

ORDINANCE NO. 2021-07-956

CITY OF TONTITOWN, WASHINGTON COUNTY, ARKANSAS

AN ORDINANCE TO WAIVE COMPETITIVE BIDDING IN ORDER TO PERFORM WORK TO REMOVE DEBRIS AND PERFORM REPAIRS IN AND ALONG BUSHY CREEK IN THE CITY OF TONTITOWN, WASHINGTON COUNTY ARKANSAS; CALLING FOR AN EMERGENCY AND FOR OTHER PURPOSES

WHEREAS, the City of Tontitown has experienced significant flooding events over the past few years;

WHEREAS, as a result of these flooding events, and in order to avoid future flooding which will impact city residents and city infrastructure, it has become necessary for the City to perform debris removal and restorative work to certain drainage and waterways in order to properly allow flood waters to be managed;

WHEREAS, the City Council is aware through the work and consultation with civil engineers that Bushy Creek in the City of Tontitown is in need of debris removal and restorative work in order to prevent future and more severe flooding;

WHEREAS, the City of Tontitown has used Charles Ward to perform debris removal and restorative work in and around Bushy Creek in the past, and Mr. Ward is found to be familiar with Bushy Creek and the work that will be required to perform the debris removal and restorative work;

WHEREAS, the City of Tontitown has estimated that this work will not exceed the sum of approximately \$90,000.00; and

WHEREAS, it is in the interest of the citizens of Tontitown to best use the resources of the City and provide a way to reliably and efficiently protect the City's infrastructure and residents and to best promote the health, safety and welfare of the citizens of Tontitown, by waiving competitive bidding as herein described.

NOW THEREFORE, BE IT ENACTED, by the City Council of the City of Tontitown, as follows:

Section 1. That pursuant to state law and applicable city ordinances, the City Council hereby waives the requirements of competitive bidding for the removal of debris and restorative work to Bushy Creek as described above in this ordinance.

Section 2. The Mayor of the City of Tontitown is hereby authorized to negotiate and execute, upon receiving the advice and approval of the City Attorney and the engineers advising the City, a contract with Charles Ward for the work described herein to be paid from general funds in a form similar, or substantially similar, to the attached Exhibit "A".

Section 3. It is estimated that the total work, including labor, equipment rental and materials will not exceed \$90,000.00.

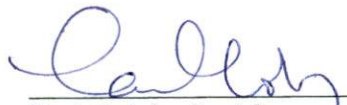
Section 4. That all ordinances or resolutions or orders, and parts thereof, in conflict with this ordinance are hereby repealed to the extent of such conflict.

Section 5. That in the event that any section, paragraph, subdivision, clause, phrase, or other provision or portion of this Ordinance be adjudged invalid or unconstitutional, the same shall not affect the validity of this Ordinance as a whole, or any part or provision, other than the part so decided to be invalid or unconstitutional, and the remaining provisions of this Ordinance shall be construed as if such invalid, unenforceable or unconstitutional provision or provisions had never been contained herein.

Section 6. EMERGENCY CLAUSE. The Tontitown City Council finds that the need for the removal of debris and other restorative work to Bushy Creek is acute and needs to be performed in an expeditious manner in order to avoid future flooding issues. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation and protection of the public peace, health, safety and welfare of the City and its citizens, shall become effective on the date of its passage and approval by the Mayor. If the Ordinance is neither approved nor vetoed by the Mayor, it shall become effective on the expiration of the period of time during which the Mayor may veto the Ordinance. If the Ordinance is vetoed by the Mayor and the veto is overridden by the City Council, it shall become effective on the date the City Council overrides the veto.


PASSED and APPROVED this 1 day of July, 2021.

APPROVED:



Paul Colvin, Jr., Mayor

ATTEST:



Rhonda Ardemagni, City Clerk-Treasurer

**CITY OF TONTITOWN AGREEMENT
WITH INDEPENDENT CONTRACTOR**

THIS AGREEMENT WITH INDEPENDENT CONTRACTOR ("Agreement") is entered into this _____ day of _____, 2021, by and between City of Tontitown, hereinafter referred to as the "City", and Charles Ward, hereinafter referred to as "Contractor".

W I T N E S S E T H

WHEREAS, the City manages and streets, right-of-ways and easements in order provide safe, reliable and financially sustainable transportation and drainage infrastructure for the City of Tontitown and its citizens; and

WHEREAS, the City has a need for debris removal and restorative work remove debris and perform restorative work to Bushy Creek in order to prevent future flooding and drainage issues that effect surrounding residents and city infrastructure (the "Services") and Contractor has experience and qualifications necessary to perform this work; and

WHEREAS, the Contractor is willing to accept the responsibility of providing these Services to the City in accordance with recognized standards, the applicable laws and regulations of the State of Arkansas and the City, and under the terms and conditions set forth in this Agreement.

NOW, THEREFORE, for and in consideration of the above premises and the mutual agreements hereinafter set forth, the parties hereto agree as follows:

1. Term. The term of this Agreement shall be month-to-month beginning until the completion of the Services, unless otherwise terminated as provided herein.

2. Scope of Work. The Contractor shall provide labor, equipment and materials to perform debris removal and restorative work, as directed by the City. If the Contractor believes that should additional Services at a location or several locations is required in addition to the Services ordered by the City, the Contactor shall seek the prior approval from the City to perform the additional Services.

2. Compensation. As compensation for Services performed under this Agreement, the Contractor shall be paid the sum of \$ _____ per hour, plus the reimbursement of expenses approved in advance by the City. The Contractor shall provide a report to the City following the completion of the Services ordered, and upon verification to the satisfaction of the City of the completion of the work, the City shall make the appropriate payment for the Services.

3. Expenses. The City shall be responsible for providing _____, the Contactor shall be responsible for all other expenses related to the provision of the Services including equipment, fuel, material labor and all applicable taxes and fees.

4. Duties. The Contractor shall use his best and most diligent efforts and skills, and shall render services to the City in accordance with and in a manner consistent with applicable laws and standards established by the City.

5. Relationship of Parties. Both parties to this Agreement intend that an Independent Contractor relationship will be created by this Agreement. City is interested only in the results to be achieved, and the conduct and control of the work will lie solely with the Contractor. Contractor is not to be considered an agent or employee of City for any purpose, and the employees of the Contractor are not entitled to any of the benefits that City provides for City's employees. It is understood that City does not agree to use Contractor exclusively. It is further understood that Contractor is free to contract for similar services to be performed for other Cities while under contract with City.

6. Liability. The work to be performed under this Agreement will be performed entirely at Contractor's risk. Contractor agrees to indemnify City for any and all liability or loss arising in any way out of the performance of this Agreement.

7. Right to Inspect. In the performance of the work herein contemplated, Contractor is an independent contractor with the authority to control and direct the performance of the details of the work, City being interested only in the results obtained. However, the work contemplated herein must meet the approval of the City and shall be subject to City's general right of inspection and supervision to secure the satisfactory completion thereof.

8. Termination. This Agreement may be terminated by the City without cause, at any time, upon written notice to the Contractor. The Termination provisions of this Section shall not be exclusive, but rather shall be in addition to any other rights and remedies that the parties may have at law or equity. The termination of this Agreement shall not relieve or discharge either party from any obligation, debt, or liability which shall have previously accrued and remain to be performed up and until the date of termination.

10. Notices. Any and all notices, demands, requests, consents, approvals, or communications required or permitted to be given hereunder, shall be in writing and shall be delivered by personal delivery, facsimile transmission, overnight delivery, or via United States, certified or registered mail. Irrespective of the manner of delivery used, all such notices shall be properly addressed and directed, with postage or delivery charges prepaid, to the parties at their respective addresses or facsimile numbers set forth below or to such other address designate in writing delivered in accordance with this provision:

City: City of Tontitown
Attn: Public Works Director

Fax Number:

With a copy to: Harrington, Miller, Kieklak, Eichmann & Brown, P.A.
Attn: R. Justin Eichmann
4710 S. Thompson
Springdale, AR 72764
Fax Number: 479-751-3715

Contractor:

Charles Ward

Notices sent by personal delivery shall be deemed given upon actual receipt. Notices sent by facsimile transmission shall be deemed given on the date of transmission if such transmission is evidenced by an acknowledgment of receipt by the recipient's facsimile machine and a copy of the transmission is deposited in the United States mail as set forth above on the date of the transmission. Notices sent via overnight delivery shall be deemed given no later than five (5) business days from mailing.

11. Legislative/Regulatory Change. If there is a change in any applicable statute, rule or regulation or a change in the manner in which the applicable rules and regulations are enforced, such that it affects the continuing legality of some or all of this Agreement, the parties agree to negotiate in good faith to amend this Agreement to conform to existing laws or regulations. If a mutually acceptable agreement that conforms to such changed rules and/or regulations cannot be reached within thirty (30) days (or such earlier time as may be required by such changed rules or regulations), this Agreement may be terminated immediately by either party by written notice to the other.

12. Time of the Essence. Time is of the essence in respect to all provisions of this Agreement that specify a time for performance; provided, however, that the foregoing shall not be construed to limit or deprive a party of the benefits of any grace or use period allowed in this Agreement.

13. Survival. Except as otherwise expressly provided in this Agreement, representations, warranties, and covenants contained in this Agreement, or in any instrument, certificate, exhibit, or other writing intended by the parties to be a part of this Agreement, shall survive the termination of this Agreement.

14. Ambiguities. Each party and its counsel have participated fully in the review and revision of this Agreement. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in interpreting this Agreement. The language in this Agreement shall be interpreted as to its fair meaning and not strictly for or against any party.

15. Wavier. No waiver of a breach, failure of any condition, or any right or remedy contained in or granted by the provisions of this Agreement shall be effective unless it is in writing and signed by the party waiving the breach, failure, right, or remedy. No wavier of any breach, failure, right, or remedy, whether or not similar, nor shall any waiver constitute a continuing waiver unless the writing so specifies.

16. Necessary Acts, Further Assurances. The parties shall at their own cost and expense execute and deliver such further documents and instruments and shall take such other actions as may be reasonably required or appropriate to evidence or carry out the intent and purposes of this Agreement.

17. Anti-Fraud and Abuse. The parties enter into this Agreement with the intent of conducting their relationship in full compliance with applicable state, local, and federal law.

18. Entire Agreement. This Agreement constitutes the entire agreement between the parties hereto and shall supercede any prior or contemporaneous oral or written statements or agreements that supplement or contradict the terms and provisions set forth herein. There are no ~~agreements, understandings, restrictions, warranties or conditions between the parties, oral or~~ otherwise, other than those set forth herein.

19. Binding Agreement. The rights and obligations of the City under this Agreement shall inure to the benefit of and shall be binding upon the successors and assigns of the City. However, neither this Agreement or any interest herein, or claim hereunder, shall be assigned or transferred by Contractor to any party or parties.

20. Modification. No modification or amendment of any of the terms, conditions or provisions hereby may be made unless by written agreement signed by the parties hereto.

21. Consent or Waiver of Breach. Consent of either party to any act or the waiver of either party of any breach of any provision of this Agreement shall not operate or be construed as a consent or waiver to any subsequent act or breach by the other party. No provision of this Agreement shall be deemed to have been waived by either party unless such waiver is in writing and signed by the parties.

22. Severability. If any part, term, clause, section or provision of this Agreement shall contravene or be invalid under the laws of the particular jurisdiction where used, construed or enforced, such contravention or invalidity shall not invalidate the whole Agreement, but instead this Agreement shall be construed as if not containing the particular provision or provisions held to be invalid in the particular jurisdiction, the validity of the remaining portions or provisions not being affected thereby, and the rights of the parties hereto shall be construed and enforced accordingly.

23. Expenses in Event of Default. In the event of any default under or breach of all or any provisions of this Agreement by either party, the other party shall be entitled to any and all expenses and costs incurred by such party in enforcing this Agreement. Such expenses shall include, but shall not be limited to, any reasonable attorneys' fees incurred by the non-defaulting or non-breaching party.

24. Construction of Agreement. The captions, headings and arrangements used in this Agreement are for convenience only and do not in any way limit or amplify the terms and provisions hereof. The use of the singular form of pronoun shall be construed to include the plural and the plural the singular where the number of the parties and the context indicates that intent. Likewise, the use of the masculine gender shall include the feminine.

25. Multiple Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, and all of which taken together shall be deemed one instrument.

26. Facsimile Signature. This Agreement may be executed by facsimile signature by the

parties hereto, and any such facsimile signatures shall have the same force and effect as if manually signed.

27. Applicable Law. This Agreement shall be construed in accordance with and governed by the laws of the State of Arkansas applicable to agreements made and to be performed wholly within such jurisdiction, without regard to the conflicts of law provisions thereof. The courts of the State of Arkansas for Washington County and the federal courts for the Western District of Arkansas shall have jurisdiction over any and all disputes which arise between the parties under this Agreement, whether in law or in equity, and each of the parties shall submit and hereby consents to such courts' exercise of jurisdiction. The aforementioned choice of venue is intended by the parties to be mandatory and not permissive in nature, thereby precluding the possibility of litigation between the parties with respect to or arising out of this Agreement in any jurisdiction other than that specified in this paragraph. Each party hereby waives any right it may have to assert the doctrine of forum non conveniens or similar doctrine or to object to venue with respect to any proceeding brought in accordance with this Paragraph, and stipulates that the State courts located in the County of Washington, State of Arkansas and the Federal court located in the Western District of Arkansas, Fayetteville Division, shall have in personam jurisdiction and venue over each of them for the purpose of litigating any dispute, controversy, or proceeding arising out of or related to this Agreement., Each party hereby authorizes and accepts service of process sufficient for personal jurisdiction in any action against it as contemplated by this paragraph by registered or certified mail, return receipt requested, postage prepaid, to its address for the giving of notices as set forth in this Agreement. Any final judgment rendered against a party in any action or proceeding shall be conclusive as to the subject of such final judgment and may be enforced in any other jurisdictions in any manner prescribed by law.

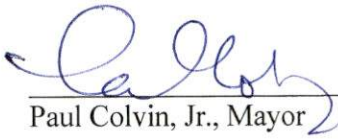
28. Specific Performance. The Parties acknowledge that it will be impossible to measure in money the damage to them caused by any failure to comply with the covenants set forth in this Agreement, that each such covenant is material, and that in the event of any such failure, the injured party will not have an adequate remedy at law or in damages. Therefore, the parties consent to the issuances of an injunction or the enforcement of other equitable remedies against them at the suit of the other, without bond or other security, to compel performances of all of the terms of this Agreement, and waive the defense of the availability of relief in damages.

29. Force Majeure. No party shall be liable for any failure to perform its obligations in connection with any action described in this Agreement, if such failure results from any act of God, riot, war, civil unrest, flood, earthquake, or other cause beyond such party's reasonable control (including any mechanical, electronic, or communications failure, but excluding failure caused by a party's financial condition or negligence).


30. Assignment. This Agreement is personal and nothing contained herein shall be construed to permit the Contractor, either voluntarily or by operation of law, to assign, hypothecate, give, transfer, mortgage, sublet, license, or otherwise transfer or encumber all or part of his rights, duties, or other interests in this Agreement or the proceeds thereof (collectively, "Assignment"), without the City's prior written consent. Any attempt to make an Assignment in violation of this provision shall be a material default under this Agreement and any Assignment in violation of this provision shall be null and void.

IN WITNESS WHEREOF, the parties to this agreement have duly executed it on the day and year first above written.

CITY:

By: 
Paul Colvin, Jr., Mayor

ATTEST:


Rhonda Ardemagni, City Clerk-Treasurer

CONTRACTOR:

Charles Ward