

Order 150-19/20

Passage: 9-0 on 3/30/2020

KATE SNYDER (MAYOR)
BELINDA S. RAY (1)
SPENCER R. THIBODEAU (2)
TAE Y. CHONG (3)
JUSTIN COSTA (4)

**CITY OF PORTLAND
IN THE CITY COUNCIL**

Effective 3/9/2020

KIMBERLY COOK (5)
JILL C. DUSON (A/L)
PIOUS ALI (A/L)
NICHOLAS M. MAVODONES, JR (A/L)

**ORDER APPROVING THE AGREEMENT BETWEEN PORTLAND
AND THE MAINE DEPARTMENT OF TRANSPORTATION
RE: FRANKLIN STREET STORM DRAIN AT I-295 EXIT 7**

ORDERED, that the agreement between the Maine Department of Transportation and the City of Portland to construct the Franklin Street Storm Drain with State Work Identification Number 024369.00 is hereby approved in substantially the form attached hereto; and

BE IT FURTHER ORDERED, that the City Council hereby authorizes the City Manager or his or her designee to execute said document and any other related documents necessary or convenient to carry out the intent of said documents and this Order.



<i>MaineDOT use only</i>
AMS ID: _____
CSN: _____
TEDOCS #: _____
PROGRAM: _____

MAINE DEPARTMENT OF TRANSPORTATION
Agreement for a State-Funded Locally Administered Project
 With the
City of Portland
 Regarding
Replacement of Large Culvert at I-295 Exit 7
 (Payable)

<i>MaineDOT Use Only</i>	
Agreement Amount: \$500,000.00	MaineDOT WIN: 024369.00
State Share: \$500,000.00	WIN Activation Date: 02/28/19
Local Share: \$0.00	Municipality's Vendor ID: VC1000073476
Agreement Begin Date: <u>Upon MaineDOT's Signature</u>	Agreement End Date: 11/30/2021

This Agreement for a state-funded project is entered into by the State of Maine Department of Transportation (**MaineDOT**) with its headquarters at 16 Child Street in Augusta, Maine, and the City of Portland (the **Municipality**) with its principal administrative offices at 389 Congress Street in Portland, Maine, which jointly shall be referred to as the **Parties**.

RECITALS

1. This Agreement shall apply to replacement of a large culvert (#46957) in the Back Cove section of Portland, starting at I-295 Exit 7 and continuing 0.09 mile to Franklin Street (the **Project**); and
2. The state-funded culvert replacement **Project** is part of a larger municipal design-build initiative to develop the Back Cove South Storage Facility, a combined sewer overflow abatement project; and
3. The Municipality shall manage the state-funded **Project** as a Locally Administered Project, subject to MaineDOT oversight to ensure that all state requirements are met.

AGREEMENT

NOW, in consideration of the foregoing statements, the Parties agree to the following:

APPENDIX

- Design and Construction Requirements, Design-Build Back Cove South Storage Facility.

ROLES AND RESPONSIBILITIES

1. **ROLE OF MUNICIPALITY**. The Municipality shall designate a municipal Project Coordinator with appropriate qualifications to manage the **Project** and carry out its responsibilities under this Agreement. This Project Coordinator shall abide by applicable sections of the latest edition of MaineDOT's Local Project Administration Manual & Resource Guide (LPA Manual).
 - Project Coordinator: Bradley A. Roland, P.E., Senior Project Engineer
 Email: brad@portlandmaine.gov
 Phone: 207-874-8440

2. **ROLE OF MAINEDOT.** MaineDOT will assign a Project Manager to carry out the State of Maine’s responsibilities. This person will have the authority to request design changes to meet applicable laws, regulations and design standards; accept and reject invoices; review construction activities to assure compliance with contract documents; and take all other action to assure proper performance of this Agreement.

- MaineDOT Project Manager: Jerry Dostie
 Email: Gerald.P.Dostie@maine.gov
 Phone: (207) 624-3457

FINANCIAL OBLIGATIONS

1. **AUTHORIZATION.** MaineDOT’s financial participation in the **Project** will begin after:
 - A. MaineDOT has executed this Agreement; and
 - B. MaineDOT has issued the Municipality a written notice to proceed.
2. **PROJECT COST.** The estimated cost of the **Project** is \$500,000.00 (Project Cost), as shown below.

Local Match		State Share		Estimated Project Cost
0%	\$0.00	100%	\$500,000.00	\$500,000.00

- A. **MAINEDOT SHARE.** MaineDOT, using state funds, will participate in all **Project** costs eligible for such funding at the rate of 100 percent, up to a maximum of **\$500,000.00**.
- B. **LOCAL MATCH.** The Municipality shall have no local share in the Project Cost but may be responsible for the following:
 - i. Expenditures exceeding the Project Cost, unless otherwise agreed upon through an executed modification to this Agreement;
 - ii. Costs incurred before the effective date of this Agreement;
 - iii. Costs deemed ineligible for state funding.
3. **REIMBURSEMENT.** MaineDOT will reimburse the Municipality for eligible **Project** costs incurred at the rate in Section 2A above.
 - A. The Municipality shall invoice MaineDOT for participating **Project** costs using the format provided in *Communication 4* from the LPA Manual, on the following schedule:
 - i. Participating preliminary engineering costs – upon Construction Begin;
 - ii. Participating construction costs – at Construction Complete;
 - iii. All remaining costs – at Final Billing.
 - B. Each invoice shall include a progress report for the service period of the invoice.
 - C. Each invoice shall document the charges incurred and proof of payment made in sufficient detail to satisfy the MaineDOT Project Manager.
 - D. Each invoice shall show MaineDOT’s and the Municipality’s portions of **Project** costs, including a running total of costs incurred to date.
 - E. The Municipality must certify that amounts claimed are correct and not claimed previously.

- F. Upon completion of the work and payment of all remaining invoices for the **Project**, the Municipality shall submit to MaineDOT a request for final reimbursement modeled after *Communication 20* from the LPA Manual. MaineDOT's payment of this final invoice shall be contingent upon a passing inspection of the **Project** by MaineDOT or its designee.
4. **MAINEDOT COSTS.** MaineDOT may charge to the **Project** costs incurred for work on the **Project**.
 5. **TERM.** The Municipality shall complete the **Project** and submit a final invoice to MaineDOT by the Expiration Date of this Agreement. The Municipality shall submit any request for a date extension to MaineDOT in writing before the end of the original period of performance.
 6. **REPAYMENT.** If the Municipality withdraws from the **Project**, causing cancellation of the **Project**, the Municipality shall refund all payments from MaineDOT toward the Project.
 7. **STATE OF MAINE'S RIGHT OF SET-OFF.** MaineDOT shall have all of its common-law, equitable and statutory rights of set-off. These rights shall include, but not be limited to, the State's option to withhold for purposes of set-off money due to the Municipality under this Agreement up to any amount due to the State with regard to this Agreement or any other agreement with MaineDOT; any other agreement with any state agency, including any agreement for a term commencing before the term of this Agreement; and any amount due to the State for any other reason including, but not limited to, tax delinquencies, fee delinquencies or monetary penalties relative thereto. MaineDOT will exercise its rights of set-off in accordance with standard state practices including, in cases of set-off pursuant to an audit, finalization of the audit by MaineDOT or the State Controller.
 8. **NON-APPROPRIATION.** The Municipality acknowledges and agrees that if MaineDOT receives insufficient funding to support this Project, if funds programmed for this Project are de-appropriated, or if MaineDOT fails to receive the legal authority to spend money otherwise programmed for this **Project**, MaineDOT shall be released from its obligation to make payment under this Agreement.

PROJECT DEVELOPMENT

1. **KICKOFF.** The Parties on April 4, 2019, held a project kickoff at Portland Public Works to go over the scope of work, Project Cost, schedule, and legal requirements for the **Project**.
2. **PROGRESS REPORTS.** The Municipality shall provide progress reports at intervals established by MaineDOT's Project Manager.
3. **CONSULTANT WORK.** The Municipality shall use a competitive solicitation and follow MaineDOT's procedures to procure the services of a design-build team to design and construct the **Project**. Upon conclusion of negotiations, the Municipality shall provide a draft contract for the **Project** to the MaineDOT Project Manager for review and comment before it is executed. Work performed before the execution date of this Agreement shall be ineligible for reimbursement.
4. **DESIGN.** The Municipality, in coordination with its contracted design-build team, shall be responsible for preparing all design plans, specifications, estimates and contract documents for the culvert-replacement Project. The design of the culvert replacement shall meet the applicable standards set out in MaineDOT's Engineering Practices and Procedures, Standard Specifications and Standard Details. Additionally:

- A. The document labeled, “Design and Construction Requirements, Design-Build Back Cove South Storage Facility,” and attached to this Agreement as Appendix A, shall govern the design and construction process on the **Project**.
 - B. The Municipality shall submit the following **Project** documents to the MaineDOT Project Manager for review and comment:
 - i. Design plans at 30 percent, 60 percent, 90 percent and 100 percent complete;
 - ii. A preliminary design report; and
 - iii. Final plans, specifications and estimate package (PS&E).
 - C. MaineDOT shall carry out the Traffic Analysis Management and Evaluation (TAME) process for the Project and issue a TAME certification for the **Project** before construction may begin. The Municipality shall assure that the design-build team abides by all traffic-related work restrictions that MaineDOT stipulates for the **Project**.
 - D. If the **Project** will require MaineDOT staff to use electronic design files prepared by or for the Municipality, such files shall be organized in accordance with MaineDOT’s policy on electronic exchange of CADD data: <http://www.maine.gov/mdot/caddsupport/>
 - E. MaineDOT will enforce all laws, regulations, construction standards and specifications that apply to the Project and will require changes if they are not met.
 - F. The Municipality, in coordination with its contracted design-build team, shall meet all engineering standards and regulations that apply to the culvert-replacement **Project**.
5. **PUBLIC PROCESS**. The Municipality shall give abutters and the public timely notice about the **Project** and an opportunity to comment on the **Project**. Upon completion of this public process, the Municipality shall submit to MaineDOT a signed public process certification modeled after *Communication 10* from the LPA Manual, with the final PS&E package for the **Project**.
6. **PERMITS**. The Municipality shall obtain all approvals, permits and licenses for the **Project**. The Municipality shall provide MaineDOT with a signed environmental certification modeled after *Communication 12* from the LPA Manual, with the final PS&E package for the **Project**.
7. **UTILITIES**. The Municipality shall coordinate the **Project** with affected utilities, if applicable. The Municipality shall provide MaineDOT with a signed utility certification modeled after *Communication 13* from the LPA Manual, with the final PS&E package for the **Project**.
8. **RIGHT-OF-WAY**. If applicable, MaineDOT will carry out the right-of-way process for the **Project**. The Municipality shall dedicate permanently to the Project, for public use, any municipal property needed for the **Project**, if applicable.
9. **ADVERTISE**. The Municipality shall use a competitive design-build solicitation to hire a contractor to construct the **Project**, as covered under section 3 above, “Consultant Work.”
10. **CONSTRUCTION**. During construction of the **Project**, the Municipality shall:
 - A. Provide a Project Resident who is either a qualified municipal employee with LPA certification or a consultant hired through a qualifications-based selection method; and

- B. Hold a pre-construction meeting with notice of at least 5 working days involving MaineDOT, the design-build contractor, utilities and other parties involved in or affected by the work; and
 - C. Coordinate materials testing necessary to meet the Minimum Testing Requirements that MaineDOT establishes for the **Project**; and
 - D. Submit contract modifications for the **Project** to MaineDOT for review and concurrence before executing them, acknowledging that MaineDOT may not reimburse the Municipality for work performed under any modification executed without such prior review; and
 - E. Provide MaineDOT with as-build plans for its files upon completion of the **Project**.
11. INSPECTION. MaineDOT will inspect the completed **Project** for compliance with the design plans, specifications and provisions of the construction contract. MaineDOT may not reimburse the Municipality for work on the **Project** that is out of such compliance.

OPERATION AND MAINTENANCE

Upon completion, the Municipality shall maintain the **Project** for the duration of its useful design life as determined by accepted engineering standards. Maintenance shall consist of general upkeep and repairs necessary to preserve the intended function of the replacement culvert. *This section shall survive the expiration of this Agreement.*

RECORDS AND AUDITS

1. Project Records, whether printed or electronic, shall include all plans, specifications, contracts, reports, notes, or other documents prepared by or for the Municipality (Project Records). The Municipality shall retain all Project Records for at least **3 years** from the date of MaineDOT's acceptance of the final invoice for the Project or the termination of this Agreement, whichever is sooner. If any litigation, claim, negotiation, or audit has begun before the end of this retention period, all Project Records shall be kept at least until all related issues are resolved.
2. The Municipality and any contracted party working on its behalf shall allow representatives of the State of Maine to inspect and audit Project Records. Copies shall be furnished at no cost to the agencies requesting them.
3. Audits shall be performed in accordance with generally accepted government auditing standards.
4. *This Records and Audits section shall survive the termination or expiration of this Agreement.*

MISCELLANEOUS PROVISIONS

1. GOVERNING LAW. The Parties agree to comply with all applicable federal, state and local laws, regulations, executive orders and ordinances.
2. INDEMNIFICATION. To the extent allowed by law, the Municipality shall indemnify, defend and hold harmless MaineDOT, its officers, agents and employees from all claims, suits or liabilities arising from any negligent or wrongful act, error or omission by the Municipality, its officers, employees, agents, consultants or contractors. Nothing in this article shall waive any defense, immunity or limitation of liability that may be available to either party under the Maine Tort Claims Act (14 M.R.S. Section 8101 et seq.) or other privileges or immunities provided by law. *This indemnification section shall survive the termination or expiration of this Agreement.*

3. CONFIDENTIALITY. The Municipality shall protect the confidentiality of engineering estimates of the construction cost to the extent required by 23 M.R.S. §63, “Confidentiality of Records.”
4. EQUAL EMPLOYMENT OPPORTUNITY. During the performance of this Agreement:
 - A. The Municipality shall not discriminate against any employee or applicant for employment relating to this Agreement because of race, color, religious creed, sex, national origin, ancestry, age, physical or mental disability, or sexual orientation, unless related to an actual occupational qualification. The Municipality shall take affirmative action to assure that applicants are employed and employees are treated during their employment without regard to their race, color, religion, sex, age, national origin, physical or mental disability, or sexual orientation. The Municipality agrees to post in conspicuous places available to employees and applicants for employment notices setting forth the provisions of this nondiscrimination clause.
 - B. The Municipality – in all solicitations or advertising for employees placed by or on behalf of the Municipality relating to this Agreement – shall state that all qualified applicants shall receive consideration for employment without regard to race, color, religious creed, sex, national origin, ancestry, age, physical or mental disability, or sexual orientation.
 - C. The Municipality shall cause the foregoing provisions to be inserted into any contract for work covered by this Agreement so that the provisions are binding upon each contractor, except for contracts or subcontracts for standard commercial supplies or raw materials.
5. INDEPENDENT CAPACITY. The Municipality, its employees, agents, representatives, consultants and contractors shall not act as officers, employees or agents of MaineDOT.
6. FLOW DOWN. Contracts between the Municipality and all third parties shall contain or incorporate by reference applicable provisions of this Agreement.
7. BINDING EFFECT. The Parties shall be bound by the terms of this Agreement, which shall apply to its executors, their successors, administrators and legal representatives.
8. ENTIRE AGREEMENT. This document represents the entire Agreement between the Parties. Neither MaineDOT nor the Municipality shall be bound by any statement, correspondence, agreement or representation not expressly contained in this Agreement.

CONFLICT OF INTEREST

1. No official or employee of the Municipality with a direct or indirect financial or other personal interest in any contract or subcontract for the Project shall negotiate, make, accept or approve any such contract or subcontract.
2. No engineer, attorney, appraiser, inspector or other person performing services for the Municipality in connection with the Project shall have a direct or indirect financial or other personal interest in any contract or subcontract for the Project, other than the person’s employment or retention by the Municipality. No officer or employee of any such person retained by the Municipality to perform services in connection with the Project shall have a direct or indirect financial or other personal interest in any real property acquired for the Project unless such interest is openly disclosed in the public record and such officer or employee has not participated in such acquisition for and on behalf of the Municipality.

3. No person or entity entering into a contract for services for the Project shall have a direct or indirect financial or other interest in the Project or in its outcome, other than the performance of the contract. This prohibition covers the following:
 - A. Any agreement with, or other interest involving, third parties having an interest in the outcome of the Project that is the subject to the contract; and
 - B. Any agreement providing incentives or guarantees of future work on the Project or related matters; and
 - C. Any interest in real property acquired for the Project unless such real property interest is openly disclosed to the Municipality before the person or entity enters into the contract.

DEBARMENT

1. By signing this Agreement, the Municipality certifies to the best of its knowledge and belief that it and its principals are not debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in covered transactions by any federal department or agency. If the Municipality cannot certify to this statement, it shall attach an explanation to this Agreement. For the term of this Agreement, the Municipality shall notify MaineDOT promptly if it or its principals are debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in this transaction by any federal department or agency.
2. The Municipality shall not hire an outside entity that is debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any federal department or agency.
3. If the Municipality contracts with any third party pursuant to this Agreement, the Municipality shall require that party and its principals to certify that they:
 - A. Have not within a 3-year period preceding the date of any contract for work on the Project been convicted of a crime or had a civil judgment rendered against them for any of the following:
 - i. Obtaining, attempting to obtain, or performing a federal, state or, local public transaction or contract under a public transaction;
 - ii. Violating federal or state antitrust statutes;
 - iii. Committing embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property.
 - B. Are not under indictment for or otherwise criminally or civilly charged by a federal, state, or local agency with commission of any offense enumerated in paragraph 3A above; and
 - C. Have not within a 3-year period preceding this Agreement had one or more federal, state, or local public transactions terminated for cause or default.

DEFAULT AND TERMINATION

1. DEFAULT. MaineDOT will send the Municipality a written Notice of Default if the Municipality commits any of the following:
 - A. Fails to complete the Project by the expiration date of this Agreement without a written extension from MaineDOT;
 - B. Takes any action that renders the Project ineligible for state funding;
 - C. Uses Project funds for a purpose not authorized by this Agreement;

- D. Misrepresents or falsifies any claim for reimbursement;
 - E. Fails to meet the standards of performance outlined in this Agreement.
2. **TERMINATION FOR CAUSE.** MaineDOT will have just cause to terminate this Agreement in the event of default by the Municipality, as defined above. MaineDOT will afford the Municipality a cure period of 14 calendar days, effective on the Municipality's receipt of Notice of Default. If the Municipality fails to address all defaults within this cure period or such longer period as MaineDOT may authorize, MaineDOT may terminate this Agreement for cause, with these conditions:
 - A. MaineDOT will recover from the Municipality all reimbursements made to the Municipality and all of MaineDOT's internal costs incurred for work on the terminated Project, if applicable.
 - B. The Municipality shall forfeit all state funds remaining in the terminated Project.
 3. **TERMINATION FOR CONVENIENCE.** The Parties may terminate this Agreement for convenience by mutual consent for any reason not defined as "default." MaineDOT will reimburse the Municipality for eligible work performed until the effective date of termination for convenience.

AGREEMENT APPROVAL

The Municipality's undersigned representative assures that the Municipality's official legislative body has approved the Municipality's entry into this Agreement, has appropriated or authorized use of required matching funds, and has authorized the representative to sign this Agreement.

The Parties have executed this Agreement on the date last signed below.

City of Portland

Maine Department of Transportation

By: _____
Jon P. Jennings, City Manager*

By: _____
Richard J. Crawford, P.E., Director *
 Bureau of Project Development

Date: _____

Date: _____

** I certify that the foregoing signature is true and accurate. I further certify – pursuant to 10 M.R.S.A. §9502, et seq. – that the signature, if electronic: (a) is intended to have the same force as a manual signature, (b) is unique to me, (c) is capable of verification, (d) is under my sole control, and (e) is linked to data in such a manner that it is invalidated if the data are changed.*

