

**CONTRACT AGREEMENT**  
**between City of Othello and Utility Service Co., Inc.**

THIS AGREEMENT is made by and between the City of Othello, a Washington municipal corporation (hereinafter the "City"), and Utility Service Co., Inc. organized under the laws of the State of Georgia, located and doing business in Atlanta, GA (hereinafter the "Contractor").

**AGREEMENT**

The parties agree as follows:

I. DESCRIPTION OF WORK.

Contractor shall perform the following services for the City in accordance with the following described plans and/or specifications:

Over the course of a **three-year contract** do the following work –

3,000,000 Standpipe (Water Tank) Exterior & Interior Renovation & Repairs & PAX mixer installation;

1,000,000 Standpipe (Water Tank) Exterior & Interior Renovation & Repairs & PAX mixer installation;

2,000,000 Standpipe (Water Tank) Visual and ROV Inspection

**All work to follow the scope of work attached, which is incorporated by reference as additional obligations of Contractor.**

Contractor's Responsibilities. This contract outlines the Company's responsibilities for inspection of the above described water tanks. This is in conjunction with the attached Scope of Work. Care and maintenance include the following:

- A. The Contractor will inspect and service the tanks. The tanks and towers will be thoroughly inspected to ensure that the structure is in a sound and watertight condition.
- B. During the washout/inspection, the tank will be completely drained and cleaned to remove all mud, silt and other accumulations that might be harmful to the tank or its contents. After cleaning is completed, the interior will be thoroughly inspected and disinfected prior to returning the tank to service; however the Owner is responsible for draining and filling the tank and conducting any required testing of the water. A written report will be mailed to the Owner after each inspection.
- C. A lock will be installed on the roof hatch of the tank.
- D. The Contractor will furnish pressure relief valves, if requested by the Owner, so that the Owner can install the valves in its water system while the tank is being serviced.

- E. The Contractor will furnish current certificates of insurance coverage to the Owner (see paragraph XII for details).
- F. Structure of the Tank. The Contractor is accepting this tank under program based upon its existing structure and components. *Any modifications to the tank, including antenna installations, shall be approved by Utility Service Co., Inc., prior to installations and may warrant an increase in the annual fee.*

Contractor further represents that the services furnished under this Agreement will be performed in accordance with generally accepted professional practices within the Eastern Washington region in effect at the time such services are performed. Contractor shall be licensed to do business in the State of Washington and shall obtain a business license from the City of Othello.

II. TIME OF COMPLETION. The parties agree that work will begin on the tasks described in Section I above, and in the attached scope of work, immediately upon execution of this Agreement. Upon the effective date of this Agreement, the Contractor shall complete the work described in Section I in accordance with the scope of work attached, but ALL work shall be complete within the length of the three-year contract – starting year 2014.

III. COMPENSATION. The City shall pay the Contractor a total amount not to exceed \$240,889 in Contract Year one (1); \$244,395 in Contract Year two (2) and \$244,395 in Contract year three (3) plus any applicable Washington State Sales Tax, for the initial work and services contemplated in this Agreement. Payment for Contract Year 1 shall be due and payable upon completion of the initial interior renovation of the 3,000,000 Standpipe Water Tank. Each subsequent annual fee, plus all applicable taxes shall be divided into 12 payments and paid monthly, starting with the first month of year two. A “Contract Year” shall be defined as each consecutive 12-month period following the first day of the month in which the Contract is executed by the Owner and each subsequent 12-month period thereafter during the time the Contract is in effect. For example, if a contract was signed by an Owner on April 17, 2012, Contract Year 1 for that contract would be April 1, 2012 to March 31, 2013, and Contract Year 2 for that contract would be April 1, 2013 to March 31, 2014 and so on. Furthermore, if the Owner elects to terminate this Contract prior to remitting the **three (3)** annual fees, then the unpaid balance for work completed prior to the date of termination shall be due and payable within thirty (30) days of the termination.

- A. Retainage. Because this contract is more than \$35,000, and pursuant to the RCW, Chapter 60.28.011, municipal governments are required to withhold 5% of the money due to the contractor for a public improvement or work, until the completion and/or acceptance of the contract. This acceptance shall be done on a yearly basis throughout the three-year term of this contract.
- B. Performance and Payment Bond. Pursuant to RCW 39.08.010 the city is required to call for a performance and payment bond. The bond is to be issued by a surety company licensed to do business in Washington. It is to be conditioned that the contractor shall faithfully perform all the provisions of such contract and pay all laborers, mechanics, subcontractors, and materials.

- C. **Defective or Unauthorized Work.** The City reserves its right to withhold payment from Contractor for any defective or unauthorized work. Defective or unauthorized work includes, without limitation: work and materials that do not conform to the requirements of this Agreement; and extra work and materials furnished without the City's written approval. If, after providing 30 days written notice, Contractor is unable, for any reason, to satisfactorily complete any portion of the work, the City may complete the work by contract or otherwise, and Contractor shall be liable to the City for any additional costs incurred by the City. "Additional costs" shall mean all reasonable costs, including legal costs and attorney fees, incurred by the City beyond the maximum Contract price specified above. The City further reserves its right to deduct the cost to complete the Contract work, including any Additional Costs, from any and all amounts due or to become due the Contractor.
- D. **Final Payment: Waiver of Claims.** THE CONTRACTOR'S ACCEPTANCE OF FINAL PAYMENT (EXCLUDING WITHHELD RETAINAGE) SHALL CONSTITUTE A WAIVER OF CONTRACTOR'S CLAIMS, EXCEPT THOSE PREVIOUSLY AND PROPERLY MADE AND IDENTIFIED BY CONTRACTOR AS UNSETTLED AT THE TIME FINAL PAYMENT IS MADE AND ACCEPTED.

IV. **INDEPENDENT CONTRACTOR.** The parties intend that an Independent Contractor-Employer Relationship will be created by this Agreement and that the Contractor has the ability to control and direct the performance and details of its work, the City being interested only in the results obtained under this Agreement.

V. **TERMINATION.**

1. The City may terminate this Agreement for good cause. "Good cause" shall include, without limitation, any one or more of the following events:

- A. The Contractor's failure to complete the work within the time specified in this Agreement.
- B. The Contractor's failure to make full and prompt payment to subcontractors or for material or labor.
- C. The Contractor's persistent disregard of federal, state or local laws, rules or regulations.
- D. The Contractor's filing for bankruptcy or becoming adjudged bankrupt.
- E. The Contractor's breach of any portion of this Agreement.

2. The City may terminate this Agreement without cause as follows:

This Contract is subject to termination by the City only if written notice of intent to terminate is received by the Contractor ninety (90) days prior to the first day of the upcoming Contract Year. Notice of Termination is to be delivered by registered mail to Utility Service Co., Inc., Attention: Customer Service, P O Box 1350, Perry, Georgia 31069, and signed by an authorized official of the Owner's management and/or Commissioners.

VI. PREVAILING WAGES. Contractor shall file a "Statement of Intent to Pay Prevailing Wages," with the State of Washington Department of Labor & Industries prior to commencing the Contract work. Contractor shall pay prevailing wages in effect on the date the bid is accepted or executed by Contractor, and comply with Chapter 39.12 of the Revised Code of Washington, as well as any other applicable prevailing wage rate provisions.

VII. CHANGES. The City may issue a written change order for any change in the Contract work during the performance of this Agreement. If the Contractor determines, for any reason, that a change order is necessary, Contractor must submit a written change order request to the City of Othello Public Works Director within fourteen (14) calendar days of the date Contractor knew or should have known of the facts and events giving rise to the requested change. If the City determines that the change increases or decreases the Contractor's costs or time for performance, the City will make an equitable adjustment. The City will attempt, in good faith, to reach agreement with the Contractor on all equitable adjustments. However, if the parties are unable to agree, the City will determine the equitable adjustment as it deems appropriate. The Contractor shall proceed with the change order work upon receiving either a written change order from the City before actually receiving the written change order. If the Contractor fails to require a change order within the time specified in this paragraph, the Contractor waives its right to make any claim or submit subsequent change order requests for that portion of the contract work. If the Contractor disagrees with the equitable adjustment, the Contractor must complete the change order work; however, the Contractor may elect to protest the adjustment as provided in subsections A through E of Section VIII, Claims, below.

The Contractor accepts all requirements of a change order by: (1) endorsing it, (2) writing a separate acceptance, or (3) not protesting in the way this section provides. A change order that is accepted by Contractor as provided in this section shall constitute full payment and final settlement of all claims for contract time and for direct, indirect and consequential costs, including costs of delays related to any work, either covered or affected by the change.

VIII. CLAIMS. If the Contractor disagrees with anything required by a change order, or another written order from the City, including any direction, instruction, interpretation, or determination by the City, the Contractor may file a claim as provided in this section. The Contractor shall give written notice to the City of all claims within fourteen (14) calendar days of the occurrence of the events giving rise to the claims, or within fourteen (14) calendar days of the date the Contractor knew or should have known of the facts or events giving rise to the claim, whichever occurs first. Any claim for damages, additional payment for any reason, or extension of time, whether under this Agreement or otherwise, shall be conclusively deemed to have been waived by the Contractor unless a timely written claim is made in strict accordance with the

applicable provisions of this Agreement.

At a minimum, a Contractor's written claim shall include the information set forth in subsections A, items 1 through 5 below.

**FAILURE TO PROVIDE A COMPLETE, WRITTEN NOTIFICATION OF CLAIM WITHIN THE TIME ALLOWED SHALL BE AN ABSOLUTE WAIVER OF ANY CLAIMS ARISING IN ANY WAY FROM THE FACTS OR EVENTS SURROUNDING THAT CLAIM OR CAUSED BY THAT DELAY.**

- A. Notice of Claim. Provide a signed written notice of claim that provides the following information:
  - 1. The date of the Contractor's claim;
  - 2. The nature and circumstances that caused the claim;
  - 3. The provisions in this Agreement that support the claim;
  - 4. The estimated dollar cost, if any, of the claimed work and how that estimate was determined; and
  - 5. An analysis of the progress schedule showing the schedule change or disruption if the Contractor is asserting a schedule change or disruption.

- B. Records. The Contractor shall keep complete records of extra costs and time incurred as a result of the asserted events giving rise to the claim. The City shall have access to any of the Contractor's records needed for evaluating the protest.

The City will evaluate all claims, provided the procedures in this section are followed. If the City determines that a claim is valid, the City will adjust payment for work or time by an equitable adjustment. No adjustment will be made for an invalid protest.

- C. Contractor's Duty to Complete Protested Work. In spite of any claim, the Contractor shall proceed promptly to provide the goods, materials and services required by the City under this Agreement.
- D. Failure to Protest Constitutes Waiver. By not protesting as this section provides, the Contractor also waives any additional entitlement and accepts from the City any written order (including directions, instructions, interpretations, and determination).
- E. Failure to Follow Procedures Constitutes Waiver. By failing to follow the procedures of this section, the Contractor completely waives any claims for protested work and accepts from the City any written order (including directions, instructions, interpretations, and determination).

**IX. DISCRIMINATION.** In the hiring of employees for the performance of work under this Agreement or any sub-contract, the Contractor, its sub-contractors, or any person acting

on behalf of the Contractor or sub-contractor shall not, by reason of race, religion, color, sex, age, sexual orientation, national origin, or the presence of any sensory, mental, or physical disability, discriminate against any person who is qualified and available to perform the work to which the employment relates.

X. INDEMNIFICATION. Contractor shall defend, indemnify and hold the City, its officers, officials, employees, agents and volunteers harmless from any and all claims, injuries, damages, losses or suits, including all legal costs and attorney fees, arising out of or in connection with the Contractor's performance of this Agreement, except for that portion of the injuries and damages caused by the City's negligence.

The City's inspection or acceptance of any of Contractor's work when completed shall not be grounds to avoid any of these covenants of indemnification.

Should a court of competent jurisdiction determine that this Agreement 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 the Contractor and the City, its officers, officials, employees, agents and volunteers, the Contractor's liability hereunder shall be only to the extent of the Contractor's negligence.

IT IS FURTHER SPECIFICALLY AND EXPRESSLY UNDERSTOOD THAT THE INDEMNIFICATION PROVIDED HEREIN CONSTITUTES THE CONTRACTOR'S WAIVER OF IMMUNITY UNDER INDUSTRIAL INSURANCE, TITLE 51 RCW, SOLELY FOR THE PURPOSES OF THIS INDEMNIFICATION. THE PARTIES FURTHER ACKNOWLEDGE THAT THEY HAVE MUTUALLY NEGOTIATED THIS WAIVER.

The provisions of this section shall survive the expiration or termination of this Agreement.

XI. INSURANCE. The Contractor shall procure and maintain for the duration of the Agreement, insurance of the types and in the amounts as required by the scope of work in the amount of 10 Million dollars Pollution Liability Insurance and 2 Million dollars Professional Liability insurance. The City of Othello must be named an additional insured on the policy to be provided prior to start of work.

XII. WORK PERFORMED AT CONTRACTOR'S RISK. Contractor shall take all necessary precautions and shall be responsible for the safety of its employees, agents, and subcontractors in the performance of the contract work and shall utilize all protection necessary for that purpose. All work shall be done at Contractor's own risk, and Contractor shall be responsible for any loss of or damage to materials, tools, or other articles used or held for use in connection with the work.

XIII. ENVIRONMENTAL, HEALTH, SAFETY OR LABOR REQUIREMENTS. The Owner hereby agrees that future mandated environmental, health, safety or labor requirements as well as changes in site conditions at the tank site which cause an increase in the cost of tank maintenance will be just cause for modification of this Contract. Said modification of this Contract will reasonably reflect the increased cost of the service with a newly negotiated annual

fee.

#### XIV. MISCELLANEOUS PROVISIONS.

- A. **Non-Waiver of Breach.** The failure of the City to insist upon strict performance of any of the covenants and agreements contained in this Agreement, or to exercise any option conferred by this Agreement in one or more instances shall not be construed to be a waiver or relinquishment of those covenants, agreements or options, and the same shall be and remain in full force and effect.
- B. **Resolution of Disputes and Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Washington. If the parties are unable to settle any dispute, difference or claim arising from the parties' performance of this Agreement, the exclusive means of resolving that dispute, difference or claim, shall only be by filing suit exclusively under the venue, rules and jurisdiction of the Adams County Superior Court, Adams County, Washington, unless the parties agree in writing to an alternative dispute resolution process. In any claim or lawsuit for damages arising from the parties' performance of this Agreement, each party shall pay all its legal costs and attorney's fees incurred in defending or bringing such claim or lawsuit, including all appeals, in addition to any other recovery or award provided by law; provided, however, nothing in this paragraph shall be construed to limit the City's right to indemnification under Section X of this Agreement.
- C. **Written Notice.** All communications regarding this Agreement shall be sent to the parties at the addresses listed on the signature page of the Agreement, unless notified to the contrary. Any written notice hereunder shall become effective three (3) business days after the date of mailing by registered or certified mail, and shall be deemed sufficiently given if sent to the addressee at the address stated in this Agreement or such other address as may be hereafter specified in writing.
- D. **Assignment.** Any assignment of this Agreement by either party without the written consent of the non-assigning party shall be void. If the non-assigning party gives its consent to any assignment, the terms of this Agreement shall continue in full force and effect and no further assignment shall be made without additional written consent.
- E. **Miscellaneous Items.** No modifications, amendments, or alterations of this Contract may be made except in writing signed by all the parties to this Contract. No failure or delay on the part of any party hereto in exercising any power or right hereunder shall operate as a waiver thereof. No waiver, alteration, or modification of any of the provisions of this Agreement shall be binding unless in writing and signed by a duly authorized representative of the City and Contractor.
- F. **Entire Agreement.** The written provisions and terms of this Agreement, together with any Exhibits attached hereto, shall supersede all prior verbal statements of any

officer or other representative of the City, and such statements shall not be effective or be construed as entering into or forming a part of or altering in any manner this Agreement. All of the above documents are hereby made a part of this Agreement. However, should any language in any of the Exhibits to this Agreement conflict with any language contained in this Agreement, the terms of this Agreement shall prevail.

- G. Compliance with Laws. The Contractor agrees to comply with all federal, state, and municipal laws, rules, and regulations that are now effective or in the future become applicable to Contractor's business, equipment, and personnel engaged in operations covered by this Agreement or accruing out of the performance of those operations.
- H. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall constitute an original, and all of which will together constitute this one Agreement.
- I. Excluded Items: This contract does NOT include the cost for and/or liability on the part of the Contractor for:
  - 1. Containment of the tank at anytime during the term of the Contract, unless caused by the contractor's negligence/actions.
  - 2. Disposal of any hazardous waste materials, unless the hazardous materials were brought onto the property by the Contractor.
  - 3. Resolution of operational problems or structural damage due to cold weather.
  - 4. Repair of structural damage due to antenna installations or other attachments for which the tank was not originally designed.
  - 5. Resolution of operational problems or repair structural damage or site damage caused by physical conditions below the surface of the ground.
  - 6. Negligent acts of the Owner's employees, agents or contractors.
  - 7. Damages, whether foreseen or unforeseen caused by the Owner's use of pressure relief valves.
  - 8. Repairs to the foundation of the tank.
  - 9. Structural repairs or interior renovations as set forth in Paragraph I, subsection F.
  - 10. Other conditions which are beyond the Owner's and Contractor's control, including, but not limited to: acts of God and acts of terrorism. Acts of terrorism include, but are not limited to, any damage to the tank or tank site which results from unauthorized entry of any kind to the tank site or tank.
  - 11. Any future exterior or interior painting.
- J. The Contractor reserves the right to assign any outstanding receivables from this Contract to its Bank or other Lending Institutions as collateral for any loans or lines of credit. Contractor shall timely provide the Owner with all necessary documentation of such assignment in the case that City must make such payment(s) to said Bank or other lending institution.

IN WITNESS, the parties below execute this Agreement, which shall become effective on the last date entered below.

CONTRACTOR:

By: J. L. L.  
(Signature)

Print Name: J. L. L.

Its: Secretary  
(Title)

DATE: 7/23/14

CITY OF OTHELLO  
500 E. Main St.  
Othello, WA 99344

By: Shawn R Logan  
(Signature)

Print Name: Shawn Logan  
Its Mayor

DATE: 7/29/14

NOTICES TO BE SENT TO:

CONTRACTOR:

Utility Service Group  
Attn: Legal Department  
535 Courtney Hodges Boulevard  
Perry, Georgia 31069  
478-988-5205 - Office  
478-987-1844 - Fax

CITY OF OTHELLO:

Wade Farris, City Administrator  
City of Othello  
500 E. Main Street  
Othello, WA 99344  
(509) 488-5686 (telephone)  
(509) 488-0102 (facsimile)

APPROVED AS TO FORM:

City Attorney  
Katherine Kennison