

**RESOLUTION NO. 3914**

**A RESOLUTION APPROVING AN AGREEMENT WITH OVIVO, USA, FOR GOODS AND SPECIAL SERVICES PERTAINING TO THE MILES CITY WASTEWATER IMPROVEMENTS PHASE II PROJECT.**

**WHEREAS**, the City of Miles City solicited bids for an aerobic digestion and sludge thickening equipment package as part of the Miles City Wastewater Improvements Phase II project, and has accepted the bid submitted by Ovivo, USA;

**AND WHEREAS**, the City of Miles City wishes to enter into an Agreement with Ovivo, USA setting for the obligations of the parties related thereto;

**NOW THEREFORE, IT IS RESOLVED BY THE CITY COUNCIL OF THE CITY OF MILES CITY, MONTANA AS FOLLOWS:**

1. The Agreement between the City and Ovivo, USA, for goods and special services related to the delivery of an aerobic digestion and sludge thickening equipment package, as set forth in Exhibit "A", attached hereto and made a part hereof, is hereby approved and adopted by this Council.

2. The Mayor of the City of Miles City is hereby empowered and authorized to execute said Agreement on behalf of the City of Miles City, and bind the City of Miles City thereto.

3. The Mayor of the City of Miles City is hereby empowered and authorized to execute such further documents as are necessary to carry out the terms of said Agreement.

**SAID RESOLUTION FINALLY PASSED AND ADOPTED BY A DULY CONSTITUTED QUORUM OF THE CITY COUNCIL OF THE CITY OF MILES CITY, MONTANA, AT A REGULAR MEETING THIS 27<sup>th</sup> DAY OF APRIL, 2016.**

  
\_\_\_\_\_  
John Hollowell, Mayor

ATTEST:

  
\_\_\_\_\_  
Lorrie Pearce, City Clerk



## AGREEMENT

THIS AGREEMENT is by and between City of Miles City ("Buyer") and Ovivo, USA ("Seller").

Buyer and Seller hereby agree as follows:

### ARTICLE 1 – GOODS AND SPECIAL SERVICES

- 1.01 Seller shall furnish the Goods and Special Services as specified or indicated in the Contract Documents.

### ARTICLE 2 – THE PROJECT

- 2.01 The Project, of which the Goods and Special Services may be the whole or only a part, is identified as follows: Miles City Wastewater Improvements Phase II-2016 Equipment Procurement, Schedule One: Aerobic Digestion and Sludge Thickening Equipment Package.

### ARTICLE 3 – ENGINEER

- 3.01 The Contract Documents for the Goods and Special Services have been prepared by Robert Peccia and Associates ("Engineer"), which is to act as Buyer's representative, assume all duties and responsibilities, and have the rights and authority assigned to Engineer in the Contract Documents in connection with Seller's furnishing of Goods and Special Services.

### ARTICLE 4 – POINT OF DESTINATION

- 4.01 The Point of Destination is designated as: *Miles City Wastewater Treatment Facility unless Buyer notifies Seller otherwise. In any case delivery will be within the confines of Miles City, MT.*

### ARTICLE 5 – CONTRACT TIMES

#### 5.01 *Time of the Essence*

- A. All time limits for Milestones, if any, including the submittal of Shop Drawings and Samples, the delivery of Goods, and the furnishing of Special Services as stated in the Contract Documents, are of the essence of the Contract.

#### 5.02 *Milestones*

- A. *Date for Submittal of Shop Drawings and Samples:* Seller shall submit all Shop Drawings and Samples required by the Contract Documents to Buyer for Engineer's

review and approval within 21 days of the issuance of the Notice to Proceed. It is the intent of the parties that (1) Engineer conduct such review and issue its approval, or a denial accompanied by substantive comments regarding information needed to gain approval, within 14 days of Seller's submittal of such Shop Drawings and Samples; and (2) resubmittals be limited whenever possible. If more than one resubmittal is necessary for reasons not the fault and beyond the control of Seller, then Seller shall be entitled to seek appropriate relief under Paragraph 7.02.B of the General Conditions.

B. *Date for Delivery of Goods:* The Goods are to be delivered to the Point of Destination and ready for Buyer's receipt of delivery within 98 days from the date of Approved Submittals.

5.03 *Buyer's Final Inspection*

A. *Days to Achieve Final Inspection:* Buyer shall make a preliminary inspection of the Goods pursuant to Paragraph 8.01.C of the General Conditions within 10 days after Buyer's acknowledgement of receipt of delivery of the Goods and Seller's completion of furnishing Special Services, if any.

5.04 *Liquidated Damages*

A. Buyer and Seller recognize that Buyer will suffer financial loss if the Goods are not delivered at the Point of Destination and ready for receipt of delivery by Buyer within the times specified in Paragraph 5.02 above, plus any extensions thereof allowed in accordance with Article 7 of the General Conditions. The parties also recognize that the timely performance of services by others involved in the Project is materially dependent upon Seller's specific compliance with the requirements of Paragraph 5.02. Further, they recognize the delays, expense, and difficulties involved in proving the actual loss suffered by Buyer if complete acceptable Goods are not delivered on time. Accordingly, instead of requiring such proof, Buyer and Seller agree that as liquidated damages for delay (but not as a penalty) Seller shall pay Buyer \$ 500.00 for each day that expires after the time specified in Paragraph 5.02.B for delivery of acceptable Goods.

## ARTICLE 6 – CONTRACT PRICE

6.01 Buyer shall pay Seller for furnishing the Goods and Special Services in accordance with the Contract Documents as follows:

A. A Lump Sum of \$ 835,000.00. (To paid out in accordance with Article 7 herein).

## ARTICLE 7 – PAYMENT PROCEDURES

### 7.01 *Submittal and Processing of Payment*

- A. Seller shall submit Applications for Payment in accordance with Section 8 of the Special Provisions. Applications for Payment will be processed by Engineer as provided in the Special Provisions.

### 7.02 *Progress Payments*

- A. Buyer shall make progress payments on account of the Contract Price on the basis of Seller's Applications for Payment. Application for Payment submitted in accordance with Section 8 of the Special Provisions, payments shall be as follows:
  - B. There shall be three (3) progress payments based upon 1) Insurance, Bonding and Submittals 2) Manufacturing and Delivery 3) Final Payment which includes Startup, Testing, and Training. A payment of up to 10% of the contract price will be allowed once Bond and Insurance Certificates and Submittals have been received and approved. A payment of up to 80% of contract price (increasing total payments to 90% of Contract Price) will be allowed once the materials and equipment are delivered, inspected and approved by the Engineer and/or Buyer. A Final Payment less any liquidated damages and reimbursable engineering expenses will be allowed once manufacturer's startup, testing and operator training has occurred, and corrective work that may be warranted has been completed. The Final Application for Payment may only be submitted after the Engineer has signed the Certificate of Substantial Completion and all punch list items have been addressed as described in Supplementary Condition 18.

## ARTICLE 8 – INTEREST

- 8.01 All monies not paid when due as provided in Article 10 of the General Conditions shall bear interest at the statutory rate.

## ARTICLE 9 – SELLER'S REPRESENTATIONS

- 9.01 In order to induce Buyer to enter into this Agreement, Seller makes the following representations:
  - A. Seller has examined and carefully studied the Contract Documents and the other related data identified in the Bidding Documents, as applicable to Seller's obligations identified in Article 1 above.
  - B. If required by the Bidding Documents to visit the Point of Destination and site where the Goods are to be installed or Special Services will be provided, or if, in Seller's judgment, any local condition may affect cost, progress, or the furnishing of the Goods and Special Services, Seller has visited the Point of Destination and site where the Goods are to be

installed or Special Services will be provided and become familiar with and is satisfied as to the observable local conditions that may affect cost, progress, and the furnishing of the Goods and Special Services.

- C. Seller is familiar with and is satisfied as to all Laws and Regulations that may affect cost, progress, and the furnishing of the Goods and Special Services.
- D. Seller has carefully studied, considered, and correlated the information known to Seller; information commonly known to sellers of similar goods doing business in the locality of the Point of Destination and the site where the Goods will be installed or where Special Services will be provided; information and observations obtained from Seller's visits, if any, to the Point of Destination and site where the Goods are to be installed or Services will be provided; and any reports and drawings identified in the Bidding Documents regarding the Point of Destination and the site where the Goods will be installed or where Special Services will be provided, with respect to the effect of such information, observations, and documents on the cost, progress, and performance of Seller's obligations under the Contract Documents.
- E. Seller has given Engineer written notice of all conflicts, errors, ambiguities, or discrepancies that Seller has discovered in the Contract Documents, and the written resolution (if any) thereof by Engineer is acceptable to Seller.
- F. The Contract Documents are generally sufficient to indicate and convey understanding of all terms and conditions for furnishing Goods and Special Services.

## ARTICLE 10 – CONTRACT DOCUMENTS

### 10.01 Contents

- A. The Contract Documents consist of the following:
  - 1. This Agreement (pages 1 to 8, inclusive);
  - 2. Performance Bond (pages 1 to 4, inclusive);
  - 3. Payment Bond (pages 1 to 4, inclusive);
  - 4. Other bonds
    - a. \_\_\_\_\_ (pages \_\_\_ to \_\_\_, inclusive);
    - b. \_\_\_\_\_ (pages \_\_\_ to \_\_\_, inclusive);
    - c. \_\_\_\_\_ (pages \_\_\_ to \_\_\_, inclusive);
  - 5. General Conditions (pages 1 to 31, inclusive);
  - 6. Supplementary Conditions (pages 1 to 14, inclusive);

7. Specifications as listed in table of contents of the Project Manual;
8. Drawings, consisting of a cover sheet and sheets numbered   1   through   5  , inclusive, with each sheet bearing the following general title: Wastewater Improvements Phase II
9. Addenda (Numbers   1   to   1  , inclusive);
10. Exhibits to this Agreement (enumerated as follows): Not Applicable
11. The following which may be delivered or issued on or after the Effective Date of the Agreement and are not attached hereto:
  - a. Notice to Proceed;
  - b. Change Order(s);
  - c. Work Change Directive(s).
- B. The documents listed in Paragraph 10.01.A are attached to this Agreement (except as expressly noted otherwise above).
- C. There are no Contract Documents other than those listed above in this Article 10.
- D. The Contract Documents may only be amended, or supplemented as provided in Paragraph 3.04 of the General Conditions.

## ARTICLE 11 – MISCELLANEOUS

### 11.01 *Terms*

- A. Terms used in this Agreement will have the meanings indicated in the General Conditions and the Supplementary Conditions.

### 11.02 *Assignment of Contract*

- A. No assignment by a party hereto of any rights under or interests in the Contract Documents will be binding on another party hereto without the written consent of the party sought to be bound. Specifically but without limitation, moneys that may become due and moneys that are due may not be assigned without such consent (except to the extent that the effect of this restriction may be limited by Laws and Regulations). Unless specifically stated to the contrary in any written consent to such an assignment, such an assignment will not release or discharge the assignor from any duty or responsibility under the Contract Documents.

11.03 *Successors and Assigns*

- A. Buyer and Seller each binds itself, its partners, successors, assigns, and legal representatives to the other party hereto, its partners, successors, assigns, and legal representatives in respect to all covenants, agreements, and obligations contained in the Contract Documents.

11.04 *Severability*

- A. Any provision or part of the Contract Documents held to be void or unenforceable under any Law or Regulation shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon Buyer and Seller. The Contract Documents shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.

11.05 *Seller's Certifications*

- A. Seller certifies that it has not engaged in corrupt, fraudulent, collusive, or coercive practices in competing for or in executing the Contract. For the purposes of this Paragraph 11.05:
1. "corrupt practice" means the offering, giving, receiving, or soliciting of any thing of value likely to influence the action of a public official in the bidding process or in the Contract execution;
  2. "fraudulent practice" means an intentional misrepresentation of facts made (a) to influence the bidding process or the execution of the Contract to the detriment of Buyer, (b) to establish Bid or Contract prices at artificial non-competitive levels, or (c) to deprive Buyer of the benefits of free and open competition;
  3. "collusive practice" means a scheme or arrangement between two or more Bidders, with or without the knowledge of Buyer, a purpose of which is to establish Bid prices at artificial, non-competitive levels; and
  4. "coercive practice" means harming or threatening to harm, directly or indirectly, persons or their property to influence their participation in the bidding process or affect the execution of the Contract.

11.06 *Limitations*

- A. Buyer and Seller waive against each other, and against the other's officers, directors, members, partners, employees, agents, consultants, and subcontractors, any and all claims for or entitlement to incidental, indirect, or consequential damages arising out of, resulting from, or related to the Contract. Upon assignment the terms of this Paragraph 11.06.A shall be binding upon the assignee with respect to Seller and assignor. The terms of this mutual waiver do not apply to or limit any claim by either Buyer or Seller against



the other based on any of the following: (a) contribution or indemnification, (b) costs, losses, or damages attributable to personal or bodily injury, sickness, disease, or death, or to injury to or destruction of the tangible property of others, (c) intentional or reckless wrongful conduct, or (d) rights conferred by any bond provided by Seller under this Contract.

- B. Upon assignment the terms of this Paragraph 11.06.B shall be binding upon both the assignor and assignee with respect to Seller's liability, and upon Seller with respect to both assignor's and assignee's liabilities. The terms of this mutual limitation do not apply to or limit any claim by either Buyer or Seller against the other based on any of the following: (a) contribution or indemnification with respect to third-party claims, losses, and damages; (b) costs, losses, or damages attributable to personal or bodily injury, sickness, disease, or death, or to injury to or destruction of the tangible property of others, (c) intentional or reckless wrongful conduct, or (d) rights conferred by any bond provided by Seller under this Contract.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their authorized representatives, on the day and year first written above

CITY OF MILES CITY

OVIVO, USA

\_\_\_\_\_

*Wayne Holliman*  
Representative

ATTEST:

\_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_

STATE OF MONTANA )  
                                  :SS,  
MILES CITY        )

On this \_\_\_\_ day of \_\_\_\_\_, 2016, before me, \_\_\_\_\_, a Notary Public for the State of Montana, personally appeared \_\_\_\_\_ and \_\_\_\_\_, known to me to be the \_\_\_\_\_ and \_\_\_\_\_, respectively, of the City of Miles City, a municipal corporation and political subdivision of the State of Montana, and acknowledged to me that they executed the written instrument on behalf of said municipal corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written

\_\_\_\_\_  
PRINTED NAME  
NOTARY PUBLIC FOR THE STATE OF MONTANA  
RESIDING AT \_\_\_\_\_  
MY COMMISSION EXPIRES \_\_\_\_\_