

APPENDIX P: SAMPLE FORM OF AGREEMENT

SAMPLE ONLY – TO BE MODIFIED BY LEGAL PRIOR TO CONTRACT EXECUTION

THIS AGREEMENT made on the day of , 2021.

B E T W E E N:

**THE CORPORATION OF THE
CITY OF NIAGARA FALLS**

(the “City”)

and

(the “Contractor”)

The City and the Contractor agree as follows:

Contract Documents

1. The following documents are included in this Agreement and form the Contract Documents:
 - a. This Agreement;
 - b. Schedule A – Description of the Work, including sketches, photographs and Specifications;
 - c. Schedule B - Request for Tender RFT44-2021 and Addenda; and,
 - d. Schedule C - Contractor’s Submission,(the “Contract Documents”).

Precedence of Contract Documents

2. If there is any conflict or inconsistency between the Contract Documents, unless otherwise provided, such documents will prevail in the following order, but only to the extent necessary to resolve the conflict or inconsistency:
 - a. This Agreement;
 - b. The Addenda;
 - c. Schedule A – Description of the Work, including sketches, photographs and Specifications;
 - d. Schedule B - Request for Tender RFT44-2021; and,
 - e. Schedule B - Contractor’s Submission.

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The Work

3. The Contractor shall perform the Work required by the Contract Documents for demolition of the Former Parks & Recreation Building located at 7565 Lundy's Lane, Niagara Falls (the "Project").
4. The Contractor shall perform the Work in accordance with the requirements of the Contract Documents.

Contract Price

5. The "Contract Price" is \$XXX plus applicable taxes, more particularly described in Schedule B, subject to adjustment in accordance with the Change Order process in the Contract Documents.

Contract Time

6. The Contractor shall commence the Work on XXXX and shall have the site backfilled in accordance with section 8 of the Scope of Work in Schedule A on or before December 22, 2021. The final grading and seeding of the site shall occur prior to May 31, 2022 based on weather conditions and at the mutual agreement of the parties.

DEFINITIONS AND INTERPRETATION

Definitions

7. In the Contract Documents,

"Agreement" means this agreement and all attached Schedules.

"Change Directive" means a written instruction prepared by the City Representative and signed by the City directing the Contractor to proceed with a change in the Work within the general scope of the Contract Documents prior to the City and the Contractor agreeing upon adjustments in the Contract Price and the Contract Time.

"Change Order" means a written amendment to the Agreement prepared by the City Representative and signed by the City and the Contractor stating their agreement upon:

- a. a change in the Work;
- b. the method of adjustment or the amount of the adjustment in the Contract Price, if any; and,
- c. the extent of the adjustment in the Contract Time, if any.

"City" means the City and its officers, employees, agents, consultants, contractors and subcontractors.

"City Representative" means the person or entity appointed or engaged by the City to manage the Work on behalf of the City.

“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. Confidential Information does not include any portions of the Confidential Information that (a) at the time of disclosure was in the public domain; (b) after disclosure hereunder, is published or otherwise becomes part of the public domain through no fault of the Contractor; or (c) is received from an independent third party who had obtained the Confidential Information lawfully and was under no obligation of secrecy or duty of confidentiality owed to the City.

“Contract Time” means the time commencing on the date of commencement of the work set out in section 6 and ending on May 1, 2020.

“Contractor Parties” means the directors, officers, employees, agents, consultants, invitees, Subcontractors and representatives of the Contractor, involved either directly or indirectly in the Project.

“Construction Act” means the *Construction Act*, R.S.O. 1990 c. C.30, as amended.

“Construction Equipment” means all machinery and equipment, either operated or not operated, that is required for preparing, fabricating, conveying, erecting, or otherwise performing the Work but is not incorporated into the Work.

“Drawings” means the detailed engineering designs, drawings, diagrams, illustrations, schedules, technical brochures and other data to be used by the Contractor in the performance of the Work and includes Shop Drawings.

“Defect” or “Defective Work” means failure to perform or deliver any of the Work in accordance with the Contract Documents.

“Deliverables” means, in any medium required by the City, the supplies, documentation or data to be prepared and/or delivered by the Contractor as identified in the Contract Documents.

“Environmental Laws” means all applicable federal, provincial, territorial, municipal and local laws, statutes, ordinances, by-laws and regulations, judgments, decrees, common laws and principles thereof, and orders, directives and decisions rendered or issued by any governmental authority relating to Environmental Contaminants or the protection of human health, natural resources or the environment.

“Environmental Contaminants” means any substance, material or waste defined, regulated, listed or prohibited by Environmental Laws.

“Force Majeure” means an event or a cause beyond the control of a party, which may include war, interference by civil or military authorities, civil insurrection, local or national emergency, blockade, seizure, riot, sabotage, vandalism, terrorism, adverse weather conditions which are materially more adverse than could reasonably be expected, earthquake, flood, act of God, accident, fire, nuclear or other explosion, disease, epidemic, quarantine restriction, strike, lockout or other labour disturbance, governmental embargo, or changes in the Laws or government priorities; provided such event is not caused by the affected party’s negligence or failure to

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exercise reasonable diligence. A Force Majeure event or cause does not include an inability to pay or a lack of financial resources.

“Intellectual Property Rights” means all domestic and foreign intellectual property rights including, without limitation:

- a. patents, applications for patents and reissues, divisions, continuations, renewals, extensions and continuations-in-part of patents or patent applications;
- b. copyrights, copyright registrations and applications for copyright registration and all related rights and including all moral rights;
- c. mask works, mask work registrations and applications for mask work registrations;
- d. designs, design registrations, design registration applications and integrated circuit topographies;
- e. trade names, business names, corporate names, domain names, website names and world wide web addresses, common law trade-marks, trade-mark registrations, trade mark applications, trade dress and logos, and the goodwill associated with any of the foregoing;
- f. trade secrets, proprietary information, know-how, technology, inventions, processes, discoveries, data, including computer data, business ideas, drawings, and specifications; and,
- g. the right to commence legal proceedings with respect to the past or present infringement of the foregoing, including the right to recover all damages and profits.

“Materials” means material, machinery, equipment, and fixtures forming the Work, but does not include Construction Equipment.

“Shop Drawings” are drawings, diagrams, illustrations, schedules, performance charts, brochures, Materials data, and other data which the Contractor provides to illustrate details of portions of the Work.

“Specifications” means that portion of the Contract Documents, wherever located and whenever issued, consisting of the written requirements and standards for the Materials, systems, workmanship, quality, and the services necessary for the performance of the Work.

“Subcontractor” means a person who contracts with the Contractor or another Subcontractor for the performance of any part of the Contractor’s obligations under the Agreement, and includes suppliers of the Contractor.

“Substantial Performance of the Work” is as defined in section 2 of the *Construction Act*.

“Supplemental Instruction” means an instruction, not involving an adjustment in the Contract Price or Contract Time, in the form of Specifications, Drawings, schedules, samples, models or

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written instructions, consistent with the intent of the Contract Documents. It is to be issued by t to supplement the Contract Documents as required for the performance of the Work.

"Taxes" means any and all taxes, levies, import duties, customs duties, stamp duties, fees, withholdings, assessments, deductions or charges whatsoever, imposed, assessed, levied or collected by any governmental authority, together with interest, fines and penalties, including occupational, excise, unemployment, ownership, sales, gross receipts, income taxes, payroll taxes, employer contributions (both statutory and otherwise) and workers' compensation payments and contributions, but does not include Harmonized Sales Tax (HST).

"Work" means everything that the Contractor is required to supply or perform in order to carry out the terms and conditions of the Contract Documents and includes any work or services not expressly in the Contract but which is, nevertheless, necessary for the proper completion of the Work.

"Work Site" means the designated site or location of the Work identified in the Contract Documents.

"Working Day" means any day except a Saturday, Sunday or statutory holiday, or statutory vacation day that is observed by the construction industry in Ontario or such other days designated as working days in the Contract Documents.

Interpretation

8. **Trade Terms.** Words and abbreviations that have well known technical or trade meanings are used in the Agreement in accordance with such recognized meanings.

EXECUTION OF THE WORK

Execution of the Work

9. The Contractor is solely responsible for the execution of the Work and shall perform the Work in accordance with the requirements of the Contract Documents. In particular, the Work to be performed by the Contractor includes:
 - a. scheduling the Work in accordance with the Contract Time and monitoring and reporting on the progress of the Work relative to the Contract Time and ensuring that each critical path or milestone is completed by the applicable dates in the Construction Schedule and in accordance with the Contract Time;
 - b. coordinating and taking responsibility for the scheduling and supervising of Subcontractors;
 - c. before the Work is commenced, ensuring that the Drawings and methods of working proposed or specified by the Contractor are provided to the City Representative; and,
 - d. consulting with the City Representative throughout the performance of the Work.

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10. For greater certainty, the Contractor shall be the “importer of record” of and shall be responsible for all Taxes including import duties on all Materials, equipment, parts or any other items forming part of the Work.

Construction Schedule

11. The Contractor shall prepare, and update as required, a construction schedule, including identification of the critical path of the Work and the schedule of operations, indicating the proposed methods of construction and sequence of work and the times the Contractor proposes to complete the various items of work within the Contract Time (the “Construction Schedule”). The Construction Schedule, if not submitted with the Contractor’s Submission, shall be submitted to the City Representative within 10 Working Days from the date of the contract award.
12. The Contractor shall, during performance of the Work and in accordance with the controls and reporting requirements in the Contract Documents, provide for the City Representative’s review and approval progress reports updating the Construction Schedule, reporting on the progress achieved, percentage of completion, schedule status and financial status with areas of immediate concern highlighted. These updated Construction Schedules shall be provided at least every 30 days. If the Construction Schedule is affected by approved Changes, the Contractor shall submit an updated Construction Schedule, if requested by the City Representative, within 7 Working Days of the request. This updated Construction Schedule shall show how the Contractor proposes to perform the balance of the Work, so as to complete the Work within the Contract Time. The City may, at its sole discretion, not issue an order to commence Work until the Construction Schedule has been received and approved.

Schedule Slippage

13. If at any time it should reasonably appear to the City that the actual progress of the Work is behind schedule or is likely to become behind schedule and notice of such opinion is given to the Contractor or the Contractor has noticed slippage in the schedule then the Contractor shall take appropriate steps to cause the actual progress of the Work to conform to the Construction Schedule and shall provide the City with an updated Construction Schedule showing how the Contractor proposes to perform the balance of the Work, so as to complete the Work within the Contract Time.

Standard of Care

14. The Contractor shall:
 - a. perform the Work in accordance with all applicable laws and the Contract Documents;
 - b. in performing the Work and its obligations under the Agreement, exercise the standard of care, skill and diligence that would normally be provided by an experienced and prudent contractor performing work of a similar nature to the Work; and,
 - c. ensure any Construction Equipment used by Contractor Parties at the Work Site will be in safe working condition, will comply with all laws applicable to such equipment and will be operated by suitably qualified and competent personnel,

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(the “**Standard of Care**”).

15. The Contractor acknowledges and agrees that the performance of the Contractor's obligations, duties and responsibilities under this Agreement shall be judged against the Standard of Care. The Contractor shall exercise the Standard of Care when recommending the use of Materials, personnel or procedures to the City.
16. Where the Work does not comply with the specified Standard of Care, the deficiency in the Work shall be corrected as directed by the City Representative. Subsequent testing to ensure that the Standard of Care has been attained (including re-testing by the City) shall be carried out at the Contractor's expense.

Permits, Licenses, Approvals

17. The Contractor shall, at the Contractor's expense, obtain prior to commencement of the Work and at all times maintain all permits, licenses, approvals, consents and other forms of authorizations, including demolition permits, necessary for the performance the Work and required in accordance with applicable laws.

Labour and Materials

18. The Contractor shall provide and pay for labour, Materials, tools and Construction Equipment, transportation and other services necessary for the performance of the Work in accordance with the Contract Documents. The Contractor shall not be entitled to a change in the Contract Price due to any increase in the cost of labour, Materials, tools, Construction Equipment, water, heat, light, power, transportation, or other facilities or services, whether or not the Contract Time is extended.
19. Unless otherwise specified in the Contract Documents, Materials provided shall be new. Substitutions for Materials which are specified by their proprietary names, part numbers, or catalogue numbers shall be of the same quality as the specified Materials and substituted Materials shall be approved by the City Representative prior to their use. The Contractor shall use all Materials in strict accordance with the manufacturer's directions except when specified otherwise.

Documents at Work Site

20. The Contractor shall keep one copy of the current Contract Documents and Deliverables, including, Supplemental Instructions, contemplated Change Orders, Change Orders, Change Directives, reviewed Shop Drawings and reports and records of meetings at the Work Site in good order and available to the City and the City Representative.

Shop Drawings

21. The Contractor shall provide Shop Drawings in the form directed by the City Representative, as required in the Contract Documents and sufficiently in advance to ensure no delay in the Work.

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22. The Contractor shall review all Shop Drawings before providing them to the City Representative and shall confirm that review by stamp, date and signature of the person responsible for the review.
23. The review of the Shop Drawings by the City shall not relieve the Contractor of responsibility for errors or omissions in the Shop Drawings or for meeting all requirements of the Contract Documents.
24. Certain specifications require the Shop Drawings to bear the seal and signature of a professional engineer. Such professional engineer must be registered in Ontario and shall have expertise in the area of practice reflected in the Shop Drawings.

Effect of Review and Approval

25. Notwithstanding any other provision of the Agreement, no direction, request, acceptance or approval by the City, or anyone on its behalf, nor any failure of the City to do so, will lessen or relieve the Contractor from performing and fulfilling its obligations or satisfying any liability under the Agreement or be construed as an acceptance of all or part of the Work or as a Change Order.

PAYMENT AND COMPLETION OF THE WORK

Contract Price

26. The City shall, subject to any right of set-off or withholding by the City, pay the Contractor the Contract Price as described in Schedule B (Contractor's Submission) in accordance with the terms of this Agreement for the performance of the Work, subject to any Change Orders authorized by the City and the Contractor in writing. The Contract Price shall constitute the Contractor's sole and exclusive consideration for performance of the Work, and the Contractor shall not be entitled to receive any other monies or other consideration for the performance of the Work. For clarity, the Contract Price takes into account the value of any salvage not retained by the City in accordance with Schedule A which the Contractor is able to dispose of for valuable consideration.

Invoices

27. The Contractor shall submit an invoice for payment on account of the Contract Price plus HST to the City Representative following the achievement of the milestones set out in the Construction Schedule with all necessary backup and support requirements identified by the City. All invoices must be sent to the City Representative within 30 days after provision of the Work or delivery of the materials to which the invoice makes reference.
28. Each invoice must contain the following:
 - a. The Contractor's name and address and the date of the invoice;
 - b. The period during which the services and Materials were supplied;
 - c. Information identifying the authority, whether in the Contract Documents or otherwise, under which the services or materials were supplied;

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- d. A description, including quantity where appropriate, of the services and Materials supplied;
 - e. The amount payable for the services or Materials supplied and the payment terms;
 - f. The name, title, telephone number and mailing address of the person to whom payment is to be sent;
 - g. Any other information that is prescribed in Schedule A or identified by the City as required;
 - h. The amount invoiced to date;
 - i. The percentage of the Contract Price invoiced; and,
 - j. The individual value of Change Orders approved during the invoice period and the cumulative value of Change Orders for the Project.
29. After the first invoice, the Contractor shall, in addition to those items in section 28, provide the following with its invoice:
- a. Statutory Declaration that all accounts for labour, subcontracts, Materials, Construction Equipment and other indebtedness which may have been incurred by the Contractor and for which the City might in any way be held responsible have been paid in full up to the previous invoice, except for amounts properly retained as a holdback or as an identified amount in dispute and that no written notice of lien has been received by it; and,
 - b. Workplace Safety and Insurance Board Clearance Certificate.
30. The City may, prior to the time it is required to issue payment in respect of an invoice, request any additional information or backup from the Contractor in respect of the invoice.
31. The Contractor shall not claim for or be entitled to payment for the correction or re-performance of any Defective Work, including labour and time of any Contractor Parties for such correction or re-performance.
32. The City shall pay to the Contractor for the amounts (not in dispute) on the invoices submitted in accordance with the Agreement, less any withholdings under the Agreement and any holdback required under the applicable lien legislation, within 30 days after approval by the City Representative of the invoice and applicable backup information.

Substantial Performance

33. When the Contractor is of the opinion that the Work is substantially performed, the Contractor shall provide the City with written notice of the date on which the Contractor estimates that Substantial Performance of the Work may be achieved. The notice shall include a list of items to be completed or corrected. Failure to include an item on the list does not alter the responsibility of the Contractor to complete the Work.

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34. The City Representative and the Contractor shall jointly inspect the Work Site at a mutually convenient time to verify that Substantial Performance of the Work has been achieved. If, following the inspection, in the opinion of the City Representative, Substantial Performance of the Work has been achieved, the City Representative shall provide a Certificate in the prescribed form confirming that Substantial Performance of the Work has been achieved and the date of such achievement. If, following the inspection, the City Representative is of the opinion that Substantial Performance of the Work has not been achieved, the City Representative shall, within 10 Working Days of the completion of the inspection, provide the Contractor with a list of items that must be completed by the Contractor for Substantial Performance of the Work to be achieved.
35. The Contractor shall complete the items in the City Representative's list as soon as practicable and in any event by the time designated by the City Representative.
36. If the City takes possession and control of the Work before the Contractor completes the items on the City Representative's list, the Contractor shall co-ordinate any remaining work with the City and perform such work in the manner and at the times required by the City while maintaining full continuous operation of the Work Site.
37. After the date of Substantial Performance of the Work is completed, the Contractor shall finish the Work within 30 days or within such other period as agreed between the parties.
38. The Contractor shall publish a copy of the Certificate of Substantial Performance in a construction trade newspaper as defined in the *Construction Act* within seven days of receiving the executed Certificate and shall provide suitable evidence of the publication to the City.

Payment of Holdback upon Substantial Performance of the Work

39. After the Certificate of Substantial Performance has been published, the Contractor may submit an application for payment of the construction lien holdback amount and the documents listed in section 29. Provided no written notices of lien or claims for lien have been received by the City, the City shall pay to the Contractor the amount of the construction lien holdback the first Working Day after the 60 day construction lien holdback period has expired.
40. Notwithstanding section 39, the City may retain a deficiency fund from the holdback funds to secure the correction of deficiencies in such amount that the City reasonably estimates to be the cost of the corrections.

Final Completion

41. Unless otherwise set out in a Change Order or Directive, the City shall retain ten percent (10%) of the Contract Price until completion by the Contractor of the final grading and seeding in the Spring of 2022 (the "Completion Holdback") and the rectification of any defects.
42. The City will consider the Work is complete and release the Completion Holdback, less any required statutory holdback, when, except for any obligations of the Contractor relating to the warranty, the Work has been fully completed in accordance with the Contract Documents, including all Defects remedied to meet the Standard of Care and the requirements of the

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Agreement, and all obligations of the Contractor to Subcontractors and anyone else related to the Work are fully satisfied.

43. When the Work has, in the opinion of the Contractor reached final completion, the Contractor shall submit a final invoice, including the following:
 - a. the documents described in section 29;
 - b. a complete statement of accounts, including any Change Orders applicable to the Work;
 - c. a complete statement of all money that the Contractor considers to be due from the City arising out of or in connection with the Work, the Agreement or any alleged breach of the Agreement, including details of how the amount claimed in the final invoice is calculated; and,
 - d. confirmation that all Deliverables and approvals of all governmental authorities as required by the Contract Documents have been delivered to the City.
44. As of the date of submission of the final invoice, the Contractor expressly waives and releases the City from any further claims against the City related to the Agreement, except those claims stated in the final invoice and those claims made in writing prior to the date of submission of the Contractor's final invoice and still unsettled.
45. Notwithstanding anything else in this part, the City may retain a finishing holdback as provided for in the *Construction Act* which shall be released to the Contractor upon expiry of the lien period provided for under the *Construction Act*, provided no written notices of lien or claims for lien have been received by the City.

Taxes

46. The Contractor shall be liable for the payment of any Taxes connected with the Work, except for taxes relating to the City's capital, operations or income. The City may deduct from or set-off against the whole or part of payments due to the Contractor any Taxes that the City is required to withhold or deduct by any governmental authority. Prior to payment being made to the Contractor, the City shall notify the Contractor of any required withholding or deduction.

Payment on Account

47. A payment made pursuant to the Agreement does not prejudice the right of either party to dispute whether the paid amount is the amount properly due and payable nor does it conclusively constitute evidence of the value of the Work or whether the Work has been executed satisfactorily.

Liens

48. The Contractor shall not permit a Subcontractor to assert any right to a construction, builder's, mechanic's or unpaid vendor's lien for unpaid work or supply of Materials (a "lien") or to issue a written notice of lien pursuant to the *Construction Act*.

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49. The Contractor shall, at its cost, promptly discharge or obtain a withdrawal of any lien that is the subject of a claim for lien or a written notice of lien relating to the Work Site or any of the City's property or buildings by the Subcontractor. If such lien is not discharged or withdrawn within 7 calendar days of the service of the written notice of lien or the claim for lien, then without prejudice to any other rights or remedies it may have, the City may take whatever steps it deems necessary and appropriate to discharge or obtain a withdrawal of the lien, including payment of any amount owing or claimed thereunder, and seek immediate recovery from the Contractor for the amount of any such payment and any associated costs, including legal costs, all of which shall be payable on demand.
50. Without limiting any of the foregoing, the Contractor shall satisfy all judgments and pay all costs resulting from any construction liens or any actions brought in connection with any liens, or in connection with any other claim or lawsuit brought against the City by any person that provided services or materials to the Project which constituted part of the Work, and the Contractor shall indemnify the City for any and all costs (including, without limitation, legal fees on a solicitor and client basis) the City may incur in connection with such claims or actions.

Withholding from Payment

51. All or part of any payment under an invoice may be withheld by the City or set-off against the payments owing to the Contractor for:
 - a. all amounts due from the Contractor to the City (including under any indemnity in this Agreement);
 - b. any amount that the City is required to withhold or deduct by the *Construction Act* or applicable laws;
 - c. the amount of any liens for which the City has received a written notice of lien or a copy of a claim for lien relating to the Work; or,
 - d. the amount required to correct Defective Work including non-compliance with health and safety rules and policies (until it has been re-performed or otherwise remedied to the City's satisfaction at the Contractor's sole expense).

CONTRACT ADMINISTRATION

The City Representative

52. The City shall appoint, and may replace, the City Representative for the Project by written notice to the Contractor.
53. The City Representative will visit the Work Site at intervals appropriate to the progress of construction to become familiar with the progress and quality of the work and to determine if the Work is proceeding in general conformity with the Contract Documents.
54. Based on the City Representative's observations and evaluation of the Contractor's invoices, the City Representative will determine the amounts owing to the Contractor under the Agreement and will recommend the invoices for payment.

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55. Matters in question by the Contractor relating to the performance of the Work or the interpretation of the Contract Documents shall be initially referred to the City Representative for interpretations and findings. The City Representative's interpretations and findings will be provided within a reasonable time.
56. With respect to claims for a change in Contract Price, the City Representative will make findings as set out in sections 74 to 78 (Changes Directives and Change Orders).
57. The City Representative will have the authority to reject any portion of the Work (including any Product) which in the City Representative's opinion does not conform to the requirements of the Contract Documents. Whenever the City Representative considers it necessary or advisable, the City Representative will have authority to require inspection or testing of Work, whether or not such work is fabricated, installed or completed. However, neither the authority of the City Representative to act nor any decision either to exercise or not to exercise such authority shall give rise to any duty or responsibility of the City Representative to the Contractor Parties.

Review and Inspection of the Work

58. The City and the City Representative shall have access to the Work at all times. The Contractor shall provide sufficient, safe and proper facilities at all times for the review of the Work by the City and the City Representative and the inspection of the Work by authorized agencies. If parts of the Work are in preparation at locations other than the Work Site, the City and the City Representative shall be given access to such Work whenever it is in progress upon reasonable notice and at its cost.
59. If any part of the Work is designated for tests, inspections or approvals in the Contract Documents or by the applicable laws, the Contractor shall give the City reasonable notification of when the part of the Work will be ready for review and inspection. The Contractor shall arrange for and shall give the City reasonable notification of the date and time of inspections by other authorities.
60. The Contractor shall furnish promptly to the City copies of any certificates and inspection reports relating to the Work.
61. If the Contractor covers, or permits to be covered, any part of the Work that has been designated for special tests, inspections or approvals before such special tests, inspections or approvals are made, given or completed, the Contractor shall, if so directed, uncover such Work, have the inspections or tests satisfactorily completed, and make good and cover such Work at the Contractor's sole expense.
62. The City may order any portion or portions of the Work to be examined to confirm that such Work is in accordance with the requirements of the Contract Documents. If the portion or portions of the Work are not in accordance with the requirements of the Contract Documents, the Contractor shall correct the Work and pay the cost of examination and correction. If such Work is in accordance with the requirements of the Contract Documents, the City shall pay the cost of examination.
63. The Contractor shall pay the cost of making any test or inspection, including the cost of samples required for such test or inspection, if such test or inspection is required in the Contract Documents or by applicable laws to be performed by the Contractor.

Defective Work

64. The Contractor 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 Work and whether or not the Defect is the result of poor design, poor workmanship, use of defective Materials or damage through carelessness or other act or omission of the Contractor.
65. If in the opinion of the City it is not expedient to correct Defective Work or Work not performed as provided in the Contract Documents, the City may deduct from the amount otherwise due to the Contractor the difference in value between the work as performed and that called for by the Contract Documents. If the City and the Contractor do not agree on the difference in value, the matter shall be handled as a dispute in accordance with sections 146 to 149 (Dispute Resolution).

EMPLOYEES AND SUBCONTRACTORS

Contractor Parties

66. The Contractor shall assign to the Work only competent, appropriately qualified, experienced and skilled Contractor Parties to perform the Work and ensure that the Work is performed under the supervision of appropriately qualified and experienced personnel.
67. All parts of the Work required by applicable laws to be performed by licensed or registered professional engineers or architects shall be performed by licensed or registered professional engineers and architects. All Deliverables must, to the extent required by the applicable laws, be reviewed by professional engineers registered to practice professional engineering in the jurisdiction in which the Work Site is located, and bear such engineer's signature and stamp.
68. The Contractor shall be solely liable to pay all salaries, wages, overtime, bonuses, allowances, profit sharing, pensions, and other remuneration of the Contractor Parties, including payment of costs related to employee benefits, and for the deduction and remittance of all applicable employment-related taxes, premiums, dues and other burdens to the appropriate governmental authorities. The Contractor shall not be entitled to claim, nor shall the City be obliged to pay or reimburse the Contractor, for any monies whatsoever in respect of or in connection with any such payments, save and except where expressly included in the Contract Price.

Subcontracting

69. The Contractor shall not enter into a subcontract for any part of the Work except as disclosed in any quote or response of the Contractor to a City procurement document or, in any other case, without the prior written approval of the City. The Contractor shall provide to the City as part of the Contractor's request for approval, a description of that part of the Work to be subcontracted and the name and address of the proposed Subcontractor, and such other information as the City may request.
70. The Contractor shall not change Subcontractors without the prior written approval of the City, which approval will not be unreasonably withheld.
71. The Contractor shall ensure that any subcontract with the Subcontractor:

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- a. enables the Contractor to terminate the subcontract for convenience and without cause and without creating any liability to the City except as provided in section 136;
 - b. contains a term that ensures that the City obtains the benefit of any warranties to be provided by the Subcontractor to the Contractor;
 - c. incorporates the relevant terms and conditions of this Agreement into the subcontract, including the requirement for insurance, with the Contractor and the City as a named insured; and,
 - d. requires the Subcontractor to perform their Work in accordance with the Contract Documents.
72. The Contractor shall be responsible to the City for the performance of all Subcontractors' Work. The Contractor is responsible for the acts, omissions and defaults of the Subcontractor and the employees, consultants, representatives and agents of the Subcontractor as if they were acts, omissions or defaults of the Contractor.
73. Nothing in the Contract Documents creates any contractual relationship between the City and any Subcontractor, except to the extent that Subcontractor warranties shall be directly enforceable by the City.

CHANGES IN THE WORK

Changes Directives and Change Orders

74. The City may at any time make any change in the Work by issuing a Change Order or Change Directive.
75. The Contractor shall not perform a change in the Work without a Change Order authorized by both parties or a Change Directive. This requirement is of the essence and it is the express intention of the parties that any claims by the Contractor for a change in the Contract Price and/or Contract Time shall not be approved unless there has been compliance with the provisions of this Part. No course of conduct or dealing between the parties, no express or implied acceptance of alterations or additions to the Work and no claims that the City has been unjustly enriched by an alteration or addition to the Work, whether in fact there is any such unjust enrichment or not, should be the basis for a claim for additional payment under this Agreement or a claim for any extension of the Contract Time.
76. When a change in the work is proposed or requested, the Contractor shall present to the City for its acceptance a description of the change in the work and the Contractor's claim for an adjustment in the Contract Price and/or Contract Time, supported by appropriate documentation, all in a form acceptable to the City. If approved by the City, a Change Order shall be issued to the Contractor, amending the Contract Price and/or Contract Time, as appropriate.
77. If the City requires the Contractor to proceed with a change prior to the City and the Contractor agreeing on a Change Order, the City shall issue a Change Directive to the Contractor authorizing the change and the Contractor shall proceed with implementation and performance of the change. If at any time after the commencement of the change directed by a Change Directive,

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the City and the Contractor reach agreement with respect to the change, this agreement shall be recorded in a Change Order signed by both the Contractor and the City and such Change Order shall supersede the Change Directive.

78. If the City and the Contractor do not agree on the proposed adjustment in the Contract Price and/or the Contract Time attributable to the change in the Work, or the method of determining it, the adjustment shall be referred to the dispute resolution process for determination.

Delay

79. If the Contractor is delayed in the performance of the Work by:

- a. an act or omission of the City contrary to the provisions of the Contract Documents; or
- b. Force Majeure,

then, provided that the delay was not attributable to any acts or omissions of the Contractor Parties, the time for the performance of the Work shall be extended for a reasonable period. The extension of time shall be of no greater duration than is reasonably required. The Contractor shall, except where the Contractor is delayed by Force Majeure, be entitled to reimbursement of any reasonable direct costs directly caused by the delay but excluding any indirect, consequential or special damages. Where the Contractor is delayed by reason of Force Majeure, there shall be no adjustment to the Contract Price and the Contractor shall not be entitled to make a claim for any reimbursement of costs incurred as a result of the Force Majeure delay.

80. No extension of the Contract Time will be approved unless the Contractor notifies the City within 48 hours of becoming aware of (or when it ought reasonably to have been aware of) or being notified of any potential delay contemplated in this section.
81. If the Contractor delays the performance of the Work and such delay is for a cause within the Contractor's control, the Contractor shall reimburse the City for the reasonable costs incurred by the City as the result of such delay or delays, in addition to any other remedies the City may have against the Contractor as a result of such delays.

WORK SITE

Access to Work Site

82. The City shall give the Contractor non-exclusive access to the Work Site to enable the Contractor to carry out its obligations under the Contract Documents, subject to the restrictions set out in the Contract Documents.

Conditions

83. The Contractor represents to the City that it has familiarized itself with local conditions at and in the vicinity of the Work Site and has examined all reasonably available information relevant to the risks, contingencies and other circumstances having an effect on the Work, the Construction Schedule, the Contract Time or the Contract Price. The Contractor shall investigate and fully familiarize itself with the Work Site, the constraints of the location, weather conditions and

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ground conditions and all of the environmental undertakings as set out in the Contract Documents or applicable laws.

84. The Contractor is not entitled to compensation or to an extension of the Contract Time for conditions which could reasonably have been ascertained by the Contractor by careful investigation undertaken prior to the submission of its proposal or quote.

Concealed or Unknown Conditions

85. If the City or the Contractor discover conditions, including mould or Environmental Contaminants, at the Work Site which are:
- a. subsurface or otherwise concealed physical conditions which existed before the commencement of the Work which differ materially from those indicated in the Contract Documents; or
 - b. physical conditions, other than conditions due to weather, that are of a nature which differ materially from those ordinarily found to exist for such Work,

then the party that discovers such conditions shall give notice to the other party of such conditions before they are disturbed and in no event later than 5 Working Days after first discovering the conditions. The City Representative will investigate the conditions and make a finding regarding whether or not the conditions differ materially and, if so, will issue a change order for the changes in the Contract Time and/or the Contract Price to complete the Work.

86. The Contractor confirms that, prior to submitting its bid in response to the procurement process for the Project, it had the opportunity to carefully investigate the Work Site and applied to that investigation the Standard of Care. The Contractor is not entitled to compensation or to an extension of the Contract Time for conditions which could reasonably have been ascertained by the Contractor by such careful investigation undertaken prior to the submission of its bid.
87. The Contractor acknowledges that the letter regarding the Designated Substance Survey and subsequent abatement work on the Work Site and the list and locations of the remaining Designated Substances on the Work Site described in section 94 was provided to the Contractor by the City for information purposes only and in compliance with the provisions of the *Occupational Health and Safety Act* prior to submission of the Contractor's proposal. The Contractor shall have no remedy against the author of the report for any damages suffered by it as a result of decisions made or actions taken by the Contractor based on the report.
88. The Contractor confirms that it has conducted its own investigation of the Work Site as described in section 86 and satisfied itself of the exact quantities and conditions of the Designated Substances at the Work Site and included in the Contract Price the cost of all the work procedures and practices needed to comply with the applicable federal and provincial laws.

Cleanup

89. The Contractor shall maintain the Work Site in a safe and tidy condition and free from the accumulation of waste Materials and debris, other than that caused by the City or other contractors.

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90. Prior to submitting notice for Substantial Performance of the Work, the Contractor shall remove waste Materials and debris, other than that resulting from the work of the City or other contractors. The Contractor shall remove Materials, tools, Construction Equipment, and temporary work not required for the performance of the remaining Work.
91. Prior to submitting the final invoice, the Contractor shall remove from the Work Site the remaining Materials, tools, Construction Equipment, Temporary Work and waste Materials and debris, except those resulting from the work of the City or other contractors.

Utilities

92. The Contractor shall determine the location of all underground utilities and structures indicated in the Contract Documents or that are discoverable by inspection using the degree of care and skills described in the Standard of Care.

Damage to Work Site

93. The Contractor shall be responsible for the remediation, at its expense, of any damage, including by Environmental Contaminants or mould, to the Work Site, the Work, the City's property or third parties' property caused by the Contractor in the performance of the Work.

Environmental Contaminants

94. The Contractor acknowledges that the City has taken reasonable steps to determine whether any Environmental Contaminants are present at the Place of the Work, and that the City has provided the Contractor with a list of such toxic or hazardous substances attached in "**Appendix C – 7565 Lundy's Lane Asbestos Condition Assessment 2019**" and "**Appendix D – Designated Substances Report**" from Ontario Environmental & Safety Network Ltd. regarding the Designated Substances Survey conducted at the Work Site.
95. As of the date set out in section 6 for the commencement of the Work, the Contractor shall be responsible for taking all reasonable steps to ensure that no person's exposure to the Designated Substances or any other Environmental Contaminants discovered after the commencement of the Work, exceeds the time weighted levels prescribed by the *Occupational Health and Safety Act* (Ontario) at the Work Site and that no property is damaged or destroyed as the result of exposure to, or the presence of the Designated Substances or any other Environmental Contaminants discovered after the commencement of the Work.
96. The Contractor shall be responsible for taking all necessary steps, in accordance with the applicable laws, including Health and Safety and Environmental Laws to dispose of, store or otherwise render harmless the Designated Substances.
97. If Environmental Contaminants are discovered after the commencement of the Work and the City determines that the Environmental Contaminants were not brought onto the Work Site by the Contractor and could not have been discovered during the inspection by the Contractor described in section 86, the City shall issue a Change Directive to the Contractor, directing the Contractor to take all reasonable steps required to safely remove and/or dispose of the Environmental Contaminants.

Environmental Liability

98. The Contractor shall comply with all applicable laws, including Environmental Laws, in the provision of the Work. If the Contractor fails to comply with Environmental Laws relating to the performance of the Work, the Contractor shall be solely responsible for and shall indemnify and hold harmless the City from, all costs, claims, fines, fees or other expenses arising from such failure to comply.
99. The Contractor shall not cause or permit any Environmental Contaminants to be located, disposed of, released, discharged or incorporated in, on or under any part of the City's land except as required to perform the Work. The Contractor shall remove from the City's land, immediately upon demand, at its cost, any Environmental Contaminants introduced thereto by the Contractor that are not required to provide the Work. If there is remediation work required on the City's land or adjacent land or watercourse due to environmental contamination that occurred as a result of the Contractor's entry onto the City's land to perform the Work, the Contractor shall be responsible for all costs incurred to complete remediation work on the City's land and adjacent land or watercourse and shall reimburse the City or any public authority or any third party for any reasonable costs incurred as a result of the requirement to complete the remediation work.
100. The Contractor shall have no responsibility for Environmental Contaminants existing in the City's land prior to the Contractor performing the Work and entering upon the City's land unless the Contractor causes the release or migration of the Environmental Contaminants while performing the Work.
101. Notwithstanding any provision of law to the contrary, any Environmental Contaminants placed or permitted on or under the City's land by the Contractor shall remain the property of the Contractor.

DELIVERABLES AND INTELLECTUAL PROPERTY

Deliverables

102. All Deliverables shall be the sole and absolute property of the City as and when created. The Contractor shall provide the Deliverables in the form required by the City.

Contractor's Background IP

103. The City acknowledges that the Contractor remains the owner of all Intellectual Property Rights owned by or licensed to the Contractor prior to and after the date of this Agreement, other than any Intellectual Property Rights arising from the Work ("Contractor Background IP").
104. The Contractor grants to the City a fully paid, non-exclusive, worldwide, transferable (with the right to assign and sub-license), royalty free, irrevocable, perpetual licence of the Contractor's Background IP to use, make, have made, import and export any of the Contractor's Background IP to the extent necessary for the City to fully enjoy Deliverables for the Project, including for the purposes of repairing, maintaining or servicing (including the supply of replacement parts), or alterations, additions or expansions to the Work or the Work Site.

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105. The City may sub-licence the Contractor's Background IP to any Person if for the purposes of providing services to, or performing work for, the City.

Work IP

106. All Intellectual Property Rights (including the Deliverables) arising from and relating to the Work (the "Work IP"), from its creation, vests in the City and is the sole and absolute property of the City as and when created. The Contractor assigns all of its Intellectual Property Rights and waives all moral rights, and shall require Subcontractors to assign their Intellectual Property Rights and waive their moral rights, in and to the Work IP, if any, to the City.
107. The Contractor shall maintain the Work IP in confidence unless otherwise agreed in writing by the City.

CONFIDENTIAL INFORMATION

Non-Disclosure and Restricted Use

108. Except as otherwise permitted in the Contract Documents, the Contractor shall keep in confidence, any Confidential Information that it now has or that may come into its possession in the course of the Agreement, including information marked "Confidential", and shall not, without the City's prior written consent, disclose the Confidential Information in any manner whatsoever, in whole or in part, and shall not use the Confidential Information for any purpose other than in connection with the Project. The Contractor may reveal or permit access to the Confidential Information only to Contractor Parties who need to know the Confidential Information, who must be advised of the confidential nature of the Confidential Information, who are directed by the Contractor to hold the Confidential Information in confidence and who agree to be bound by and to act in accordance with the terms and conditions of the Agreement. The Contractor shall take all necessary precautions or measures to prevent improper access to, or use or disclosure of, the Confidential Information by such parties and agrees to be jointly and severally responsible for any breach of the Agreement by any Contractor Parties.
109. The Contractor acknowledges that the City is subject to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* as amended from time to time.

AUDITS

110. The City has the right to audit all financial and related records associated with the terms of the Agreement and the Contract Documents, including Deliverables, timesheets, reimbursable out of pocket expenses, materials, goods and Construction Equipment claimed by the Contractor.
111. The Contractor shall at all times during the term of the Agreement and for a period of six years after the expiration or termination of the Agreement, keep and maintain records of the Work performed pursuant to the Agreement. The Contractor shall at its own expense make such records available for inspection and audit by the City at all reasonable times and without prior notice.

TITLE, RISK, INSURANCE AND WSIB

Title and Risk

112. Title to all Work, including the Deliverables and other items supplied by the Contractor or its Subcontractors, completed or in the course of completion and all Materials for this Project, except Construction Equipment shall become the property of the City upon the earlier of payment by the City on account for such item or delivery to the Work Site. Notwithstanding the foregoing, until final completion of the Work and the City taking possession and control of the Work, the Contractor shall retain all risk with respect to and be responsible for: (a) all items supplied by the City, the Contractor or its Subcontractors that are to be incorporated into the Work or used in performing the Work; and (b) any Work completed or in progress.

Insurance

113. The Contractor 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, satisfactory to the City, of the following insurance coverages, all taken out with insurers licensed to transact insurance business in Ontario and satisfactory to the City:
- a. Commercial General Liability Insurance
 - i. The Bidder shall, at their expense obtain and keep in force during the term of the Agreement, Commercial General Liability Insurance satisfactory to the City and underwritten by an insurer licensed to conduct business in the Province of Ontario. The policy shall provide coverage for Bodily Injury, Property Damage and Personal Injury and shall include but not be limited to:
 - a) A limit of liability of not less than \$5,000,000/occurrence.
 - b) Non-owned automobile coverage with a limit not less than \$2,000,000 and shall include contractual non-owned coverage
 - c) Name the Owner as Additional Insured
 - d) Cross-liability and severability of interest
 - e) Blanket Contractual Liability
 - f) Products and Completed Operations
 - g) Premises and Operations Liability
 - h) Contingent Employers Liability
 - i) Owners and Contractors Protective
 - j) Premises and Operations Liability
 - k) Broad Form Property Damage
 - l) Attached Machinery
 - m) The Policy shall not contain any exclusions of liability for damage to property, building or land, arising from the removal or weakening of support of any property, building or land whether such support is natural or otherwise.
 - n) The Policy shall be written on an "occurrence basis". 'Claims Made' insurance policies will not be permitted.

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- ii. If applicable to the construction project described in the Contract Agreement, coverage shall include shoring, blasting, excavation, underpinning, demolition, pile driving, caisson work and work below ground surface including tunneling and grading.
 - iii. To achieve the desired limits, umbrella or excess liability insurance may be used.
- b. Automobile Liability Insurance:
- i. The Bidder shall maintain automobile liability insurance **covering third party property damage and bodily injury liability (including accident benefits) as may be required by Applicable Laws** on all Owned and Leased Automobiles to a limit of **Two million (\$2,000,000)** throughout the term of this **Agreement/Purchase Order**. **Five million (\$5,000,000) is required if Heavy Equipment is to be used as to complete the work or project.**
- c. Contractor's Equipment Floater:
- i. The Bidder shall provide and maintain coverage on equipment used during the term of this Agreement. Coverage will be provided, on a broad form basis, for construction machinery, equipment, tools and stock that will be used by the Bidder in the performance of the work. The coverage will also include the rental expense.
- d. Contractor's Pollution Liability:
- i. The Bidder shall carry a Contractor's Pollution Liability Policy, underwritten by an insurer licensed to conduct business in the Province of Ontario for a limit of not less than Five Million Dollars (\$5,000,000). The policy shall provide coverage for pollution conditions as a result of the operations performed at the job.
- e. Provisions
- i. Prior to issuance of an **Agreement** and prior to the commencement of any work, the Proponent shall forward **certified Certificates of Insurance forms attached (no substitutes or omissions will be accepted)** evidencing **the above noted** insurance with the executed Agreement. These Certificates shall state that coverage will not be suspended, voided, cancelled, reduced in coverage or in limits except after thirty (30) days prior written notice by certified mail to the City.
 - ii. **All policies listed above to remain in force until final acceptance of the work described herein by the City.**
 - iii. It is also understood and agreed that in the event of a claim any deductible or self-insured retention under this policy of insurance shall be the sole responsibility of the Contractor and that this coverage shall be primary insurance. Any insurance or self-insurance maintained by the City shall be considered excess of the Contractor's insurance.
- f. Additional Insured

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- i. The following parties are identified to be included as additional insured for this project:
 - a) The Corporation of the City of Niagara Falls
 - b) Ontario Environmental Safety Network Ltd. (OESN)
 - c) The Regional Municipality of Niagara
114. If any of the Contractor's insurance policies expire during the term of this agreement, the Contractor shall renew or replace them and, within sixty (60) days after such expiry, provide to the City certificates of the renewed/replaced insurance.
115. The Contractor shall ensure that all the insurance is primary and does not call into contribution any other insurance coverage available to the City. The Contractor shall not do or omit to do anything which would impair or invalidate the insurance policies.
116. If the Contractor fails to take out or maintain the above-described insurance, the City may, in its discretion, terminate this agreement immediately or take over and maintain such insurance, whereupon the Contractor shall immediately pay to the City any premium paid by the City for such insurance.

Workers' Compensation

117. The Contractor shall ensure all of its and its Subcontractors' employees, consultants, representatives and agents and visitors attending at the Work Site, or any of them who perform Work but do not attend at the Work Site, are registered for workers' compensation coverage.
118. The Contractor shall provide to the City a current certificate under the WSIA confirming that the Contractor has complied with its obligations under the WSIA and whenever a certificate has expired and been replaced with a new, current, certificate, the new certificate shall be provided to the City.

WARRANTY

119. The Contractor warrants the work free from Defect for a warranty period of six (6) months from the date of Substantial Performance of the Work or, if Substantial Performance of the Work was not certified, six (6) months from the date of Final Completion of the Work (the "Warranty Period").
120. The City shall promptly give the Contractor notice of observed Defects which arise during the Warranty Period. Following the receipt of the notice, the Contractor shall remedy, at the Contractor's expense, the Defects in the Work within ten (10) Working Days of receipt of the notice, or such other period directed by the City, acting reasonably (the "Remediation Period"). The Contractor shall correct or pay for damage resulting from such remediation.
121. If the Contractor fails to remedy a Defect within the Remediation Period, the City may upon written notice to the Contractor, in its sole discretion, either proceed to remedy the Defect itself or contract a third party to remedy the Defect (including redesign costs, reconstruction costs and costs related to damages arising from such Defect). The City shall be entitled to recover from the Contractor the costs thereof or may deduct the money from any monies due or that become due to the Contractor, including any Warranty Holdback.

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122. The Contractor further warrants any and all remedial work it performs for a further period of six (6) months from completion of the remedial work.
123. The City may hold back, on each invoice, advance payment or progress draw, 5.0% of the total amount payable under each such invoice, advance payment or progress draw as security for the Contractor's performance of its warranty obligations (the "Warranty Holdback"). In the event the Contractor fails to correct a Defect during the warranty period within the required time and/or fails to pay for the redesign, reconstruction and other costs related to damages arising from a Defect, the City shall have the right to use the Warranty Holdback money, or such part of it still being held by the City, to pay for the costs of remedying the Defect and any redesign, reconstruction or other costs relating to the Defect. If the costs are greater than the amount of the Warranty Holdback, the Contractor shall pay the additional costs upon receipt of an invoice from the City. The Contractor shall have the right to invoice the City for the balance of the Warranty Holdback at the end of the warranty period or extended warranty period.
124. Acceptance of the Work by the City shall not relieve the Contractor from any responsibility for Defects.
125. The Contractor shall assign to the City all warranties, guarantees or other obligations for Work, services or Materials performed or supplied by any Subcontractor, supplier or other person in connection with the Work and such assignment shall be with the consent of the assigning party where required by law or by the terms of that party's agreement. Such assignment shall be in addition to, and shall in no way limit, the warranty rights of the City under the Contract Documents.
126. If the Contract Documents require the Contractor to provide extended warranties for specific services or Materials, the extended warranties shall be provided to the City at no additional cost.

FORCE MAJEURE

127. If the performance by either Party of its obligations under the Agreement is prevented, substantially restricted, or rendered impossible by Force Majeure, the obligations of the party affected by Force Majeure shall be suspended and deferred for the duration of the Force Majeure, and non-performance of such obligations shall not be a breach of the Agreement or give rise to any claim for damages or result in any increase to the Contract Price, and such party shall not be liable for any non-performance of such obligations.
128. The party claiming Force Majeure shall promptly give the other party notice with reasonably full particulars of the Force Majeure and use its reasonable efforts to overcome the effects of Force Majeure and resume performance of its obligations.
129. If the City has given a notice of a Force Majeure, or if the City Representative agrees with the Contractor's notice of Force Majeure, then the City shall:
 - a. cause or permit the Contractor to complete the Work, with such time adjustments to the Construction Schedule as are required by the Force Majeure and as documented in a Change Order; or,
 - b. suspend the Work in accordance with this Agreement.

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130. If the Contractor gives notice of a Force Majeure and the non-performance of any obligation affected by such Force Majeure continues for a period longer than 30 days, the City may terminate the Agreement by notice in writing to the Contractor. The City shall pay the Contractor for the Work performed to the date of termination.

SUSPENSION AND TERMINATION

Suspension

131. The City may suspend the Work at any time and for any reason upon providing notice to the Contractor and such notice shall have immediate effect, unless stated otherwise. At the end of the suspension period, the City and the Contractor may negotiate in good faith any adjustments to the Contract Price, the Contract Time or the Construction Schedule to account for the time in which the Work was suspended. The Contractor shall not be entitled to any adjustment where the suspension was a result of any act or omission of the Contractor.

Termination for Convenience

132. The City may, at its sole and absolute discretion and without cause, terminate the Agreement upon written notice to the Contractor and the Contractor shall cease the performance of the Work effective on the date specified in that notice.

Contractor Default

133. The Contractor is in default under the Agreement if any of the following occurs:
- a. the Contractor becomes insolvent or makes a general assignment for the benefit of its creditors, enters into a plan of arrangement for the benefit of its creditors or otherwise acknowledges its insolvency or if a bankruptcy or receiving order is filed or made against it;
 - b. the Contractor commits a breach of the health and safety plan applicable to the Work Site;
 - c. the Contractor abandons the Work for a period which exceeds 7 days from receipt by the Contractor of a written request from the City to return to the Work Site;
 - d. the Contractor assigns the Agreement or any right or obligation under the Agreement or subcontracts the Work without the prior written consent of the City; or,
 - e. the Contractor commits a breach of any of the terms of the Agreement (other than a breach already referred to in this section), and upon receiving notice of such breach from the City, the Contractor fails to remedy such breach within 7 days after receipt of notice from the City of the breach.

If the Contractor is in default, the City shall be entitled to immediately terminate this Agreement upon providing notice to the Contractor and/or to exercise any one of its rights in section 134.

Remedies of the City for Default

134. Upon the occurrence of a Contractor default, provided the City has given the Contractor notice, the City may, without prejudice to any of its other rights and remedies, do any or all of the following in its sole discretion:
- a. terminate the Agreement in its entirety by written notice having immediate effect;
 - b. take any action the City considers appropriate to rectify or attempt to rectify the Contractor's default but shall not be obligated to do so and all costs and expenses incurred by the City in rectifying or attempting to rectify the Contractor's default, together with interest thereon, shall be payable by the Contractor on demand. Such action by the City shall not be deemed a termination;
 - c. take possession of all goods and the Contractor's Construction Equipment, Materials and plant and shall have the right to use the same to complete, or arrange to have completed, the Work;
 - d. withhold all further payments to the Contractor, subject to the City's rights of set off, and use any amounts withheld for any purpose to advance the Project, and upon final completion, recover from the Contractor any liability incurred or suffered by the City as a result of, or arising out of, or in any way in connection with, the Contractor default;
 - e. make a claim against any applicable contract security required to be provided by the Contractor; and,
 - f. recover all legal costs and expenses on a full indemnity basis that were incurred by the City associated with the termination.

City Default

135. The City shall be in default under the Contract Documents if any of the following occur:
- a. the City becomes insolvent or makes a general assignment for the benefit of its creditors, enters into a plan of arrangement for the benefit of its creditors or otherwise acknowledges its insolvency or if a bankruptcy or receiving order is filed or made against it; or
 - b. the City fails to make an undisputed payment that is due and payable within the payment period in accordance with the Contract Documents and upon receiving notice of such breach from the Contractor, the City fails to remedy such breach within 20 Working Days of notice of such breach,

in which case, the Contractor, shall be entitled to immediately terminate this Agreement upon providing notice to the City.

On Termination

136. If the Agreement is terminated under sections 132 or 135, the City shall pay the Contractor all undisputed invoices due to the Contractor for Work performed in the relevant period, together with reasonable and auditable demobilization costs and other direct costs the Contractor reasonably incurs and provides satisfactory evidence for in terminating the Agreement, including reasonable cancellation fees payable to its Subcontractors. The amount to be paid under this section is the Contractor's sole claim for payment for termination.
137. If the Agreement, in whole or in part, is terminated:
- a. the Contractor shall immediately deliver to the City all the Deliverables and all other documents and work product arising in connection with the Work, completed or in progress;
 - b. the Contractor shall effect an orderly transition to any contractor replacing the Contractor for the completion of the Work;
 - c. as directed by the City Representative, subject to subsection 134 (c), remove from the Work Site any property of or in the possession or control of the Contractor prior to the effective date of termination other than property belonging to the City or to be incorporated in the Work. The City may, without any liability whatsoever and at the Contractor's sole expense, remove or dispose of any such property left at the Work Site after such date; and,
 - d. all terms and obligations set forth in the Agreement that by their terms or nature continue to apply to the Contractor following termination or expiration of the Agreement shall apply.

INDEMNITY AND LIABILITY

Representations

138. Except for the representations and warranties and conditions expressly set out in this Agreement, the City hereby excludes any and all representations, warranties and conditions of any kind, express or implied, including any implied warranty of merchantability or fitness for a particular purpose.

General Indemnity

139. The Contractor shall indemnify the City and its officers, employees, consultants, contractors and agents (collectively the "the City Indemnitees") and save them harmless from and against all losses, claims, liabilities, damages and costs ("Loss") which may arise by reason of the exercise of the responsibilities and obligations contained in the Contract Documents by the Contractor or as a result of any breach of the terms of this Agreement by the Contractor or by any act or omission of the Contractor or Contractor Parties or those for whom the Contractor is at law responsible, including all legal costs and expenses reasonably incurred by the City in connection with the defence or settlement of any such Loss, unless such Loss is caused by the negligent act or omission

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of the City or those for whom it is in law responsible. For the purpose of enforcement of this indemnity, the City is acting as agent and trustee for the City Indemnitees.

Specific Indemnities

140. The Contractor shall indemnify the City and the City Indemnitees and save them harmless from and against all Loss incurred by the City arising from:
- a. any decision or interpretation by any court or governmental authority that: (i) any of the Contractor Parties is an employee of the City; or (ii) the City is liable to pay statutory contributions or deductions in respect of any of the Contractor Parties under any Laws, including employment insurance, provincial health insurance, income tax or other employment matters;
 - b. any health, medical disability or similar claims which the Contractor or Contractor Parties may have during or after the term of this Agreement;
 - c. a claim by any third party against the City alleging that the Work IP and its use by the City, infringes any Intellectual Property Rights;
 - d. safety infractions committed by the Contractor under the Occupational Health and Safety Act; and,
 - e. exposure to, or the presence of, toxic or hazardous substances or materials or Environmental Contaminants which were either brought on to the Work Site by the Contractor or a Contractor Party and mishandled or handled negligently or improperly.

Exception

141. The Contractor shall not be liable for any Loss arising from errors or omissions in any of the information which is supplied to the Contractor by the City.

Bodily Injury and Property Damage

142. The Contractor 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 and act or omission of the Contractor or a Contractor Party or those for whom it is at law responsible.

Waiver

143. The Contractor waives against the City and the City Indemnitees 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 Contractor or Contractor Parties and for any loss or damage of the Contractor unless caused by the negligent act or omission of the City or the City Indemnitees.

Limitation of Liability

144. 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.

Survival

145. Sections 131 to 137 shall survive the expiry or termination of this Agreement.

DISPUTE RESOLUTION

146. All unresolved claims, disputes or controversies of any kind arising out of or in connection with this Agreement or the provision of the services (hereafter referred to as the "Dispute") shall be resolved in a tiered approach as follows:
- a. A Dispute shall be referred to the City's project manager for the Project and a representative of the Contractor of the equivalent seniority or position for resolution within a period not to exceed thirty (30) days;
 - b. If unresolved, after following the process described in (a), the Dispute shall be referred to the City Director who is responsible for the Project and an employee of the Contractor of the equivalent seniority or position for resolution within a period not to exceed thirty (30) days; and,
 - c. If unresolved after following the process described in (b), and only at the election of the City, the Dispute shall be referred to the CAO of the City and the most senior executive employee of the Contractor for resolution within a period not to exceed thirty (30) days. If the City does not elect, at its sole option, to proceed under this paragraph, the Dispute shall proceed to the next step as described in section 147.
147. If the Dispute remains unresolved despite the Parties attempting to resolve it following the process in section 146 (a) to (c), a party may elect to proceed with the Dispute under a mediation model to be agreed upon by the parties. A party shall elect to proceed to mediation no later than ten (10) days following the expiry of the timeline set out in (b) or (c), whichever is the later. If a party elects to proceed with mediation, the other party shall be bound to proceed to mediation. No later than ten (10) days, or as may be amended by mutual agreement of the parties, after a party makes an election to proceed to mediation, the parties shall enter into a mediation agreement which shall set out the mediation process and designate the mediator.
148. If neither party elects to proceed to mediation within the timelines outlined in section 147 or the Parties are unable to enter into a mediation agreement within the time limits, the matter shall proceed and be finally resolved through the applicable court proceeding unless the Parties agree to arbitration. If arbitration is agreed to, it shall be binding arbitration by a single arbitrator in accordance with the *Arbitration Act*, 1991, S.O. 1991, c. 17 (hereafter referred to as the "Act") as

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amended by an arbitration agreement to be executed by the parties and the arbitrator. The Parties shall mutually agree on the selection of the arbitrator, failing which the arbitrator shall be appointed in accordance with the Act. The arbitration proceedings shall take place in a location agreed by the parties. The language of the arbitration shall be English. The Parties agree that any arbitration award, including with respect to costs, shall be binding on the Parties, may be enforced in any court of competent jurisdiction and shall be final and no appeals or judicial reviews shall be permitted as of right or by application to any court of competent jurisdiction, except on errors of law. The Parties shall each bear their own costs and their proportionate share of any joint costs of arbitration, subject to any award of an arbitrator.

149. The timelines in sections 146 and 147 may be amended by mutual agreement of the Parties.

CONTRACT SECURITY

150. The Contractor shall, prior to commencement of the Work or within the time specified in the procurement documents, provide to the City the performance bond and labour and material payment bond, if any, specified in the procurement documents. The bonds shall be maintained in good standing until final completion is achieved. The bonds shall be in the form prescribed by the *Construction Act*.

HEALTH AND SAFETY

151. The Contractor shall be solely responsible for construction safety at the Work Site and for compliance with the rules, regulations and practices required by the applicable construction health and safety legislation and shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Work.
152. Prior to the commencement of the Work, the Contractor shall submit to the City documentation of the Contractor's health and safety policy and programs and a copy of the Notice of Project filed with the Ministry of Labour naming itself as "Constructor" under the *Ontario Occupational Health and Safety Act*.
153. The Contractor shall comply with all health and safety policies, instructions and rules established by the City from time to time.

PRIOR SERVICES OR WORK

154. Any aspect of the Work provided for herein which has been performed by the Contractor prior to the execution of this Agreement and any payment made by the City for such work shall be deemed to be subject to and performed and paid under this Agreement.

GENERAL

155. **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. The subsequent acceptance of any remittances from the Contractor by the City shall not be deemed a waiver of any preceding

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breach by the Contractor regardless of the City's knowledge of such preceding breach at the time of the acceptance of such compensation.

156. **Relationship:** Nothing contained in this Agreement shall be deemed or construed by the parties nor by any third party as creating the relationship of principal and agent, landlord and tenant, or of partnership or of joint venture between the parties.
157. **Governing Law:** This Agreement shall be governed by and constituted in accordance with the laws in force in the Province of Ontario without regard to 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.
158. **Severability:** Should any section or part or parts of a 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 Service Provider as though such section or part or parts thereof had never been included in this Agreement.
159. **Entire Agreement:** This Agreement constitutes the entire agreement and understanding of the parties and supersedes any and all prior understandings, discussions, negotiations, commitments, representations, warranties, and agreements, written or oral, express or implied between them with respect to the subject of this Agreement. No amendment, variation or change to this Agreement shall be binding unless the same shall be in writing and signed by the parties.
160. **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.
161. **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.
162. **Notice:** Any notice, consent, acceptance or approval required or permitted to be given in connection with the Contract Documents shall be in writing and shall be sufficiently given if delivered to the recipient party if sent to the address of the party set out below by personal delivery, courier, mail, facsimile or email.

Notice to the City at:

City of Niagara Falls
4310 Queen Street, P.O. Box 1023
Niagara Falls ON L2E 6X5
Attention: Legal Services
E: legalservices@niagarafalls.ca
T: 905-356-7521

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F: 905-371-2892

and Notice to the Contractor at:

Attention:

E:

T:

F:

Any notice delivered or transmitted to a party shall be deemed to have been given and received on the day it is delivered or transmitted, provided that if it is delivered or transmitted on a day that is not a Working Day, then the notice shall be deemed to have given and received on the next Working Day. Any party may, from time to time, change its contact information by giving notice to the other party in accordance with this section.

- 163. **Assignment and Enurement:** The Contractor may not assign this Agreement (or the proceeds thereof) or subcontract its obligations under this Agreement without the express consent of the City, which consent may be withheld or conditioned in the City's sole and absolute discretion. This Agreement enures to the benefit of and it is binding upon the parties and their respective successors and permitted assigns.

IN WITNESS WHEREOF the parties have executed this Agreement.

**THE CORPORATION OF THE
CITY OF NIAGARA FALLS**

By: _____

Date: _____

I have authority to bind the Corporation

By: _____

Name:

Title:

Date: _____

I have authority to bind the Corporation