



676-2016 ADDENDUM 2

SUPPLY AND INSTALLATION OF AN INDUCTIVELY COUPLED PLASMA MASS SPECTROMETERY INSTRUMENT

URGENT

PLEASE FORWARD THIS DOCUMENT TO WHOEVER IS IN POSSESSION OF THE REQUEST FOR PROPOSAL

ISSUED: October 4, 2016
BY: Courtney Diduck
TELEPHONE NO. 204 - 986-4752

THIS ADDENDUM SHALL BE INCORPORATED INTO THE REQUEST FOR PROPOSAL AND SHALL FORM A PART OF THE CONTRACT DOCUMENTS

Template Version: Ar20150806

Please note the following and attached changes, corrections, additions, deletions, information and/or instructions in connection with the Request for Proposal, and be governed accordingly. Failure to acknowledge receipt of this Addendum in Paragraph 9 of Form A: Proposal may render your Proposal non-responsive.

PART B – Bidding Procedures

B2.1 The Submission Deadline is 12:00 noon Winnipeg time, October 13, 2016.

PART D – SUPPLEMENTAL CONDITIONS

Add: D2.3 Further to C5.3 and Notwithstanding C7.1 and C7.3, The City shall have the right to request a change in Work at any time after the award of Contract. Such changes shall be under mutually agreeable terms.

Page numbering on some forms may be changed as a result.

QUESTIONS AND ANSWERS

- Q1 With regards to D11 Liquidated Damages; can penalties be capped at 10% of the contract value for penalties that are under our direct control?
- A1 No, Liquidated Damages have been calculated based on the operational impact of not meeting D10 Delivery.
- Q2 Clause C5.3 Contract, clause C7 Changes in work, Please confirm that any amendment of this Agreement must be in writing and mutually agreed to and signed by both parties.
- A2 Yes, any changes in Work shall be in writing and mutually agreed to and signed by both parties. See Addendum 2.
- Q3 Clause C5.4 Inspection, and C5.10 Control, C9.10 Rejection of Goods and Clause C11.7. Acceptance of the Work. Please confirm that all inspections and final acceptance will be completed within 30 days after delivery. Accounting principles do not allow us to recognize our revenue with an unlimited right of return clause in a contract.
- A3 Final acceptance of the Work will be after successful installation, inspection and approval by Contract Administrator.
- Q4 Clause C5.7 Control, Please note that we are a publicly traded company and as such cannot allow third parties to interfere our business operations/strategies.

- A4 C5.7 does not deal with business operations/strategies concerning publicly traded companies. C5.7 concerns how the contract (the "Work") is performed. In this case it will apply to Installation.
- Q5 Clause C6.20- C6.18 Patents and Royalties, Please note that IP indemnity is an important part of a contract and cannot be broad. Please add: Seller agrees to indemnify, defend and save Buyer, its officer, directors, and employees from and against any and all damages, liabilities, actions, causes of action, suits, claims, demands, losses, costs and expenses (including without limitation reasonable attorney's fees) ("Indemnified Items") for (i) injury to or death of persons or damage to property to the extent caused by the negligence or willful misconduct of Seller, its employees, agents or representatives or contractors in connection with the performance of services at Buyer's premises under this Agreement and (ii) claims that a Product infringes any valid Canadian or United States patent, copyright or trade secret; provided, however, Seller shall have no liability under this Section to the extent any such Indemnified Items are caused by either (i) the negligence or willful misconduct of Buyer, its employees, agents or representatives or contractors, (ii) by any third party, (iii) use of a Product in combination with equipment or software not supplied by Seller where the Product would not itself be infringing, (iv) compliance with Buyer's designs, specifications or instructions, (v) use of the Product in an application or environment for which it was not designed or (vi) modifications of the Product by anyone other than Seller without Seller's prior written approval. Buyer shall provide Seller prompt written notice of any third party claim covered by Seller's indemnification obligations hereunder. Seller shall have the right to assume exclusive control of the defense of such claim or, at the option of the Seller, to settle the same. Buyer agrees to cooperate reasonably with Seller in connection with the performance by Seller of its obligations in this Section. Notwithstanding the above, Seller's infringement related indemnification obligations shall be extinguished and relieved if Seller, at its discretion and at its own expense (a) procures for Buyer the right, at no additional expense to Buyer, to continue using the Product; (b) replaces or modifies the Product so that it becomes non-infringing, provided the modification or replacement does not adversely affect the specifications of the Product; or (c) in the event (a) and (b) are not practical, refund to Buyer the amortized amounts paid by Buyer with respect thereto, based on a five (5) year amortization schedule. The foregoing indemnification provision states seller's entire liability to buyer for the claims described herein.
- A5 No changes accepted. C6.18-C6.20 specify the obligations of both parties relative to Patents and Royalties. General and IP indemnity are addressed in C15.
- Q6 Clause C6.32 Delivery and Clause 9.13 - Rejection of Goods. Please note, our global policies do not allow us to accept uncapped penalties that are more than 10% of the contract value. Please confirm whether penalties can be capped at 10% of the contract value for penalties that are under our direct control.
- A6 See A1.
- Q7 Clause C9.5 Defective Work and Clause C11 Warranty - Please confirm that any defects will be remedied as per the Contractor's standard warranty, and that the Contractor's standard warranty for the equipment will take precedence over these sections. Note that we are not authorized to sell products without our standard global warranty.
- A7 No changes accepted as we do not have Contractor's standard warranty. C11 requires 1 year warranty from the date of Total Performance, or better if offered by the manufacturer.
- Q8 Clause C10.6 Final Payment - Please confirm that payment terms are as per section D13 Payment of the RFP document.
- A8 Payment terms, including D13, are read together with the balance of the Contract including C10.6. Payment terms are not restricted to D13.
- Q9 Clause C13.1 Assignment - Please note we reserve the right to assign this Contract, without approval, to our affiliates only. We are a global corporation that may restructure our subsidiaries from time to time. Having to review all our contracts and having to obtain written approval from those who demand it creates a large administrative burden, and could cause delays to our restructuring.
- A9 No changes accepted. City requires consent before an assignment.

Q10 Clause C14. Force Majeure - In the essence of fairness we request that clause C14.3 be mutual and clause C14.1 be deleted.

A10 No changes accepted.

C14.1 requires that the Contract Administrator be satisfied that the event is "totally beyond" the Contractor's control before schedule relief is considered. Under C14.3, the City is relieved if events are "beyond the reasonable control" of the City.

C14.1 reinforces the importance of time for Contractor performance – by requiring that that relief is only provided if the delay was caused for reasons totally beyond its control.

Q11 Clause C15 Indemnity

Please note, our global policies do not allow us to accept unlimited liability in a contract, with the exception of death, injury, and IP infringement. Please replace with:

Seller agrees to indemnify, defend and save Buyer, its officer, directors, and employees from and against any and all damages, liabilities, actions, causes of action, suits, claims, demands, losses, costs and expenses (including without limitation reasonable attorney's fees) ("Indemnified Items") for (i) injury to or death of persons or damage to property to the extent caused by the negligence or willful misconduct of Seller, its employees, agents or representatives or contractors in connection with the performance of services at Buyer's premises under this Agreement and (ii) claims that a Product infringes any valid Canadian or United States patent, copyright or trade secret; provided, however, Seller shall have no liability under this Section to the extent any such Indemnified Items are caused by either (i) the negligence or willful misconduct of Buyer, its employees, agents or representatives or contractors, (ii) by any third party, (iii) use of a Product in combination with equipment or software not supplied by Seller where the Product would not itself be infringing, (iv) compliance with Buyer's designs, specifications or instructions, (v) use of the Product in an application or environment for which it was not designed or (vi) modifications of the Product by anyone other than Seller without Seller's prior written approval. Buyer shall provide Seller prompt written notice of any third party claim covered by Seller's indemnification obligations hereunder. Seller shall have the right to assume exclusive control of the defense of such claim or, at the option of the Seller, to settle the same. Buyer agrees to cooperate reasonably with Seller in connection with the performance by Seller of its obligations in this Section.

Notwithstanding the above, Seller's infringement related indemnification obligations shall be extinguished and relieved if Seller, at its discretion and at its own expense (a) procures for Buyer the right, at no additional expense to Buyer, to continue using the Product; (b) replaces or modifies the Product so that it becomes non-infringing, provided the modification or replacement does not adversely affect the specifications of the Product; or (c) in the event (a) and (b) are not practical, refund to Buyer the amortized amounts paid by Buyer with respect thereto, based on a five (5) year amortization schedule. The foregoing indemnification provision states seller's entire liability to buyer for the claims described herein.

Notwithstanding anything to the contrary contained herein, the liability of seller under these terms and conditions (whether by reason of breach of contract, tort, indemnification, or otherwise, but excluding liability of seller for breach of warranty (the sole remedy for which shall be as provided under section 7 above)) shall not exceed an amount equal to the lesser of (a) the total purchase price theretofore paid by buyer to seller with respect to the product(s) giving rise to such liability or (b) one million dollars (\$1,000,000). Notwithstanding anything to the contrary contained herein, in no event shall seller be liable for any indirect, special, consequential or incidental damages (including without limitation damages for loss of use of facilities or equipment, loss of revenue, loss of data, loss of profits or loss of goodwill), regardless of whether seller (a) has been informed of the possibility of such damages or (b) is negligent.

A11 No changes accepted. C15.1 caps the indemnity at \$2 million plus twice the Contract value. See A5.

Q12 Clause C17.1 City's Rights and Remedies and clause C17.7 Taking the work out of the Contractor's control Please confirm that before clauses C17.1 and/or C17.7 are enforced Contractor will be given 30 days to cure a default.

A12 No changes accepted.

Q13 Clauses C17.3-C17.6 Withholding of Payment - Please note we do not agree to the City of Winnipeg taking money from us without discussion or proof that they're owed the money (i.e., it's self-help without any chance for us to object). Also, it creates an accounting nightmare for us if the City unilaterally decides to set-off against other contracts or matters we have open with them. We end up billing them, putting them into collections, etc. because we don't know when/why they've short paid an invoice. Please confirm that any disputes will be dealt with as per section C20 Arbitration.

A13 No changes accepted. This is the City's sole remedy for deficiencies, in the absence of a performance security. As an explanation:

- a) C17.3 only applies to withholding money
- b) C17.4 only applies in limited circumstances described therein.
- c) C17.13 is only triggered under circumstances described in C16, and applies only in connection with costs incurred by the City in connection with the default.

At this time, these are remote possibilities. All disputes are resolved in accordance with C20.