



RESOLUTION 2021-044

AUTHORIZING THE CITY MANAGER PRO TEM TO ENTER INTO AN INTERGOVERNMENTAL AGREEMENT WITH THE CITY OF WILSONVILLE FOR CONSTRUCTION AND FUNDING OF A WATER TREATMENT PLANT EXPANSION/IMPROVEMENT PROJECT

WHEREAS, in December 2006 the City of Sherwood entered into an Intergovernmental Agreement (IGA) with Tualatin Valley Water District to acquire an undivided ownership interest of 5 million gallons per day (mgd) in the Willamette River Water Treatment Plant (WRWTP) in order to use the Willamette River as a long term water source for the City of Sherwood; and

WHEREAS, the WRWTP Expansion/Upgrade project will expand the plant's total maximum capacity from 15 mgd to 20 mgd, with one-third of this amount being allocated to the City of Sherwood, and will provide updates that will optimize performance and extend the useful life of the plant facilities, with the City of Sherwood ultimately having an increased capacity ownership interest of 6.66 mgd.

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

Section 1. The City Council hereby authorizes the City Manager Pro Tem to enter into an Intergovernmental Agreement (IGA) with the City of Wilsonville for Construction and Funding of a Water Treatment Plant Expansion/Improvement project in a form substantially similar to the attached Exhibit A.

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

Duly passed by the City Council this 21st of June 2021.


Keith Mays, Mayor

Attest:


Sylvia Murphy, MMC, City Recorder

INTERGOVERNMENTAL AGREEMENT BETWEEN THE CITIES OF SHERWOOD AND WILSONVILLE REGARDING CONSTRUCTION AND FUNDING FOR A WATER TREATMENT PLANT EXPANSION/IMPROVEMENT PROJECT

The above entitled Agreement (“Agreement”) is made and entered into this ___ day of _____ 2021 (“Effective Date”), by and between the **City of Sherwood**, an Oregon municipal corporation (“Sherwood”), and the **City of Wilsonville**, an Oregon municipal corporation (“Wilsonville”), referred to individually as a “Party” and collectively as the “Parties.”

RECITALS

A. WHEREAS, Tualatin Valley Water District (“TVWD”) and Wilsonville partnered to construct and own undivided ownership shares in the Willamette River Water Treatment Plant (“WRWTP”) and appurtenances thereto from the raw water intake in the Willamette River through Segment 1 of the finished 63-inch water transmission line (“Supply Facilities”). The treatment plant portion of the WRWTP has a current designed capacity of 15 million gallons per day (“mgd”). Subsequently, based on certain conditions, Wilsonville consented to Sherwood’s purchasing certain interests in the WRWTP Supply Facilities from TVWD’s interests, which included a capacity purchase from TVWD of TVWD’s 1/3 or 5 mgd of the 15 mgd capacity, while Wilsonville owns 2/3 or 10 mgd of the WRWTP capacity. In addition, Wilsonville and TVWD own larger capacity interests in other appurtenant facilities; and

B. WHEREAS, TVWD does not currently use the WRWTP. Wilsonville and Sherwood, as the only current users, wish to expand the WRWTP capacity from 15 mgd to 20 mgd, as well as make additional WRWTP upgrades that will optimize performance and extend the useful life of the WRWTP facilities; and

C. WHEREAS, the WRWTP 2017 Water Master Plan (“WMP”) established a road map to expand the WRWTP capacity to 20 mgd in order to meet increasing water demand from Sherwood and Wilsonville, with the added 5 mgd to be owned and allocated 66.70% to Wilsonville and 33.30% to Sherwood; and

D. WHEREAS, the WMP also identified other related improvements to life-safety, seismic, electrical, and operations and maintenance for the WRWTP; and

E. WHEREAS, the project cost estimate for the foregoing WRWTP expansion and improvement project – Wilsonville CIP #1144 (“Project”), including Stantec Consulting Services Inc.’s design and engineering Professional Services Agreement, Wilsonville project management costs, and the Construction Manager/General Contractor (“CM/GC”) Contract still being developed and not yet awarded, is \$29,101,675. Both contracts are collectively referred to herein as the “Contract”; and

F. WHEREAS, whatever the final cost of the Project, Wilsonville will pay 66.70% and Sherwood will pay 33.30% of the total final Project costs (“Project Costs”); and

G. WHEREAS, it is recognized by the Parties that it is necessary to enter into this Intergovernmental Agreement pursuant to ORS Chapter 190 to accomplish the objectives of the Recitals set forth above; and

H. WHEREAS, the Parties have the authority to enter into this Agreement pursuant to their applicable charters and ordinances and ORS 190.003 – 190.030;

NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS:

1. **Recitals.** The Recitals set forth above are incorporated by reference and made a part of this Agreement.

2. **Consideration.** In consideration of the terms and conditions set forth below, the Parties enter into this Agreement.

3. **Term.** This Agreement will be effective upon the Effective Date and will continue until all obligations set forth herein have been completed.

4. **Purpose and Framework.** As described in the Recitals of this Agreement, the primary purpose of this Agreement is to set out the agreement between the Parties as to the following matters:

4.1. Reimbursement to Wilsonville by Sherwood of 33.30% of the total Project Costs.

4.2. Responsibilities for management and oversight of the Project.

5. **Responsibilities of Wilsonville.** Wilsonville will be responsible for all contracting of obligations and services required by this IGA, subject to active involvement and coordination with Sherwood on all key aspects of the Project. Specifically:

5.1. Wilsonville will perform or cause to be performed all tasks needed to design and construct the Project, including all permitting, management of the Stantec Contract, solicitation for and selection of a CM/GC Contractor (with input from Sherwood), and development of all construction documents, including the CM/GC Contract.

5.2. Wilsonville will make all Project design and construction plans and information available to Sherwood for review and comment. Such information will include: Project milestones; permitting; specifications; opinions of probable construction costs; plans, applications, and permit documents; and any other information as required for successful coordination and collaboration. The documentation will be available electronically and hosted by Wilsonville.

5.3. Wilsonville will prepare design plans and technical specifications for the Project. Wilsonville will provide Sherwood the opportunity to review and comment on the design prior to final design documents (minimum five (5) business days). Design documents include plans/drawings, specifications, standard details, engineer's opinion of probable construction costs, and other documents that are required for each milestone.

5.4. Wilsonville will prepare the Project construction package(s), including Request for Proposals, Proposal Rating Forms, Contract Forms, Standard General

Conditions, Special Provisions, Technical Specifications, design plans, and others as required for successful bidding and construction of the Project (collectively, “Contract Documents”) and will provide Sherwood the opportunity to review and comment on these documents prior to their finalization (minimum five (5) business days).

5.5. Wilsonville will administer the Project in compliance with all public contracting laws.

5.6. Wilsonville will be responsible for the overall management and administration of the Project.

5.7. Wilsonville will invite Sherwood to all regular design and construction coordination meetings, public information and outreach meetings, and other meetings as required for successful coordination and completion of the Project.

5.8. Wilsonville will be solely responsible for managing the Project schedule, including establishing milestones. Wilsonville will provide the construction contractor’s baseline schedule and monthly schedule updates for Sherwood’s review and comment (minimum five (5) business days).

5.9. In all instances where Wilsonville is required by the above provisions to provide Sherwood an opportunity to review and comment on documents, Wilsonville will incorporate reasonable Sherwood review comments that do not significantly impact Project Costs or Project schedule, and will also give consideration to reasonable Sherwood comments that may or will impact costs or schedule.

5.10. Wilsonville will provide Sherwood with a minimum of ten (10) calendar days to evaluate the CM/GC proposals prior to selecting the CM/GC and issuing notice of intent to award the Contract for the Project. Wilsonville will invite Sherwood to participate in CM/GC interviews. Prior to issuing notice of intent to award the Contract, Wilsonville will evaluate all bids and determine the best qualified contractor to be selected, based on a tabulation of scoring criteria. The contract will be awarded to the Contractor with the highest point score (not necessarily lowest initial bid), as long as the bid is under \$22,000,000 (the anticipated GC share of the estimated \$29,101,675 total Project amount).

5.11. Because this is a CM/GC contract, the maximum price for design and construction is not finally determined when the Contract is awarded. Wilsonville will keep Sherwood advised of any changes in the proposed price from the time of initial contract award as the design moves forward. Prior to or at the time of receipt of the final guaranteed maximum price, Wilsonville and Sherwood will confer to approve or disapprove the guaranteed maximum price for the total Project if it exceeds the estimated \$29,101,675 by more than 10%. If it does exceed this amount by more than 10%, the Parties will confer how to move forward and make a mutually acceptable determination.

5.12. Wilsonville will cause the CM/GC to name and endorse Wilsonville and Sherwood, their elected or appointed officials, officers, employees, consultants, and agents as additional insureds on all policies provided by the construction contractor under the Contract. The endorsements to policies shall provide for not less than thirty (30) days’ written notice of cancellation. Wilsonville will provide Sherwood with a copy of the

certificates for its records. Wilsonville will cause the construction contractor to extend indemnity and hold harmless provisions given to Wilsonville to Sherwood, its elected or appointed officials, officers, employees, consultants, and agents.

5.13. Wilsonville will have overall responsibility for Project administration and inspection of the work performed and will be responsible to monitor and manage the construction contractor's work as provided in the construction Contract Documents. Wilsonville's assigned Project Manager is Mike Nacrelli, who will be Sherwood's primary point of contact for the Project.

5.14. Wilsonville will provide a final cost accounting for the Project and Sherwood's share, including all internal and external costs, within forty-five (45) days of Final Completion of the Project and payment to all contractors and suppliers.

5.15. Wilsonville will require the CM/GC to submit a Quarterly Spending Report by the fifteenth (15th) day of the last month for each calendar quarter for the entire duration of the Contract. Wilsonville will provide a copy of the Quarterly Spending Report to Sherwood when it receives it from the construction contractor. This report shall include, at a minimum, the following information:

5.15.1. Total amount spent by the CM/GC and each subcontractor, vendor, and supplier for the quarter;

5.15.2. Subcontractor/subconsultant name, address, and type of service(s) provided; and

5.15.3. Other business information that may be required by Wilsonville or requested by Sherwood.

5.16. Wilsonville will submit to Sherwood all Project Change Orders, Construction Change Directives, or other proposed revisions to the Project for review if they have impacts on Project Costs or schedule. Wilsonville will endeavor to provide notice of potential Project Change Orders, claims, or disputes as early as reasonably possible.

5.17. Wilsonville will notify Sherwood of any significant disputes, delays, or claims relating to the Project.

5.18. Wilsonville will promptly notify Sherwood of any Contract claim or request for Change Order, along with Wilsonville's proposed response. If a claim or request for Change Order would increase Sherwood's share of the Project Costs, Sherwood will have five (5) business days to respond whether it approves or disapproves of the claim or request for Change Order. Wilsonville may resolve or settle any single claim or cumulative claims for Change Orders of up to \$50,000 without Sherwood's written approval. Thereafter, Sherwood must give written approval for all Change Orders.

6. **Responsibilities of Sherwood.** Sherwood designates Craig Sheldon as its Project Manager, who will be the designated point of contact for Wilsonville's Project Manager. The Wilsonville Project Manager shall have authority to accept and act upon the written directions and decisions of the Sherwood Project Manager. Sherwood agrees to diligently and timely respond to

all notices and requests from Wilsonville pertaining to the Project. It is Sherwood's responsibility to review and understand all Contract Documents and promptly raise any noted concerns with Wilsonville. If Sherwood disputes a Change Order, Sherwood will follow the processes outlined in **Section 8.3** below.

7. Invoicing and Payment Responsibilities of Parties. Wilsonville and Sherwood will establish an account and an Irrevocable Limited Power of Attorney Agreement with the Local Government Investment Pool ("Account"), which will authorize Wilsonville's Director of Finance to make monthly withdrawals from an account established by Sherwood for Sherwood's monthly share of each invoice submitted for the Project. The Power of Attorney Agreement will be signed and an account will be opened. The account will be fully funded by Sherwood, including a contingency in the amount of 20% of Sherwood's estimated share of the Project Costs. Sherwood's initial deposit for the cost of design work, consultation, and Wilsonville project management will be agreed upon by the Parties and deposited by Sherwood when the CM/GC is selected. Thereafter, Sherwood will make an additional deposit when the CM/GC maximum price is agreed upon, in the amount of Sherwood's 33.3% share of said price plus a 20% contingency. Wilsonville project management costs are estimated at 5.0% (and will not exceed 6.0% without the written approval of Sherwood) of the total design, CM/GC, and construction contracted amounts. The Account funding amount will be modified to reflect actual bid amounts prior to the Notice to Proceed. If subsequent Change Orders cause there to be insufficient funds remaining in the Account to pay for all of Sherwood's share of the Project Costs, Sherwood will deposit additional funds, as required, within thirty (30) days of written notice and supporting documentation thereof from Wilsonville. Before Sherwood's initial deposit, as described above, Sherwood will also reimburse Wilsonville for Sherwood's percentage share of all Project Costs already incurred, including payments already made by Wilsonville to Stantec and Wilsonville's own actual administrative costs already incurred.

7.1. Wilsonville will submit monthly invoices to Sherwood generally as described below:

7.1.1. Each invoice shall be accompanied with documentation supporting all requested costs for compensation or reimbursement.

7.1.2. Account withdrawals shall follow issuance of invoices. Each invoice shall show the actual cost and the percentage allocation between Sherwood and Wilsonville.

7.2. Wilsonville will submit a final invoice to Sherwood within forty-five (45) days of final completion of the Project.

7.3. If insufficient funds remain in Sherwood's account to pay the final invoice, Sherwood will pay the difference within thirty (30) days of receipt of the final invoice and supporting documentation.

8. Construction Change Directives and Change Orders.

8.1. Construction Change Directives will be as defined in the Contract between Wilsonville and the CM/GC. Wilsonville may unilaterally issue a Construction Change Directive that does not increase the Project Costs to Sherwood or materially affect the

Project schedule. Wilsonville will have sole responsibility to prepare Construction Change Directives, and all Construction Change Directives shall be issued through Wilsonville.

8.2. All modifications to either Contract that will change shared costs or impact the schedule will not be effective until approved by a written Change Order approved, in writing, by Wilsonville and the contractor requesting the Change Order. Change Orders that raise the Project Cost by more than \$50,000, as described in **Section 5.18**, must be approved, in writing, by both Wilsonville and Sherwood. Sherwood must respond with approval or disapproval for Change Orders to Wilsonville within five (5) days following receipt of the proposed Change Order. Wilsonville may direct the applicable contractor to perform the Change Order without Sherwood's prior consent if it reasonably deems emergency conditions exist or action is necessary to prevent adverse health or safety issues or prevent the plant operations from being stopped or delayed. In emergency circumstances, Wilsonville will provide notice reasonable under the circumstances, and Sherwood will respond in a timely manner reasonable under the circumstances. If Sherwood fails to respond to a Change Order request within five (5) days, Wilsonville will be entitled to assume Sherwood approves the Change Order and Wilsonville can sign and approve it.

8.3. If Sherwood disputes a Change Order, Sherwood will provide Wilsonville with the reason for the objection. Wilsonville may still elect to proceed with the Change Order, but with the understanding that Sherwood reserves all rights to contest payment and determine responsibility for payment under the Dispute Resolution provisions set forth below.

9. **Dispute Resolution.** If a dispute arises between the Parties regarding breach of this Agreement, interpretation of any term of this Agreement, or the validity of any Change Order, Construction Change Directive, or invoice, the Parties shall first attempt to resolve the dispute by negotiation, followed by mediation and, if unsuccessful, litigation.

9.1. Step One – Negotiation: The respective Public Works Directors of the Parties, or their designees, will negotiate on behalf of the Party each represents. If the dispute is resolved at this Step One, there shall be a written determination of such resolution, signed by each Party's City Manager and ratified by each governing body, if required by the governing body, which shall be binding upon the Parties. Step One will be deemed concluded and unsuccessful when a Party delivers notice, in writing, to the other Party that the Party desires to proceed to Step Two.

9.2. Step Two – Mediation: If the dispute cannot be resolved within ten (10) calendar days of Step One, or earlier after written notice given by either Party, the Parties shall submit the matter to non-binding mediation by a professional engineer with demonstrated substantial experience in the design, construction, and operation of complex municipal water treatment, transmission, distribution, and storage systems. The Parties shall attempt to agree on a mediator. If they cannot agree, the Parties shall request a list of five mediators from an entity or firm experienced in providing engineering mediation services who does not have an existing professional relationship with either Party. The Parties will mutually agree upon a mediator from the list provided. If the Parties cannot agree, one of the five names will be randomly selected by blind drawing. Any common

costs of mediation shall be borne equally by the Parties, who shall each bear their own costs and attorney fees. If the issue(s) is resolved at this Step Two, a written determination of such resolution shall be signed by each Party's City Manager and approved by their respective governing bodies, if required by the governing body, which shall be binding upon the Parties.

9.3. Step Three – Litigation: If mediation does not resolve the issue within thirty (30) calendar days of submission of the issue to mediation, either Party may initiate litigation in Clackamas County Circuit Court to resolve the dispute.

9.4. Equitable Remedies: The Parties understand and agree that water service is critical to each Party's customers and that monetary damages may be an insufficient remedy, considering the infrastructure involved. Therefore, the Parties expressly agree that equitable remedies, such as injunction or specific performance, must be contemplated and allowed by this Agreement at any time, and without the need of first going through Steps One or Two, if doing so would cause significant or irreparable harm.

10. **Default.** Either Party will be deemed to be in default if it fails to comply with any term, condition, or covenant in this Agreement. The Parties agree time is of the essence in the performance of this Agreement. The non-defaulting Party will provide the defaulting Party with written notice of default and allow thirty (30) calendar days within which to cure or diligently commence to cure the defect within a reasonable time. If a defaulting Party fails to cure or fails to diligently commence to cure the default within that time, the non-defaulting Party may elect to terminate this Agreement and sue for the amount owed by the defaulting Party to complete the Project. In the event there is any dispute over the amount due to be paid under this Agreement by either Party, the undisputed amount shall be paid immediately and the Agreement shall not be in default while the solution to the disputed payment portion is resolved under **Section 9**. As noted above, the Parties understand and agree that water service is critical to each Party's customers and that monetary damages may be an insufficient remedy, considering the infrastructure involved. Therefore, the Parties expressly agree that equitable remedies such as injunction or specific performance are specifically contemplated and allowed by this Agreement.

11. **Notices.** Notices regarding performance, breach, default, dispute resolution, or termination shall be deemed sufficient at the time of personal delivery or four business days (Monday-Friday, excluding holidays when city offices are closed) after deposited in the United States Mail, Certified Mail, Return Receipt Requested, postage prepaid, addressed to the Parties as follows:

City Manager
City of Sherwood
22560 SW Pine Street
Sherwood, OR 97140
Email: gallj@sherwoodoregon.gov
Telephone: (503) 625-4200

City Manager
City of Wilsonville
29799 SW Town Center Loop East
Wilsonville, OR 97070
Email: cosgrove@ci.wilsonville.or.us
Telephone: (503) 570-1504

Notice may also be sent by email for faster delivery, as long as it is still delivered by one of the two methods provided above. Either Party may change its notice contact information above at any time by written notice to the other Party.

12. **Insurance and Indemnity.** To the full extent permitted by law, each Party agrees to indemnify and hold harmless the other, its elected officials, counsel, officers, employees, and agents from any and all claims, demands, damages, actions, or other harm caused by the sole negligence or intentional acts of that Party, including any attorney fees or other costs of defense. Further, independent of the indemnity obligation, and as may be allowed under law, each Party agrees to maintain general liability insurance in an amount not less than the current Oregon Tort Claim limits applicable to public agencies, as set forth in ORS 30.260 – 30.300.

13. **Succession.** This Agreement shall be binding upon any successors to the respective Parties, whether through merger, consolidation, or any other means. No transfer to a private, non-public entity is permissible without the consent of both Parties.

14. **Amendment.** The terms of this Agreement may be amended or supplemented by mutual written agreement, signed by Wilsonville and Sherwood and approved by their respective governing bodies.

15. **Good Faith and Cooperation.** The Parties agree and represent to each other good faith, complete cooperation, and due diligence in the performance of all obligations of the Parties pursuant to this Agreement.

16. **Governing Law and Venue.** This Agreement is governed by the laws of the State of Oregon. Venue will be in Clackamas County, Oregon.

17. **Legal Action/Attorney Fees.** If a suit, action, or other proceeding of any nature whatsoever (including any proceeding under the U.S. Bankruptcy Code) is instituted in connection with any controversy arising out of this Agreement or to interpret or enforce any rights or obligations hereunder, the prevailing Party shall be entitled to recover attorney, paralegal, accountant, and other expert fees and all other fees, costs, and expenses actually incurred and reasonably necessary in connection therewith, as determined by the court or body at trial or on any appeal or review, in addition to all other amounts provided by law. Payment of all such fees shall also apply to any administrative proceeding, trial, and/or any appeal or petition for review.

18. **Counterparts.** This Agreement may be signed in two counterparts, each of which shall be deemed an original and, when taken together, shall constitute one and the same agreement.

19. **Instruments of Further Assurance.** From time to time, at the request of either Party, each Party shall, without further consideration, execute and deliver such further instruments and shall take such further action as may be reasonably required to fully effectuate the purposes of this Agreement.

20. **Severability.** In case any one or more of the provisions contained in this Agreement shall be judicially deemed invalid, illegal, or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby.

21. **Time of the Essence.** Time is expressly made of the essence in the performance of this Agreement.

22. **Interpretation.** Wilsonville and Sherwood acknowledge that this Agreement shall be deemed and construed to have been prepared mutually by each Party and it shall be expressly agreed that any uncertainty or ambiguity existing therein shall not be construed against any Party.

23. **Authority.** Each Party signing on behalf of its City hereby warrants actual authority to bind their respective City.

IN WITNESS WHEREOF, the Parties, pursuant to official action of their respective governing bodies duly authorizing the same, have caused their respective authorized official to execute this Agreement on their City's behalf.

CITY OF SHERWOOD,
an Oregon municipal corporation

CITY OF WILSONVILLE,
an Oregon municipal corporation

Kristen Switzer, City Manager Pro Tem

Bryan Cosgrove, City Manager

APPROVED AS TO FORM

APPROVED AS TO FORM

Josh Soper, City Attorney

Barbara Jacobson, City Attorney