

This PURCHASE AGREEMENT MADE as of _____, 2020 (the "Effective Date")

BETWEEN:

The Corporation of the City of Niagara Falls ("the City")

- and-

(the "**Supplier**").

THE PARTIES AGREE AS FOLLOWS:

Definitions

1. In this agreement, the following terms have the corresponding meanings:

"Acceptance Date" means the date following inspection and testing of the Equipment by the City that the City advises the Supplier there are no observable Defects in the Equipment;

"Agreement Date" means the date this agreement is signed by the last party to sign it, as determined by the dates indicated with the parties' signatures;

"Confidential Information" includes information, whether oral, written, visual, electronic, or in any other form, relating in any way to this agreement, which is identified as confidential or that would reasonably be considered as being confidential;

"Defect" or "Defective" means non-conformity to the quantity, quality, specifications, and/or other requirements set out in the Contract Documents;

"Delivery Date" means the date for the delivery of the Equipment as set out in the Contract Documents;

"Disclosing Party" means the party disclosing Confidential Information;

"Equipment" means the all supplies, materials, equipment or other things required to be furnished or delivered as specified in Schedule A (Specifications) and Schedule B (Supplier's Tender);

"Insider" of a party includes every partner, associate, officer, director, employee, consultant, subconsultant, Supplier, Subcontractor and agent of the party;

"Intellectual Property Rights" includes all industrial and intellectual property rights whether protected by statute, at common law or in equity, including all copyright and similar rights, trade secrets and know-how, rights in relation to designs (whether or not registerable), rights in relation to registered and unregistered trademarks, circuit layout designs and rights in relation to circuit layouts;

"Loss" includes loss, liability, damage, cost, expense, legal cost and disbursement;

"Notice" includes notification or communication required or permitted to be given by one party to the other party under this agreement;

"Receiving Party" means the party receiving Confidential Information, and includes all Insiders of that party;

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“**Subcontractor**” means a person who contracts with the Supplier or another Subcontractor for the performance of any part of the Supplier’s obligations under the agreement.

SPECIFICS OF THIS PARTICULAR AGREEMENT

Description of the Equipment

2. The Supplier shall provide the Equipment described in Schedule A (Specifications for Equipment) as modified by Schedule B (Supplier’s Tender).

Contract Price

3. the City shall pay the Supplier for the Equipment to be supplied under this agreement, the following amounts: XXX (the “Contract Price”).

Duration of this Agreement

4. This agreement becomes effective on the Effective Date, and, unless terminated earlier in accordance with this agreement, lasts until final completion or expiry of the Supplier’s obligations under this agreement.

Contract Documents

5. The contract documents consist of the following:
 - (a) This Agreement;
 - (b) Specifications for Equipment (Schedule A);
 - (c) Supplier’s Tender (Schedule B);
 - (d) Preproduction Meeting Minutes (Schedule C); and,
 - (e) Any other documents incorporated by reference in any of the foregoing (the “Contract Documents”).

Precedence

6. Subject to any contrary intention elsewhere in this agreement, in case of any inconsistency or conflict between the parts of the Contract Documents, such parts shall prevail in the following order, but only to the extent necessary to resolve the conflict or inconsistency:
 - (a) Schedule C (Preproduction Meeting Minutes);
 - (b) Schedule B (Supplier’s Tender);
 - (c) Schedule A (Specifications); and,
 - (d) Any other documents incorporated by reference in any of the foregoing.

PROVISION OF THE EQUIPMENT BY THE SUPPLIER

Prior to Provision of the Equipment

7. Immediately after the Effective Date, and prior to production of any of the Equipment, the Supplier shall provide to the City proofs of insurance and other proofs of compliance required under this agreement.

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Standard of Care

8. The Supplier shall:
 - (a) provide the Equipment in accordance with all applicable laws and the Contract Documents;
 - (b) in performing its obligations under the Contract Documents, exercise the standard of care, skill and diligence that would normally be provided by an experienced and prudent Supplier providing Equipment of a similar nature to the Equipment; and,
 - (c) ensure any equipment used by the Supplier or by its Subcontractors at the City's premises will be in safe working condition, will comply with all laws applicable to such equipment and will be operated by suitably qualified and competent Supplier Parties,
(collectively, the "**Standard of Care**").
9. The Supplier acknowledges and agrees that throughout the performance of its obligations under the Contract Documents, the performance of the Supplier's obligations, duties and responsibilities shall be judged against the Standard of Care. The Supplier shall exercise such Standard of Care in respect of any products, personnel or procedures which it may provide to the City.

Production of the Equipment

10. The parties shall have a preproduction meeting in Niagara Falls prior to production to review drawings and designs. The Supplier shall provide the City with design drawings for the Equipment for the approval of the City prior to commencement of the production of the Equipment. The Equipment shall not go into production until the City has approved the final drawings for the Equipment.
11. The City shall be entitled to inspect the Equipment during production at such other times as requested by the City.
12. Any Defects disclosed during the inspection shall be remedied by the Supplier without any additional cost to the City.

Changes

13. Changes of any kind to the design or specifications for the Equipment shall only be made by the Supplier, upon receipt of a written change order signed by an authorised member of each Party (each, a "Change Order"). The Change Order shall provide details of the change in design or specifications and specify any agreed adjustment to the Contract Price in respect of the change and any agreed adjustment to the production schedule, whether an increase or reduction. A Change Order shall represent the full amount payable for all costs and any adjustment to the schedule associated with the change or changes for which it was issued.
14. The City shall have no liability whatsoever for any claim for payment for additional costs incurred by the Supplier which have not been authorised in advance by the City by way of a Change Order.

Defective Work

15. The Supplier shall promptly correct Defective work that has been rejected by the City as failing to conform to the Contract Documents whether or not the Defective work has been incorporated in the Equipment and whether or not the Defect is the result of poor design, poor workmanship, use of Defective products or damage through carelessness or other act or omission of the Supplier.

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16. All or part of any payment under an invoice or any holdback may be withheld by the City or set-off against the payments owing to the Supplier until the Supplier has remedied any Defects at the Supplier's sole expense.

Delivery and Acceptance

17. The Delivery Date for the Equipment shall be: XX. The Supplier shall be responsible for delivery of the Equipment to the location specified by the City on or before the Delivery Date. The Supplier shall pay all costs incurred in connection with the shipping and delivery of the Equipment including all duties, excise taxes and brokerage fees. The risk of loss or damage to the Equipment during delivery and prior to the Acceptance Date shall be with the Supplier.
18. The City shall inspect and test the Equipment within 30 days of delivery. Within one business day following the inspection and testing, the City shall either accept the Equipment or advise the Supplier of any Defects discovered in the Equipment and may:
 - (a) Require the Supplier to remedy the Defect at the City's location within a specified number of days; or
 - (b) If the Defect is unable to be remedied at the City's location, require the Supplier to retrieve the Equipment and remedy the Defect at the Supplier's location within a specified number of days.
19. Following the remediation of a Defect pursuant to section 20, the City shall re-inspect and test the Equipment to determine if the Defect has been remediated. If the Defect has not been remediated, the procedures in section 20 shall be repeated. When all the Defects have been remediated, the City shall accept the Equipment and advise the Supplier of such acceptance.
20. Notwithstanding sections 18 and 19, if, following inspection and testing, the City determines, in its sole discretion, that the Defects are unable to be remediated, the City may reject the Equipment and the Supplier shall retrieve the Equipment from the City's location at its sole expense and the City shall pursue its remedies under this Agreement and applicable law.

Title and Risk

21. Subject to any contrary intention in the Contract Documents, title to all Equipment and all risk of damage or loss thereof shall pass to the City on the Acceptance Date.

Time of the Essence

22. The parties agree that time is of the essence in this agreement and the Equipment must be delivered to the City on the Delivery Date specified in Schedule A, as amended by a Change Order, if any.
23. **The Supplier acknowledges that the City will suffer damages if the Equipment is not delivered to the City on the Delivery Date for reasons other than Force Majeure or if the Equipment has Defects that delay the Acceptance Date. The Supplier shall be responsible for all damages suffered by the City as a result of failure to delivery on the Delivery Date or a delay in the Acceptance Date due to Defects. Notwithstanding any other provision of the Contract Documents, these damages shall include, but not be limited to, the cost to the City, including the cost of internal resources, to obtain alternate equipment, any losses to the City due to a delay in obtaining alternate equipment, and any other incidental, consequential or other indirect damages.**

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Intellectual Property

24. The Supplier is responsible for obtaining all approvals and licenses with regarding to any Intellectual Property Rights associated with the Equipment.
25. The Supplier shall be liable for and fully indemnify and hold harmless the City against any liability, whether direct or indirect, arising out of a claim by any third party against the City alleging that the Equipment and its use by the City, infringes any Intellectual Property Rights. In the event that an injunction is obtained against the City's use of the Equipment because of patent or copyright infringement, in addition to any other remedy available to the City, the Supplier shall replace the Equipment to the satisfaction of the City so that they become non-infringing.

Warranty

26. The warranty for the Equipment provided by the Supplier is described in Schedule A (Specifications).
27. At the Delivery Date and for the duration of the warranty period, the Supplier warrants that it has the full right and legal authority to sell the Equipment to the City.
28. The City shall benefit from all legal and manufacturer's warranties available in connection with the Equipment, equipment, machinery, tools and consumables incorporated in the Equipment and the Supplier shall assign all such warranties to the City on the same terms in which these warranties have been provided to the Supplier, to the extent such warranties permit assignment. The Supplier shall cooperate with the City in the enforcement of the assignment and the warranties against the manufacturers.

PAYMENT BY the City

Amounts Chargeable in Respect of the Equipment

29. The Supplier may charge the City, for the provision of the Equipment amounts not greater than the Contract Price and any Change Orders.

Payment

30. The City shall pay the Supplier the Contract Price for the Equipment, less a ten percent holdback, on the Delivery Date. The holdback shall be released on the Acceptance Date, less any amounts owing to the City by the Supplier.
31. Whenever any amount is recoverable from or payable by the Supplier to the City pursuant to the Contract Documents, the City may deduct this amount from any amount due to the Supplier.

Final Invoice

32. As of the date of submission of the final invoice, the Supplier expressly waives and releases the City from any further claims against the City related to the Contract Documents, except those claims stated in the final invoice and those claims made in writing prior to the date of submission of the Supplier's final invoice and still unsettled.

EXTENSION AND EARLY TERMINATION OF THIS AGREEMENT

Force Majeure

33. Neither party shall be liable to the other for any delay in or failure to perform its obligation under this agreement (other than non-payment of money by the City to

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the Supplier) if any such delay or failure is due to Force Majeure. **“Force Majeure”** means an event or a cause beyond the reasonable control of the party affected, which may include acts of God, acts or policies of any federal, provincial, civil or military authority, governmental priorities and mandates, civil commotion, war, fire, flood, earthquake, storm, epidemic, labour slowdown, strike, lockout, other labour dispute, labour shortage, or shortage of material but does not include lack of funds or events caused by any extent to an act or omission by the affected party or its Insiders or failure to exercise reasonable diligence. If a party becomes aware of an event of Force Majeure affecting its ability to perform its obligations under this Agreement, it shall give the other party oral notice within two business days of the event of Force Majeure, and, in addition, Notice, together with a proposed plan of corrective action to resolve or minimize the effect of the event of Force Majeure, within five (5) Working Days of the event of Force Majeure.

34. If there is an event of Force Majeure, the party claiming such event shall:
 - (a) complete the performance of its obligations as soon as possible after the event of Force Majeure is removed;
 - (b) make all reasonable efforts to mitigate the effect of the event of Force Majeure on the other party; and
 - (c) not treat other parties with whom it contracts more favourably where its obligations to such other parties are affected by the same event of Force Majeure.
35. For each full day of Force Majeure in which substantially all of the production work is stopped or suspended, the Delivery Date shall be extended by a full day.
36. If an event of Force Majeure continues for a period in excess of 60 continuous days and results in substantially all of the work being stopped or suspended during that period, either party may terminate this agreement effective upon Notice to the other party and the City shall pay the Supplier for the prorated value of the work performed to the date of termination, less the resale value of the equipment under production. This amount shall be the sole remedy of the Supplier for the termination of the agreement pursuant to this section.

Early Termination

37. The City may, for cause, terminate this agreement if the Supplier defaults in the performance of any of the terms and conditions of this agreement or with any proper order or request of the City, upon providing written notice to the Supplier of the particulars of the default. If the Supplier fails to remedy the default within seven days from the date of delivery of the Notice, the City shall have the right, at its sole option, to terminate this agreement forthwith by providing Notice to the Supplier.
38. The Supplier may terminate this agreement upon at least seven days' Notice if the City fails to make payment that is due and payable within the payment period in accordance with the agreement and the City failing to remedy such breach within seven days of receiving Notice of the breach.
39. The parties may, by agreement, terminate this agreement at any time.
40. This agreement will terminate immediately upon:
 - (a) The dissolution of the Supplier; or

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- (b) Subject to the provisions of the Bankruptcy and Insolvency Act, RSC 1985, c. B-3, the Supplier making an assignment for the benefit of its creditors, becoming bankrupt or insolvent, undergoing reorganization, making a proposal to its creditors, or otherwise becoming financially unable to perform its obligations under this agreement.
41. If this agreement is terminated early in accordance with sections 37 or 40, then:
- (a) the City is excused from further performance under this agreement;
 - (b) any money payable by the Supplier to the City is immediately due and payable;
 - (c) the City shall not be responsible for paying any amount over and above the chargeable amounts, including payment on a pro-rated basis if applicable, incurred up to the effective date of such termination, or a later date if work, already commenced by the Supplier, cannot reasonably be discontinued until such later date, less the value of the work completed to date which can be resold to another customer of the Supplier; and,
 - (d) the City shall retain any rights, powers and remedies it has or may have against the Supplier.

CONFIDENTIAL INFORMATION

General Confidentiality Requirements

- 42. The Receiving Party shall ensure that all Insiders of the Receiving Party comply with all the provisions of this agreement relating to Confidential Information and the Receiving Party shall be responsible for any failure by any Insider of the Receiving Party to do so.
- 43. The Receiving Party shall use Confidential Information only for the purposes of this agreement.
- 44. The Receiving Party shall not copy or transcribe into another form, any Confidential Information received from the Disclosing Party except as reasonably necessary.
- 45. Upon the termination of this agreement, or earlier upon the request of the Disclosing Party, the Receiving Party shall promptly destroy or return (as directed by the Disclosing Party) all copies of the Confidential Information disclosed to the Receiving Party.

Keeping Confidential Information Confidential

- 46. Except as provided in this agreement, the Receiving Party shall keep confidential all Confidential Information disclosed to it by the Disclosing Party.
- 47. The Receiving Party shall protect the Confidential Information disclosed to it by the Disclosing Party, in the same manner and to the same extent that it protects its own Confidential Information.
- 48. The provisions of this agreement relating to Confidential Information will remain in effect for five years after the termination of this agreement.

Disclosing Confidential Information

- 49. The Receiving Party may disclose Confidential Information if:

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- (a) The Disclosing Party approves;
 - (b) The Receiving Party is required by law to disclose it; or
 - (c) The Confidential Information is generally and publicly available.
50. If the Receiving Party is required by law to disclose Confidential Information, it shall promptly notify the Disclosing Party so that the Disclosing Party may intervene to prevent the disclosure.
51. The Supplier specifically acknowledges that the City is subject to the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, and that the City may be compelled by law to disclose certain Confidential Information.

Breach of Confidentiality

52. If either party breaches any provision of this agreement relating to Confidential Information, it shall immediately give Notice of such breach to the other party and take all necessary steps to limit the extent and impact of the breach.
53. If a party were to breach the provisions of this agreement relating to Confidential Information, the harm that would be suffered by the other party would not be compensable by monetary damages alone. Therefore either party may, in addition to any other remedies, seek an injunction against any breach or threatened breach by the other party of any provision relating to Confidential Information.

INDEMNIFICATION, INSURANCE and SECURITY

Representations, Waiver and Indemnification

54. The Supplier shall indemnify the City and the City Insiders and save them harmless from and against any and all Losses which may arise by reason of the exercise of the responsibilities and obligations contained herein by the Supplier or as a result of any breach of the terms of this Agreement by the Supplier or by any act or omission of the Supplier or its Insiders, including all legal costs and expenses reasonably incurred by the City in connection with the defence or settlement of any such claim, unless such claim or damage is caused by the negligent act or omission of the City or its Insiders. The Supplier shall, at the City's election, either assume the defence of every proceeding brought in respect of such Loss, or 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. For the purpose of enforcement of this indemnity, the City is acting as agent and trustee for the the City Insiders.
55. The Supplier shall not be liable for any Loss arising from errors or omissions in any of the information which is supplied to the Supplier by the City.
56. The Supplier shall make full and complete compensation for any bodily injury or death to any person and for any damage caused to the City's physical property by the Supplier's act or omission or that of any of its Insiders or those for whom it is at law responsible.
57. The Supplier waives against the City and the City Insiders any claims of any kind whether directly or indirectly arising out of or connected with the existence of this Agreement or for any injury to or death of any person or for any loss of or damage to any property belonging to the Supplier or its employees, servants, agents, invitees,

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licensees, contractors or visitors and for any loss or damage of the Supplier unless caused by the negligent act or omission of the City or its Insiders.

58. Notwithstanding any other provision of this Agreement, the City shall not be responsible for indirect, consequential, special, incidental or contingent damages of any nature whatsoever, including loss or revenue or profit or damages resulting from interruption of service or transmission. This limitation shall apply regardless of the form of action, damage, claim, liability, cost, expense or loss, whether in contract (including fundamental breach), statute, tort (including negligence), or otherwise, and regardless of whether the City has been advised of the possibility of such damages.
59. Sections 54 to 58 shall survive the expiry or termination of this Agreement.

Insurance

60. Without restricting the generality of the provisions related to indemnification, the Supplier shall obtain, and for as long as this agreement is in effect, maintain, pay for and, upon request by the City from time to time, provide evidence of the following insurance coverage, taken out with insurers with an AM Best rating of no less than A+:
- (a) Commercial General Liability Insurance:
- i. Including "The Corporation of the City of Niagara Falls" as an additional insured;
 - ii. To a limit of not less than five million dollars (\$5,000,000) inclusive per occurrence;
 - iii. Including product liability, bodily injury, personal injury, death and damage to property and the loss of use of such property; and,
 - iv. Endorsed to provide the City with not less than thirty (30) days' notice, in advance, of any cancellation, change or amendment restricting coverage.
61. If any of the foregoing policies expires while this agreement is in effect, the Supplier shall immediately renew or replace it, and, within sixty (60) days after such expiry, provide to the City evidence of the renewed/replaced policy.
62. The Supplier shall ensure that all the foregoing insurance is primary and does not call into contribution any other insurance coverage available to the City. The Supplier shall not do or omit to do anything which would impair or invalidate the insurance policies.

GENERAL

63. **Notices:** A party giving Notice shall give it in writing and shall send it by personal delivery, email, facsimile, courier or prepaid regular mail to the other party's contact person at an address of the other party provided for in this agreement.
64. The initial contact person and contact address for the parties are:

The Corporation of the City of Niagara Falls
Attention:
3200 Stanley Avenue
Niagara Falls, ON L2E 6S4
T: 905-356-7521 ext.

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E: @niagarafalls.ca

Attention:

T:

E:

65. A Notice sent by:
- (a) Personal delivery is deemed to be delivered on the date it is personally delivered;
 - (b) Email is deemed to be delivered upon the sender receiving from the recipient a written acknowledgment of receipt;
 - (c) Facsimile is deemed to be delivered one day after the date it is sent;
 - (d) Courier is deemed to be delivered two days after the date it is sent; and
 - (e) Prepaid regular mail is deemed to be delivered three days after the date it is sent, provided that if a postal interruption occurs, the Notice is deemed to be delivered three days after the resumption of postal service.
66. **Outside Communications:** Neither party will communicate with the media or anyone else about the Equipment except with the prior written approval of the other party, except as such communication may be required by law.
67. **No Waiver:** No waiver by a party of any breach by the other party of any of its covenants, agreements or obligations in this Agreement shall be a waiver of any subsequent breach or the breach of any other covenants, agreements or obligations, nor shall any forbearance by a party to seek a remedy for any breach by the other party be a waiver by the party of its rights and remedies with respect to such breach or any subsequent breach.
68. **Relationship:** The Supplier is an independent contractor of the City. The Supplier shall not, except as the City may specifically authorize in writing, enter into any contracts or commitments in the name of or on behalf of the City, or bind the City in any respect whatsoever. The Supplier is not a partner, joint venturer, agent or employee of the City.
69. **Governing Law:** This Agreement shall be governed by and constituted in accordance with the laws in force in the Province of Ontario excluding any conflict of laws principles. The Parties hereby irrevocably attorn to the exclusive jurisdiction of the courts of the Province of Ontario for any legal proceedings arising out of this Agreement or the performance of the obligations hereunder.
70. **Severability:** Should any section or part or parts of an section in this Agreement be illegal or unenforceable, it or they shall be considered separate and severable from the Agreement and the remaining provisions of this Agreement shall remain in full force and effect and shall be binding upon the City and the Supplier as though such section or part or parts thereof had never been included in this Agreement.

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71. **Survival:** In addition to those provisions which are expressly stated to survive the termination or expiration of this Agreement, the provisions of this Agreement that are by their nature intended to survive termination or expiration of this Agreement shall continue in full force and effect subsequent to and notwithstanding termination or expiration until or unless they are satisfied.
72. **Entire Agreement:** The Contract Documents constitute the entire contract between the parties with respect to its subject matter and supersedes all prior or contemporaneous commitments, representations, warranties, arrangements, understandings agreements, and negotiations, whether written or oral, or collateral or other, with respect to its subject matter, existing between the parties at the Agreement Date.
73. **Counterparts and Electronic Delivery:** This Agreement may be executed and delivered by facsimile or electronic transmission and the parties may rely upon all such facsimile or electronic signatures as though such facsimile or electronic signatures were original signatures. This Agreement may be executed in any number of counterparts and all such counterparts shall, for all purposes, constitute one agreement binding on the parties.

[Signature Page follows]

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IN WITNESS WHEREOF, the parties have duly executed this Agreement.

THE CORPORATION OF THE CITY OF NIAGARA FALLS

Per _____

Date_____

I have authority to bind the corporation

(Name of Supplier providing equipment)

Per _____

Name:

Title:

Date_____

I have authority to bind the corporation.

Schedule A
Specifications for the Equipment

Schedule B – Supplier’s Tender

Schedule C – Preproduction Meeting Minutes