

GENERAL CONDITIONS FOR CONSULTANT SERVICES

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GENERAL CONDITIONS FOR CONSULTANT SERVICES

C1. DEFINITIONS

C1.1 For the purposes of the Contract the following expressions shall have the following meanings:

- (a) **“Acceptance”** means:
 - (i) when in reference to a Proposal, a Letter of Intent sent by the Chief Administrative Officer or his/her delegated authority notifying the Consultant that a contract for Services is being awarded to the Consultant; or
 - (ii) when in reference to Services provided by the Consultant to the City, a letter of acceptance of the particular report, recommendation, program project or totally completed project, or other related matter proposed by the Consultant requiring acceptance, endorsement, confirmation or other appropriate form of approval or consent from the Project Manager prior to continuance by the Consultant of the previously agreed upon Services or the conclusion of same;
- (b) **“Allowable Disbursements”** means the cost of out of town travel and related meals and accommodations, specialized software, rental rates for specialized equipment, drilling, sampling, laboratory testing and any other out-of-pocket expenses, excluding normal overhead, directly related to Services provided. Overhead shall include any items included in day to day operations and shall include, but not be limited to, computer costs, communication costs, digital photography, administrative fees and items incidental to the Services, except as provided herein, and is expressly excluded;
- (c) **“Award Authority”** means the authority having the jurisdiction to award the Contract according to the City’s by-laws, policies or procedures;
- (d) **“Bidding Procedures”** means the portion of the Request for Proposal by that name which sets out the terms and conditions governing the Offer, and a reference to a section, clause or subclause with the prefix “B” designates a section, clause or subclause in that portion of the Request for Proposal;
- (e) **“Business Day”** means any Calendar Day, other than a Saturday, Sunday or statutory or civic holiday;
- (f) **“C”** designates a section, clause or subclause in these General Conditions;
- (g) **“Calendar Day”** means the period from one midnight to the following midnight;
- (h) **“Change in Services”** or **“Scope Change”** means an addition, deletion or modification to the Services as described in the Contract and which have been approved by the Project Manager;
- (i) **“Chief Administrative Officer”** means the City employee holding that office or, if applicable, the successor to the authority or responsibility of such office;
- (j) **“City”** means The City of Winnipeg as continued under The City of Winnipeg Charter, Statutes of Manitoba 1989-90, c.10, and any subsequent amendments thereto;
- (k) **“City Solicitor”** means the City employee holding that office or, if applicable, the successor to the authority or responsibility of such office;
- (l) **“Confidential Information”** means any and all information concerning the City, the Project, and the Services, that is supplied by or to which access is given to the Consultant by the City or which in any other way comes into the possession or knowledge of the Consultant during the course of performance of the Services (regardless of format or medium), the Deliverables and this Contract.
- (m) **“Consultant”** means the Person undertaking the performance of Services under the terms of the Contract;

- (n) “**Consultant Representative**” means the Consultant's representative throughout the duration of the Contract who has the authority to act on behalf of the Consultant to the extent expressly provided for in this Contract;
- (o) “**Contract**” means the combined documents consisting of either:
 - (i) all documents which form the basis of the formal contract which shall be deemed to include these General Conditions, Request for Proposal, Schedule of Prices, Time Schedule, Consultant Services Proposal, Consultant's Statement of Qualifications, Letter of Intent, and all schedules, attachments and amendments to the aforementioned documents; or
 - (ii) the Purchase Order prepared and forwarded to the Consultant which shall be deemed to include these General Conditions, Request for Proposal, Schedule of Prices, Time Schedule, Consultant Services Proposal, Consultant's Statement of Qualifications, Letter of Intent, and all schedules, attachments and amendments to the aforementioned documents;
- (p) “**Contract Price**” means the price agreed upon for Services and any adjustments thereto which may be required or agreed to pursuant to the Contract;
- (q) “**contractor**” is any party or parties, other than the Consultant, contracting with the City for work associated with the Project;
- (r) “**Cost Plus Fee**” means a fee for Services where the Consultant is paid for its total cost associated with carrying out the Services of the Contract, plus a stated percentage for profit;
- (s) “**Council**” means the Council of The City of Winnipeg;
- (t) “**Deliverables**” means all reports, drawings, calculations, designs, plans, leading practices, specifications, and other data, information and all material utilized, collected, compiled, drawn and produced (including digital files) to carry out Services contemplated in this Contract;
- (u) “**Drawings**” means drawings, diagrams, illustrations, schedules, performance charts, technical brochures and other data, digital or otherwise, which are to be created or provided by the Consultant and/or Subconsultant;
- (v) “**Final Total Construction Cost**” means the cost to the City for work associated with the Project, as applicable, including such sums as are paid to the various contractors and approved additions thereto, provided that the following shall not be included:
 - (i) Goods and Services tax (GST);
 - (ii) Manitoba Retail Sales Tax (MRST or PST)
 - (iii) administration, interest charges, management and legal costs incurred by the City;
 - (iv) fees paid by the City for soil borings and material testing;
 - (v) the cost of installation or relocation of public utilities or other works when the installation or relocation is not designed and administered by the Consultant;
 - (vi) cost of acquisition of real property or any interest therein;
 - (vii) professional fees and payment to the Consultant;
 - (viii) settlements of dispute resolutions; and
 - (ix) any additional costs incurred due to Consultant errors and omissions.
- (w) “**Fixed Fee**” means a fee or fees for Services based on the defined Scope of Services, regardless of the time, effort or resources expended by the Consultant and/or its Subconsultants;
- (x) “**Hourly Rate**” means direct salary cost plus provision for statutory holidays, vacations with pay, employment insurance, health, medical and accidental insurance, group life insurance, Canada Pension Plan, Company Pension Plan, sick leave allowance,

compensation and overhead and shall apply to all hours that are billed in performance of the Services;

- (y) "**Letter of Intent**" means the letter sent by the Chief Administrative Officer or his/her delegated authority notifying the Consultant that a contract for Services has been awarded to the Consultant;
- (z) "**Manager of Materials**" means the City employee holding that office or, if applicable, the successor to the authority or responsibility of such office;
- (aa) "**may**" indicates an allowable action or feature which will not be evaluated;
- (bb) "**must**" or "**shall**" indicates a mandatory requirement which will be evaluated on a pass/fail basis;
- (cc) "**Party**" means The City of Winnipeg, the Consultant or both The City of Winnipeg and the Consultant;
- (dd) "**Percentage Based Fee**" means a fee for Services based upon a percentage of the estimated Final Total Construction Cost;
- (ee) "**Person**" means an individual, firm, partnership, association or corporation, or any combination thereof, and includes heirs, administrators, executors or legal representatives of a person;
- (ff) "**Project**" shall refer to the project described in the Scope of Services;
- (gg) "**Project Manager**" means the City's representative throughout the duration of the Contract who has the authority to act on behalf of the City to the extent expressly provided for in this Contract;
- (hh) "**Proponent**" means any Person or Persons submitting a Proposal for Services;
- (ii) "**Proposal**" means the offer contained in the Proposal Submission;
- (jj) "**Proposal Submission**" or "**Submission**" means that portion of the Request for Proposal which must be completed or provided and submitted by the Submission Deadline in order to constitute a responsive Proposal;
- (kk) "**Request for Proposal (RFP)**" means the Proposal Submission, the Bidding Procedures, these General Conditions, the Supplemental Conditions, the Specifications, and all Addenda;
- (ll) "**Services**" means carrying out and doing of all things of every kind, either expressly or impliedly required, that are to be done by the Consultant in accordance with the terms of this Contract and Appendices and Schedules attached hereto and includes all Services, testing, analysis, equipment, matters and things necessary for or incidental to the fulfilment of the requirements of the Contract, and all Changes in Services which may be approved as herein provided;
- (mm) "**Set-off**" means the City deducting monies owed by the Consultant to the City from payment(s) due by the City to the Consultant.
- (nn) "**should**" indicates a desirable action or feature which will be evaluated on a relative scale;
- (oo) "**Site**" means the lands and other places, including structures, on, under, in or through which the Service is applicable to but does not include a Consultant's Facility;
- (pp) "**Subconsultant**" means a person contracting with the Consultant to perform a part or parts of the Services to be provided by the Consultant pursuant to the Contract;
- (qq) "**Submission Deadline**" means the time and date set out in the Bidding Procedures for final receipt of Proposals;
- (rr) "**Supplemental Conditions**" means the portion of the Bid Opportunity/RFP/Contract by that name which sets out terms and conditions specific to the Contract and supplements or modifies the General Conditions;

- (ss) "**Termination Expenses**" means expenses incurred by the Consultant which are directly attributable to termination of the Services;
- (tt) "**Time-Based Fee**" means a fee for Services charged at an Hourly Rate to an upset limit for Services where the effort to accomplish the Scope of Services cannot be specified prior to executing the Contract;
- (uu) "**Total Performance**" means that the entire Services have been completed in accordance with the requirements of the Contract and upon determination of the Project Manager.

C2. INTERPRETATION

- C2.1 The provisions of this Contract shall supersede all previous agreements, arrangements or understandings, whether written or oral, between the City and the Consultant in connection with and incidental to the Services, and it is agreed that this Contract constitutes the sole and entire Contract between the City and the Consultant relating to the Services, and no other terms, conditions, representations, covenants or warranties, whether expressed or implied, shall form a part hereof.
- C2.2 Where the Consultant consists of more than one Person, the liability to perform the Services herein contained to be performed by the Consultant shall be joint and several.
- C2.3 The Contract has been entered into in the Province of Manitoba and shall be governed by and construed, performed and enforced according to the laws of the Province of Manitoba and of Canada, as applicable, and is subject to the exclusive jurisdiction of the Courts of Manitoba.
- C2.4 Headings, titles and marginal notes in this Contract are inserted for convenience of reference only and shall not be used as explanatory of the clauses or paragraphs below or opposite which they appear.
- C2.5 If there is any conflict or inconsistency between portions of the Contract, the following order of precedence shall apply:
 - (a) the executed agreement between the City and Consultant shall govern over all schedules or other documents forming part of the Contract;
 - (b) the Letter of Intent shall govern over the Proposal;
 - (c) the Proposal shall govern over the Supplemental Conditions;
 - (d) the Supplemental Conditions shall govern over the General Conditions;
 - (e) the General Conditions shall govern over Specifications;
 - (f) Specifications of a later date shall govern over Specifications of an earlier date;
- C2.6 The City and the Consultant acknowledge and agree that the Consultant is an independent Consultant and neither the Consultant, nor any officer, servant or agent of the Consultant, shall be deemed to be an employee, agent, representative or servant of the City.
- C2.7 Any provision of the Contract may be waived only by express waiver in writing by the Project Manager. No express waiver of any provision shall imply the waiver of any other provision. The waiver by any Party of the strict observance or performance of any term of this Contract or of any breach of it on the part of any Party shall not be held or deemed to be a waiver of any subsequent failure to observe or perform the same or any other term of this Contract.
- C2.8 All obligations under this Contract that necessarily extend beyond termination of this Contract in order to fully achieve their intended purpose shall survive termination of this Contract, including without limiting the generality of the foregoing, all indemnification provisions, intellectual property provisions, and confidentiality provisions.

C3. DECLARATIONS

Investigation

C3.1 The Consultant declares that, in submitting a Proposal for the Services and in entering into the Contract, it:

- (a) has investigated the nature of Services to be done and all conditions that might affect its Proposal or its performance of the Services; or
- (b) has not investigated the nature of Services to be done or conditions;

and, in either event, assumes all risk for conditions now existing or arising in the course of the Services which have been or could have been determined through such investigation, and that it did not and does not rely upon information furnished by the City or any of its servants or agents other than information furnished in writing which specifically states it may be relied on for or in connection with the Proposal or the Contract by the Project Manager.

No Conflict

C3.2 The Consultant hereby declares that this Contract is entered into in good faith on the part of the Consultant, that no member of City Council, administrative or financial officer, director or any other officer of the City has any pecuniary interest, direct or indirect, in this Contract or any other agreement or part of an agreement, contract or commission made pursuant to this Contract or to any benefit to arise therefrom, and agrees that it shall forfeit all claims for payment or otherwise under this Contract if it shall appear that any member of City Council, administrative or financial officer, director or any other officer of the City is at any time interested therein or if any interest therein is given or agreed to be given to it and as well shall refund to the City any monies paid to the Consultant by the City under this Contract.

C3.3 The Consultant declares that it has not participated in any collusive scheme or combine in connection with this Contract and agrees that it shall forfeit all claims under this Contract if it should ever be established that this declaration is false and as well shall refund the City any monies paid to the Consultant under this Contract.

C4. EXECUTION OF CONTRACT

C4.1 Where a formal contract is provided for as set out in C1.1(o)(i), the Consultant shall execute the Contract in the manner stipulated by the City Solicitor and return the Contract, within seven (7) Calendar Days of receipt of the Contract, to the attention of the City Solicitor at the address indicated in C16.4.

C4.2 No payments will be made by the City to the Consultant until the Consultant has executed and returned the Contract as set out in C4.1.

C5. AUTHORITY OF PROJECT MANAGER

C5.1 If more than one Project Manager is appointed, each Project Manager shall be designated for a particular stage or stages of the Project, and each Project Manager shall be authorized to act on behalf of the City to the extent provided for in the Contract with respect to the particular stage or stages that the Project Manager has been assigned.

C5.2 The Project Manager shall provide the Consultant with any information, plans and specifications regarding existing or proposed activities or works relevant to the Services to be performed, which the City has in its possession, or has reasonable access to, and documents relating to the Project, except insofar as the Consultant is expressly instructed by the Project Manager to furnish same under the terms hereof.

- C5.2.1 The City does not represent or warrant the accuracy or completeness of the said information, except as specifically stated it can be relied on as set out in C3.1, and the Consultant shall so determine and rectify any errors or omissions therein.
- C5.3 The Project Manager shall give prompt consideration to all documents submitted by the Consultant including all sketches, Drawings, specifications, tenders, proposals, contracts, agreements, reports and correspondence and shall provide written decisions, instructions, Acceptances and any other information required as soon as reasonably possible in order to enable the Consultant to comply with the agreed time schedule.
- C5.3.1 Acceptance provided by the Project Manager does not relieve the Consultant of its professional responsibility for errors and omissions.
- C5.4 The Project Manager may give instructions or orders to the Consultant to the extent necessary to ensure that the Services are performed in an orderly manner and meet the requirements of the Contract.
- C5.5 The Project Manager may order the Consultant to remove any individual employed or retained by the Consultant or a Subconsultant in the performance of the Services, who the Project Manager determines is incompetent, negligent or guilty of misconduct.
- C5.6 The Project Manager shall determine whether Total Performance is achieved and shall certify the date thereof.
- C6. PROJECT MANAGER'S DECISION**
- C6.1 Every certificate, decision or approval of the Project Manager in any matter or question specifically referred to him/her under the terms of this Contract or the schedules hereto shall not be effective unless in writing and shall be final and binding on the Consultant.
- C7. CONSULTANT'S SERVICES AND RESPONSIBILITIES**
- C7.1 The Consultant shall appoint a Project Supervisor or Project Supervisors for the Project. Where more than one Project Supervisor is appointed, each shall be designated for a particular stage or stages of the Project and each Project Supervisor shall be authorized to transmit instructions to and accept information and advice from the City.
- C7.2 The Consultant shall perform, to the satisfaction of the Project Manager, all Services of every kind, either expressly or impliedly required for the Project, including those identified in the Scope of Services, as well as any Change in Services.
- C7.3 After giving notice to the Consultant, the Project Manager may, in writing at any time after the execution of the Contract or the commencement of the Services, delete, extend, increase, vary or otherwise alter the Services, and if such action by the Project Manager necessitates additional staff or Services, the Consultant shall be paid in accordance with C11 for such additional staff employed directly thereon, together with such disbursements as may be allowed under C11. In the case of a reduction in the requirement for Services, the Consultant's fee shall be reduced accordingly and confirmed in writing.
- C7.4 The Consultant shall submit to the Project Manager for approval, a detailed time schedule for the performance of its Services for the Project. The Consultant must comply with the approved time schedule which forms an integral part of this Contract. If a change in the approved time schedule becomes necessary, the Consultant shall promptly submit a report to the Project Manager and obtain prior written approval for any change in the time schedule.
- C7.5 The Consultant, if requested in writing to do so by the Project Manager, shall make any required changes in the Project notwithstanding his/her previous approval and the Consultant shall

advise the Project Manager of any effect on the time schedule, budget and other implications of the changes.

- C7.5.1 However, nothing done by the Consultant to remedy design errors or other deficiencies attributable to shortcomings of the Consultant, including persons consulted, employed or supervised by it, shall entitle it to additional fees.
- C7.6 The Consultant shall provide competent, suitably qualified personnel to perform the Services.
- C7.7 The Consultant, with respect to Services to be performed under subcontract, shall:
- (a) enter into contracts or written agreements with its Subconsultants to require them to comply with, and to perform their work in complete conformance with and subject to, the terms and conditions of the Contract; and
 - (b) be as fully responsible to the City for acts, omissions or defaults of any Subconsultants and of persons directly or indirectly employed or engaged by them as if they were the acts, omissions or defaults of the Consultant.
- C7.8 The Consultant shall incorporate the terms and conditions of the Contract into all contracts or written agreements with its Subconsultants.
- C7.9 Where required, before any additional Services are commenced, the Consultant shall submit to the Project Manager for approval, the name and a resume of the qualifications and experience of all personnel together with the Hourly Rate for those individuals it intends to employ to perform Services on the Project.
- C7.10 The Consultant shall remove, within ten (10) Calendar Days, any personnel performing Services on the Project upon receipt of written notice from the City. Any individual so removed shall not be re-employed on the Project.
- C7.11 No Subconsultant shall be engaged by the Consultant for the performance of Services in connection with the Project without approval by the Project Manager. When a Subconsultant has been identified for parts of the Services they must be used only for those parts of the Services unless the prior approval of the Project Manager has been obtained.
- C7.12 The Consultant shall notify and obtain the approval of the Project Manager for all significant additions and changes to staff.
- C7.13 The Consultant shall have the duty to coordinate the Services to be performed by the Consultant, Subconsultants, contractors, and the City's own forces throughout the Project.
- C7.14 The Consultant shall keep the Project Manager fully advised and informed during each stage of the Project.
- C7.15 The Consultant's status reports shall be made at the times and in the manner as required by the Project Manager, consistent with the Contract.
- C7.16 The Consultant shall keep and maintain accurate time sheets and cost invoice records of its Services performed under this Contract including Services performed on its behalf by any Subconsultant and, when required, shall make such material available for inspection and audit by the Project Manager. The Consultant shall keep and preserve the said material for a period of at least six (6) years following Total Performance or termination of its Services under this Contract.
- C7.17 The Consultant shall ensure that the Services comply with all relevant federal, provincial and municipal legislation, codes, bylaws and regulations. Where there are two or more laws, by-laws, regulations or codes applicable to the Services, the most restrictive shall apply.

- C7.18 The Consultant and all professional individuals conducting Services pursuant to the Contract shall be members in good standing with the applicable professional association in the Province of Manitoba.
- C7.19 The Consultant shall obtain and pay for all necessary permits or licences required for the execution of the Services.
- C7.20 Any Project identification signs proposed for the Site must be approved by the Project Manager.
- C7.21 If the Consultant performs the Services contrary to any laws, by-laws, regulations, codes and orders of any authority having jurisdiction, the Consultant shall be responsible for and shall correct any violations thereof and shall bear all resulting costs, expenses and damages.
- C7.22 In the event the Consultant fails to comply with any legislation or any regulations thereunder and the City is required to do anything or take any steps or pay any sums to rectify such non-compliance, the City may set-off the cost of such rectifications from any monies owed to the Consultant. Any such set-off is not to be construed as liquidated damages.
- C7.23 Drawings and specifications shall be issued in metric notation unless directed otherwise.

C8. CHANGES IN SERVICES

General

- C8.1 The City shall have the right to order a Change in Services at any time after award of the Contract.
- C8.2 If, at any time after award of the Contract, the Consultant is of the opinion that a Change in Service is necessary to accomplish the result intended by the Contract, it shall promptly provide notice thereof to the Project Manager, including:
- (a) the reason for the proposed Change in Services;
 - (b) a detailed description of the proposed Change in Services;
 - (c) the Consultant's proposed method(s) to determine the adjustment, if any, to the Contract.
- C8.2.1 Without limiting the generality of C8.2, if the Consultant observes:
- (a) any substantial difference in the nature of the Services required from those set out in the Contract; or
 - (b) that the Contract is at variance with any laws, ordinances, rules, regulations or codes of authorities having jurisdiction, or if changes are made to any laws, ordinances, rules, regulations and codes subsequent to the Submission Deadline which require modifications to the Contract;
- the Consultant shall immediately notify the Project Manager.
- C8.3 The Project Manager shall determine whether a Change in Services is necessary and whether a corresponding adjustment to the Contract is required.
- C8.3.1 If the Project Manager determines that no Change in Services is necessary, he/she will issue a notice stating his/her determination.
- C8.3.2 If the Project Manager determines that a Change in Services is necessary but no corresponding adjustment to the Contract is required, he/she will issue a notice approving the Change in Services and stating his/her determination.
- C8.3.3 If the Project Manager determines that a Change in Services is necessary, which requires a corresponding adjustment to the Contract, and he/she is able to determine such adjustment based on the available information, he/she shall issue a notice approving the

Change in Services and stating his/her determination regarding the method(s) to be used to determine the adjustment to the Contract.

- C8.3.4 If the Project Manager determines that a Change in Services is necessary, which requires a corresponding adjustment to the Contract, and he/she requires further information to determine such adjustment, he/she shall issue a notice stating his/her determination and requiring the Consultant to submit the Consultant's proposed method(s) to determine the adjustment to the Contract, and upon receipt and evaluation of such information, he/she shall issue a notice in accordance with C8.3.3.

Valuation of a Change in Services

- C8.4 The adjustment in Contract resulting from a Change in Services shall be determined by one or more of the following methods:

- (a) by estimate in a lump sum;
- (b) by the unit prices and methods of measurement set out in the Contract or subsequently agreed upon;
- (c) by the actual cost of the Change in Services to the Consultant plus a fixed fee;

- C8.4.1 For the purposes of C8.4(c), "actual cost" on any portion of the Change in Services undertaken by the Consultant's own forces shall mean the Hourly Rate based on employee classification multiplied by the hours worked and any other payments made by the Consultant with the prior approval of the Project Manager that are necessary for the performance of the Change in Services.

- C8.4.2 For the purposes of C8.4(c), "actual cost" on any portion of the Change in Services undertaken by a Subconsultant shall mean the amount invoiced by the Subconsultant and paid by the Consultant, net of any discounts and excluding any late payment interest or penalties.

- C8.5 If a Change in Services diminishes the Services, or any part thereof, resulting in costs incurred by the Consultant, directly attributable to the diminution, for which it would not be entitled to payment on a unit price basis, the Consultant shall be compensated therefor by the City in the sum or sums determined by the Project Manager.

- C8.5.1 No claim may be made for damages on the ground of loss of anticipated profit on Services so diminished.

- C8.6 If the method of valuation or measurement or the adjustment to the Contract cannot be promptly agreed upon and the Project Manager requires the Change in Services to proceed, then the Project Manager will determine the method of valuation and measurement and the adjustment to the Contract. The Project Manager shall issue a notice approving the Change in Services and setting out the method of valuation, measurement, and any approved adjustments to the Contract.

- C8.7 If the Consultant disputes a determination made by the Project Manager, the Consultant shall act in accordance with the Project Manager's determination. Notwithstanding the foregoing, the Consultant may appeal the determination of the Project Manager to the Chief Administrative Officer as provided for in C16.3.

Cost Records

- C8.8 If a valuation is required pursuant to C8.4 or C8.5, the Consultant shall provide the Project Manager with:

- (a) detailed and accurate statements showing:

- (i) Hourly Rate of pay and hours of work for each of the persons employed by the Consultant; and
 - (ii) Allowable Disbursements.
- (b) access to any cost records (including payroll records, time books and invoices) or other data necessary to verify the accuracy of such statements.

C9. INTELLECTUAL PROPERTY AND OWNERSHIP OF INFORMATION

- C9.1 All reports, drawings, calculations, designs, plans, leading practices, specifications, and other data, information and all material utilized, collected, compiled, drawn and produced (including digital files) to carry out the Services contemplated in this Contract ("Deliverables") are solely the property of the City, with the exception of the materials and information in the possession of the Consultant prior to the commencement of this project, and the Consultant's copyright in such property, if any, is hereby assigned to the City.
- C9.1.1 For greater clarity, any disclaimer that is included in or on any Deliverable to limit the use by the City of such Deliverable, as provided for under this agreement, shall have no force and effect and will not alter the terms of this Agreement, unless the terms of that disclaimer are expressly agreed to by both parties in writing as an amendment to this Agreement.
- C9.2 Upon completion of the Services or termination of this Contract, all of the Deliverables shall be delivered by the Consultant to the City on demand by the City. The Consultant may retain one complete set of the Deliverables for its records and the City shall make the originals, or a reasonable reproduction thereof, available to the Consultant for all proper and reasonable purposes during the period of five (5) years following the completion or termination of the Consultant's Services under this Contract.
- C9.3 Without prejudice to any rights which may exist in the City by virtue of any prerogative rights and powers or by virtue of the Copyright Act of Canada, as amended from time to time, the Consultant assigns all present and future rights in the copyright in the Deliverables absolutely and immediately to the City. Furthermore, the City or any third party granted a right through the City, may use the Deliverables or any part thereof for, or apply it to, other studies or projects without the Consultant's consent and without any payment or compensation whatsoever. If the City or any third party granted a right through the City elects to so use or apply the Deliverables to another project, it does so at its own risk and the Consultant shall not be liable in any way for such other use or application or any adverse consequences flowing therefrom.
- C9.4 The Consultant expressly waives any claim to moral rights, as provided for in the law of copyright, over the Deliverables or any part thereof, created by the Consultant, and the Consultant shall ensure that any agent or employee of the Consultant shall have waived all moral rights, as provided for in the law of copyright, over the Deliverables or any part thereof.
- C9.5 All concepts, products or processes produced by or resulting from the Services rendered by the Consultant in connection with the Project, or which are otherwise developed or first reduced to practise by the Consultant in the performance of Services, and which are patentable, capable of trademark or otherwise, shall be the property of the City.
- C9.6 The Consultant shall have a permanent, non-exclusive, royalty-free licence to use any concept, product or process, which is patentable, capable of trademark or otherwise, produced by or resulting from the Services rendered by the Consultant in connection with the Project, for the life of the Project, and for no other purpose or project.
- C9.7 The Consultant shall not infringe any copyright, trademark, patent, industrial design, trade secret, moral or other proprietary right of a third party and shall indemnify the City from all claims arising out of such an infringement.

- C9.8 If the City or the Consultant is served with a claim or notice of an infringement or alleged infringement of any patent, copyright, trademark or trade name, the Party so served shall immediately give notice thereof to the other Party.
- C9.9 The Consultant shall assist the City in every reasonable way to secure, maintain and defend for the City's benefit all copyrights, patent rights, trade secret rights and other proprietary rights in and to the Deliverables.
- C9.10 If the City or the Consultant is prevented by injunction from using any design, device, material or process covered by letters patent, copyright, trademark or trade name, the Consultant shall, at its own cost, substitute an equally suitable design, device, material or process, all subject to the prior approval of the Project Manager.

Ownership of Information

- C9.11 The Consultant shall not disclose or appropriate to its own use, or to the use of any third party, at any time during or subsequent to the term of this Contract, any Confidential Information of the City of which the Consultant has been or hereafter becomes informed, whether or not developed by the Consultant, including without limitation, information pertaining to this Project and the resulting report, if any, to be provided. This clause shall not apply to information the Consultant may necessarily be required to disclose or use in connection with the Services which it is obligated to perform under this Contract or as required by law.
- C9.12 The Contract, all Deliverables produced or developed, and information provided to or acquired by the Consultant are the property of the City. The Consultant shall not disclose or appropriate to its own use or promotional material, or to the use of any third party, all or any part thereof without the prior written consent of the Project Manager.
- C9.12.1 Further to C9.12 and in accordance with C9.4, the Consultant expressly waives any claim to moral rights, as provided for in the law of copyright.
- C9.13 The Consultant shall not at any time make any public announcement, or press release, nor make any statement of fact or opinion regarding the Contract, the Project, the Services or the Deliverables without the prior written authorization of the Project Manager.
- C9.14 The Consultant hereby agrees to execute such other documentation as may be reasonably requested by the City to evidence their respective intellectual property rights in and to the Deliverables.

C10. CONFIDENTIALITY

- C10.1 During the course of the Contract, the Consultant may acquire Confidential Information. The Consultant shall not, except in accordance with the Contract, disclose Confidential Information to any other Person without the prior written consent of the Project Manager.
- C10.2 The Consultant's obligations under C10.1 shall not apply, or shall cease to apply, to any Confidential Information if or when, but only to the extent that, such Confidential Information:
- (a) was in the public domain when it is received by or becomes known to the Consultant or which subsequently enters the public domain through no fault of the Consultant (but only after it enters the public domain);
 - (b) was already known to the Consultant at the time of its disclosure to the Consultant and is not known by the Consultant to be the subject of an obligation of confidence of any kind;
 - (c) is independently developed by the Consultant without any use of or reference to the Confidential Information and which such independent development can be established by evidence that would be acceptable to a court of competent jurisdiction; or

- (d) is received by the Consultant in good faith without an obligation of confidence of any kind from a third party who the Consultant had no reason to believe was not lawfully in possession of such information free of any obligation of confidence of any kind, but only until the Consultant subsequently comes to have reason to believe that such information was subject to an obligation of confidence of any kind when originally received.
- C10.2.1 Confidential Information shall not be deemed to be in the public domain merely because any part(s) of the Confidential Information is embodied in general disclosures or because individual features, components or combinations of Confidential Information are now or become known to the public.
- C10.3 In the event that the Consultant receives notice indicating that it may or shall be legally compelled to disclose any of the Confidential Information by reason of a duly authorized administrative or court order, it shall provide the City Solicitor with prompt notice so that the City may at the City's sole discretion seek a protective order or other appropriate remedy. In the event that such protective order or other remedy is not obtained, or in cases where a subpoena or other court order requires the Consultant to immediately comply, the Consultant shall furnish only that portion of the Confidential Information in respect of which the Consultant is legally required and compelled to disclose.
- C10.4 The Consultant may disclose Confidential Information to its employee or Subconsultant who has a need to know for the purposes of the Services, provided first that prior to such disclosure each such Person shall have been made aware of the requirements of C10. The Consultant shall be responsible for any violation of C10 by any such Person.
- C10.5 The Consultant shall:
- (a) take reasonable steps (including those steps that the Consultant takes to protect its own information that it regards as confidential) to keep the Confidential Information confidential.
 - (b) use the Confidential Information only for the purpose of performing the Services and for no other purpose whatsoever;
 - (c) at the Project Manager's request and option, immediately return Confidential Information to the City, or certify in writing that it has been destroyed;
- C10.6 In the event of a breach or threatened breach of C10, the parties agree that the harm suffered by the City would not be compensable by monetary damages alone and, accordingly, that the City shall, in addition to any other available legal or equitable remedies, be entitled to an injunction against such breach or threatened breach.
- C10.7 A Consultant who violates any provision of C9 and C10 may be determined to be in breach of Contract.
- C11. TERMS OF PAYMENT**
- C11.1 The City shall pay the Consultant, as consideration for the execution of the Services as follows:
- (a) Fixed Fees shall be paid in accordance with the Contract;
 - (b) Time Based Fees shall be paid for Services actually performed and based on the Hourly Rate and the hours actually worked to a maximum of the amount stipulated in the Contract;
 - (c) Percentage Based Fees shall be calculated by multiplying the appropriate percentage stipulated in the Contract with the applicable Final Total Construction Cost. Where Services are reimbursed on a Percentage Based Fee basis, the Percentage Fee should be all-inclusive except as specifically excluded as an Allowable Disbursement;
 - (d) Cost Plus Fees.
- C11.1.1 The Goods and Services Tax shall be applied to all Services.

- C11.2 Additional Services shall be paid in accordance with the method described for those Services authorized in writing by the Project Manager.
- C11.3 The City shall pay the Consultant, as consideration for Allowable Disbursements described herein, the actual cost of the disbursement to the Consultant, with no administrative mark-ups.
- C11.4 Consultant shall be responsible for its own income taxes, Canada Pension Plan contributions, Workers' Compensation assessments, Employment Insurance premiums and all other taxes, levies or charges payable to any governmental or public authority with respect to the consideration paid by the City to the Consultant under this Contract.
- C11.5 The Consultant shall indemnify the City, against all costs and expenses incurred by the City as a result of it not withholding income tax, Canada Pension Plan contributions, Workers' Compensation assessments and Employment Insurance premiums from the consideration paid by the City to the Consultant including, without limiting the generality of the foregoing, any income tax, interest or penalties that may be assessed against the City for failure to withhold tax or for any other amounts whatsoever which may be charged to it, levied against it or otherwise claimed from it on account of Canada Pension Plan contributions, Workers' Compensation assessments or Employment Insurance premiums in respect of such consideration.
- C11.6 The City shall withhold from any and all payments of fees such amounts in respect of non-resident withholding taxes as it may be required to withhold under the terms of the Income Tax Act (Canada) or the terms of any International Tax Convention and shall remit same as required pursuant thereto.

Payment of Fees and Allowable Disbursements

- C11.7 Invoices shall clearly identify:
- (a) the billing period;
 - (b) Fixed Fees - statement of fees for Services rendered in accordance with the Contract;
 - (c) Time Based Fees - personnel names, hours charged, Hourly Rate and total cost for time based Services for the billing period;
 - (d) Percentage Based Fees - percentage of Services completed for the billing period based on the estimated Final Total Construction Cost;
 - (e) Cost Plus Fees
 - (f) tabulation of Allowable Disbursements by category with proof of purchase or expenditure for Allowable Disbursements within the billing period; and
 - (g) a summary table identifying approved budgets, billing period charges and total cumulative charges for each category of Services consistent with the Proposal.
- C11.8 Invoices shall be submitted and paid in Canadian Funds.
- C11.9 Invoices from non-Canadian Consultants must clearly identify labour and expenses for Services performed in Canada separate from Services performed outside of Canada. Labour performed in Canada and unsupported expenses (expenses with no receipts) will be assessed Non Resident Withholding Tax unless a Waiver has been obtained from Canada Revenue.
- C11.10 No payment will be made for charges exceeding an agreed to budget or resulting from a revision to the method of payment for any category of Services unless approved in writing by the Project Manager.
- C11.11 The Consultant agrees that Allowable Disbursements shall not exceed the maximums stated within the Contract unless approved in writing by the Project Manager. The Consultant shall

obtain the written consent of the Project Manager prior to incurring any disbursements not previously identified in the Contract.

- C11.12 The City shall endeavour to make payment in Canadian funds to the Consultant within thirty (30) Calendar Days after receipt and approval of the Consultant's invoice.
- C11.13 It is understood by the City and agreed by the Consultant that the fees are only payable when the Services have been performed to the satisfaction of the Project Manager and any partial payment in respect of a phase or part of a phase is not to be deemed a waiver of the City's rights of set-off at law under this Contract for costs or expenses arising from default or the negligence of the Consultant.
- C11.14 The City may, at its option, pay the Consultant by direct deposit to the Consultant's banking institution.

C12. FORCE MAJEURE/SUSPENSION

- C12.1 Either Party shall not be liable to the other Party for any loss, damage or other claim whatsoever, including direct or indirect losses, loss of profits, or compensation for any inconvenience, nuisance or discomfort, arising out of a force majeure as defined below, or if either Party is prevented from having access to and/or from the premises arising out of a force majeure as defined below, provided that the Party claiming a force majeure hereunder shall promptly notify the other specifying the cause and probable duration of the delay. In the case of a continuing delay, only one claim for an extension shall be necessary.
- C12.2 "Force majeure" means any circumstances beyond the reasonable control of the affected Party and not caused by its default or act of commission or omission and not avoidable by the exercise of reasonable effort or foresight by such Party. Without restricting the generality of the foregoing, force majeure shall include any one or more of the following: any act of God; embargo, confiscation, acts or restraints of governments or public authorities; wars, sabotage, act of public enemy or riot; strikes, slow-downs, lockouts or other labour or employee interruptions or disturbances, whether involving employees of that Party or of any other person over which that Party has no reasonable control; explosion, fire, radioactive contamination, flood or natural disaster. Lack of finances shall in no event be deemed to be a cause beyond a Party's reasonable control.
- C12.3 The performance of any obligation suspended or delayed due to force majeure shall resume as soon as reasonably possible after the force majeure ends and the work schedule shall be adjusted by a period of time equal to the time lost due to such delays.

C13. INDEMNITY

- C13.1 The Consultant shall use due care in the performance of the obligations under this Contract to ensure no person is injured, no property is damaged or lost, and no rights are infringed.
- C13.2 The Consultant shall indemnify and save harmless the City from and against all claims, losses, damages, costs, expenses and fees, actions and other proceedings made, sustained, brought or prosecuted in any manner based upon, occasioned by or attributable to any injury, infringement or damage arising from any negligent act, defect, error or omission of the Consultant, its servants or agents or persons for whom it has assumed responsibility, including Subconsultants, in the performance or purported performance of this Contract to a maximum of the Contract Price or two million dollars, whichever is greater.
- C13.3 Subject to C13.4, the City has the right, acting reasonably and upon notice to the Consultant, to settle any such action, proceeding, claim or demand and charge the Consultant with the amount so paid or to be paid in effecting a settlement.

- C13.4 The City and the Consultant agree that the applicable insurer will have a priority right to defend insured claims. Within fourteen (14) Calendar Days after the date on which the insurer is provided with a copy of the notice of claim, the insurer must advise the City and the Consultant if it intends to exercise its priority right to defend the claim.
- C13.5 In the event that the claim is settled by the insurer, all costs incurred in effecting the settlement are the responsibility of the Consultant and not the City.
- C13.6 In the event that the claim is unsuccessfully defended, either in whole or in part, then the City may charge the Consultant with the amount to be paid to satisfy the judgment or order.
- C13.7 The Consultant shall pay to the City the value of all reasonable legal fees and disbursements required to settle any such claim or to defend the City against any such action, proceeding, claim or demand, notwithstanding that the settlement or defence of the said action, proceeding, claim or demand was undertaken on behalf of the City by a salaried employee of the City.
- C13.8 If the Consultant fails to make any payment required to be made to the City pursuant to the foregoing, the City shall be entitled to deduct the amount of such payment from any payment required to be made by the City to the Consultant under the Contract and/or take whatever other remedies against the Consultant that the City may have at law.

C14. DEFAULT, SUSPENSION AND TERMINATION

- C14.1 An event of default will be deemed to have occurred if the Consultant:
- (a) discontinues providing the Services; or
 - (b) is adjudged bankrupt or files for bankruptcy, becomes insolvent, makes a general assignment for the benefit of its creditors, or has a receiver or liquidator appointed in respect of its assets; or
 - (c) is not performing or has not been performing the Services, or any part thereof in the City's best interests, in a competent and workmanlike manner and in all respects in strict conformity with the Contract; or
 - (d) is not progressing continuously with the Services or any part thereof, and in such a manner as to ensure the completion of the Services or any part thereof, in accordance with the time schedule referred to herein; or
 - (e) fails to comply with any laws, by-laws or statutory regulations; or
 - (f) fails to submit any schedules, documents or information required by the Project Manager; or
 - (g) refuses or neglects to comply with an order given by the Project Manager; or
 - (h) commits any other breach of this Contract.
- C14.2 If in the opinion of the Project Manager an event of default has occurred, the City may by written notice require the default to be corrected. If within thirty (30) Calendar Days after receipt of such notice by the Consultant, such default has not been corrected, the City may do any one or more of the following:
- (a) withhold or retain the whole or part of any payment;
 - (b) take the whole of the Services, or any part or parts thereof out of the hands of the Consultant;
 - (c) demand payment for any amount owed to the City;
 - (d) terminate this Contract.

- C14.3 In the event of an emergency, as a result of the default, the City reserves the right to remedy the default as necessary.
- C14.3.1 Additional costs incurred as a result of such remedy, shall be considered as set out in C14.9.
- C14.4 In addition, the City shall have the right to terminate this Contract due to a lengthy suspension or interruption of the Project as a consequence of a Force Majeure.
- C14.5 In addition, the City shall have the right to terminate this Contract for any reason whatsoever upon giving thirty (30) Calendar Days prior written notice to the Consultant.
- C14.6 Upon receipt of written notice of termination of this Contract, the Consultant shall perform no further services other than those reasonably necessary to close out its Services and pursuant to instructions provided by the Project Manager.
- C14.7 In the event that the City terminates this Contract as provided in C14.2, the City shall, upon completion of close out Services pursuant to C14.6, pay the Consultant only for the cost of the Services rendered and disbursements incurred by the Consultant in accordance with the terms of this Contract and remaining unpaid as of the effective date of such termination.
- C14.8 In the event that the City terminates this Contract as provided in C14.4 and C14.5, the City shall, upon completion of close out Services pursuant to C14.6, pay the Consultant for the cost of the Services rendered and disbursements incurred by the Consultant pursuant to the terms of this Contract and remaining unpaid as of the effective date of such termination, plus the Consultant's reasonable Termination Expenses as defined in C1.1(ss).

Set-Off

- C14.9 It is expressly understood and agreed that the City shall reserve a right of set-off for any default by the Consultant arising from the termination of this Contract, in addition to any other remedies that it may have at law.

C15. SUCCESSORS AND ASSIGNMENT

- C15.1 This Contract shall inure to the benefit of and be binding upon the parties hereto and upon their respective successors and permitted assigns.
- C15.2 The Consultant shall not, without first obtaining the prior written approval of the Project Manager, assign this Contract or any payments thereunder.
- C15.3 Further to C7.11, if the Consultant proposes to engage a Subconsultant for any portion(s) of the Project, then the following information must be provided to the Project Manager, for his/her prior approval:
- (a) the name and address of the Subconsultant;
 - (b) the services to be undertaken by the Subconsultant and how these relate to the Services of the Consultant;
 - (c) the personnel of the Subconsultant along with their qualifications who will perform the Services; and
 - (d) the fee of the Subconsultant for performing the Services.
- C15.4 Should the Consultant, upon obtaining the written consent of the Project Manager, enter into any Sub-Contract, the Consultant shall ensure that the new Subconsultant agrees in writing that all Services done by the Subconsultant shall be subject in all respects to the provisions of this Contract.

C15.5 The Consultant shall obtain the written approval of the City before changing any Subconsultant previously approved by the City, or performing Services with its own forces, and must provide the Project Manager with the information detailed in C15.3 as well as outlining the reason(s) for the change.

C16. NOTICES

C16.1 All notices, requests, nominations, consents, approvals, statements, authorizations, documents or other communications required or permitted to be given under the Contract shall be in writing and shall be delivered by hand, by facsimile transmission (fax) or by mail.

C16.2 All notices, requests, nominations, consents, approvals, statements, authorizations, documents or other communications to the City, except as expressly otherwise required in C16.3 or C16.4, or elsewhere in the Contract, shall be sent to the attention of the Project Manager.

C16.3 All notices of appeal to the Chief Administrative Officer shall be sent to the attention of the Chief Financial Officer at the following address:

The City of Winnipeg
Attn: Chief Financial Officer
Office of the Chief Administrative Officer
Susan A. Thompson Building
2nd Floor, 510 Main Street
Winnipeg MB R3B 1B9

C16.4 All notices, requests, nominations, consents, approvals, statements, authorizations, documents or other communications required to be submitted or returned to the City Solicitor shall be sent to the following address or facsimile number:

The City of Winnipeg
Legal Services
Attn: City Solicitor
185 King Street, 3rd Floor
Winnipeg MB R3B 1J1
Facsimile No.: (204) 947-9155

C16.4.1 Either party may, by giving notice, designate another address or addresses at which it will accept delivery of notices, requests, nominations, consents, approvals, statements, authorizations, documents or other communications.

C16.4.2 Delivery to the Consultant's designated supervisor at the Site shall constitute delivery to the Consultant.

C16.5 Any notices, requests, nominations, consents, approvals, statements, authorizations, documents or other communications given as provided herein shall:

- (a) if delivered by hand, be deemed to have been received on the day of receipt;
- (b) if delivered by facsimile transmission, be deemed to have been received on the day of transmission, if a Business Day, or if not a Business Day, on the Business Day next following the day of transmission; and
- (c) if delivered by mail, be deemed to have been received on the second Business Day on which mail is delivered by Canada Post following the date of mailing.

C17. ARBITRATION

C17.1 If, at any time during the term or this Contract, any dispute, difference or question shall arise between the City and the Consultant regarding the Services, then every such dispute, difference

- or question may, with the consent of the Chief Administrative Officer, on behalf of the City, and the Consultant, be referred to arbitration
- C17.2 The party desiring arbitration (the "Requesting Party") shall request the consent of the other party (the "Other Party") to refer a particular dispute, difference or question to arbitration.
- C17.3 The Other Party shall reply to the request within seven (7) Calendar Days of receiving same.
- C17.4 If the Other Party has consented to arbitration, the Requesting Party shall nominate an arbitrator (the "Requesting Party's Nominee") within seven (7) Calendar Days of receiving the reply. The Other Party shall have seven (7) Calendar Days after receiving notice of the nomination to accept or reject the Requesting Party's Nominee.
- C17.5 If the Other Party accepts the Requesting Party's Nominee, the dispute, difference or question shall be promptly referred to him/her.
- C17.6 If the Other Party rejects the Requesting Party's Nominee, it shall, within seven (7) Calendar Days of rejection, appoint its own arbitrator.
- C17.7 The Requesting Party shall, within seven (7) Calendar Days of receiving the Other Party's rejection, appoint its own arbitrator.
- C17.8 The arbitrators appointed under the foregoing sub-clauses C17.6 and C17.7 shall, within seven (7) Calendar Days of the date on which the last of them was appointed, appoint a third arbitrator (the "Panel Chair") who will act as chair of the arbitration panel.
- C17.9 The Arbitration Act (Manitoba) or any successor legislation thereto shall apply to the arbitration in all respects except as expressly otherwise provided in these General Conditions.
- C17.10 The single arbitrator or the Panel Chair, as the case may be, shall determine the procedure to be followed in the arbitration, which shall be consistent with The Arbitration Act (Manitoba) or any successor legislation thereto.
- C17.11 Where the matter proceeds with a single arbitrator, each Party shall be responsible for its own legal expenses, expenses to produce expert evidence or other expenses voluntarily incurred, and for an equal share of the fees and expenses of the single arbitrator and of any other expenses related to the arbitration.
- C17.12 Where the matter proceeds with an arbitration panel, each Party shall be responsible for its own legal expenses, expenses to produce expert evidence or other expenses voluntarily incurred, for the fees and expenses of the arbitrator appointed by it, and for an equal share of the fees and expenses of the Panel Chair and of any other expenses related to the arbitration.
- C17.13 The duties and obligations imposed upon the Consultant by the Contract and the rights and remedies available to the City hereunder shall be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed upon the Consultant or available to the City at law.
- C17.14 The determination that any provision of this Contract is invalid or unenforceable shall not invalidate this Contract. If any court of appropriate jurisdiction deems any provisions hereof unenforceable, such provision shall be modified only to the extent necessary to render it enforceable and this Contract shall be valid and enforceable and the parties hereto agree to be bound by and perform same as thus modified.
- C17.15 This Contract may be modified by the parties hereto only by mutual agreement in writing and executed by both parties.