

**AGREEMENT
CITY OF YAKIMA
BID 12107**

**Nelson Dam Removal Project – Phase I Intake and In-River Improvements
Materials: Boulders and Rocks per Specification**

THIS AGREEMENT, entered into on the date of last execution, between the City of Yakima, a Washington municipal corporation ("City"), and Herke Rock, ("Contractor").

WITNESSETH: The parties, in consideration of the terms and conditions herein, do hereby covenant and agree as follows:

1. Statement of Work

The minimum services that the Contractor will provide include services described in Bid 12107 specifications, which are attached as Exhibit A hereto and incorporated herein by this reference.

2. Compensation

The City agrees to pay the Contractor according to Exhibit B, attached hereto and incorporated herein, which Exhibit includes the Bid Form included in the Contractor's Bid submittal at the time and in the manner and upon the conditions provided for the Contract.

3. Contract Term

Materials shall be distributed or delivered as required by the City over the course of the Project from July 1st, 2021 to April 1st, 2023. Final work schedule shall be coordinated with Project Coordinator David Brown 509-575-6204.

Extensions shall be granted upon mutual written agreement by and between Bidder.

4. Agency Relationship between City and Contractor

Contractor shall, at all times, be an independent Contractor and not an agent or representative of City with regard to performance of the Services. Contractor shall not represent that it is, or hold itself out as, an agent or representative of City. In no event shall Contractor be authorized to enter into any agreement or undertaking for, or on, behalf of City.

5. Successors and Assigns

- a. Neither the City, nor the Contractor, shall assign, transfer, or encumber any rights, duties, or interests accruing from this Contract without the prior written consent of the other.
- b. The Contractor for himself, and for his heirs, executors, administrators, successors, and assigns, does hereby agree to the full performance of all the covenants herein contained upon the part of the Contractor.

6. Property Rights

All records or papers of any sort relating to the City and to the project will at all times be the property of the City and shall be surrendered to the City upon demand. All information concerning the City and said project which is not otherwise a matter of public record or required by law to be made public, is confidential, and the Contractor will not, in whole or part, now or at any time disclose that information without the express written consent of the City.

7. Inspection and Production of Records

- a. The records relating to the Services shall, at all times, be subject to inspection by and with the approval of the City, but the making of (or failure or delay in making) such inspection or approval shall not relieve Contractor of responsibility for performance of the Services in accordance with this Contract, notwithstanding the City's knowledge of defective or non-complying performance, its substantiality or the ease of its discovery. Contractor shall provide the City sufficient, safe, and proper facilities, and/or send copies of the requested

documents to the City. Contractor's records relating to the Services will be provided to the City upon the City's request.

- b. Contractor shall promptly furnish the City with such information and records which are related to the Services of this Contract as may be requested by the City. Until the expiration of six (6) years after final payment of the compensation payable under this Contract, or for a longer period if required by law or by the Washington Secretary of State's record retention schedule, Contractor shall retain and provide the City access to (and the City shall have the right to examine, audit and copy) all of Contractor's books, documents, papers and records which are related to the Services performed by Contractor under this Contract.
- c. All records relating to Contractor's services under this Contract must be made available to the City, and the records relating to the Services are City of Yakima /Yakima County records. They must be produced to third parties, if required pursuant to the Washington State Public Records Act, Chapter 42.56 RCW, or by law. All records relating to Contractor's services under this Contract must be retained by Contractor for the minimum period of time required pursuant to the Washington Secretary of State's records retention schedule.
- d. The terms of this section shall survive any expiration or termination of this Contract.

8. Work Made for Hire

All work the Contractor performs under this Contract shall be considered work made for hire, and shall be the property of the City. The City shall own any and all data, documents, plans, copyrights, specifications, working papers, and any other materials the Contractor produces in connection with this Contract. On completion or termination of the Contract, the Contractor shall deliver these materials to the City.

9. Guarantee

Contractor warrants the Materials will be free from defects in workmanship for a period of one year following the date of delivery and acceptance of the Materials.

10. Compliance with Law

Contractor agrees to perform all Services under and pursuant to this Contract in full compliance with any and all applicable laws, rules, and regulations adopted or promulgated by any governmental agency or regulatory body, whether federal, state, local, or otherwise. Contractor shall procure and have all applicable and necessary permits, licenses and approvals of any federal, state, and local government or governmental authority or this project, pay all charges and fees, and give all notices necessary and incidental to the due and lawful execution of the work.

- a. Procurement of a City Business License. Contractor must procure a City of Yakima Business License and pay all charges, fees, and taxes associated with said license.
- b. Contractor must provide proof of a valid Washington department of Revenue state excise tax registration number, as required in Title 85 RCW.
- c. Contractor must provide proof of a valid Washington Unified Business Identification (UBI) number. Contractor must have a current UBI number and not be disqualified from bidding on any public works contract under RCW 39.06.101 or 36.12.065(3).
- d. Contractor must provide proof of a valid Washington Employment Security Department number as required by Title 50 RCW.
- e. Foreign (Non-Washington) Corporations: Although the City does not require foreign corporate proposers to qualify in the City, County or State prior to submitting a proposal, it is specifically understood and agreed that any such corporation will promptly take all necessary measures to become authorized to

conduct business in the City of Yakima at their own expense, without regard to whether such corporation is actually awarded the contract, and in the event that the award is made, prior to conducting any business in the City.

11. Prevailing Wages

(*Refer to WAC 296-127-018. Only required when delivery is to a construction site, not required when delivery is to a stockpile.)

The Contractor will comply with all provisions of Chapter 39.12 RCW - Prevailing Wages on Public Work.

- a. RCW 39.12.010 - the Prevailing Rate of Wage. It is solely the responsibility of the Contractor to determine the appropriate prevailing wage rate for the services being provided.
- b. RCW 39.12.040 - Statement of Intent to Pay Prevailing Wages and an Affidavit of Wages Paid. Before an awarding agency may pay any sum due on account, it must receive a statement of Intent to Pay Prevailing Wages approved by the Department of Labor and Industries. Following final acceptance of a public work project, and before any final money is disbursed, each contractor and subcontractor must submit to the awarding agency an Affidavit of Wages Paid, certified by the Department of Labor and Industries.
- c. RCW 39.12.070 - Fees Authorized for Approval Certification and Arbitrations. Any fees charged by the Department of Labor and Industries for approvals or fees to cover costs of arbitration conducted shall be the responsibility of the Contractor.

The State of Washington prevailing wage rates applicable for this public works project, which is located in Yakima County, may be found at the following website address of the Department of Labor and Industries:

<https://fortress.wa.gov/lni/wagelookup/prvWagelookup.aspx>. Based on the bid submittal for this project, the applicable effective (start) date of this project for the purposes of determining prevailing wages is the bid date, April 2, 2021.

12. Nondiscrimination

During the performance of this Contract, the Contractor agrees as follows:

The Contractor shall not discriminate against any person on the grounds of race, creed, color, religion, national origin, sex, age, marital status, sexual orientation, gender identity, pregnancy, veteran's status, political affiliation or belief, or the presence of any sensory, mental or physical handicap in violation of the Washington State Law Against Discrimination (RCW chapter 49.60) or the Americans with Disabilities Act (42 USC 12101 et seq.).

This provision shall include but not be limited to the following: employment, upgrading, demotion, transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, selection for training, and the provision of Services under this Agreement.

In the event of the Contractor's noncompliance with the non-discrimination clause of this contract or with any such rules, regulations, or orders, this Contract may be cancelled, terminated, or suspended in whole or in part and the Contractor may be declared ineligible for any future City contracts.

13. Indemnification and Hold Harmless

- a. Contractor shall take all necessary precautions in performing the Services to prevent injury to persons or property. Contractor agrees to defend, indemnify and hold harmless the City, its elected and appointed officials, officers, employees, attorneys, agents, and volunteers from any and all claims, demands, losses,

liens, liabilities, penalties, fines, lawsuits, and other proceedings and all judgments, awards, costs and expenses (including reasonable costs and attorney fees) which result or arise out of the sole negligent acts or omissions of Contractor, its officials, officers, employees or agents.

- b. If any suit, judgment, action, claim or demand arises out of, or occurs in conjunction with, the negligent acts and/or omissions of both the Contractor and the City, or their elected or appointed officials, officers, employees, agents, attorneys or volunteers, pursuant to this Contract, each party shall be liable for its proportionate share of negligence for any resulting suit, judgment, action, claim, demand, damages or costs and expenses, including reasonable attorneys' fees.
- c. Contractor's Waiver of Employer's Immunity under Title 51 RCW. If any design or engineering work is done pursuant to this Contract, Contractor intends that its indemnification, defense, and hold harmless obligations set forth above in Section A shall operate with full effect regardless of any provision to the contrary in Title 51 RCW, Washington's Industrial Insurance Act. Accordingly, to the extent necessary to fully satisfy the Contractor's indemnification, defense, and hold harmless obligations set forth above in Section A, Contractor specifically waives any immunity granted under Title 51 RCW, and specifically assumes all potential liability for actions brought by employees of the Contractor against the City and its elected and appointed officials, officers, employees, attorneys, agents, and volunteers. The parties have mutually negotiated this waiver. Contractor shall similarly require that its subcontractors, and anyone directly or indirectly employed or hired by Contractor, and anyone for whose acts Contractor may be liable in connection with its performance of this Agreement, shall comply with the terms of this paragraph, waive any immunity granted under Title 51 RCW, and assume all potential liability for actions brought by their respective employees. The provisions of this section shall survive the expiration or termination of this Agreement.
- d. Nothing contained in this Section or this Contract shall be construed to create a liability or a right of indemnification in any third party.
- e. The terms of this Section shall survive any expiration or termination of this Contract.

14. Contractor's Liability Insurance

At all times during performance of the Services and this Contract, Contractor shall secure and maintain in effect insurance to protect the City and Contractor from and against any and all claims, damages, losses, and expenses arising out of or resulting from the performance of this Contract. Contractor shall provide and maintain in force insurance in limits no less than that stated below, as applicable. The City reserves the right to require higher limits should it deem it necessary in the best interest of the public.

Contractor will provide a Certificate of Insurance to the City as evidence of coverage for each of the policies and outlined herein. A copy of the additional insured endorsement attached to the policy will be included with the certificate. This Certificate of insurance shall be provided to the City, prior to commencement of work.

Failure of City to demand such verification of coverage with these insurance requirements or failure of City to identify a deficiency from the insurance documentation provided shall not be construed as a waiver of Contractor's obligation to maintain such insurance.

The following insurance is required:

- a. **Commercial Liability Insurance**

Before this Contract is fully executed by the parties, Contractor shall provide the City with a certificate of insurance as proof of commercial liability insurance with a minimum liability limit of Two Million Dollars

(\$2,000,000.00) per occurrence, combined single limit bodily injury and property damage, and Two Million Dollars (\$2,000,000.00) general aggregate. If Contractor carries higher coverage limits, such limits shall be shown on the Certificate of Insurance and Endorsements and the City, its elected and appointed officials, employees, agents, attorneys and volunteers shall be named as additional insureds for such higher limits. The certificate shall clearly state who the provider is, the coverage amount, the policy number, and when the policy and provisions provided are in effect. Said policy shall be in effect for the duration of this Contract. The policy shall name the City of Yakima, its elected and appointed officials, employees, agents, attorneys and volunteers as additional insureds, and shall contain a clause that the insurer will not cancel or change the insurance without first giving the City prior written notice. The insurance shall be with an insurance company or companies rated A-VII or higher in Best's Guide and admitted in the State of Washington. The requirements contained herein, as well as City of Yakima's review or acceptance of insurance maintained by Contractor is not intended to and shall not in any manner limit or qualify the liabilities or obligations assumed by Contractor under this contract.

b. Automobile Liability Insurance

Before this Contract is fully executed by the parties, Contractor shall provide the City with a certificate of insurance as proof of automobile liability insurance with a minimum liability limit of Two Million Dollars (\$2,000,000.00) per occurrence. If Contractor carries higher coverage limits, such limits shall be shown on the Certificate of Insurance and Endorsements and the City, its elected and appointed officials, employees, agents, attorneys and volunteers shall be named as additional insureds for such higher limits. The certificate shall clearly state who the provider is, the coverage amount, the policy number, and when the policy and provisions provided are in effect. Said policy shall be in effect for the duration of this Contract. The policy shall name the City of Yakima, its elected and appointed officials, employees, agents, attorneys and volunteers as additional insureds, and shall contain a clause that the insurer will not cancel or change the insurance without first giving the City prior written notice. The insurance shall be with an insurance company or companies rated A-VII or higher in Best's Guide and admitted in the State of Washington. The requirements contained herein, as well as City of Yakima's review or acceptance of insurance maintained by Contractor is not intended to and shall not in any manner limit or qualify the liabilities or obligations assumed by Contractor under this contract. The business auto liability shall include Hired and Non-Owned coverage if necessary.

c. Employer's Liability (Stop Gap)

Contractor and all subcontractor(s) shall at all times comply with all applicable workers' compensation, occupational disease, and occupational health and safety laws, statutes, and regulations to the full extent applicable, and shall maintain Employer's Liability insurance with a limit of no less than \$1,000,000.00. The City shall not be held responsible in any way for claims filed by Contractor or its employees for services performed under the terms of this Contract. Contractor agrees to assume full liability for all claims arising from this Contract including claims resulting from negligent acts of all subcontractor(s). Contractor is responsible to ensure subcontractor(s) have insurance as needed. Failure of subcontractor(s) to comply with insurance requirements does not limit Contractor's liability or responsibility.

Contractor's insurance coverage shall be primary insurance with respect to those who are Additional Insureds under this Contract. Any insurance, self-insurance or insurance pool coverage maintained by the City shall be in excess of the Contractor's insurance and shall not contribute to it.

If at any time during the life of the Contract, or any extension, Contractor fails to maintain the required insurance in full force and effect, all work under the contract shall be discontinued immediately. Any failure to maintain the required insurance may be sufficient cause for the City to terminate the Contract.

Should a court of competent jurisdiction determine that this Contract is subject to RCW 4.24.115, then, in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of Contractor and the City, its officers, elected and appointed officials, employees, agents, attorneys and volunteers, Contractor's liability hereunder shall be limited to the extent of the Contractor's negligence.

15. Severability

If any term or condition of this Contract or the application thereof to any person(s) or circumstances is held invalid, such invalidity shall not affect other terms, conditions or applications which can be given effect without the invalid term, condition or application. To this end, the terms and conditions of this Contract are declared severable.

16. Contract Documents

This Contract, the Invitation to Bid 12107 Scope of Work, conditions, addenda, and modifications and Contractor's Bid submittal (to the extent consistent with City of Yakima documents) constitute the Contract Documents and are complementary. Specific Federal and State laws and the terms of this Contract, in that order respectively, supersede other inconsistent provisions. These Contract Documents are on file in the Office of the Purchasing Manager, 129 No. 2nd St., Yakima, WA, 98901, and are hereby incorporated by reference into this Contract.

17. Termination

Termination for Cause: In the event of Contractor's breach of this Contract, the City may terminate the Contract after providing the Contractor with thirty (30) calendar days written notice of the Contractor's right to cure a failure of the Contractor to perform under the terms of this Contract.

The Contractor may terminate the Contract after providing the City sixty (60) calendar days' notice of the City's right to cure a failure of the City to perform under the terms of the Contract.

Upon the termination of the Contract for any reason, or upon Contract expiration, each party shall be released from all obligations to the other party arising after the date of termination or expiration, except for those that by their terms survive such termination or expiration.

The following represents a non-exclusive list of examples of breach by the Contractor:

- a. Defaults on an obligation under the Contract;
- b. Fails to perform any material obligation required under the Contract;
- c. Files a petition in bankruptcy, becomes insolvent, or otherwise takes action to dissolve as a legal entity;
- d. Allows any final judgment not to be satisfied or a lien not to be disputed after a legally-imposed, 30-day notice;
- e. Makes an assignment for the benefit of creditors;
- f. Fails to follow the sales and use tax certification requirements of the State of Washington;
- g. Incurs a delinquent Washington tax liability;
- h. Becomes a State or Federally debarred Contractor;
- i. Is excluded from federal procurement and non-procurement Contracts;
- j. Fails to maintain and keep in force all required insurance, permits and licenses as provided in the Contract;
- k. Fails to maintain the confidentiality of the City information that is considered to be Confidential Information, proprietary, or containing Personally Identifiable Information;
- l. Contractor performance threatens the health or safety of a City, County or municipal employee; or

Termination for Convenience: Either party may terminate the Contract at any time, without cause, by providing a written notice; the City by providing at least thirty (30) calendar days' notice to the Contractor, and the Contractor providing at least thirty (30) calendar days' notice to the City in advance of the intended date of termination.

In the event of termination for convenience, the Contractor shall be entitled to receive compensation for any fees owed under the Contract. The Contractor shall also be compensated for partially completed services. In this event, compensation for such partially completed services shall be no more than the percentage of completion of the services requested, at the sole discretion of the City, multiplied by the corresponding payment for completion of such services as set forth in the Contract. Alternatively, at the sole discretion of the City, the Contractor may be compensated for the actual service hours provided. The City shall be entitled to a refund for goods or services paid for but not received or implemented, such refund to be paid within thirty (30) days of written notice to the Contractor requesting the refund.

Change in Funding: In addition to the above termination provisions, if the funds upon which the City relied to establish this Contract are withdrawn, reduced, or limited, or if additional or modified conditions are placed on such funding, the City may terminate this Contract by providing at least five business days written notice to the Contractor. The termination shall be effective on the date specified in the notice of termination.

This Contract may be terminated by either party by giving thirty (30) days written notice of such intent and will become effective thirty (30) days from the date such written notice is delivered to the applicable party to the Contract.

18. Dispute Resolution

In the event that any dispute shall arise as to the interpretation of this agreement, or in the event of a notice of default as to whether such default does constitute a breach of the contract, and if the parties hereto cannot mutually settle such differences, then the parties shall first pursue mediation as a means to resolve the dispute. If the afore mentioned methods are either not successful then any dispute relating to this Agreement shall be decided in the courts of Yakima County, in accordance with the laws of Washington. If both parties consent in writing, other available means of dispute resolution may be implemented.

19. Force Majeure

Contractor will not be responsible for delays in delivery due to acts of God, fire, strikes, epidemics/pandemics, war, riot, delay in transportation or railcar transport shortages, provided Contractor notifies the City immediately in writing of such pending or actual delay. Normally, in the event of any such delays (acts of God, etc.) the date of delivery will be extended for a period equal to the time lost due to the reason for delay.

20. Governing Law

This Contract shall be governed by and construed in accordance with the laws of the State of Washington.

21. Venue

The venue for any judicial action to enforce or interpret this Contract shall lie in a court of competent jurisdiction in Yakima County, Washington.

22. Authority

The person executing this Contract, on behalf of Contractor, represents and warrants that he/she has been fully authorized by Contractor to execute this Contract on its behalf and to legally bind Contractor to all the terms, performances and provisions of this Contract.

23. Change or Notice

Any alterations, including changes to the nature of the service, made to the Contract shall be rendered in writing and signed by both responsible parties; no changes without such signed documentation shall be valid. No alterations

outside of the general scope and intent of the original Request for Proposals or in excess of allowable and accepted price changes shall be made.

In no event shall the Contractor be paid or be entitled to payment for services that are not authorized herein or any properly executed amendment.

Notice of Business Changes: Contractor shall notify the City in writing within three (3) business days of any change in ownership of the facilities of the Contractor or of the facilities of any subcontractor. The Contractor shall notify the City in writing as soon as possible, and in no event later than three (3) business days, after any decision by the Contractor to change or discontinue service that will affect services provided to the City under this Contract.

The City shall have the right to renegotiate the terms and conditions of this Contract to the extent required to accommodate a change in governing law or policy that, in the sole discretion of the City, either substantially and unreasonably enlarges the Contractor's duties hereunder, or renders performance, enforcement or compliance with the totality of the Contract impossible, patently unreasonable, or unnecessary. Notices and demands under and related to this Contract shall be in writing and sent to the parties at their addresses as follows:

TO CITY: Bob Harrison, City Manager
City of Yakima
City Hall—First Floor
129 North Second Street
Yakima, WA 98901

TO CONTRACTOR: Herke Rock
19320 Ahtanum Road
Yakima, WA 98903

COPY TO: City of Yakima Purchasing
Christina Payer, Buyer I
City Hall—First Floor
129 North Second Street
Yakima, WA 98901

24. Survival

The foregoing sections of this Contract, 2-23 inclusive, shall survive the expiration or termination of this Contract in accordance with their terms.

IN WITNESS WHEREOF, the parties hereto execute this Contract as of the day and year first above written.

CITY OF YAKIMA

HERKE ROCK

City Manager

By: _____

Date: _____

Date: 5/18/2021_____

Attest:

Steve Herke, owner
(Print name)

City Clerk