



# Public Works Utility Operations Department

**DATE:** June 21, 2022

**FROM:** Michelle Klose, Public Works Utility Water Director

**ITEM:** Request approval of the Agreement for Cost-Share Reimbursement with the State Water Commission for the WU137 Watermain Replacement Project

**REQUEST:**

Request for approval of the Agreement for Cost-Share Reimbursement with the State Water Commission for the WU137 Watermain Replacement Project.

Please place this item on the June 28, 2022 City Commission meeting agenda.

**BACKGROUND INFORMATION:**

On June 7, 2022, the North Dakota State Water Commission approved a Cost-Share Request for the WU137 Watermain Replacement Project. The State Water Commission will provide cost-share of \$2,170,000 to reimburse 60 percent of the actual eligible costs incurred from the WU137 Watermain Replacement Project, contingent on availability of funds and conditions of the agreement. The agreement is attached.

**RECOMMENDED CITY COMMISSION ACTION:**

Approve the Agreement for Cost-Share Reimbursement with the North Dakota State Water Commission for the WU137 Watermain Replacement Project.

**STAFF CONTACT INFORMATION:**

Michelle Klose, Director of Utility Operations, 355-1700, [mklose@bismarcknd.gov](mailto:mklose@bismarcknd.gov)

## **Agreement for Cost-Share Reimbursement Bismarck WU137 Watermain Replacement**

**1. PARTIES.** This agreement is between the State of North Dakota (State), by and through the State Water Commission (Commission), and City of Bismarck (Sponsor).

**2. COMMISSION'S RESPONSIBILITY AND INTENT.** Commission will provide Sponsor with cost-share, not to exceed \$2,170,000, as approved by Commission on June 7, 2022, to reimburse 60 percent of eligible costs incurred in Sponsor's WU137 Watermain Replacement Project (Project), contingent on availability of funds and conditions of this agreement. Commission's intent in providing this funding to Sponsor is merely to help Sponsor financially afford Project. Sponsor retains sole and absolute discretion in the manner and means of carrying out Project, except to the extent specified in this agreement.

**3. SPONSOR'S RESPONSIBILITIES.** Sponsor must:

- a. Complete Project.
- b. Provide continued maintenance for Project.
- c. Ensure all applicable permits (federal, state, and local) are obtained.
- d. Acquire all title to land and easements for Project.
- e. Comply with all North Dakota laws governing the requirements for competitive bids, advertising, and awarding of contracts for construction of Project.
- f. Provide written certification to Commission that Project does not duplicate the service area or affect another water service provider's users.
- g. Provide a water service agreement if Project is located within extraterritorial jurisdiction.
- h. Maintain a Project file containing relevant documents and correspondence generated during the course of Project. State is not responsible for maintaining a Project file.
- i. Prior to signature, inform Commission and any other relevant party regarding Project of any errors, misinterpretations, changes, modifications, miscalculations, incorrect Project descriptions, or any other information stated herein that is inaccurate.
- j. Provide assurance to Commission of sustainable operation, maintenance, and replacement plan of Project facilities.
- k. Provide a progress report to Commission at least every four years if the term of Project exceeds four years. If a progress report is not timely received, or if after a review of a progress report Commission determines Project has not made sufficient progress, Commission may terminate the agreement for Project funding.

**4. PROJECT DESCRIPTION AND LOCATION.** Project is for replacement of watermain in the south-central area of Bismarck.

**5. ELIGIBLE COSTS.** Commission has sole discretion to determine eligible costs and availability of Commission funds. Additional information is outlined in Commission's cost-share policy.

**6. PAYMENT.** Commission will make partial payments upon receipt and approval of Sponsor's written request. Sponsor must provide Commission verification of actual costs and a Project status report with each payment request. A Commission representative may inspect Project to determine whether the work satisfies Commission's cost share requirements before Commission makes payment(s) to Sponsor. Request for final payment must include documents or record drawings features constructed.

**7. INDEMNIFICATION.** Sponsor must require all subcontractors, other than state employed subcontractors, before commencement of an agreement between Sponsor and the subcontractor, to defend, indemnify, and hold harmless State, from and against claims based on the vicarious liability of State or its agents, but not against claims based on State's negligence or intentional misconduct. This obligation to defend, indemnify, and hold harmless does not extend to professional liability claims arising from professional errors and omissions. The legal defense provided by subcontractor to State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for State is necessary. Subcontractor also agrees to reimburse State for all costs, expenses, and attorneys' fees incurred if State prevails in an action against subcontractor in establishing and litigating the indemnification coverage required herein. This obligation continues after the termination of this agreement.

**8. INSURANCE.** State and Sponsor each must secure and keep in force during the term of this agreement, from an insurance company, government self-insurance pool, or government self-retention fund authorized to do business in North Dakota, commercial general liability with minimum limits of liability of \$500,000 per person and \$2,000,000 per occurrence.

In addition, Sponsor must require all subcontractors, other than state employed subcontractors, before commencement of an agreement between Sponsor and the subcontractor, to secure and keep in force during the term of this agreement, from insurance companies authorized to do business in North Dakota, the following insurance coverages:

- a. Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of \$2,000,000 per occurrence.
- b. Automobile liability, including Owned (if any), Hired, and Non-owned automobiles, with minimum liability limits of \$500,000 per person and \$2,000,000 per occurrence.
- c. Workers' compensation coverage meeting all statutory requirements. The policy must provide coverage for all states of operation that apply to the performance of this contract.

- d. If subcontractor is domiciled outside State, employer's liability or "stop gap" insurance of not less than \$2,000,000 as an endorsement on the workers compensation or commercial general liability insurance.

The insurance coverages listed above must meet the following additional requirements:

- e. Any deductible or other similar obligation under the policies is the sole responsibility of the subcontractor. The amount of any deductible is subject to approval by State.
- f. This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form, and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by State. The policies must be in form and terms approved by State.
- g. State will be defended, indemnified, and held harmless to the full extent of any coverage actually secured by the subcontractor in excess of the minimum requirements set forth above. The duty to defend, indemnify, and hold harmless State under this agreement is not limited by the insurance required in this agreement.
- h. State must be endorsed on the commercial general liability policy, including any excess policies, as additional insured. State must have all the benefits, rights, and coverages of an additional insured under these policies that are not limited to the minimum limits of insurance required by this agreement or by the contractual indemnity obligations of Sponsor.
- i. The insurance required in this agreement, through a policy or endorsement, must include:
  - (1) A "Waiver of Subrogation" waiving any right to recovery the insurance company may have against State;
  - (2) A provision that subcontractor's insurance coverage is primary (i.e., pay first) as respects any insurance, self-insurance, or self-retention maintained by State and that any insurance, self-insurance, or self-retention maintained by State must be in excess of the subcontractor's insurance and must not contribute with it;
  - (3) Cross liability/severability of interest for all policies and endorsements;
  - (4) The legal defense provided to State under the policy and any endorsements must be free of any conflicts of interest, even if retention of separate legal counsel for State is necessary;
  - (5) The insolvency or bankruptcy of the insured subcontractor must not release the insurer from payment under the policy, even when such insolvency or bankruptcy prevents the insured

- subcontractor from meeting the retention limit under the policy.
- j. Failure to provide insurance as required in this agreement is a material breach of contract entitling State to terminate this agreement immediately.

**9. BREACH.** Violation of any provision of this agreement by Sponsor constitutes breach of this agreement. A breach obligates Sponsor to reimburse Commission for all funds paid to Sponsor and relieves Commission of all obligations under this agreement.

**10. AGREEMENT BECOMES VOID.** This agreement is void if not signed and returned by Sponsor within 60 days of Commission's signature.

**11. TERMINATION.**

- a. Commission may terminate this agreement effective upon delivery of written notice to Sponsor, or a later date as may be stated in the notice, under any of the following conditions:
  - (1) If Commission determines an emergency exists.
  - (2) If funding from federal, state, or other sources is not obtained and continued at levels sufficient to provide the funds necessary to comply with this agreement. The parties may modify this agreement to accommodate a reduction in funds.
  - (3) If federal or state laws or rules are modified or interpreted in a way that the services are no longer allowable or appropriate for purchase under this agreement or are no longer eligible for the funding proposed for payments authorized by this agreement.
  - (4) If any license, permit, or certificate required by law, rule, or this agreement is denied, revoked, suspended, or not renewed.
  - (5) If Commission determines that continuing the agreement is no longer necessary or would not produce beneficial results commensurate with the further expenditure of public funds.
- b. Any termination of this agreement is without prejudice to any obligations or liabilities of either party already accrued prior to termination.
- c. The rights and remedies of any party provided in this agreement are not exclusive.

**12. APPLICABLE LAW AND VENUE.** This agreement is governed by and construed under the laws of State. Any action to enforce this agreement must be adjudicated exclusively in the District Court of Burleigh County, North Dakota.

**13. SEVERABILITY.** If any term of this agreement is declared by a court having jurisdiction to be illegal or unenforceable, the validity of the remaining terms is unaffected, and if possible, the rights and obligations of the parties are to be construed and enforced as if the agreement did not contain that term.

**14. SPOILIATION – PRESERVATION OF EVIDENCE.** Sponsor agrees to promptly notify Commission of all potential claims that arise or result from this agreement. Sponsor must also take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and grants to Commission the opportunity to review and inspect the evidence, including the scene of an accident.

**15. MERGER AND MODIFICATION.** This agreement constitutes the entire agreement between the parties. There are no understandings, agreements, or representations, oral or written, not specified within this agreement. This agreement may not be modified, supplemented, or amended in any manner except by written agreement signed by both parties.

**NORTH DAKOTA STATE WATER COMMISSION**

By:



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ANDREA TRAVNICEK, Ph.D.  
Secretary

Date:  
06/10/2022

**CITY OF BISMARCK**

By:

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MIKE SCHMITZ  
Mayor

Date: June 28, 2022