

**RESOLUTION NO. 3927**

**A RESOLUTION APPROVING AN AGREEMENT BETWEEN THE CITY OF MILES CITY AND PROCESS WASTEWATER TECHNOLOGIES FOR PURCHASE OF A DEWATERING EQUIPMENT PACKAGE.**

*WHEREAS*, the City of Miles City has solicited bids for the provision of a dewatering equipment program as part of the Miles City Wastewater Improvements project, Phase II;

*AND WHEREAS* said bid was awarded to the only bidder for the project, being Process Wastewater Technologies;

*AND WHEREAS*, Process Wastewater Technologies has indicated that they are unable to meet the bonding requirements of the agreement which was part of the bid package, and the City finds it in the best interest of the parties to revise certain terms of said agreement;

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

1. The Agreement for the purchase of dewatering equipment, attached hereto as Exhibit "A", and made a part hereof, is hereby approved and adopted by the 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 to bind the City of Miles City thereto.

**SAID RESOLUTION FINALLY PASSED AND ADOPTED BY A DULY CONSTITUTED QUORUM OF THE CITY COUNCIL OF THE CITY OF MILES CITY, MONTANA, THIS 24<sup>th</sup> DAY OF MAY, 2016.**

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

ATTEST:

  
Lorrie Pearce, City Clerk

## AGREEMENT

THIS AGREEMENT is by and between City of Miles City ("Buyer") and Process Wastewater Technologies ("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 Two: Dewatering 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 are modified from those shown in the Contract Documents as stated in this Article. The timeframes herein are the essence of the Contract. All equipment provided under this Contract shall be delivered to the City of Miles City (Point of Destination as listed above) by **October 15, 2016**.

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 by **October 15, 2016**.

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. The Sum of \$ 466,500.00. (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 shall be modified from those included in the original Contract Documents. These progress payments shall be submitted as follows:
  - B. Progress payments based upon 1) After insurance certificates have been received and submittals have been approved; 2) Following Startup, Testing, and Training ( unless start-up is delayed beyond 150 days from delivery, excluding winter shutdown); and 3) At the end of the three (3) year Warranty Period. A payment of up to 10% of the contract price will be allowed once Insurance Certificates and Submittals have been received and approved. A payment of up to 40% of the contract price 150 days from delivery date before start-up occurs, excluding winter shutdown, and a payment of up to 40% of contract price will be allowed once manufacturer's startup, testing and operator training has occurred, and corrective work that may be warranted has been completed. Application for Payment following start-up 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 18. A Final Payment of no less than 10% less any liquated damages and reimbursable engineering expenses will be allowed once the one (1) year Warranty Period has expired and any corrective work has been completed. The additional warranty will extend for another (2) years, not to exceed forty-two (42) months.

## **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 Bidding Documents to visit the Point of Destination and site where the Good 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.

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## 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 anything 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

PROCESS WASTEWATER TECHNOLOGIES

[Signature]

[Signature]  
Representative

ATTEST:

[Signature: Lorrie Pearce]

APPROVED AS TO FORM:

[Signature: Dean Kelm]

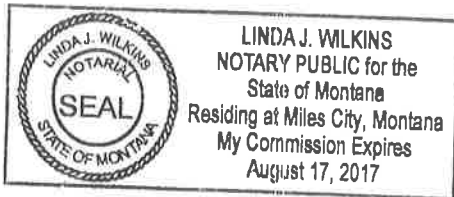
STATE OF MONTANA )

:SS,

MILES CITY )

On this 27<sup>th</sup> day of June, 2016, before me, Linda J. Wilkins, a Notary Public for the State of Montana, personally appeared John Hollowell and Lorrie Pearce, known to me to be the Mayer and City Clerk, 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



[Signature: Linda J. Wilkins]  
PRINTED NAME Linda J. Wilkins  
NOTARY PUBLIC FOR THE STATE OF MONTANA  
RESIDING AT Miles City MT  
MY COMMISSION EXPIRES August 17, 2017