

59E for



STATE OF NEW HAMPSHIRE
DEPARTMENT of NATURAL and CULTURAL RESOURCES
DIVISION of PARKS and RECREATION
BUREAU of TRAILS

172 Pembroke Road Concord, New Hampshire 03301
Phone: (603) 271-3254 Fax: (603) 271-3553 E-Mail: nhtrails@dncr.nh.gov
Web: www.nhtrails.org

August 12, 2021

His Excellency, Governor Christopher T. Sununu
and the Honorable Executive Council
State House
Concord, New Hampshire 03301

REQUESTED ACTION

Pursuant to RSA 21-I:80, I(b), authorize the Department of Natural and Cultural Resources, Division of Parks and Recreation, Bureau of Trails (Department) to enter into a **Retroactive** contract with J. Fenoff Siteworks, LLC (VC #371058), Waterford, VT in the amount of \$52,500 for Rail, Tie and other Railroad Related Infrastructure Removal at the Berlin Branch Rail Corridor in Littleton, NH effective upon Governor and Executive Council approval for the period from September 2, 2021 through December 1, 2021. 20% Agency Income/80% Federal Funds.

Funding is available in accounts, Trails Maintenance, and Nat'l Recreational Trails Fund, as follows:

	FY 2022
03-035-035-351510-35580000-048-500226 – Contractual Maintenance B&G	\$10,500
03-035-035-351510-37770000-048-500226 – Contractual Maintenance B&G	\$42,000
Total:	\$52,500

EXPLANATION

This request is retroactive due to a need to meet the limits of the contractor's availability to perform the agreed upon services in order to leverage significant cost savings relative to bid pricing received from all of other vendors. Among the many bids we received, this vendor's bid, which came in at \$52,500, was significantly lower than the next lowest bid of \$168,517. In the course of ensuing negotiation discussions, once we determined with confidence that they would be able to complete the scope of services for the project, it was also determined that due to other projected commitments on their part, they must be able to start work by September 2, 2021 or they won't have time otherwise to fit this project into their full schedule for the year. With the clear advantage of pricing by selecting this vendor, we then moved forward to get them under signed contract so we could move quickly for approval prior to September. However, this contractor has never worked with the State of New Hampshire so additional administrative process steps were needed such as vendor data setup in the State procurement system. While the process only delayed approval for a short period of time, the fixed date of a September 2nd work start date could not be moved unless we were to select another vendor and forfeit the cost savings. In our steadfast belief that we are acting in the best interest of the state, we are seeking to stay the course with the use of this vendor to leverage the savings identified and therefore, ask for retroactive approval by the Governor and Executive Council in support of this plan.

This project is to remove approximately 2.18 miles of rail and ties from the State-owned property. This is the second phase of development of this 6.7 mile recreational trail expansion in Littleton. The Department of Transportation will be retaining rail materials, such as joint bars, tie plates and rail sections of 100 lbs. or greater, for future use on other State-owned rail corridors. The contractor may retain the lower rated portions of rail as was part of their bid price. Once completed this trail will greatly improve the winter snowmobile access through the Littleton area, as part of the NH Statewide Trail System, and will provide for additional non-motorized summer trail use in the area. This project is tied to the Littleton Main Street development improvements.

In July 2021, an invitation to submit bids to remove existing rails and ties on a recently abandoned portion of the Berlin Branch Rail Corridor in Littleton was posted on the Division of Purchase and Property's website, the Division of Parks and Recreation's website, and the following construction services' websites: Construction Summary of NH; Infinite Imaging, McGraw Hill Construction, Signature Press and Blueprinting, and Works in Progress. Eight bids were received on July 30, 2021 and lowest bidder, J. Fenoff Siteworks, LLC, was selected. Attached for your information is a tabulation of bids received for this project.

The Attorney General's office has approved the contract as to form, substance and execution

(15M)

Respectfully submitted,



Philip A. Bryce
Director

Concurred,



Sarah L. Stewart
Commissioner

STATE OF NEW HAMPSHIRE
DEPARTMENT of NATURAL and CULTURAL RESOURCES
Division of Parks and Recreation
Bureau of Trails

Closing Date: July 30th, 2021 at 2:00 pm

(Project # TB-2101 Railroad rail & tie removal on the Berlin branch corridor, Littleton, NH)

Contractor Name and Address	Bid Amount
Hammond Grinding + Recycling Inc. PO Box 17 Canaan, NH 03741	\$200,357.25
G.W. Brooks + Son, Inc. 362 Eaton Rd. Freedom, NH 03836	\$531,247.00
Hammer Down Construction LLC 873 Mount Eustis Road. Littleton, NH 03561	\$275,320.19
J.A. McDonald, Inc. PO Box 132 Lyndon, Ctr. VT 05850	\$512,000.00
Casella Construction, Inc. 25 Industrial Ln., Mendon, VT 05701	\$172,708.00
J. Fenoff Siteworks LLC 367 Fenoff Heights Ln. Waterford, VT 05819	\$52,500.00
Allen Rexford Excavating 64 Bush Rd. Dalton, NH 03598	\$168,517.00
A.B. Excavating Inc. 653 Main St. Lancaster, NH 03584	\$235,430.00

Bidding Procedure: In July 2021, an invitation to submit bids for the removal of rail, ties and other railroad related infrastructure from the Berlin Branch railroad, Littleton, NH was issued in accordance with Department of Administrative Service's policy. Bids were due on July 30th, 2021 by 2:00pm. Eight (8) bid proposals were received and the low bidder was selected.

2. SERVICES TO BE PERFORMED. The State of New Hampshire, acting through the agency identified in block 1.1 ("State"), engages contractor identified in block 1.3 ("Contractor") to perform, and the Contractor shall perform, the work or sale of goods, or both, identified and more particularly described in the attached EXHIBIT B which is incorporated herein by reference ("Services").

3. EFFECTIVE DATE/COMPLETION OF SERVICES.

3.1 Notwithstanding any provision of this Agreement to the contrary, and subject to the approval of the Governor and Executive Council of the State of New Hampshire, if applicable, this Agreement, and all obligations of the parties hereunder, shall become effective on the date the Governor and Executive Council approve this Agreement as indicated in block 1.17, unless no such approval is required, in which case the Agreement shall become effective on the date the Agreement is signed by the State Agency as shown in block 1.13 ("Effective Date").

3.2 If the Contractor commences the Services prior to the Effective Date, all Services performed by the Contractor prior to the Effective Date shall be performed at the sole risk of the Contractor, and in the event that this Agreement does not become effective, the State shall have no liability to the Contractor, including without limitation, any obligation to pay the Contractor for any costs incurred or Services performed. Contractor must complete all Services by the Completion Date specified in block 1.7.

4. CONDITIONAL NATURE OF AGREEMENT.

Notwithstanding any provision of this Agreement to the contrary, all obligations of the State hereunder, including, without limitation, the continuance of payments hereunder, are contingent upon the availability and continued appropriation of funds affected by any state or federal legislative or executive action that reduces, eliminates or otherwise modifies the appropriation or availability of funding for this Agreement and the Scope for Services provided in EXHIBIT B, in whole or in part. In no event shall the State be liable for any payments hereunder in excess of such available appropriated funds. In the event of a reduction or termination of appropriated funds, the State shall have the right to withhold payment until such funds become available, if ever, and shall have the right to reduce or terminate the Services under this Agreement immediately upon giving the Contractor notice of such reduction or termination. The State shall not be required to transfer funds from any other account or source to the Account identified in block 1.6 in the event funds in that Account are reduced or unavailable.

5. CONTRACT PRICE/PRICE LIMITATION/ PAYMENT.

5.1 The contract price, method of payment, and terms of payment are identified and more particularly described in EXHIBIT C which is incorporated herein by reference.

5.2 The payment by the State of the contract price shall be the only and the complete reimbursement to the Contractor for all expenses, of whatever nature incurred by the Contractor in the performance hereof, and shall be the only and the complete

compensation to the Contractor for the Services. The State shall have no liability to the Contractor other than the contract price.

5.3 The State reserves the right to offset from any amounts otherwise payable to the Contractor under this Agreement those liquidated amounts required or permitted by N.H. RSA 80:7 through RSA 80:7-c or any other provision of law.

5.4 Notwithstanding any provision in this Agreement to the contrary, and notwithstanding unexpected circumstances, in no event shall the total of all payments authorized, or actually made hereunder, exceed the Price Limitation set forth in block 1.8.

6. COMPLIANCE BY CONTRACTOR WITH LAWS AND REGULATIONS/ EQUAL EMPLOYMENT OPPORTUNITY.

6.1 In connection with the performance of the Services, the Contractor shall comply with all applicable statutes, laws, regulations, and orders of federal, state, county or municipal authorities which impose any obligation or duty upon the Contractor, including, but not limited to, civil rights and equal employment opportunity laws. In addition, if this Agreement is funded in any part by monies of the United States, the Contractor shall comply with all federal executive orders, rules, regulations and statutes, and with any rules, regulations and guidelines as the State or the United States issue to implement these regulations. The Contractor shall also comply with all applicable intellectual property laws.

6.2 During the term of this Agreement, the Contractor shall not discriminate against employees or applicants for employment because of race, color, religion, creed, age, sex, handicap, sexual orientation, or national origin and will take affirmative action to prevent such discrimination.

6.3. The Contractor agrees to permit the State or United States access to any of the Contractor's books, records and accounts for the purpose of ascertaining compliance with all rules, regulations and orders, and the covenants, terms and conditions of this Agreement.

7. PERSONNEL.

7.1 The Contractor shall at its own expense provide all personnel necessary to perform the Services. The Contractor warrants that all personnel engaged in the Services shall be qualified to perform the Services, and shall be properly licensed and otherwise authorized to do so under all applicable laws.

7.2 Unless otherwise authorized in writing, during the term of this Agreement, and for a period of six (6) months after the Completion Date in block 1.7, the Contractor shall not hire, and shall not permit any subcontractor or other person, firm or corporation with whom it is engaged in a combined effort to perform the Services to hire, any person who is a State employee or official, who is materially involved in the procurement, administration or performance of this Agreement. This provision shall survive termination of this Agreement.

7.3 The Contracting Officer specified in block 1.9, or his or her successor, shall be the State's representative. In the event of any dispute concerning the interpretation of this Agreement, the Contracting Officer's decision shall be final for the State.

8. EVENT OF DEFAULT/REMEDIES.

8.1 Any one or more of the following acts or omissions of the Contractor shall constitute an event of default hereunder ("Event of Default"):

8.1.1 failure to perform the Services satisfactorily or on schedule;

8.1.2 failure to submit any report required hereunder; and/or

8.1.3 failure to perform any other covenant, term or condition of this Agreement.

8.2 Upon the occurrence of any Event of Default, the State may take any one, or more, or all, of the following actions:

8.2.1 give the Contractor a written notice specifying the Event of Default and requiring it to be remedied within, in the absence of a greater or lesser specification of time, thirty (30) days from the date of the notice; and if the Event of Default is not timely cured, terminate this Agreement, effective two (2) days after giving the Contractor notice of termination;

8.2.2 give the Contractor a written notice specifying the Event of Default and suspending all payments to be made under this Agreement and ordering that the portion of the contract price which would otherwise accrue to the Contractor during the period from the date of such notice until such time as the State determines that the Contractor has cured the Event of Default shall never be paid to the Contractor;

8.2.3 give the Contractor a written notice specifying the Event of Default and set off against any other obligations the State may owe to the Contractor any damages the State suffers by reason of any Event of Default; and/or

8.2.4 give the Contractor a written notice specifying the Event of Default, treat the Agreement as breached, terminate the Agreement and pursue any of its remedies at law or in equity, or both.

8.3. No failure by the State to enforce any provisions hereof after any Event of Default shall be deemed a waiver of its rights with regard to that Event of Default, or any subsequent Event of Default. No express failure to enforce any Event of Default shall be deemed a waiver of the right of the State to enforce each and all of the provisions hereof upon any further or other Event of Default on the part of the Contractor.

9. TERMINATION.

9.1 Notwithstanding paragraph 8, the State may, at its sole discretion, terminate the Agreement for any reason, in whole or in part, by thirty (30) days written notice to the Contractor that the State is exercising its option to terminate the Agreement.

9.2 In the event of an early termination of this Agreement for any reason other than the completion of the Services, the Contractor shall, at the State's discretion, deliver to the Contracting Officer, not later than fifteen (15) days after the date of termination, a report ("Termination Report") describing in detail all Services performed, and the contract price earned, to and including the date of termination. The form, subject matter, content, and number of copies of the Termination Report shall be identical to those of any Final Report described in the attached EXHIBIT B. In addition, at the State's discretion, the Contractor shall, within 15 days of notice of early termination, develop and

submit to the State a Transition Plan for services under the Agreement.

10. DATA/ACCESS/CONFIDENTIALITY/PRESERVATION.

10.1 As used in this Agreement, the word "data" shall mean all information and things developed or obtained during the performance of, or acquired or developed by reason of, this Agreement, including, but not limited to, all studies, reports, files, formulae, surveys, maps, charts, sound recordings, video recordings, pictorial reproductions, drawings, analyses, graphic representations, computer programs, computer printouts, notes, letters, memoranda, papers, and documents, all whether finished or unfinished.

10.2 All data and any property which has been received from the State or purchased with funds provided for that purpose under this Agreement, shall be the property of the State, and shall be returned to the State upon demand or upon termination of this Agreement for any reason.

10.3 Confidentiality of data shall be governed by N.H. RSA chapter 91-A or other existing law. Disclosure of data requires prior written approval of the State.

11. CONTRACTOR'S RELATION TO THE STATE. In the performance of this Agreement the Contractor is in all respects an independent contractor, and is neither an agent nor an employee of the State. Neither the Contractor nor any of its officers, employees, agents or members shall have authority to bind the State or receive any benefits, workers' compensation or other emoluments provided by the State to its employees.

12. ASSIGNMENT/DELEGATION/SUBCONTRACTS.

12.1 The Contractor shall not assign, or otherwise transfer any interest in this Agreement without the prior written notice, which shall be provided to the State at least fifteen (15) days prior to the assignment, and a written consent of the State. For purposes of this paragraph, a Change of Control shall constitute assignment. "Change of Control" means (a) merger, consolidation, or a transaction or series of related transactions in which a third party, together with its affiliates, becomes the direct or indirect owner of fifty percent (50%) or more of the voting shares or similar equity interests, or combined voting power of the Contractor, or (b) the sale of all or substantially all of the assets of the Contractor.

12.2 None of the Services shall be subcontracted by the Contractor without prior written notice and consent of the State. The State is entitled to copies of all subcontracts and assignment agreements and shall not be bound by any provisions contained in a subcontract or an assignment agreement to which it is not a party.

13. INDEMNIFICATION. Unless otherwise exempted by law, the Contractor shall indemnify and hold harmless the State, its officers and employees, from and against any and all claims, liabilities and costs for any personal injury or property damages, patent or copyright infringement, or other claims asserted against the State, its officers or employees, which arise out of (or which may be claimed to arise out of) the acts or omission of the

Contractor, or subcontractors, including but not limited to the negligence, reckless or intentional conduct. The State shall not be liable for any costs incurred by the Contractor arising under this paragraph 13. Notwithstanding the foregoing, nothing herein contained shall be deemed to constitute a waiver of the sovereign immunity of the State, which immunity is hereby reserved to the State. This covenant in paragraph 13 shall survive the termination of this Agreement.

14. INSURANCE.

14.1 The Contractor shall, at its sole expense, obtain and continuously maintain in force, and shall require any subcontractor or assignee to obtain and maintain in force, the following insurance:

14.1.1 commercial general liability insurance against all claims of bodily injury, death or property damage, in amounts of not less than \$1,000,000 per occurrence and \$2,000,000 aggregate or excess; and

14.1.2 special cause of loss coverage form covering all property subject to subparagraph 10.2 herein, in an amount not less than 80% of the whole replacement value of the property.

14.2 The policies described in subparagraph 14.1 herein shall be on policy forms and endorsements approved for use in the State of New Hampshire by the N.H. Department of Insurance, and issued by insurers licensed in the State of New Hampshire.

14.3 The Contractor shall furnish to the Contracting Officer identified in block 1.9, or his or her successor, a certificate(s) of insurance for all insurance required under this Agreement. Contractor shall also furnish to the Contracting Officer identified in block 1.9, or his or her successor, certificate(s) of insurance for all renewal(s) of insurance required under this Agreement no later than ten (10) days prior to the expiration date of each insurance policy. The certificate(s) of insurance and any renewals thereof shall be attached and are incorporated herein by reference.

15. WORKERS' COMPENSATION.

15.1 By signing this agreement, the Contractor agrees, certifies and warrants that the Contractor is in compliance with or exempt from, the requirements of N.H. RSA chapter 281-A ("*Workers' Compensation*").

15.2 To the extent the Contractor is subject to the requirements of N.H. RSA chapter 281-A, Contractor shall maintain, and require any subcontractor or assignee to secure and maintain, payment of Workers' Compensation in connection with activities which the person proposes to undertake pursuant to this Agreement. The Contractor shall furnish the Contracting Officer identified in block 1.9, or his or her successor, proof of Workers' Compensation in the manner described in N.H. RSA chapter 281-A and any applicable renewal(s) thereof, which shall be attached and are incorporated herein by reference. The State shall not be responsible for payment of any Workers' Compensation premiums or for any other claim or benefit for Contractor, or any subcontractor or employee of Contractor, which might arise under applicable State of New Hampshire Workers' Compensation laws in connection with the performance of the Services under this Agreement.

16. **NOTICE.** Any notice by a party hereto to the other party shall be deemed to have been duly delivered or given at the time of mailing by certified mail, postage prepaid, in a United States Post Office addressed to the parties at the addresses given in blocks 1.2 and 1.4, herein.

17. **AMENDMENT.** This Agreement may be amended, waived or discharged only by an instrument in writing signed by the parties hereto and only after approval of such amendment, waiver or discharge by the Governor and Executive Council of the State of New Hampshire unless no such approval is required under the circumstances pursuant to State law, rule or policy.

18. **CHOICE OF LAW AND FORUM.** This Agreement shall be governed, interpreted and construed in accordance with the laws of the State of New Hampshire, and is binding upon and inures to the benefit of the parties and their respective successors and assigns. The wording used in this Agreement is the wording chosen by the parties to express their mutual intent, and no rule of construction shall be applied against or in favor of any party. Any actions arising out of this Agreement shall be brought and maintained in New Hampshire Superior Court which shall have exclusive jurisdiction thereof.

19. **CONFLICTING TERMS.** In the event of a conflict between the terms of this P-37 form (as modified in EXHIBIT A) and/or attachments and amendment thereof, the terms of the P-37 (as modified in EXHIBIT A) shall control.

20. **THIRD PARTIES.** The parties hereto do not intend to benefit any third parties and this Agreement shall not be construed to confer any such benefit.

21. **HEADINGS.** The headings throughout the Agreement are for reference purposes only, and the words contained therein shall in no way be held to explain, modify, amplify or aid in the interpretation, construction or meaning of the provisions of this Agreement.

22. **SPECIAL PROVISIONS.** Additional or modifying provisions set forth in the attached EXHIBIT A are incorporated herein by reference.

23. **SEVERABILITY.** In the event any of the provisions of this Agreement are held by a court of competent jurisdiction to be contrary to any state or federal law, the remaining provisions of this Agreement will remain in full force and effect.

24. **ENTIRE AGREEMENT.** This Agreement, which may be executed in a number of counterparts, each of which shall be deemed an original, constitutes the entire agreement and understanding between the parties, and supersedes all prior agreements and understandings with respect to the subject matter hereof.

STATE OF NEW HAMPSHIRE
DEPARTMENT OF NATURL AND CULTURAL RESOURCES
DIVISION OF PARKS AND RECREATION

Railroad rail and tie removal from abandoned Berlin Branch, Littleton, NH.

EXHIBIT A

There are no changes or additional provisions to this contract

EXHIBIT B

Scope of Work

Project No. TB-2101: This project consists of dismantling approximately 11,510 lf of out of service rail, plates, joint bars and Other Track Materials (OTM) and removal of RR ties from 2.18 miles of abandoned rail corridor. Contractor shall leave rail and ties in place on bridge crossing Ammonoosuc River. Erosion controls shall be used when working near banks of Ammonoosuc River.

EXHIBIT C

Contract Price

All rail infrastructure nor marked for retention by NHDOT, may be retained by the contractor as scrap metal. If 100 lb rail or heavier, and other track materials 100 lbs or heavier, is found within the limits of the project extent they shall be transported to NHDOT yard in Whitefield, NH. All switch stands shall be retained by DNCR.

Mobilization and Demobilization	\$800.00
Rail Removal of approximately 11,510' of railroad track (equaling 23,020' of rail length) of 85 lb rail; joint bars and plates.	\$30,822.00
Tie removal and disposal	\$8,000.00
Clean-up, restoration and disposal of materials	\$2,878.00
An allowance of \$10,000.00 to be included in contract. This will make money available for modifications and/or additions to contract items due to owner – initiated changes or unknown latent or differing existing conditions.	<u>\$10,000.00</u>

TOTAL: \$52,500.00

Method of Payment

Payments shall be made within 30 days after receipt of progress based invoices and inspections by Contract Coordinator.

Term

This contract shall be effective upon approval of the Governor and Executive Council with a start date of **September 2, 2021** and a completion date of **December 1st, 2021**.

State of New Hampshire

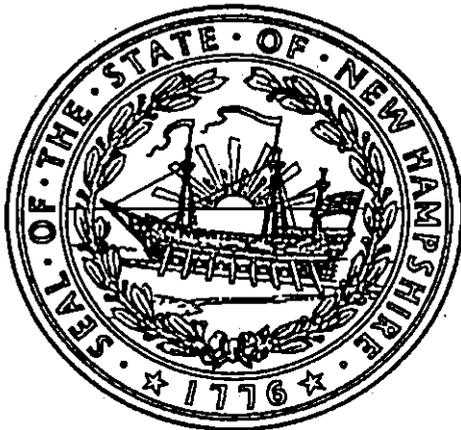
Department of State

CERTIFICATE

I, William M. Gardner, Secretary of State of the State of New Hampshire, do hereby certify that JOSH FENOFF SITEWORKS, LLC is a Vermont Limited Liability Company registered to transact business in New Hampshire on August 31, 2017. I further certify that all fees and documents required by the Secretary of State's office have been received and is in good standing as far as this office is concerned.

Business ID: 777965

Certificate Number: 0005417203



IN TESTIMONY WHEREOF,

I hereto set my hand and cause to be affixed
the Seal of the State of New Hampshire,
this 3rd day of August A.D. 2021.

A handwritten signature in black ink, appearing to read "Wm Gardner".

William M. Gardner
Secretary of State

Limited Partnership or LLC Certificate of Authority

I, Josh Fenoff, hereby certify that I am a Partner, Member or Manager
(Name)
of J Fenoff Siteworks, LLC a limited liability partnership under RSA 304-B, a limited
(Name of Partnership or LLC)
liability professional partnership under RSA 304-D, or a limited liability company under
RSA 304-C.

I certify that Robert McNally is authorized to bind the partnership or LLC. I
(P-37 Signatory)*

further certify that it is understood that the State of New Hampshire will rely on this
certificate as evidence that the person listed above currently occupies the position indicated
and that they have full authority to bind the partnership or LLC and that this authorization
shall remain valid for thirty (30) days from the date of this Corporate Resolution

DATE: August 4, 2021

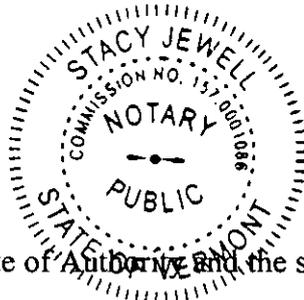
ATTEST: [Signature]
(Name)
Owner President
(Title)

STATE OF Vermont
COUNTY OF Caledonia

On the 6 day of Aug, before me JOSHUA FENOFF, the undersigned officer
personally appeared in St. Johnsbury, known to me or satisfactorily proven to be the person
whose name is subscribed to the within instrument and acknowledged that he/she executed the same for
purposes therein contained. In witness whereof, I hereunto set me hand and official seal:

Stacy Jewell
Justice of the Peace / Notary Public

My Commission Expires: 1-31-23



* Note: The signatory to this Certificate of Authority and the signatory to the P-37 may not be the same individual.

