

**AGREEMENT
BETWEEN THE CITY OF SHEBOYGAN, WISCONSIN AND
SCHICHTEL'S NURSERY, INC
FOR THE PURCHASE OF STREET TREES**

This Agreement ("Agreement") is made and entered into effective this ____ day of _____, 2022 (the "Effective Date"), by and between the City of Sheboygan (the "City"), a Wisconsin municipal corporation with principal offices located at 828 Center Avenue, Sheboygan, WI 53081, and Schichtel's Nursery, Inc., a New York business corporation with principal offices located at 7420 Peters Road, Springville, NY 14141 ("Vendor").

Article 1. Purchase and Delivery of Goods

Vendor shall furnish 370 street trees (including Vendor's proposed substitutions, which are acceptable to the City) as indicated on Vendor's Bid, which is attached to this Agreement as Exhibit 1.¹

Vendor and the City's Representative shall coordinate with regard to the exact delivery date for the street trees, which will be in early April 2023.

Vendor shall deliver all street trees to the City of Sheboygan's Municipal Service Building (2026 New Jersey Avenue, Sheboygan, Wisconsin 53081). Vendor shall provide the City's Representative at least 24 hours' notice before delivery. Deliveries will only be accepted between the hours of 7:00 a.m. and 1:30 p.m. CST. Deliveries will only be accepted Monday through Friday (and will not be accepted on state holidays). All trees shall be properly loaded on a truck or trailer, tarped, and secured so as not to cause damage in transport. All trees shall be identified and tagged by variety and size.

Title of the trees shall pass upon acceptance of goods by the City at the Municipal Service Building in Sheboygan, Wisconsin.²

¹ All trees shall be nursery grown at a northern location so as to be acclimated to the local climate. Single-stem trees are desired unless otherwise indicated in Exhibit 1. Trees are to be of the diameter / caliper range specified in Exhibit 1, Type 1 quality, true to type, and exhibiting good health and vigor. All trees will be free of any and all injury due to insects and disease, and free from any other defects that will affect the survivability and long-term health of the trees. The trunk bark will be sound with no large wounds. Small wounds will be callused over or have good callus formation. Crown shape and branch structure shall be typical of each species or variety. Shade trees shall have a strong central leader. The crowns will also be free of any major defects (such as co-dominate leaders, poor branch angles, or heavy branches not in proportion to the rest of the plant). Branch height will be appropriate for the size and tree provided. All trees will be dug and handled in such a manner as to prevent injuries to trunks, branches, and roots. All whips shall be unbranched to lightly branched. All bare root trees must have a well-branched and fibrous root system characteristic of the species. All tree specifications will adhere to the standards set forth by the most recent edition of the American Standard for Nursery Stock (ANSI Z60.1).

² The City reserves the right to inspect all trees upon delivery. The City reserves the right to reject any plants that do not meet the specifications set forth in this Agreement. All return freight costs for rejected trees will be borne by Vendor.

Article 2. Cost

Pursuant to Vendor's Bid, the City shall pay Vendor an amount not to exceed \$33,512.00 for the trees. This price includes all handling, transportation, and insurance charges. The City shall make payment to Vendor within 45 days of acceptance of the trees and receipt of an invoice from Vendor.³ Any amount not paid when due will bear interest at the rate of 0% per year.

Vendor shall submit the invoice to:

Bernard Rammer
Purchasing Agent
City of Sheboygan
828 Center Ave., Suite 205
Sheboygan, WI 53081
bernard.rammer@sheboyganwi.gov

Vendor shall file waivers of lien from any suppliers and subcontractors with the City prior to receiving payment. The submission of the invoice shall be deemed a waiver and release by Vendor of all liens and claims with respect to this Agreement, except as specifically reserved and noted on such invoice.

Article 3. City's Representative

The City designates Tim Bull as its Representative for purposes of this Agreement. The City's Representative is authorized to act on the City's behalf with respect to this Agreement. For the avoidance of doubt, the City's Representative shall have the authority to consent to substitute trees, and to the exact delivery date for the trees.

Article 4. Terms and Conditions

A. Entire Agreement

This Agreement consists of the following parts, each of which is as fully a part of this Agreement as if fully set out herein:

1. This Agreement and its Exhibits
 - a. Exhibit 1 – Vendor's Bid Response
2. Any Written Amendment to the Agreement that may be delivered or issued after the Effective Date of the Agreement (including Change Orders)

This Agreement (and its Exhibits) is the entire and integrated agreement between the City and Vendor regarding the subject matter of the Agreement. It supersedes all prior and contemporaneous communications, representations, and agreements that are not part of this Agreement. This Agreement may only be modified by a written amendment signed by both parties.

³ Payment shall be considered timely if the payment is mailed, delivered, or transferred within 45 days after acceptance of the trees and receipt of an invoice from Vendor, unless Vendor is notified in writing of a dispute before payment is made.

In resolving conflicts, errors, discrepancies, and disputes, the component of the Agreement expressing the greater quantity, quality, or other scope of work in question, or imposing the greater obligation upon Vendor and affording the greater right or remedy to the City shall govern.

B. Access to Records

Vendor has not identified any part of its Bid Response as constituting a trade secret.

The parties understand that the City is bound by the Wisconsin Public Records Laws and, as such, this contract is subject to that law. Vendor acknowledges that it is obligated to assist the City in retaining and producing records related to the contract, and that the failure to do so shall constitute a material breach of the contract, in which case Vendor must defend and hold the City harmless from liability under that law.

Vendor shall maintain all records related to this contract for a period of not less than 7 years after receipt of Final Payment under the Agreement, except in the event of litigation or settlement of claims arising from the performance of this Agreement, in which case records shall also be maintained until the disposition of all such litigation, appeals, claims, or exceptions related thereto.

C. Appropriation of Funds

If funds for the continued fulfillment of this Agreement by the City are at any time not forthcoming or are insufficient, through failure of any entity, including the City itself, to appropriate funds or otherwise, the City shall have the right to terminate this Agreement without penalty.

D. Assignment

Neither party shall assign any rights or duties under this Agreement without the prior written consent of the other party. Such written approval by the City shall not relieve the Vendor of the obligations incurred by the Vendor under the terms of this Agreement.

E. Compliance with Laws

Vendor shall comply with all laws, ordinances, rules, regulations, and lawful orders of any public authority bearing on the delivery of the street trees. Vendor represents and warrants that the goods furnished under this Agreement, including all labels, packages, and containers for said goods, comply with all applicable standards, rules, and regulations in effect under the requirements of all federal, state, and local laws, rules, and regulations as applicable, including the Occupational Safety and Health Act (OSHA), as amended, with respect to design, manufacture or use for their intended purpose of said goods. If it is determined by the City that these standards are not met, the Vendor agrees to bear all costs required to meet the minimum standards as stated above for the goods furnished under this Agreement.

The Vendor shall be required to demonstrate valid possession of all required licenses, and to keep all required licenses in effect for the term of this Agreement.

F. Conflict of Interest

Vendor declares that it has no present interest, nor shall it acquire any interest, direct or indirect, which would conflict with the performance of its obligations under this Agreement. Vendor agrees that no person having any such interest shall be employed in the performance of this Agreement.

G. Force Majeure

Neither party shall be in default by reason of any failure in performance of this Agreement when such failure in performance is caused by or results from unforeseeable causes beyond the reasonable control of the affected party and without fault or negligence on the part of the affected party. Such causes may include, but are not restricted to, acts of nature or the public enemy, acts of the government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather.

H. Governing Law and Venue.

This Agreement shall be governed by the laws of the State of Wisconsin. Venue of any disputes arising under this Agreement shall be in the Sheboygan County Circuit Court, Wisconsin.

I. Indemnification

To the extent permitted by law, Vendor shall be liable to and hereby agrees to defend and hold the City, and its officers, officials, agents, and employees harmless from all liability, including, but not limited to, claims, actions, causes of action, liens, losses, damages, costs, legal fees, expenses, or judgments resulting from claimed injury, death, damage to property, or loss of use of property or any person or legal entity arising out of or in any way connected with Vendor's responsibilities under this Agreement.

J. Independent Contractor

During the term of this Agreement, Vendor shall be an independent contractor, and in no event shall any of its personnel, agents or subcontractors be construed to be, or represent themselves to be, employees of the City. Vendor shall be solely responsible for the payment and reporting of all employee and employer taxes, including social security, unemployment, and any other federal, state, or local taxes required to be withheld from employees or payable on behalf of its employees.

K. Insurance

Vendor will insure, and will require any subcontractor to insure, as indicated, against the following risks to the extent stated below.

1. Commercial General Liability. Vendor shall procure and maintain during the life of this Agreement, Commercial General Liability insurance including, but not limited to, products and completed operations, bodily injury, property damage, and personal injury in an amount not less than \$1,000,000 per occurrence. This policy shall also provide contractual liability in the same amount. Vendor's coverage shall be primary and list the City as an additional insured. Vendor shall require any subcontractor under this Agreement to procure and maintain insurance meeting the above criteria, applying on a primary basis, and listing the City as an additional insured.

2. Automobile Liability. Vendor shall procure and maintain during the life of this Agreement, Business Automobile Liability Insurance covering owned, non-owned, and hired automobiles with limits of not less than \$1,000,000 combined single limit per accident. Vendor shall require any subcontractor under this Agreement to procure and maintain insurance meeting the above criteria.
3. Workers' Compensation. Vendor shall procure and maintain during the life of this Agreement, Workers' Compensation insurance that complies with all statutory requirements. Vendor shall require any subcontractor under this Agreement to procure and maintain insurance meeting the above criteria.

Acceptability of Insurers. The insurance policies required by this Section shall be issued by an insurer with an A.M. Best rating of no less than A- (A minus) and a Financial Category rating of no less than VII.

Proof of Insurance. Vendor shall provide the City with certificate(s) of insurance showing the type, amount, effective dates, and expiration dates of required policies. Vendor shall provide the certificate(s) to the City's Purchasing Agent. If any of the policies required under this Section expire when this Agreement is in effect, Vendor shall provide renewal certificates to the City. The certificate of insurance shall require the insurance company to notify the City at least 30 days prior to the expiration, cancellation, non-renewal, or material change in the coverage. The Certificate Holder on the proof of insurance should be listed as:

City of Sheboygan, Wisconsin
828 Center Ave., Suite 110
Sheboygan, Wisconsin 53081

This insurance shall not relieve or decrease the extent to which Vendor may be held responsible for payment of damages resulting from this Agreement.

If Vendor fails or refuses to procure or maintain the insurance required by these provisions, or fails or refuses to furnish the City the required proof that the insurance has been procured and is in force and paid for, the City shall have the right at its election to terminate the Agreement.

L. Intent to Be Bound

The City and Vendor each binds itself and its successors, executors, administrators, permitted assigns, legal representatives and, in the case of a partnership, its partners to the other party to this Agreement, and to the successors, executors, administrators, permitted assigns, legal representatives and partners of such other party in respect to all provisions of this Agreement.

M. Non-Collusion

Vendor is certifying, under penalty of perjury, that to the best of its knowledge and belief:

1. The prices in its bid were arrived at independently, without collusion, consultation, communication, or agreement for the purpose of restricting competition as to any other matter relating to such prices with any other bidder or with any other competitor.
2. Unless otherwise required by law, the prices quoted in Vendor's bid were not disclosed by Vendor prior to opening.
3. No attempt was made to induce any other person, partnership, or corporation to submit or not submit a response to the City regarding the street trees for the purpose of restricting competition.

N. Non-Discrimination

In connection with the performance of work under this Agreement, Vendor agrees not to discriminate against any employee or applicant for employment because of age, race, religion, color, handicap, sex, physical condition, disability, developmental disability (as defined in Wis. Stat. 51.01(5)), sexual orientation (as defined in Wis. Stat. 111.32(13m)), gender identity, or national origin. This provision shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

Vendor further agrees to take affirmative action to ensure equal employment opportunities.

O. Notices

Any notice required by this Agreement shall be made in writing to the individuals/addresses specified below:

City:

Vendor:

City Clerk		Schichtel's Nursery
City of Sheboygan		7420 Peters Road
828 Center Ave.		Springville, NY 14141
Sheboygan, Wisconsin 53083		

Nothing contained in this Article shall be construed to restrict the transmission of routine communications between representatives of the City and Vendor.

P. Severability

The invalidity, illegality, or unenforceability of any provision of this Agreement or the occurrence of any event rendering any portion or provision of this Agreement void shall in no way affect the validity or enforceability of any other portion or provision of this Agreement. Any void provision shall be deemed severed from this Agreement, and the balance of the Agreement shall be construed and enforced as if it did not contain the particular provision held to be void. The parties

further agree to amend this Agreement to replace any stricken provision with a valid provision that comes as close as possible to the intent of the stricken provision. The provisions of this Article shall not prevent this entire Agreement from being void should a provision which is of the essence of this Agreement be determined void.

Q. Schedule

The Parties agree that no charges or claims for damages shall be made by Vendor for any delays or hindrances, from any cause whatsoever, during its completion of its obligations under this Agreement. Such delays or hindrances, if any, may be compensated for by an extension of time for a reasonable period as may be mutually agreed upon between the Parties, it being understood however, that permitting Vendor to proceed to complete any obligation, or any part of its obligations, after the date to which the time of completion may have been extended shall, in no way operate as a waiver on the part of the City of any of its rights herein.

Failure of the Vendor to adhere to the schedule as specified or to promptly replace rejected products shall render the Vendor liable for all costs in excess of the contract price when alternate procurement is necessary. Excess costs shall include the administrative costs and other costs attributable to the delay.

R. Termination

In the event Vendor shall default in any of the covenants, agreements, commitments, or conditions contained in this Agreement, and any such default shall continue unremedied for a period of 10 days after written notice to Vendor, the City may, at its option, and in addition to all other rights and remedies which it may have in law or equity, terminate the Agreement and all rights of Vendor under the Agreement.

The City reserves the right to cancel this Agreement with any state or federally debarred contractor.

S. Third Party Rights

Nothing in this Agreement shall be construed to give any rights or benefits to anyone other than the City and Vendor.

T. Vendor's Representations

In order to induce the City to enter into this Agreement, Vendor makes the following representations:

1. Vendor has carefully examined the Agreement.
2. If, in Vendor's judgment, any observable local or site conditions may affect the delivery, cost, progress, or furnishing of the goods, then Vendor has visited the Point of Destination and site where the goods are to be installed and become familiar with and is satisfied as to the observable local and site conditions that may affect delivery, cost, progress, and furnishing of the goods.
3. Vendor is familiar with and is satisfied as to all Laws and Regulations that may affect the cost, progress, and performance of Vendor's obligations under the Agreement.

4. Vendor has carefully studied, considered, and correlated the information known to Vendor with respect to the effect of such information on the cost, progress, and performance of Vendor's obligations under the Agreement.
5. Vendor has given the City written notice of all conflicts, errors, ambiguities, or discrepancies that Vendor has discovered in the Agreement, and the written resolution (if any) by the City is acceptable to Vendor.
6. The Agreement is generally sufficient to indicate and convey understanding of all terms and conditions for performance of Vendor's obligations under the Agreement.
7. Vendor's entry into this Agreement constitutes an incontrovertible representation by Vendor that without exception all prices in the Agreement are premised upon furnishing the goods as required by the Agreement.

U. Waiver

No failure of either party to enforce a term of this Agreement against the other shall be construed as a waiver of that term, nor shall it in any way affect the party's right to enforce that term. No waiver by any party of any term of this Agreement, which may only occur in writing, shall be considered to be a waiver of any other term or breach thereof.

V. Other Provisions

1. **Advertising and News Releases.** Reference to or use of the City, or any of its departments, officials, or employees, for commercial promotion is prohibited. News releases pertaining to this procurement shall not be made without prior approval of the City's Representative. Release of broadcast e-mails pertaining to this procurement shall not be made without prior written authorization of the City's Representative.
2. **Authority.** Each person executing this Agreement on behalf of a party hereto represents and warrants to the other party: That the execution and delivery of this Agreement has been duly authorized, that the person or persons executing this Agreement have the full power, authority, and right to do so, and that such execution is sufficient and legally binding on such party to enable this Agreement to be enforceable in accordance with its terms.
3. **Interpreting the Contract Documents.** In interpreting the Agreement, words describing materials that have a well-known technical or trade meaning shall be construed in accordance with such well known meanings unless otherwise specifically defined.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed the day and year first written above.

CITY OF SHEBOYGAN, WISCONSIN

SCHICHTEL'S NURSERY

BY: _____
Ryan Sorenson, Mayor

BY: _____

ATTEST: _____
Meredith DeBruin, City Clerk

DATE: _____

DATE: _____

This Agreement Authorized by Resolution _____

EXHIBIT 1

14	44	village green zelkova, <i>Zelkova serrata</i> 'Village Green'	#68.00	#2992.00
		proposed substitution:		
15	44	spaeth's alder, <i>Alnus x Spaethii</i> — 30 Available	#106.00	#3180.00
		acceptable substitution or combination: <i>Catalpa speciosa</i> 14 Available	#82.00	#1148.00
		proposed substitution:		
16	4 (not 44)	japanese stewartia, <i>Stewartia pseudocamellia</i>	#145.00	#580.00
		proposed substitution:		
Item	Quantity Required	4' to 5' Whip	Price Each	Price Total
17	10	sugar maple, <i>Acer saccharum</i>	#36.00	#360.00
		proposed substitution:		
18	10	shagbark hickory, <i>Carya ovata</i>	#44.00	#440.00
		proposed substitution:		

Firm Name:

Schichtel's Nursery, Inc.

Address:

7420 Peters Rd.

City, State, Zip:

Springville NY 14141

Phone:

716.592.9383 x 127

Fax:

716.592.4282

Authorized Signature:

Nicole Sage

Printed Name:

Nicole Sage - Assistant Secretary

Email

mds@Schichtels.com

Mark Schichtel

FIRM NAME:

Schichtel's Nursery, Inc.

City of Sheboygan

Spring 2023 Street Tree Purchase

Item	Quantity Required	1.5" to 1.75" Bare Root Single Stem WILL NOT accept Container or B&B trees	Price Each	Price Total
1	50	robin hill serviceberry, <i>Amelanchier grandiflora</i> 'Robin Hill'	\$ 111.00	\$ 5550.00
		proposed substitution:		
2	50	ruby slippers maple, <i>Acer ginnala</i> 'Ruby Slippers'	\$ 88.00	\$ 4400.00
		acceptable substitution or combination: <i>Acer ginnala</i> 'Flame'		
		proposed substitution:		
3	50	regal prince oak, <i>Quercus robur x bicolor</i> 'Regal Prince'	\$ 98.00	\$ 4900.00
		proposed substitution:		
4	50	worplesdon sweetgum, <i>Liquidambar styraciflua</i> 'Worplesdon'	\$ 91.00	\$ 4550.00
		acceptable substitution or combination: <i>Liquidambar styraciflua</i> 'Moraine'		
		proposed substitution:		
5	50	exclamation planetree, <i>Platanus x 'Exclamation'</i>	\$ 56.00	\$ 2800.00
		proposed substitution:		
6	50	scarlet oak, <i>Quercus coccinea</i>	\$ 93.00	\$ 4650.00
		proposed substitution:		
7	44	sugar cone maple, <i>Acer saccharum</i> 'Sugar Cone' — 30 Available	\$ 106.00	\$ 3180.00
		acceptable substitution or combination: <i>Acer tataricum</i>		
		proposed substitution: → 14 Available	\$ 88.00	\$ 1232.00
8	44	seven-son flower, <i>Heptacodium miconioides</i> — 25 Available	\$ 115.00	\$ 2875.00
		acceptable substitution or combination: <i>Crataegus crusgalli</i> 'Inermis'		
		proposed substitution: → 19 Available	\$ 97.00	\$ 1843.00
9	44	golden glory cornelian cherry, <i>Cornus mas</i> 'Golden Glory'	\$ 98.00	\$ 4312.00
		acceptable substitution or combination: <i>Cornus mas</i> 'Saffron Sentinel'		
		proposed substitution:		
10	44	black tupelo, <i>Nyssa sylvatica</i>	\$ 140.00	\$ 6160.00
		proposed substitution:		
11	44	autumn gold maldenhair tree, <i>Ginkgo biloba</i> 'Autumn Gold'	\$ 104.00	\$ 4576.00
		proposed substitution:		
12	44	european hornbeam, <i>Carpinus betulus</i>	\$ 121.00	\$ 5324.00
		proposed substitution:		
13	44	dawn redwood, <i>Metasequoia glyptostroboides</i>	\$ 97.00	\$ 4268.00
		proposed substitution:		