractor is in compliance with these Workers' Compensation coverage requirements and the Workers' Compensation law. The Contractor shall ensure that its insurance carrier files a Guaranty Contract with the Oregon Workers' Compensation Division before performing any Work.

8. **Performance, Payment and Maintenance Bonds.** Prior to the commencement of the Work, Contractor shall provide good and sufficient Performance Bond and Payment Bond approved by the City, each in an amount equal to the 100% of the Contract sum, for the faithful performance of the Work in all respects and indemnifying City for any claims or liens for labor, work, equipment or material provided by others in the performance of the Work. The amount of the Performance Bond and Payment Bond shall be increased whenever the Contract Sum is increased for any reason.

At the conclusion of the Construction and prior to Final Acceptance of the Work by the City, the Contractor shall provide a 10% Maintenance Bond for a period of **two (2) years** from the date of Final Acceptance by the City. A surety licensed to do business as a surety in the state of Oregon shall provide the Maintenance Bond.

The acceptance by the Contractor of Final Payment shall be and shall operate as a release to the City of all claims and all liability to the Contract other than claims in stated amounts as may be specifically excepted by the Contractor in writing prior to the request for final payment for all things done or furnished in connection with this work and for every act and neglect of the City and its agents and others relating to or arising out of this work. However, any payment, final or otherwise, or any acceptance, shall not release the Contractor or its sureties from any obligations under the Contract Documents or the Performance and Payment Bonds or diminish the Agency's rights under the Guaranty Provisions.

In addition to and not in lieu of any other warranties required under the Contract make all

necessary repairs and replacements to remedy, in a manner satisfactory to the Engineer and at no cost to the Agency, any and all defects, breaks, or failures of the Work occurring during the specified warranty period due to faulty or inadequate materials or workmanship. Repair damage or disturbance to other improvements under within, or adjacent to the Work, whether or not caused by settling, washing, or slipping, when such damage or disturbance is caused, in whole or in part, from activities of the Contractor in performing his duties and obligations under this Contract when such defects or damage occur within the warranty period. The two-year maintenance period required shall, with relation to such required repair, be extended one year from the date of completion of such repair or to the end of the original two-year maintenance period, whichever comes later.

If Contractor, after written notice, fails within ten days to proceed to comply with the terms of this section, Agency may have the defects corrected, and Contractor and Contractor's Surety shall be liable for all expense incurred. In case of an emergency where, in the opinion of the Engineer, delay would cause serious loss or damage, repairs may be made without notice being given to the Contractor with the Contractor or surety paying the cost of repairs. Failure of the Engineer to act in case of an emergency shall not relieve Contractor or Surety from liability and payment of all such costs.

9. **Termination and Compensation.** City may terminate this contract or suspend the Work at any time as provided in the specifications.
10. **Performance for Goods and Services.** In performance of the Work, Contractor shall prefer materials that have been manufactured or produced in the state of Oregon, if price, fitness, availability and quality are otherwise equal.
11. **Non-Resident Contractor.** If Contractor is not a resident bidder as defined in ORS 279A.120, and the contract price exceeds \$10,000, the Contractor must report to the Department of Revenue, on the department's form, the total contract price, terms of payment, length of contract and such other information as the department may require before the Contractor may receive final payment under the Contract. The Contractor must provide copies of all forms filed with the Department to the City to receive final payment.
12. **Laws and Ordinances.** In addition to those laws, rules and ordinances specifically identified in this Contract, Contractor shall comply with and require its Subcontractors to comply with all applicable provisions of Federal, State and local statutes, ordinances, orders, rules and regulations.
13. **Default and Willful Violation.** If the Contractor willfully violates any of the provisions of the Sherwood Code, or any of the provisions of law governing public contracts, or if Contractor knowingly files false affidavits of compliance required under the Contract, Contractor shall waive for a period of one year any right to bid upon any public improvement project let by City. If Contractor or any of Contractor's Subcontractors violates any such provisions or files any such false affidavits of compliance, or in the event Contractor otherwise fails to perform any of its obligations under this Contract, time and quality of performance being of the essence, City may, at its option, terminate this Contract upon written notice to Contractor. In the event of a termination of this Contract or a subcontract under these provisions, Contractor or the Subcontractor, if applicable, shall forfeit all rights under this Contract or the subcontract, as the case may be. The City's claim for damages under paragraph 15 and any other relief available to City resulting from the Contractor's breach shall survive a termination of the Contract.

14. **Liquidated Damages.** In the event the Work is not completed within the Contract Time as specified in Bid Statement, or as may be extended in accordance with the Contract's terms, Contractor will pay to City or City may withhold from any payment due Contractor, Liquidated Damages as specified in the specifications. The parties believe that due to the costs of bringing an action and the difficulty of establishing the exact amount of damages City will incur, it would be inconvenient and infeasible for City to bring an action for the actual damages it will incur because of Contractor's failure to complete the Work within the Contract Time. In order to compensate City for the damages City will suffer because of a delay, the amount City would be damaged for every Calendar Day completion is delayed is **\$2,000.00 per Calendar Day**. The parties agree that the sum set as Liquidated Damages is reasonably related to City's anticipated damages per Calendar Day after the Completion Date that the Work is not completed. Contractor agrees that any liquidated damages imposed under the Contract is the best estimate of the City's damages and is not a penalty. Contractor will not contest such sum as being other than the best measure of damages in the event liquidated damages become payable under these provisions.

15. **Notices.** Any written notices permitted or required by this Contract shall be deemed given when personally delivered, or five days after deposit in the United States mail, postage fully prepaid, certified, return receipt requested, addressed to the representatives of the parties as set forth below or when delivered by electronically confirmed facsimile transmission to the FAX address and attention of the representatives of the parties set for below:

Contractor: \_\_\_\_\_, Project Superintendent

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

City: Bob Galati P.E., City Engineer, City of Sherwood

or such other address as either party may provide to the other by notice given in accordance with this provision.

16. **Contract Documents/Interpretation.** Where possible, all parts of the Contract shall be interpreted in a manner that avoids conflict between the various documents and their provisions. In the event that any provision of this Document conflicts with any provision of the specifications, the provision that is most detailed shall prevail. In the event that any other component part of the Contract conflicts with any provision of any other component part, the precedence of documents shall be as set forth in the Special Provisions.

17. **Governing Law, Jurisdiction and Venue.** This Contract shall be governed by and interpreted in accordance with the laws of the State of Oregon, without respect to conflict of laws principles. Notwithstanding any contrary provisions in the Contract Documents, any litigation arising out of or relating to this Contract shall be tried to a court without a jury. Any claim or action must be brought in the Circuit Court of Washington County, Oregon. If a claim or action must be brought in a federal forum, then it shall be brought and conducted solely and exclusively within the United States District Court for the District of Oregon. In no event shall this paragraph be construed as a waiver by the City of any form of defense or immunity, whether sovereign immunity, governmental immunity or otherwise, from any claim or from the jurisdiction of any court. Contractor by execution of the Contract hereby consents to the personal jurisdiction of the courts referenced in this paragraph.

18. **Dispute Resolution.** Disputes will be resolved in accordance with Section 00199 of the General Conditions in ODOT's 2018 Standard Specifications as modified in the Supplemental Specifications and project Special Provisions.

In any litigation, the entire text of any order or permit issued by a governmental or regulatory authority, as well as any documents referenced or incorporated therein by reference, shall be admissible for the purpose of Contract interpretation.

The Contract shall not be construed against either party regardless of which party drafted it. Other than as modified by the Contract, the applicable rules of contract construction and evidence shall apply.

19. **Payment of Costs, Expenses and Attorney's Fees.** Notwithstanding any language to the contrary in the Contract Documents, each party is responsible for all of its own costs and fees, including expert fees and attorney fees. This includes any costs and fees incurred in any trial and in any appeal.
20. **No Third Party Beneficiaries.** The parties to this Contract do not intend to confer on any third party any rights under this Contract. All Subcontractors are third parties.
21. **Survival.** Any obligation arising under the Contract which is not, or cannot be performed or paid prior to the expiration or termination of the Contract, including, but not limited to, all provisions concerning the quality of the Work, warranties and obligations for payment, indemnification, and reimbursement, shall survive termination or expiration of the Contract.
22. **Integration; Amendment.** The Contract includes the entire agreement between the parties as of its date of execution and shall not be modified or amended, except as expressly provided in the Contract.
23. **Effective Date.** The effective date of the Contract shall be the latest date of signature by the parties.
24. **Prompt Payment.** The Contractor shall:
- (a) Make payment promptly, as due, to all persons supplying to the contractor labor or material for the performance of the work provided for in the Contract.
  - (b) Pay all contributions or amounts due the Industrial Accident Fund from the contractor or subcontractor incurred in the performance of the Contract.
  - (c) Not permit any lien or claim to be filed or prosecuted against the state or a county, school district, municipality, municipal corporation or subdivision thereof, on account of any labor or material furnished.
  - (d) Pay to the Department of Revenue all sums withheld from employees under ORS 316.167.

25. **Drug Testing.**

- (a) The Contractor shall demonstrate that an employee drug testing program is in place at the time of submitting its bid, and that such program will be maintained throughout the Contract period, including any extensions. The failure of

Contractor to have, or to maintain such a drug testing program is grounds for rejection of a bid or immediate termination of this Contract.

- (b) The City of Sherwood shall not be liable, either directly or indirectly, in any dispute arising out of the substance or procedure of Contractor's drug testing program. Nothing in this drug testing provision shall be construed as requiring Contractor to violate any legal, including constitutional, rights of any employee, including but not limited, to selection of which employees to test and the manner of such testing. The City shall not be liable for Contractor's negligence in establishing or implementing, failure to establish or implement a drug testing program, or for any damage or injury caused by Contractor's employees acting under the influence of drugs while performing work covered by this Contract. These are Contractor's sole responsibilities and nothing in this provision is intended to create any third party beneficiary rights against the City.
26. **Demolition Contracts to Require Material Salvage.** On demolition projects, the Contractor is required to salvage or recycle construction and demolition debris, if feasible and cost-effective.
27. **Landscape Maintenance Projects to Require Composting or Mulching.** On Landscape Maintenance Projects, the Contractor is required to compost or mulch yard waste material at an approved site; if feasible and cost-effective.
28. **Conditions Concerning Payment of Claims by Public Officers to Person Furnishing Labor of Services when Contractor Neglects or Refuses to Make Prompt Payment.** If the Contractor fails, neglects or refuses to make prompt payment of any claim for labor or services furnished to the Contractor or a subcontractor by any person in connection with this Contract as the claim becomes due, the City may pay such claim to the person furnishing the labor or services and charge the amount of the payment against funds due or to become due to the Contractor by reason of the Contract.
29. **Conditions Concerning Neglect or Refusal to Make Prompt Payment of Claim by Contractor or First-Tier Subcontractor to Persons Furnishing Labor or Materials.** If the Contractor or a first-tier subcontractor fails, neglects or refuses to make payment to a person furnishing labor or materials in connection with this contract within 30 days after receipt of payment from the City or the Contractor, the Contractor or first-tier subcontractor shall owe the person the amount due plus interest charges commencing at the end of the 10-day period that payment is due under ORS 279C.580(4) and ending upon final payment, unless payment is subject to a good faith dispute as defined in ORS 279C.580. See additional text in ORS 279C.515(2).
30. **Complaints Concerning Contractor or Subcontractor Neglect or Refusal to Make Payment to Persons Furnishing Labor or Material.** If the Contractor or a subcontractor fails, neglects or refuses to make payment to a person furnishing labor or materials in connection with the public improvement contract, the person may file a complaint with the Construction Contractors Board, unless payment is subject to a good faith dispute as defined in ORS 279C.580.
31. **Condition Concerning Hours of Labor.** A person may not be employed for more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity, emergency or when the public policy absolutely requires it, and in such cases, except in cases of contracts for personal services as defined in ORS 279C.100, the employee shall be paid at least time and a half pay:

- (a) For all overtime in excess of eight hours in any one day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday; or
  - (b) For all overtime in excess of 10 hours in any one day or 40 hours in any one week when the work week is four consecutive days, Monday through Friday; and
  - (c) For all work performed on Saturday and on any legal holiday specified in ORS 279C.540.
32. **Condition Concerning Payment for Medical Care.** The Contractor and all subcontractors, as applicable, shall promptly, as due, make payment to any person, co-partnership, association or corporation furnishing medical, surgical and hospital care services or other needed care and attention, incident to sickness or injury, to the employees of the Contractor or subcontractor, as applicable, of all sums that the Contractor or subcontractor, as applicable, agrees to pay for the services and all moneys and sums that the Contractor or subcontractor, as applicable, collected or deducted from the wages of employees under any law, contract or agreement for the purpose of providing or paying for the services.
33. **Condition Concerning Payment for Providing Workers' Compensation.** All subject employers working under the Contract are either employers that will comply with ORS 656.017 or employers that are exempt under ORS 656.126.
34. **Retainage.** The amount to be retained from progress payments will be 2.5% of the value of the Work accomplished as noted in Section 00195.50(b) of the specifications, and will be retained in one of the forms specified in Section 00195.50(c) of the specifications.
33. **Contractor Claims. Notice of Claim.** Claims on public works bonds and payment bonds shall be submitted in writing and follow the procedures established by ORS 279C.600 and ORS 279C.605.
34. **Certified Statements Regarding Payment of Prevailing Rates of Wage; Retainage.**  
(1) The contractor or the contractor's surety and every subcontractor or the subcontractor's surety shall file certified statements with the public agency in writing, on a form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying:
- (a) The hourly rate of wage paid each worker whom the contractor or the subcontractor has employed upon the public works; and
  - (b) That no worker employed upon the public works has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the contract.

The certified statement shall be in accordance with ORS 279C.845.

**CITY OF SHERWOOD**

**CONTRACTOR**

By: \_\_\_\_\_  
Kristen Switzer, City Manager Pro Tem

\_\_\_\_\_  
(print name)

Date: \_\_\_\_\_

By: \_\_\_\_\_  
(signature)

\_\_\_\_\_  
(print name)

Date: \_\_\_\_\_

Approved as to form: \_\_\_\_\_  
Josh Soper, City Attorney