

## Consulting Services Agreement (Non-Construction)

Contract No. xx-xxx

This consulting services agreement is between THE CORPORATION OF THE CITY OF GUELPH, an Ontario municipality (the "City"), and [LEGAL NAME OF CONSULTANT] [a/an] [jurisdiction of incorporation/formation] corporation/partnership/sole proprietor (the "Consultant").

Whereas the City wishes to retain the consultant to provide consulting services for [description of project] (the "Project") pursuant to request for [proposals/tenders] reference number xx-xxx;

And whereas the Consultant has agreed to provide the services upon the terms and conditions of this Agreement;

Now therefore, the parties agree as follows:

### Article 1 Interpretation

#### 1.1 Definitions

In this Agreement, the following terms have the following meanings:

- 1.1.1 "Agreement" means this consulting services agreement, as amended, modified or supplemented by written agreement between the parties.
- 1.1.2 "Agreement Date" means the date this Agreement is signed by the last party to sign it, as indicated by the date associated with that party's signature.
- 1.1.3 "AODA" means the *Accessibility for Ontarians with Disabilities Act, 2005*, S.O. 2005, c.11.
- 1.1.4 "Applicable Law" means, with respect to a Person, property, transaction or event, all applicable laws, statutes, regulations, treaties, judgments and decrees and (whether or not having the force of law) all applicable official directives, rules, consents, approvals, by-laws, permits, authorizations, guidelines, orders and policies of any Governmental Authority having authority over that Person, property, transaction or event.
- 1.1.5 "Business Day" means any weekday, excluding Saturday and Sunday, between 8:30a.m. to 4:30p.m., except for statutory holidays, or other days on which the administrative offices of the City are closed.
- 1.1.6 "Change Directive" means a written instruction from the City directing the Consultant to proceed with a change in the Services within the scope of the Contract Documents prior to the City and the Consultant agreeing upon any adjustment in fees or time for performance.

- 1.1.7 "Change Order" means a written amendment signed by the City and the Consultant stating their agreement upon a change in the Services and the adjustment or method of adjustment of fees and/or time for performance, if any.
- 1.1.8 "City's Requirements" consist of the written requirements and information provided by the City to the Consultant for the Project, including any terms of reference, designs, diagrams, manuals or other documents and requirements included with the Request for Proposals.
- 1.1.9 "Confidential Information" means all non-public, confidential or proprietary information (including Personal Information), whether oral, written, visual, electronic, or in any other form, relating in any way to this Agreement or made available to the receiving party, whether or not identified as "confidential", but does not include information which:
- 1.1.9.1 is or becomes public knowledge other than by a breach of this Agreement;
  - 1.1.9.2 is in the receiving party's possession without restriction in relation to disclosure on or before the date on which it is disclosed to or acquired by the receiving party; or
  - 1.1.9.3 has been independently developed by the receiving party or acquired from a source which was not subject to a duty of confidentiality to the disclosing party.
- 1.1.10 "Conflict of Interest" includes any situation or circumstance where the Consultant's other commitments, relationships, or financial interests could or could be seen to:
- 1.1.10.1 exercise an improper influence over the objective, unbiased, and impartial exercise of its independent judgement;
  - 1.1.10.2 compromise, impair, or be incompatible with the effective performance of its contractual obligations under this Agreement; or
  - 1.1.10.3 constitute a conflict with the interests of the City.
- 1.1.11 "Consultant's Proposal" means the proposal submitted by the Consultant in response to the Request for Proposals in the form accepted by the City.
- 1.1.12 "Contract Documents" means the documents listed in schedule A.
- 1.1.13 "Defaulting Party" is defined in section 12.1.
- 1.1.14 "Governmental Authority" means:
- 1.1.14.1 any federal, provincial, state, local, municipal, regional, territorial, indigenous, or other government, governmental or

public department, branch, ministry, or court, domestic or foreign, including any district, agency, commission, board, arbitration panel or authority and any subdivision of any of them exercising or entitled to exercise any administrative, executive, judicial, ministerial, prerogative, legislative, regulatory, or taxing authority or power of any nature; and

- 1.1.14.2 any quasi-governmental or private body exercising any regulatory, expropriation or taxing authority under or for the account of any of them, and any subdivision of any of them.
- 1.1.15 "Intellectual Property" includes all industrial and intellectual property rights and rights of a similar nature whether protected by statute, at common law, or in equity, including all rights in and to patents, patent disclosures and inventions (whether patentable or not), copyright, trade secrets and know-how, rights in relation to designs (whether or not registerable), rights in relation to registered and unregistered trademarks, service marks, circuit layout designs and industrial and similar designs, together with the goodwill associated with the foregoing and any derivative works, and all applications, registrations, renewals, and extensions pertaining to the foregoing.
- 1.1.16 "Loss" means any loss, liability, damage, expense, charge, fine, penalty or assessment, including the expenses of any suit, proceeding, demand, assessment, judgment, settlement or compromise and all interest, fines, penalties and professional fees and disbursements on a 100 percent, complete indemnity basis.
- 1.1.17 "Milestone Deliverable Schedule" is defined in section 3.3.1.4.
- 1.1.18 "Notice" means notification or communication from one party to the other party under this Agreement in accordance with schedule D.
- 1.1.19 "OHSA" means the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1.
- 1.1.20 "Person" will be broadly interpreted and includes a natural person, a corporation or a company of any kind, a partnership of any kind, a sole proprietorship, a trust, a joint venture, an association, an unincorporated association, an unincorporated syndicate, an unincorporated organization, or any other association, organization or entity of any kind, and a Governmental Authority.
- 1.1.21 "Project" means the project indicated in schedule A.
- 1.1.22 "Personal Information" means all information and data pertaining to an identifiable individual, other than the name, business telephone number, and business address of such individual used for the purpose of communicating with such individual in relation to the individual's employment, business, or profession.

- 1.1.23 "Representative" of a party includes every partner, associate, officer, director, employee, consultant, subconsultant, contractor, volunteer and agent of the party, and Representatives of the City include members of Council.
- 1.1.24 "Retained Intellectual Property" means any work or intellectual property of the Consultant for which the Consultant can establish through written records, the burden of which shall be upon the Consultant, that: (i) existed before the earlier of the date of this Agreement or the date that the Consultant commenced the Services; (ii) was developed independent of the Services; or (iii) constitutes processes, methodologies, experience and know-how of the Consultant, including incremental improvements thereto, learned or developed by the Consultant during the performance of the Services (except to the extent such processes, methodologies, experience and know-how incorporate City-provided Intellectual Property or City Confidential Information).
- 1.1.25 "RFP/RFT" or "Request for Tenders/Proposals" means the request for tenders or proposals, as applicable, for the Project, all addenda thereto, and all schedules, appendices, exhibits thereto and documents incorporated by reference therein.
- 1.1.26 "Services" means the consulting services to be performed under this Agreement, as described in the Contract Documents, and includes delivery of Work Product.
- 1.1.27 "Site" includes the actual work site of the Project and other locations where the checking of materials, equipment and workmanship is carried out.
- 1.1.28 "Study Area" means the area that is the subject of study or analysis within the geographic boundaries stated in the Contract Documents.
- 1.1.29 "Term" means the term of this Agreement as set forth in schedule C.
- 1.1.30 "Work Product" means all deliverables, reports, submittals, training materials and recordings, and information in any form prepared by or for the Consultant as part of the Services, including work in progress.
- 1.1.31 "WSIA" means the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c.16.

## 1.2 **Rules of Interpretation**

- 1.2.1 In this Agreement, words signifying the singular include the plural and vice versa, and words signifying gender include all genders. Every use of the words "including" or "includes" in this Agreement is to be construed as meaning "including, without limitation" or "includes, without limitation", respectively.

- 1.2.2 The division of this Agreement into articles, sections, subsections, and schedules is for convenience of reference only and does not affect the construction or interpretation of this Agreement.
- 1.2.3 Unless otherwise specified, any reference in this Agreement to a statute includes all regulations and subordinate legislation made under or in connection with that statute at any time, and is to be construed as a reference to that statute as amended, modified, restated, supplemented, extended, re-enacted, replaced or superseded at any time.
- 1.2.4 If the Consultant's Proposal includes standard terms and conditions upon which the Services shall be provided, those standard terms and conditions shall not apply and the terms of this Agreement shall supersede and be of full force and effect as against both the City and the Consultant.
- 1.2.5 Whenever a provision of this Agreement requires an approval or consent by a party to this Agreement, such consent or approval must be in writing. Where Notice of such approval or consent is not delivered within the applicable time, then, unless otherwise specified, the party whose consent or approval is required shall be conclusively deemed to have withheld its approval or consent.

### 1.3 **Currency**

All sums of money referred to in this Agreement are expressed in lawful money of Canada, unless otherwise specified.

### 1.4 **Governing law**

This Agreement is governed by and construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable in it.

### 1.5 **Entire Agreement**

This Agreement and the Contract Documents constitute the entire agreement between the parties with respect to the subject matter hereof and supersede all prior commitments, arrangements, understandings, agreements, negotiations, and discussions of the parties, whether written or oral, direct or collateral, with respect to the subject matter hereof.

### 1.6 **Severability**

Each provision of this Agreement is distinct and severable. Any provision of this Agreement, in whole or in part, determined to be invalid, void, voidable or unenforceable in any jurisdiction by any court of competent jurisdiction, shall be ineffective to the extent of such determination without affecting the validity or enforceability of the remaining provisions, in whole or in part, of this Agreement.

### 1.7 **Submission to Jurisdiction**

Each of the parties irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of the Province of Ontario to determine all issues arising

from this Agreement. To the extent permitted by Applicable Law, each of the parties irrevocably waives any objection that it might now or in the future have to the venue of any legal proceeding brought in a court of the Province of Ontario, including any claim of inconvenient forum.

### **1.8 No Third Party Beneficiaries**

This Agreement is not intended to, and does not, confer any rights or remedies on any Person other than the parties and their respective successors and permitted assigns, except as set out in Article 10 (Indemnification).

### **1.9 No Contra Proferentem**

This Agreement has been reviewed by each party's professional advisors and each party acknowledges that this Agreement expresses their agreement. If there is any ambiguity in any of the provisions of this Agreement, no rule or interpretation favouring one party over another based on authorship will apply.

### **1.10 Schedules**

The following is a list of Schedules to this Agreement:

Schedule	Subject Matter
A	Project and Services
B	Fees
C	Term
D	Notices and Communications
E	Supplementary Special Provisions

## **Article 2 Statements of Consultant**

### **2.1 Representations and Warranties**

The Consultant represents and warrants in favour of the City as follows:

- 2.1.1 it has received, read, and understands the City's Requirements and will comply with the City's Requirements;
- 2.1.2 it has carefully examined the Site or Study Area and any surrounding areas necessary for the proper performance of the Services;
- 2.1.3 the Consultant shall ensure any plans and specifications it prepares for the Project are accurate, correct and suited for use by the Contractor for the Project;
- 2.1.4 the Consultant and its Representatives shall only specify products that are fit for their intended purpose and generally known in the Consultant's industry to be in accordance with good industry practice;
- 2.1.5 it has no pecuniary interest in the business of any third party that would affect the objectivity of the Consultant in carrying out the Services. Should the Consultant acquire such an interest during the term of this Agreement, the Consultant shall notify the City immediately;

- 2.1.6 it has the financial means to meet its obligations to its employees and subconsultants and to perform the Services;
- 2.1.7 it possesses, and will require its Representatives to possess, all licenses, approvals, permits, registrations, professional designations and memberships necessary to perform the Services;
- 2.1.8 it has at its disposal and will continue to have throughout the term of this Agreement sufficient competent personnel and resources in order to perform the Services;
- 2.1.9 the personnel it assigns to perform the Services, whether directly or through subconsultants, have substantial knowledge and experience with the work required;
- 2.1.10 if the Consultant is a corporation, it is duly incorporated, amalgamated, or continued under the laws of its jurisdiction of incorporation, amalgamation, or continuance, is in good standing, and has all necessary corporate power and capacity to enter into and comply with its obligations under this Agreement;
- 2.1.11 if the Consultant is a corporation, it has taken all necessary corporate action to authorize the execution, delivery and performance of its obligations under this Agreement;
- 2.1.12 it has executed and delivered this Agreement, and this Agreement constitutes a legal, valid, and binding obligation enforceable against it in accordance with its terms, subject only to bankruptcy, insolvency, liquidation, reorganization, moratorium and other similar laws generally affecting the enforcement of creditors' rights, and to the fact that equitable remedies are discretionary remedies; and
- 2.1.13 to the best of the Consultant's knowledge, no actions, suits or proceedings are pending or threatened against or affecting the Consultant in any court, or before or by any Governmental Authority, which might adversely affect the financial condition of the Consultant, title to the Consultant's assets, or the Consultant's ability to comply with its obligations under this Agreement.

## 2.2 **Residency**

The Consultant is not a non-resident of Canada for purposes of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.). In the event that the Consultant ceases to be a resident of Canada, it shall promptly notify the City, in which case the City may deduct from all payments due to the Consultant under this Agreement such sums as might be required in order to satisfy withholding obligations under Applicable Law.

## 2.3 **Representations and Warranties Continuously Given**

The representations and warranties of the Consultant are deemed to be continuously given throughout the Term of this Agreement. The Consultant shall notify the City promptly of any change in the accuracy of the representations and warranties contained in this Article 2. Upon request by the City, the Consultant shall certify to the City that the representations and warranties of the Consultant contained in this Article 2 remain true and correct as of the date requested by the City.

### **Article 3 Consulting Services**

#### **3.1 Retainer**

3.1.1 The City hereby retains the Consultant to provide the Services, and the Consultant accepts the retainer and shall provide the Services to the City, under the general direction and control of the City.

3.1.2 The Consultant shall obtain and supply all personnel, equipment, materials, accommodations, travel, insurance, transportation, and all communications, administrative, technical, and other support services necessary to provide the Services, except those specified in the Contract Documents to be supplied by the City, and such costs and expenses are included in the fees set out in schedule B.

#### **3.2 Consultant Obligations**

3.2.1 During the Term of this Agreement, the Consultant will serve as a professional consultant to the City with responsibility for providing the Services.

3.2.2 The Consultant shall appoint the Representative named in schedule D to act as the primary contact with respect to all matters pertaining to this Agreement.

3.2.3 No later than five (5) Business Days following the Agreement Date, and prior to commencing the Services, the Consultant shall provide to the City all security, proofs of insurance and other proofs of compliance required under this Agreement.

3.2.4 The Consultant shall consult with the City prior to commencing the Services. The City may refuse to accept any Services commenced or completed without satisfactory prior Notice and may direct the Consultant to redo such Services at no expense to the City. Where the Services are provided in phases, the Consultant shall not commence work on the next phase of the Services until the City provides authorization to proceed.

3.2.5 Unless otherwise provided in the Contract Documents, where the work of the Consultant is subject to the approval or review of a Governmental Authority other than the City, applications for such approval or review shall be the responsibility of the Consultant. The Consultant shall submit such applications through the offices of the City, and, unless authorized by the



City, the Consultant shall not seek or obtain any such approval or review by direct contact with such Governmental Authority.

- 3.2.6 The Consultant shall ensure that it, and every Person for whom the Consultant is responsible at law, avoids causing damage to real property, personal property, or activities in the course of performance of the Services. If damage occurs, the Consultant shall, at the option and upon direction of the City, repair such damage, or provide undamaged replacements at the Consultant's sole expense and to the satisfaction of the City.

### 3.3 **Schedule of the Services**

- 3.3.1 No later than five (5) Business Days following the Agreement Date, or by such later date as the City may specify in writing, the Consultant shall, in consultation with the City, prepare and present to the City a work plan for the provision of the Services, including the following:
- 3.3.1.1 if fees are to be calculated on a time basis, an estimate of the total fees to be paid for the Services;
  - 3.3.1.2 if fees are to be calculated on a time basis, an estimated staffing schedule for Representatives of the Consultant engaged in the Services, indicating the number of hours, hourly rates, and the particular portions of the Services to be provided by such Representatives;
  - 3.3.1.3 an estimated progress schedule for the provision of each portion of the Services, showing an estimate of the portion of the Services to be completed in each month and an estimate of the portion of the fee which will be payable each such month; and
  - 3.3.1.4 where applicable, a milestone deliverable schedule for each phase of the Services, including a review period following completion of each phase ("Milestone Deliverable Schedule").
- 3.3.2 Unless otherwise specified in this Agreement, on a monthly basis, and at other times upon request by the City, the Consultant shall provide reports to the City on the Services, including opinions regarding progress of the Services, any variances from the schedules provided under section 3.3.1, and explanations for such variances. The reports shall be in a form and substance satisfactory to the City.
- 3.3.3 Without limiting the generality of section 3.4, the Consultant will require prior written approval from the City, reflected in a Change Order, for any of the following changes:
- 3.3.3.1 any increase in the fees beyond those specified in this Agreement;

- 3.3.3.2 any change in the number, classification and hourly rate ranges of the Representatives provided under section 3.3.1.2;
- 3.3.3.3 any material change in the progress schedule provided under section 3.3.1.3; and
- 3.3.3.4 any change in the Milestone Deliverable Schedule provided under section 3.3.1.4.

#### **3.4 Change Orders; Change Directives**

- 3.4.1 The City may make additions, deductions or other changes in the Services at any time by issuing a Change Order or Change Directive. The Consultant shall not be required to proceed with a change in the Services until receipt of a Change Order or Change Directive. Upon receipt of a Change Order or Change Directive, the Consultant shall proceed with the change in the Services.
- 3.4.2 The Change Order shall specify the agreed adjustment or method of adjustment to the fees in respect of the change in Services and the agreed adjustment to the time for performance of the Services, if any, whether an increase or reduction. Any adjustments to the fees shall be determined based on the block/unit fees or hourly rates set forth in schedule B or the staffing schedule delivered under section 3.3.1.2 or otherwise approved in writing by the City. A Change Order shall represent the Contractor's full compensation for all costs, expenses, and any adjustment in time for performance associated with the change(s) for which it was issued and the Contractor shall not be entitled to claim any further costs, expenses or extensions of time for such change(s).
- 3.4.3 Prior to finalization of a Change Order, the City may instruct the Consultant to proceed with additional or changed work by issuing a Change Directive. Upon receipt of a Change Directive, the Consultant shall immediately proceed with the change(s) to the Services as identified in the Change Directive. The parties shall finalize a Change Order as soon as practicable after issuance of a Change Directive, acting reasonably. Prior to the finalization of the relevant Change Order, the Consultant shall be entitled to reimbursement for pre-approved, reasonable, documented additional costs incurred in respect of a Change Directive, determined based on the hourly rates set forth in the staffing schedule delivered under section 3.3.1.2, and any additional expenses incurred in respect of the Change Directive charged at cost. The City shall have no liability whatsoever for any claim for costs or expenses incurred by the Consultant in respect of a Change Directive which were not authorized in advance by the City.
- 3.4.4 The Consultant shall not be entitled to any compensation for loss of anticipated profit or allocated overhead resulting from changes made by the City to the scope of the Services.

### 3.5 **Performance Standards**

- 3.5.1 The Consultant shall, and shall cause its Representatives to:
- 3.5.1.1 act honestly, in good faith, with a view to the best interests of the City in the performance of the Services;
  - 3.5.1.2 exercise the care, skill, competence and diligence of at least the degree of care, skill, competence and diligence exercised by qualified, diligent and prudent professionals performing similar services for a similar project at the time such services are rendered, and in compliance with Applicable Laws governing the Consultant's profession;
  - 3.5.1.3 give the City the full benefit of its skills, qualification, experience, knowledge and professional expertise in the performance of the Services;
  - 3.5.1.4 perform the Services efficiently, effectively, economically, in a good and competent manner in compliance with Applicable Laws and the requirements of the Contract Documents; and
  - 3.5.1.5 the Consultant shall perform the Services to meet the City's Requirements unless the City provides written direction or approval in accordance with this Agreement.
- 3.5.2 If the Services include design services, the design services shall be provided by design professionals licensed in the Province of Ontario who are employees of or retained by the Consultant. All design documents shall be properly sealed or stamped, as applicable, by licensed design professionals. The Services shall comply with, and be based upon, the City's Requirements for the Project. If, in the Consultant's professional opinion, the City's Requirements contain errors, material omissions, or may not be functional, the Consultant shall promptly advise the City in writing.
- 3.5.3 All Services must be completed strictly in accordance with the Milestone Deliverables Schedule, as may be amended in accordance with this Agreement.
- 3.5.4 The City, or persons authorized by the City, may at all reasonable times inspect or otherwise review the Services performed, or being performed, and will be the sole judge of the adequacy and value of the Services performed. The City may order such changes to the manner of providing the Services that it believes to be necessary or desirable to comply with this Agreement.
- 3.5.5 Upon receipt of a written request from the City, the Consultant shall immediately correct, at the cost and expense of the Consultant, any non-

conformance by the Consultant or its Representatives with this Agreement, including with the performance standards in section 3.5.1.

### **3.6 Format of Work Product**

- 3.6.1 The Consultant shall consult with and obtain prior written approval from the City of all software to be used to generate Work Product, which shall at a minimum be in accordance with current industry standard and compatible with the City's current software products.
- 3.6.2 All Work Product(s) shall be in native file format as specified in the Contract Documents or otherwise approved by the City and to the City's satisfaction.
- 3.6.3 If any of the Work Product, in the opinion of the City, is inadequately provided or requires correction, the Consultant shall forthwith make the necessary corrections at its own expense as specified by the City in writing.

### **3.7 Records and Audit**

- 3.7.1 The Consultant shall keep and maintain detailed records of the Services, including with respect to changes, claims, delays, disputes, and all necessary records to substantiate charges and payments under the Agreement and that all Work Product was provided in accordance with the Contract Documents. Upon request by the City, the Consultant shall provide timesheets of hours worked by its Representatives and copies of receipts with respect to any expenses or disbursement for which the Consultant claims payment under this Agreement.
- 3.7.2 The Consultant shall retain the records for a period of seven (7) years following expiry or termination of this Agreement. During this period, the City may upon request, and acting reasonably, require copies of, inspect, and audit all records relating to the Services. The City may be assisted by a third-party audit firm of the City's choice.

### **3.8 Consultant's Representatives**

- 3.8.1 The Consultant shall provide the Services through Representatives approved in writing by the City. The Consultant shall not change any Representative through whom it provides Services to the City, without the City's prior written approval. Any replacement Representative must have equal or greater experience and qualifications as the Representative they are replacing and the City shall not be responsible for any additional costs.
- 3.8.2 The Consultant may, with the prior written approval of the City, engage subconsultants to assist with the provision of the Services. The Consultant may not change any authorized subconsultants under this Agreement without the prior written approval of the City.

- 3.8.3 The Consultant shall ensure that its Representatives through whom it provides the Services:
- 3.8.3.1 have the requisite competence, knowledge, skill, ability, experience, expertise and qualifications to provide the Services;
  - 3.8.3.2 meet the performance standards in section 3.5.1; and
  - 3.8.3.3 when on Site or at the City's premises, are of professional appearance, are identifiable as members of the Consultant's Representatives, and maintain good conduct.

3.8.4 The Consultant shall:

- 3.8.4.1 coordinate the activities of its Representatives;
- 3.8.4.2 be responsible for all wages, benefits, withholdings for tax purposes, and all other liabilities and expenses relating to its Representatives; and
- 3.8.4.3 be fully responsible for every act or omission of its Representatives and Persons retained directly or indirectly by them.

3.9 **Media Communications**

- 3.9.1 The Consultant will not, without the prior written consent of the City, make or publish any remark, comment, statement, whether written or verbal, regarding this Agreement or the Services, including on any business or personal social media account or in response to public or media inquiries.

3.10 **Status of Consultant**

- 3.10.1 The Consultant is an independent contractor of the City. Nothing in this Agreement is intended or shall be deemed to constitute a partnership, agency, employer-employee or joint venture relationship between the parties.
- 3.10.2 Except and to the extent specified in the Contract Documents, the Consultant has no authority to act as agent for or enter into any contract or commitment in the name or on behalf of the City or to represent or bind the City in any manner.

3.11 **Default by Consultant**

In the event of default by the Consultant of its obligations under this Agreement, the City shall have the right, without prejudice to any other rights or remedies, to take one or more of the following steps:

- 3.11.1 give the Consultant Notice of the default and time to cure it and hold the Consultant responsible for any Loss suffered by the City as a result of the default;

- 3.11.2 assign one or more of its Representatives to supervise and work with the Consultant to correct and mitigate the effects of the Consultant's default;
- 3.11.3 suspend the Consultant's right and obligation to perform the Services until such time as the Consultant is able to demonstrate to the City's reasonable satisfaction that the Consultant can satisfactorily meet its obligations under this Agreement; and
- 3.11.4 retain one or more other Persons to provide any or all of the Services and deduct the expense of such retention from amounts payable by the City to the Consultant.

### 3.12 **Force Majeure**

- 3.12.1 Any delay or failure of either party to comply with its obligations under this Agreement will be excused to the extent that such failure or delay was caused directly by an event beyond that party's reasonable control, without such party's fault or negligence, and that by its nature could not have been foreseen by such party or, if it could have been foreseen, was unavoidable (a "Force Majeure Event").
- 3.12.2 If a party is affected by a Force Majeure Event it shall immediately and, in any event, no later than three (3) days following the occurrence of such event, provide Notice to the other party. The Notice shall include a description of the nature and any actual or potential impact of the Force Majeure Event. No extensions of time shall be granted unless Notice is given to the City under this section. The affected party shall take all reasonable measures to mitigate the effect of any Force Majeure Event. In the case of a continuing Force Majeure Event, the Consultant shall provide updates to the City at reasonable intervals on the actual and potential impact of the continuing event.
- 3.12.3 If a party is delayed or prevented from performing any obligation under this Agreement due to the occurrence of a Force Majeure Event, the time within or by which such party is required to perform such obligation shall be extended for a period equal to the time such party was prevented from performing such obligation as a result of a Force Majeure Event. A party's right to receive payment for any actions that were to be undertaken during a Force Majeure Event shall be suspended for the period during which it was unable to perform such action.
- 3.12.4 The Consultant shall not be entitled to payment for costs incurred as a result of delay due to a Force Majeure Event unless such delay was the direct result of actions by the City or its Representatives.

### 3.13 **Conflicts of Interest**

- 3.13.1 During the Term, the Consultant shall:
  - 3.13.1.1 avoid any Conflict of Interest in the performance of the Services;

- 3.13.1.2 immediately disclose to the City any actual or potential Conflict of Interest that arises during the performance of the Services; and
- 3.13.1.3 comply with all requirements imposed by the City to resolve any actual or potential Conflict of Interest that arises during the performance of the Services.
- 3.13.5 If an actual or potential Conflict of Interests arises during the Term, the City may, at its discretion, suspend the Services until the conflict is resolved to the City's satisfaction, or terminate the Agreement.

#### **Article 4 City Obligations**

- 4.1 The City shall appoint the Representative named in schedule D to act as the City's primary contact with respect to all matters pertaining to this Agreement.
- 4.2 The City shall provide reasonable instructions and guidance to the Consultant and make available, at reasonable times, relevant City Representatives for the purpose of consultation.
- 4.3 The City shall use reasonable efforts to make available to the Consultant any reports, background information, data, drawings, plans, surveys and any other materials relevant to the Services which are in its possession; provided that the Consultant shall not be entitled to rely on any such materials unless the City has authorized such reliance in writing.
- 4.4 When the Consultant requires a decision from the City related to the Services, the City shall give due consideration to all relevant designs, drawings, plans, specifications, reports, tenders, proposals and other information submitted by the Consultant, and shall make such decision within a reasonable time.

#### **Article 5 Fees, Invoicing and Payment**

##### **5.1 Fees**

- 5.1.1 For the Services to be performed under this Agreement, the City will pay up to the fees set out in schedule B, and such additional or other amounts as the parties have agreed in writing. No fee rate or block/unit fee increase will be effective unless the City has provided its prior written approval.
- 5.1.2 The Consultant may charge the City for any expenses that the City has agreed in writing to pay.
- 5.1.3 The Consultant may charge the City for Harmonized Sales Tax on amounts payable by the City to the Consultant.

5.1.4 The Consultant shall only charge the City for the portion of Services actually performed, either at the applicable block/unit fee, or for the pro-rated portion of the fees for Services performed up to the earlier of:

5.1.4.1 the date upon which the City gave the Consultant Notice to discontinue Services; or

5.1.4.2 the date the Consultant is able to safely discontinue Services already commenced.

## 5.2 **Invoicing**

5.2.1 Unless otherwise specified in this Agreement, the Consultant shall submit invoices on a monthly basis including the following, as applicable:

5.2.1.1 Consultant's name and address;

5.2.1.2 the date of the invoice and the period during which invoiced Services were supplied;

5.2.1.3 identifying the Agreement under which Services were supplied;

5.2.1.4 a description of the Services supplied;

5.2.1.5 the amount payable for the Services supplied;

5.2.1.6 the name, title, telephone number and mailing address of the person to whom payment is to be sent;

5.2.1.7 the number of hours worked and hourly rate, for each of its Representatives;

5.2.1.8 the portions of the Services subject to block/unit fees which have been completed;

5.2.1.9 the amount of pre-approved disbursements for which the Consultant is requesting reimbursement;

5.2.1.10 the amount of Harmonized Sales Tax payable on amounts charged;

5.2.1.11 a cumulative invoiced-to-date figure, as well as updated monthly payment forecast and updated forecast final account figure, as applicable; and

5.2.1.12 such other accompanying documentation reasonably requested by the City to evidence amounts charged.

5.2.2 The Consultant shall provide monthly contract status reports with each invoice, summarizing contract progress, schedule of work, change orders and associated costs, quality control deviations, infraction reports, and actions or risks associated with contract completion on schedule or budget.



- 5.2.3 Upon request by the City, the Consultant shall make available full accounts, records, receipts, vouchers and documents to substantiate the Consultant's charges.
- 5.2.4 Unless otherwise approved through Change Order, the Consultant is not entitled to invoice for fees and disbursements exceeding the upset cost estimate for specified tasks or Services as outlined in schedule B.
- 5.2.5 Unless otherwise approved through Change Order, the Consultant is not entitled to reallocate budget within or between specified tasks or Services.

### **5.3 Payment**

- 5.3.1 The City may review any account rendered by the Consultant and is not required to pay such account until the City has completed its review.
- 5.3.2 Except for invoiced amounts or any portion thereof that the City has successfully disputed, the City shall pay the Consultant all invoiced amounts within twenty eight (28) days of receipt by the City of a proper invoice.
- 5.3.3 No payments made by the City under this Agreement shall constitute an acceptance of any portion of the Services which is not in accordance with the requirements of this Agreement.
- 5.3.4 In the event that payment to the Consultant is in arrears, for any reason, the City shall have no obligation to pay interest, and the Consultant shall have no entitlement to receive any interest. The Consultant's right to its earned but unpaid fees shall be the Consultant's exclusive remedy for breach of the City's payment obligations.

## **Article 6 Compliance by Consultant with Laws and Policies**

### **6.1 Compliance with Laws General**

In providing the Services, the Consultant shall comply with Applicable Laws. If the City gives Notice that the Consultant is not in compliance with any Applicable Law, then the Consultant shall promptly correct the non-compliance.

### **6.2 Workplace Safety and Insurance Act, 1997**

- 6.2.1 If, at the Agreement Date, the Consultant is subject to the insurance requirements under the WSIA, it shall provide to the City a current clearance from the Workplace Safety and Insurance Board within ten (10) days after the Agreement Date.
- 6.2.2 If, at the Agreement Date, the Consultant is not subject to the insurance requirements under the WSIA, it shall provide to the City proof of such status within ten (10) days after the Agreement Date.

- 6.2.3 If the Consultant's status changes after the Agreement Date such that the Consultant becomes subject to the insurance requirements under the WSIA, it shall provide to the City a current clearance from the Workplace Safety and Insurance Board within ten (10) days after such status change.
- 6.2.4 The Consultant shall provide the City with a current clearance from the Workplace Safety and Insurance Board whenever an existing clearance has expired, and from time to time upon request by the City.

### 6.3 **Occupational Health and Safety Act**

The Consultant (and not the City) shall:

- 6.3.1 comply, and enforce compliance by its Representatives, with the OHSA and all regulations thereunder;
- 6.3.2 be the employer, as defined in the OHSA, in respect of workers employed or whose services are contracted for by the Consultant for provision of the Services;
- 6.3.3 ensure that its written occupational health and safety policy under the OHSA meets, at a minimum, the City's health and safety policy; and
- 6.3.4 promptly provide the City with a copy of all correspondence, reports, compliance orders, charges or other documents it receives under the OHSA that apply to any of the Services.

### 6.4 **Accessibility for Ontarians with Disabilities Act, 2005**

- 6.4.1 The Consultant shall comply, to the extent applicable, with the AODA in respect of all Services provided by the Consultant on behalf of the City.
- 6.4.2 Without limiting the generality of the foregoing, the Consultant shall:
  - 6.4.2.1 ensure that the Consultant and all of its Representatives supplying the Services are in full compliance with the training requirements of section 7 and section 80.49 of Ontario Regulation 191/11, Integrated Accessibility Standards, made under the AODA; and
  - 6.4.2.2 provide all final Work Product and any other Work Product identified by the City as intended website content in an accessible format that complies, at a minimum, with the World Wide Web Consortium Web Content Accessibility Guidelines 2.0 Level AA and the City's guidelines for accessible documents. Drawings shall be made accessible in accordance with the requirements of the Contract Documents and the City's guidelines for accessible documents. Notwithstanding the foregoing, provided the Consultant has complied with section 3.6 of this Agreement regarding format of Work Product, if the City Representative agrees that any Work Product cannot be

provided in accessible format due to unavailability of commercial software or tools, an equitable accessible alternative shall be coordinated between one of the City's Representative and the Consultant.

## **6.5 City Bylaws and Policies**

- 6.5.1 Without limiting the generality of Section 6.1, the Consultant shall comply with all applicable City bylaws and policies, including building and planning bylaws and policies relating to conflict of interest, workplace safety and insurance, occupational health and safety, contractor safety, human rights, accessibility (including the City's Facility Accessibility Design Manual, where applicable), and such other policies as may be specified by the City. The City shall make copies of all applicable City policies available to the Consultant.
- 6.5.2 If the City gives Notice that the Consultant is not complying with any applicable bylaw or policy of the City, then the Consultant shall promptly correct the non-compliance.

## **Article 7 Insurance**

### **7.1 Policies**

- 7.1.1 Without restricting the generality of the provisions in this Agreement related to indemnification, the Consultant shall, at its own expense, purchase and maintain the following insurance, with insurers licensed to transact insurance business in Ontario and in form satisfactory to the City:
- 7.1.1.1 commercial general liability insurance covering all liabilities for personal injury and property damage arising from the Services, including personal injury, death, damage to and loss of use of property, with limits of not less than \$5,000,000 for each occurrence;
  - 7.1.1.2 if the Consultant will use or provide for use of motor vehicles in performing the Services, automobile (motor vehicle) insurance covering all liabilities for personal injury and property damage arising from the use of such vehicles, with limits of liability of not less than \$2,000,000 for each occurrence, and including:
    - (a) standard owner's form automobile policy providing third party liability and accident benefits insurance,
    - (b) coverage of licensed vehicles owned or operated by or on behalf of the Consultant,
    - (c) standard non-owned automobile form policy including contractual liability endorsement; and

- 7.1.1.3 professional liability insurance with limits of liability of not less than \$2,000,000 per claim and subject to an annual aggregate of not less than \$2,000,000; and
    - 7.1.1.4 any additional coverage specified in the Request for Proposals.
  - 7.1.2 The Consultant shall ensure that the foregoing insurance names "The Corporation of the City of Guelph" as additional insured and is endorsed to provide the City with not less than thirty (30) days' Notice, in advance, of any cancellation, change, or amendment of the Consultant's insurance coverage.
  - 7.1.3 The Consultant shall ensure that the foregoing insurance, except professional liability insurance, is primary and non-contributory.
- 7.2 **General**
  - 7.2.1 On or prior to the Agreement Date and from time to time upon request by the City, the Consultant shall provide certificates of insurance and endorsements as evidence of the insurance required under this Agreement.
  - 7.2.2 If any of the Consultant's insurance policies expire during the Term, the Consultant shall promptly renew or replace it, and, within sixty (60) days after such expiry, provide to the City evidence satisfactory to the City of the renewed or replaced policy.
  - 7.2.3 The Consultant shall not do or omit to do anything that would impair or invalidate any of its insurance policies.
  - 7.2.4 If the Consultant fails to take out or maintain the insurance required under this Agreement or provide proof of insurance, the City may, at its option, terminate this Agreement with immediate effect.

## **Article 8 Confidentiality**

### **8.1 General**

The Consultant shall:

- 8.1.1 keep Confidential Information confidential and protect and safeguard the City's Confidential Information with at least the same degree of care as the Consultant would protect its own Confidential Information, but in no event less than a commercially reasonable degree of care;
- 8.1.2 not use Confidential Information or permit it to be accessed or used for any purpose other than to comply with its obligations under this Agreement;

- 8.1.3 not copy or transcribe into another form any Confidential Information received from the City except as reasonably necessary to comply with its obligations under this Agreement;
- 8.1.4 not disclose any Confidential Information to any Person except to the Consultant's Representatives who need to know the Confidential Information to assist the Consultant, or act on its behalf, in exercising its rights or complying with its obligations under this Agreement and who are informed of the confidential nature of the Confidential Information;
- 8.1.5 ensure that its Representatives comply with all the provisions of this Agreement relating to Confidential Information and the Consultant shall be responsible for any breach or failure by any Representative of the Consultant to do so; and
- 8.1.6 if the Consultant becomes aware of a breach of any provision of this Agreement relating to Confidentiality, the Consultant shall immediately give the City Notice of such breach and take all necessary steps to limit the extent and impact of the breach.

## 8.2 **Disclosure**

- 8.2.1 Subject to section 8.2.3, if, in the opinion of the Consultant's counsel, the Consultant or any of its Representatives is required to disclose the City's Confidential Information under Applicable Law, the Consultant shall first provide the City with prompt written Notice of such requirement so that the City may seek a protective order or other remedy to prevent the disclosure. The Consultant shall, at the Consultant's sole expense, provide reasonable assistance in opposing such disclosure or seeking a protective order or other limitations on disclosure.
- 8.2.2 If, after providing such Notice and assistance, a protective order or other remedy is not obtained, the Consultant or such Representative of the Consultant to whom such requirement is directed, will furnish only that portion of the Confidential Information which on the written advice of the Consultant's counsel is legally required to be disclosed and, upon the City's request, use its commercially reasonable efforts to obtain assurances that confidential treatment will be accorded the Confidential Information.
- 8.2.3 The Consultant specifically acknowledges that the City is subject to the Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56, and that the law might compel the City to disclose certain Confidential Information. The City is not required to take steps to oppose or prevent, or assist the Consultant in opposing or preventing, any disclosure of Confidential Information which, in the opinion of the City's counsel, is legally required to be disclosed.

## 8.3 **Remedies**

The parties acknowledge that monetary damages would not be a sufficient remedy for any breach or threatened breach of the confidentiality provisions in this Article 8. Therefore, in addition to all other remedies available, the non-breaching party may seek specific performance and injunctive and other equitable relief as a remedy for a breach or threatened breach.

#### **8.4 Return or Destruction of Confidential Information**

- 8.4.1 Subject to section 8.4.2, upon the expiration or termination of this Agreement, and during the Term upon the request of the City, the Consultant shall, within three (3) Business Days following the expiry, termination or request, destroy or return (as directed by the City) all copies, extracts, notes or other reproductions of the Confidential Information disclosed to the Consultant.
- 8.4.2 The Consultant may retain any copies of Confidential Information which are:
  - 8.4.2.1 included in any materials that document a decision to terminate this Agreement, or otherwise to cease communications with the City;
  - 8.4.2.2 required to comply with the Consultant's internal record-keeping policies or Applicable Law; or
  - 8.4.2.3 maintained as archive copies on the Consultant's disaster recovery and/or information technology backup systems, where such copies will be destroyed upon the normal expiration of the Consultant's backup files.
- 8.4.3 The Consultant and its Representatives will continue to be bound by the terms of sections 8.1 and 8.2 with respect to any Confidential Information retained in accordance with this section 8.4.

### **Article 9 Intellectual Property**

#### **9.1 Ownership and Title**

- 9.1.1 All Work Product and all Intellectual Property Rights to all Work Product, excluding Retained Intellectual Property, will be owned by and be the sole and exclusive property of the City. For greater certainty, all work done by the Consultant in performance of the Services is work for hire of which the City is the first author for copyright purposes and in respect of which copyright will vest in the City. The Consultant hereby transfers and assigns all right, title, and interest in and to all Work Product to the City.
- 9.1.2 The Consultant hereby grants the City a perpetual, irrevocable, non-exclusive, royalty-free, fully-transferrable licence to:
  - 9.1.2.1 use, reproduce, copy, transmit, modify and create derivative works from any Retained Intellectual Property that is

incorporated into or necessarily used with the Work Product or the Project; and

- 9.1.2.2 disclose or sublicense any or all rights to any Retained Intellectual Property granted to the City in this section 9.1.2 to any Person who requires such Retained Intellectual Property or rights in connection with the City's use of the Work Product.

## 9.2 **Intellectual Property Representations and Warranties**

9.2.1 The Consultant represents and warrants to the City that:

- 9.2.1.1 none of the Services, the Work Product, or the City's use of the Services or Work Product will infringe or constitute a misappropriation of the Intellectual Property rights of any Person;
- 9.2.1.2 there is no claim, demand or suit, or to the knowledge of the Consultant any potential claim, demand or suit, respecting the Work Product or the Retained Intellectual Property, in whole or in part, that could affect the performance, function or use of the Work Product or Retained Intellectual Property, in whole or in part, as intended by this Agreement;
- 9.2.1.3 before transferring ownership in the Work Product to the City, the Consultant is the exclusive owner of, and has good and marketable title to, all the Work Product. Except for the Consultant's Intellectual Property Rights in the Retained Intellectual Property, there is no agreement, option or other right, title, benefit, interest or privilege outstanding in favour of any Person for the purchase, licence, or security interest in, any of the Work Product; and
- 9.2.1.4 the Consultant has the right to grant the licence rights in the Retained Intellectual Property under section 9.1.2 and will obtain such rights from subconsultants.

## 9.3 **Records**

The Consultant will keep complete, accurate and authentic notes, reference materials, data, and records of all Work Product. All Work Product will be Confidential Information upon its creation.

## 9.4 **Waiver of Moral Rights**

The Consultant hereby irrevocably waives all moral rights arising under the Copyright Act, R.S.C., 1985, c. C-42 or similar legislation in any applicable jurisdiction, or at common law, that the Consultant has or might have with respect to the Work Product, including any rights that the Consultant might possess to have its name associated with, or dissociated with, the Work Product, any right the Consultant might have to prevent the alteration or destruction of the Work Product,

and any rights the Consultant might have to control the use of the Work Product. This waiver may be invoked by the City or any of its Representatives in respect of any or all of the Work Product and the City may assign the benefit of this waiver to any Person.

## **9.5 Further Assurances**

The Consultant shall promptly sign and deliver any further documents and instruments and take such further and other actions necessary or desirable to give effect to the provisions of this Article 9.

## **Article 10 Indemnification**

### **10.1 Indemnification by Consultant**

- 10.1.1 Subject to section 10.1.2, the Consultant shall indemnify and save harmless the City and the City's Representatives from and against all Losses which arise or result, directly or indirectly, from the fraud, negligent act or omission, or wilful misconduct of the Consultant, any Representative of the Consultant, or any other Person for whom the Consultant is in law responsible in connection with this Agreement and the provision of the Services except to the extent the Loss is caused by the fraud, negligent act or omission, or wilful misconduct of the City or any of its Representatives.
- 10.1.2 The Consultant will not be liable for any Loss arising from errors or omissions in any of the information that the City is required to provide to the Consultant, unless the Consultant had actual or imputed knowledge of such error or omission, or the City has disclaimed reliance on such information.
- 10.1.3 For the purpose of the Consultant's obligation to indemnify the City's Representatives, the parties acknowledge that the City is acting as the agent and trustee for its Representatives.
- 10.1.4 In no event shall the Consultant be liable under this section 10.1 for any special, indirect or consequential damages.

### **10.2 Third Party Claims**

- 10.2.1 Upon receipt by the City of a claim from a third-party, the City may, at its option, permit the Consultant to assume the defence of such third party claim or require the Consultant to cooperate with the City in the defence, including providing the City with prompt Notice of any possible Loss and providing the City with all information and material relevant to the possible Loss.
- 10.2.2 If the Consultant has assumed defence of a third-party claim, the Consultant shall not settle or compromise such claim without prior written consent of the City. Any settlement of any claim by the Consultant shall



not include an admission of liability or wrongdoing and must include a full and complete release of the City.

### **10.3 Continuing Obligation**

The indemnities in this Article 10 are continuing and irrevocable obligations of the Consultant and will not be released, discharged, impaired or affected by any extensions of time or variations of obligations which the City may grant or permit, or any waiver by or neglect or failure of the City to enforce any of the terms, obligations, and conditions in respect of this Agreement.

## **Article 11 Suspension of Services**

- 11.1 The City may at any time, for any reason, and without affecting the validity of this Agreement, suspend the Services in whole or in part for such period of time as the City may specify by Notice to the Consultant.
- 11.2 Promptly following receipt of a Notice of suspension from the City, the City may require the Consultant to provide a report to the City detailing all Services provided to the effective date of suspension, including all Work Product developed and copies of all drawings, along with an invoice for unpaid amounts for such Services, and the City shall render payment in accordance with Article 5. In the event the Services are not resumed and this Agreement is terminated in accordance with Article 12, the payment made by the City pursuant to this section shall be deemed to be a final settlement of all amounts owing to the Consultant under this Agreement.
- 11.3 The City may direct the Consultant to resume suspended Services by providing Notice of resumption. Such Notice of resumption shall provide a minimum of five (5) Business Days' notice before the Consultant shall be required to resume performance. The Consultant shall be entitled to an extension of time equal to the length of the suspension but shall not be entitled to additional compensation or reimbursement of losses, costs or damages. For greater certainty, in no event shall the City be liable to the Consultant for any loss of anticipated profit, allocated overhead, or any punitive, special, incidental or consequential damages arising from or related to suspension of the Services.
- 11.4 If a suspension of Services continues for more than 90 consecutive calendar days, the Consultant may terminate this Agreement by giving thirty (30) days' prior written Notice to the City. If the Services are resumed by the City prior to the effective date of termination as stated in the Notice from the Consultant, the Notice of termination shall be of no further force and effect.

## **Article 12 Termination**

### **12.1 Power to Terminate**

- 12.1.1 The City may terminate this Agreement at any time and for any reason by providing at least thirty (30) days' prior written Notice to the Consultant.

- 12.1.2 Either party may terminate this Agreement, effective upon written Notice to the other party (the "Defaulting Party"), if the Defaulting Party:
- 12.1.2.1 breaches a material term of this Agreement or fails to properly perform its obligations under this Agreement and such breach or failure is incapable of cure, or, with respect to a breach or failure capable of cure, the Defaulting Party does not cure such breach or failure to the satisfaction of the non-defaulting party within five (5) Business Days after receipt of written Notice from the non-defaulting party;
  - 12.1.2.2 becomes insolvent, admits its inability to pay its debts generally as they become due, makes an assignment for the benefit of creditors or is the subject of any proceedings under any bankruptcy or insolvency law;
  - 12.1.2.3 winds up, dissolves, liquidates or takes steps to do so or otherwise ceases to function as a going concern;
  - 12.1.2.4 if a receiver or other custodian, interim or permanent, of any of the assets of the Defaulting Party is appointed by private instrument or by court order, or if any exertion or other similar process of any court becomes enforceable against the Defaulting Party or its assets, or if distress is made against any of the Defaulting Party's assets; or
  - 12.1.2.5 undergoes a change of control by way of (a) merger, consolidation or acquisition with, by, or into another Person, (b) a change in the ownership, directly or indirectly, of more than fifty percent (50%) of its voting capital stock in one or more related transactions, or (c) the sale or transfer of all or substantially all its assets.
- 12.1.3 If this Agreement extends into a fiscal year of the City subsequent to its execution, continuation of the Agreement is conditional upon an appropriation of funds by the City sufficient to satisfy payments due under the Agreement. In the event that such funds are not available as a result of: (i) non-appropriation for the fiscal year in which payment becomes due; and (ii) the payment being neither charged nor chargeable to an appropriation for a previous fiscal year, the City may terminate the Agreement upon Notice to the Consultant and such termination shall become effective on the first day of the fiscal year for which funds have not been appropriated.
- 12.2 **Effect of Termination**
- 12.2.1 Upon receipt of Notice of termination, the Consultant shall perform no further Services other than those reasonably necessary to close out the Consultant's Services in progress as the City may direct.

- 12.2.2 In the event of termination of this Agreement by the City under section 12.1.2.1, the Consultant shall not be entitled to payment for any amounts charged or incurred by the Consultant after the date of the Notice of termination. The City may arrange, upon such terms and conditions and in such manner as the City deems appropriate, for any incomplete Services to be completed by a replacement consultant. The Consultant shall be liable to the City for any costs in excess of the total fees payable under this Agreement that the City incurs to retain a replacement consultant to complete the Services. The City may, in its sole discretion, withhold from any amounts due to the Consultant upon termination of this Agreement such sums as the City determines to be necessary to protect the City against any excess costs it might incur in relation to the retention of a replacement consultant for the completion of the Services.
- 12.2.3 Upon expiry or termination of this Agreement, the City is excused from further compliance under this Agreement and shall only be responsible for paying amounts chargeable in accordance with Article 4. Any amounts payable by the Consultant to the City shall be immediately due and payable and the City may set off any such amounts against amounts payable to the Consultant for Services rendered prior to the effective date of termination.
- 12.2.4 Upon expiration or termination of this Agreement, the Consultant shall:
- 12.2.4.1 deliver to the City all Work Product, whether or not complete, prepared by or on behalf of the Consultant in the course of performing the Services;
  - 12.2.4.2 provide the City with a report detailing: (i) the current state of the provision of Services by the Consultant at the date of termination; and (ii) any other information requested by the City pertaining to the provision of the Services;
  - 12.2.4.3 return to the City all City-owned property, equipment or materials in its possession or control;
  - 12.2.4.4 remove any Consultant-owned property, equipment or materials from City-owned locations;
  - 12.2.4.5 comply with section 8.4 of this Agreement with respect to return or destruction of Confidential Information;
  - 12.2.4.6 provide reasonable cooperation and assistance to the City upon the City's request in transitioning the Services to an alternate service provider; and
  - 12.2.4.7 on a pro rata basis, repay all fees and expenses paid in advance for any Services that have not been provided.

- 12.2.5 In no event shall the City be liable to the Consultant for any loss of anticipated profit, allocated overhead, or any punitive, special, incidental or consequential damages arising from or related to termination of this Agreement.

### **12.3 Continuing Obligation**

Termination of this Agreement will not release, discharge or otherwise affect any rights, powers and remedies the City has or might have against the Consultant for Services provided before the termination took effect, or any other rights, powers or obligations of the Consultant which survive termination of this Agreement in accordance with its terms.

### **12.4 Survival**

The rights and obligations of the parties set forth in sections 1.3, 1.5, 1.7, 1.8, 3.10, 3.13, 5.3, 12.2 and Article 8, Article 9 and Article 10, and any right or obligation of the parties in this Agreement which, by its nature, should survive termination or expiration of this Agreement, will survive any such termination or expiration of this Agreement.

## **Article 13 General**

### **13.1 Time of Essence**

Time is of the essence in this Agreement.

### **13.2 Amendment**

No change or modification of this Agreement is valid unless it is in writing and signed by both parties.

### **13.3 Waiver**

13.3.1 Either party may waive any of its rights, powers or remedies under this Agreement by giving Notice to the other party.

13.3.2 No waiver of, failure to exercise, partial exercise, or delay in exercising any right, power or remedy under this Agreement constitutes a waiver of any other right, power or remedy. No action or failure to act constitutes an approval of or acquiescence in any breach, except as specifically agreed to in writing. No single waiver constitutes a continuing waiver unless otherwise expressly provided.

13.3.4 Despite the City taking any action which is the responsibility of the Consultant under this Agreement, the Consultant will remain obligated to take such action.

### **13.4 Further Assurances**

Each party will, at that party's own expense, do or cause to be done all such further acts, and shall execute and deliver all such other agreements, certificates,

instruments and documents, as the other party may reasonably request in order to carry out the intent of this Agreement.

### **13.5 Assignment**

The Consultant shall not assign this Agreement or any of the benefits or obligations under this Agreement without the prior written consent of the City, which consent may be unreasonably withheld. Despite the City approving an assignment by the Consultant, the Consultant will retain all its obligations and liabilities under this Agreement.

### **13.6 Enurement**

This Agreement enures to the benefit of and binds the parties and their respective legal representatives, successors and permitted assigns.

### **13.7 Cumulative Remedies**

All rights and remedies provided in this Agreement are cumulative and not exclusive, and the exercise by either party of any right or remedy does not preclude the exercise of any other rights or remedies that might now or subsequently be available at law, in equity, by statute, in any other agreement between the parties, or otherwise.

### **13.8 Counterparts and Electronic Signatures**

The parties may sign this Agreement in one or more counterparts, each of which may be delivered by fax, e-mail or other functionally equivalent electronic means of transmission, and those counterparts will together constitute one and the same instrument.

[Signature page follows]

Each party is signing this Agreement on the date stated opposite that party's signature.

**THE CORPORATION OF THE CITY OF GUELPH**

\_\_\_\_\_  
Date Name:  
Title:  
I have authority to bind the corporation.

**[LEGAL NAME OF CONSULTANT]**

\_\_\_\_\_  
Date Name:  
Title:  
I/We have authority to bind the corporation.

\_\_\_\_\_  
Name:  
Title:  
I/We have authority to bind the corporation.

**[NTD: Revise signature block if Consultant is a non-corporate entity]**

## **Schedule A**

### **Project**

[Insert description of project by reference to RFP or terms of reference]

### **Description of Services**

The scope of Services shall be in accordance with the Contract Documents whether or not attached hereto.

### **Contract Documents**

Contract Documents means, collectively, in descending order of precedence: [Note to Draft: Revise list as necessary]

- 1) this Agreement, including all schedules;
- 2) all addenda to the Request for Tenders/Proposals in descending order;
- 3) Request for Tenders/Proposals;
- 4) the Consultant's Proposal; and
- 5) any other documents incorporated by reference in any of the foregoing.

In the event of a conflict or inconsistency in any provisions in the Contract Documents, such documents shall take precedence and govern in the descending order listed above, to the extent of the inconsistency or conflict.

## **Schedule B**

### **Fees**

[Note to Draft: Select the applicable fee structure and delete non-applicable]

#### **Fees on a Time Basis with Upset Cost Limit**

- (a) The City shall pay the Consultant a fee, calculated on a time basis, for the Services. Fees on a time basis for all staff shall be hourly rates based on job classifications as detailed in the Consultant's Proposal, which hourly rates shall be firm for the duration of the Agreement, unless the City otherwise agrees in writing.
- (b) Included in the fee, the Consultant shall be reimbursed at cost plus an administrative charge of [REDACTED] % for all reasonable expenses properly incurred by them in connection with the Services, including, but not limited to: vehicle use charges, traveling and living expenses, long distance telephone charges, report production costs, photography, special delivery charges, supplies and equipment, field equipment costs, laboratory costs. Computer and office charges are considered part of overhead and shall not be invoiced as disbursements.
- (c) Notwithstanding subsections (a) and (b) above, the total fees and disbursements paid by the City to the Consultant for the Services shall not exceed the total upset amount of \$ [REDACTED] plus applicable taxes made up as follows:
  - (i) \$ [REDACTED] plus applicable taxes for the Services described in schedule A; and
  - (ii) \$ [REDACTED] plus applicable taxes as a contingency allowance for additional services that may be required, and are approved by the City in a Change Order, but are not included in the Services described in schedule A.
- (d) Notwithstanding subsections (a) and (b) above, the City, in its sole discretion, may limit the fees and disbursements paid by the City to the percentage equivalent to the Project complete in the opinion of the City.

#### **Fees on a Lump Sum Basis**

- a) Fees for the scope of work covered under this Agreement will be on a lump sum price basis, inclusive of labour, disbursements and reimbursable expenses as detailed in the Consultant's Proposal.
- b) Monthly progress invoices will be based on the percentage of the Services completed, or on a milestone achieved basis, as specified in the RFP.



## **Schedule C**

### **Term [and Renewal]**

The Consultant's engagement under this Agreement (the "Term") becomes effective on the Agreement Date, and, unless earlier terminated in accordance with this Agreement, shall expire upon the later of:

1. [outside date];
2. three (3) months after the acceptance by the City of all project deliverables pursuant to this Agreement.

### **[Add renewal provision if required]**

## Schedule D

### Notices and Communications

1. Notices. All notices, requests, consents, claims, demands, waivers and other communications under this Agreement (each, a "Notice") must be in writing and addressed to the designated contact person of the other party at the contact information set forth below, or to such other contact person and other contact information that the party may designate from time to time in accordance with this schedule.
2. City's Contact Person. The initial principal contact person and contact information for the City are:  
[Name and title]  
City of Guelph  
1 Carden Street  
Guelph, ON., N1H 3A1  
Tel: 519-822-1260, ext. ....  
Fax: 519-822-...  
...@guelph.ca
3. Consultant's Contact Person. The initial principal contact person and contact information for the Consultant are:  
[Name and title]  
[Name of Consultant]  
[Address]  
[Telephone]  
[Fax]  
[Email address]
4. Changes. From time to time, either party may change its contact person or any of its contact information by Notice given in accordance with this Agreement. From time to time, either party, through its principal contact person, may designate secondary contact persons in respect of specific issues.
5. Delivery. Notices sent in accordance with this schedule will be deemed effectively given: (a) when received, if delivered by hand, with signed confirmation of receipt; (b) when received, if sent by a nationally recognized overnight courier, signature required; (c) when sent, if by fax or e-mail (in each case, with confirmation of transmission) if sent during the addressee's normal business hours, and on the next Business Day if sent after the addressee's normal business hours; and (d) on the fifth day after the date mailed by certified or registered mail by the Canada Post Corporation, return receipt requested, postage prepaid.

## **Schedule E**

### **Supplementary Special Provisions**

[Not Applicable **OR** Insert additional contract terms as supplemental special provisions]

PREVIEW

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