

**THE CORPORATION OF THE CITY OF MARKHAM  
MARCH 6, 2019 Version 9**

**GENERAL TERMS AND CONDITIONS – CONSULTANT (ITS)**

**PART I – DEFINITIONS**

The terms below shall have the following meanings:

“**Bid**” means the offer of a Bidder to furnish goods or services in response to a Quotation issued by the City.

“**Bidder**” means any individual, corporation or other person submitting a response to a Quotation issued by the City.

“**Bid Form**” means the “Bid Form” section of the Quotation, which must be completed by the Bidder and include the Bid Price and the signature of the authorized signing representative(s) of the Bidder.

“**Bid Price**” means the total bid price for the Work as specified in the Bid, EXCLUDING all applicable taxes.

“**Bidding System**” means the City’s online web-based solution for issuing solicitations and/or receiving online bid submissions and posting bid results.

“**Business Days**” means a day other than a Saturday, Sunday, statutory holiday or other holiday that is observed by the City.

“**City**” means The Corporation of the City of Markham, and shall include any elected official, director, officer, employee or agent of the City who has been authorized to act on its behalf.

“**Closing Time**” means the date and time that all Bids must be received by the City as specified in the Quotation.

“**Competent Person**” means a person who is qualified because of knowledge, experience and training to organize the Work and its performance, is familiar with the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 and Regulations, as amended, that apply to the Work, and has knowledge of any potential or actual danger to health or safety in the workplace.

“**Conflict of Interest**” means a situation in which the personal, private or commercial interests of a Bidder, Consultant or Subconsultant (or their directors, officers, employees, or agents) conflict with the interests of the City.

“**Contract**” means the legally binding agreement between the City and the Successful Bidder, which agreement is comprised of the Quotation, the Bid, the Purchase Order and any other written agreement between the City and the Successful Bidder regarding the Work, unless otherwise specified in the Quotation.

“**Contract Award**” means the notice in writing (signed by a duly authorized representative of the City) that a Bidder has been selected as the Successful Bidder for the purposes of a Quotation.

“**Consultant**” means the Successful Bidder which has been awarded the Contract by the City for the Work.

“**Council**” means the Council of The Corporation of the City of Markham.

“**Deliverables**” means all services, materials, plans, designs, drawings, data, products, equipment, devices, hardware, software or other deliverables created, developed, prepared or provided by or on behalf of the Consultant in connection with the Work or the Consultant’s obligations under the Contract.

“**General Terms and Conditions**” mean the City’s *General Terms and Conditions*, as may be revised by the City from time to time.

“**Purchase Order**” means the form of purchase order used by the City to procure goods and/or services.

“**Purchasing By-law**” means the by-law enacted by Council with respect to the procurement of goods and/or services by the City, which by-law may be revised by Council from time to time.

“**Quotation**” means a request for quotation, request for proposal, request for tender, request for pre-qualification, expression of interest (and any addenda thereto issued by the City) or other document by which Bids are solicited by the City.

“**Successful Bidder**” means the Bidder which has been awarded the Contract by the City for the Work.

“**Subconsultant**” means the individual, corporation or other person engaged by the Consultant to complete a portion of the Work.

“**Total Bid Price**” means the total bid price for the Work as specified in the Bid, INCLUDING all applicable taxes.

“**Work**” means the labour, materials, products, equipment and/or services specified in the Quotation and, upon Contract Award, required to complete the requirements of the Contract.

## **PART II – INSTRUCTIONS TO BIDDERS**

### **1. QUOTATION PROCESS**

By submitting a Bid in response to a Quotation, the Bidder agrees to be bound by the terms and conditions of the Quotation and the City’s *General Terms and Conditions* and *Purchasing #2017-8*, which can be found on the City’s website:

<https://www.markham.ca/wps/portal/home/business/bids-tenders/bylaw-terms-and-conditions/05-by-law-terms-and-conditions> or from the City.

### **2. MANDATORY REQUIREMENTS**

The failure by a Bidder to comply with any requirement of a Quotation which is identified as “MANDATORY” shall result in the Bid being rejected as non-compliant.

### **3. MANDATORY SITE MEETING**

If a Quotation indicates that a MANDATORY site meeting shall be held, all Bidders must attend the site meeting (on the date and time indicated) and register with the City's representative. Failure to attend and register shall result in the Bid being rejected as non-compliant.

### **4. BIDDER'S RESPONSIBILITY**

- 4.1 It is the Bidder's responsibility to examine all components of the Quotation, including all appendices, schedules, forms and addenda, and to seek clarification of any requirement that they consider unclear before submitting a Bid. The failure of any Bidder to examine any component of the Quotation or to seek clarification shall not relieve the Bidder of any obligation with respect to their Bid or any Contract awarded based on their Bid.
- 4.2 Should a Bidder find discrepancies in or omissions from the Quotation, or have any questions regarding a Quotation, the Bidder shall direct all inquiries to the designated City staff specified on the Quotation cover page. No oral interpretations shall be effective to modify any provisions of the Quotation. Only written addenda issued by the City shall modify the Quotation.
- 4.3 It is the Bidder's responsibility to review the Work site and to include in their Bid any items that might have been missed from the specifications that would reasonably be considered part of the specifications. The Bidder shall take into account all obstacles that may be faced during the Work when setting prices in the Bid.

### **5. ADDENDA**

- 5.1 The City reserves the right, in its sole discretion, to revise the Quotation *prior to* the Closing Time. If the City exercises this right, the revisions shall be by addendum forwarded through the Bidding System or to the email address provided. The addendum shall form part of the Quotation upon issuance by the City.
- 5.2 It is the responsibility of the Bidder to confirm that they have received all addendums that have been issued by the City. Bidders should check on line at <https://markham.bidsandtenders.ca> or contact the City prior to submitting their Bid.

### **6. CONFIDENTIALITY**

All correspondence, documentation and information provided by the City to Bidders in connection with a Quotation;

- (a) are and shall remain the property of the City,
- (b) shall be treated by Bidders as confidential, and
- (c) shall not be used for any purpose other than for replying to the Quotation and completing the requirements of the Contract.

## **7. BID SUBMISSION**

- 7.1 The City shall not be liable for, nor reimburse any Bidder for, costs incurred in the preparation and/or submission of a Bid.
- 7.2 Bidders are required to disclose in their Bid any real or potential Conflict of Interest.
- 7.3 Bidders are required to disclose in their Bid a list of all proposed Subconsultants. The City reserves the right, in its sole discretion, to accept or reject any or all Subconsultants proposed in a Bid (and any subsequent changes thereto). Upon request, Bidders shall provide evidence satisfactory to the City (as determined by the City in its sole discretion) that the proposed Subconsultants have the qualifications, experience and resources to complete the Work.
- 7.4 If a Quotation requires the submission of paper copy of the Bids:
  - (a) The Bid shall be legible, written in ink or typed. Any erasures, overwriting or strike-outs should be initialed by the person(s) signing on behalf of the Bidder.
  - (b) Bids shall be submitted in a sealed envelope, with a submission label clearly identifying the Bid number and project description.
  - (c) The Bid Form shall bear the legal name and signature of the authorized signing representative(s) of the Bidder. If a joint Bid is submitted, the Bid Form shall be signed on behalf of each of the Bidders and, if the authorized signing representative for both Bidders is one individual, such individual shall sign separately on behalf of each Bidder.
  - (d) Bids shall be in the possession of the City, date and time stamped no later than the Closing Time. Bids received by the City after the Closing Time shall NOT be accepted and shall be returned unopened to the Bidders.
  - (e) The use of mail or courier for delivery of a Bid shall be at the risk of the Bidder. Bids submitted by email or other telecommunications shall not be accepted, unless otherwise specified in the Quotation.
- 7.5 If a Quotation requires the submission of Bids through the Bidding System:
  - (a) Bids shall be received by the Bidding System, no later than the Closing Time.

Bidders are cautioned that the timing of their Bid submission is based on when the Bid is **RECEIVED** by the Bidding System, **not** when a Bid is submitted by the Bidder, as Bid transmission can be delayed by an “Internet traffic jam” due to file transfer size, transmission speed etc. Bidders should allow sufficient time to upload their Bid submission and attachment(s) and to resolve any issues that may arise. The Closing Time shall be determined by the City’s Bidding System web clock.

- (b) Where, in the sole opinion of the City, the Bidding System has experienced or is experiencing an issue affecting the receipt of Bids, or there is a failure of the underlying infrastructure, the City may extend the Closing Time without prior notice. As soon as practicable in the circumstances, the City will notify Bidders that the Closing Time has been extended. Once the issue has been resolved, the City shall notify Bidders of the new Closing Time via an addendum released through the Bidding System.
- (c) Bidders should contact the City, at least twenty-four (24) hours prior to the Closing Time, if they encounter any problems. The Bidding System will send a confirmation email to the Bidder advising that their Bid was submitted successfully. Bidders should contact the City immediately if they do not receive a confirmation email.
- (d) To ensure receipt of the latest information and updates via email regarding a Quotation, or if a Bidder has obtained a Quotation from a third party, the onus is on the Bidder to create a Bidding System Vendor account and register as a “Plan Taker” for the Quotation opportunity at <https://markham.bidsandtenders.ca>.

- 7.6 Adjustments by any method to a Bid already submitted shall **NOT** be considered. A Bidder desiring to make adjustments to a Bid shall submit a revised Bid prior to the Closing Time.
- 7.7 Bids shall be irrevocable and valid for acceptance by the City for a period of NINETY (90) Business Days from the Closing Time, unless otherwise specified in the Quotation.
- 7.8 Disclosure of information submitted to the City in connection with a Quotation is subject to the *Municipal Freedom of Information and Protection of Privacy Act* (“*MFIPPA*”). Bidders should clearly indicate in their Bid which parts, if any, are exempt from disclosure under MFIPPA.

## 8. BID PRICE

- 8.1 The quantities referenced in a Quotation are estimates only and shall be used as a basis for calculating the Bid Price. These quantities are not guaranteed to be accurate and are furnished without any liability to the City. The City reserves the right, in its sole discretion, to increase or decrease quantities as required. Payment shall be based on actual quantities ordered, received and accepted for use by the City.
- 8.2 The Bid Price shall include all labour, materials, products, equipment, services, cash allowances, costs, expenses, disbursements, duties, overhead and profit required to complete the Work, with the unit price for each Work item detailed in the Bid (if required by the Quotation).
- 8.3 If a Quotation requires the submission of paper copy of the Bids and in the event of an ambiguity, discrepancy or mathematical error in the prices set out in the Bid, the City shall have the right, in its sole discretion, to resolve such ambiguity, discrepancy or mathematical error in accordance with the following:
1. In the event of an ambiguity or discrepancy between the lump sum price and the unit price for any Work item (“Unit Price Error”), the unit price shall prevail. Extensions, sub-totals and totals shall be corrected accordingly, and adjustments resulting from the correction shall be applied to the Bid Price and Total Bid Price.
  2. In the event of an ambiguity, discrepancy or mathematical error other than described in Section 8.3(a) above:
    - (i) the Bid Price shall prevail over all other prices contained in the Bid (including, without limitation, the Total Bid Price) (collectively, the “Summary Prices”), and the Bid Price shall be capable of acceptance by the City; and
    - (ii) the City reserves the right (in its sole discretion) to seek clarification from the Successful Bidder regarding any such ambiguity, discrepancy or mathematical error in the Summary Prices, to correct such ambiguity, discrepancy or mathematical error in the Summary Prices (as confirmed by the Successful Bidder), and to require that the Successful Bidder initial such corrected ambiguity, discrepancy or mathematical error.
- 8.4 In the event that the City exercises any of its rights under Section 8.3 above:
- (a) The Bid Price shall NOT be considered uncertain, erroneous, non-compliant or incapable of acceptance by the City; and

- (b) The Bid shall NOT be considered non-compliant or incapable of acceptance by the City.

## **9. BLACK-OUT PERIOD**

To ensure that the City's procurement process is fair, open and transparent to all Bidders, there shall be no communication between the City and Bidders during a Quotation process, except as specified in the Quotation. Any communication between a Bidder and City staff or Council (other than as specified in the Quotation) may result in the Bid being rejected as non-compliant.

## **10. BID OPENING**

"Requests for Tenders" and "Requests for Proposals" shall be opened at a public meeting at the Markham Civic Centre, 101 City Centre Boulevard, Markham, Ontario. The Bid opening shall be done in public approximately fifteen (15) minutes after the Closing Time. For "Requests for Tenders", only the Bid Price shall be read out. For "Requests for Proposals", only the names of the Bidders shall be read out.

If a Quotation requires the submission of Bids through the Bidding System, a public Bid opening will not be held. The names of the Bidders and the unverified Bid Price shall be posted on the City's Bidding System on the same day as the Closing Time.

All Bid prices are subject to review and verification by the City

## **11. WITHDRAWAL OF BIDS PRIOR TO THE CLOSING TIME**

### *Paper copy Bid Withdrawal*

- 11.1 A Bidder may request that their Bid be withdrawn. The withdrawal shall be allowed if the request is received by the City prior to the Closing Time. Withdrawal requests shall be made in writing by an authorized representative of the Bidder and should be directed to the designated City staff specified on the Quotation cover page. Telephone requests shall NOT be considered.
- 11.2 Bids confirmed by the City as withdrawn prior to the Closing Time shall be returned unopened to the Bidder.
- 11.3 The withdrawal of a Bid does not disqualify a Bidder from submitting another Bid for the same Quotation prior to the Closing Time.
- 11.4 If more than one Bid is submitted by the same Bidder for the same Quotation and no withdrawal notice has been received by the City prior to the Closing Time, the Bid bearing the latest date and time shall be considered the intended Bid. All earlier Bids shall be considered void and shall be returned unopened to the Bidder.

*Bidding System Bid Withdrawal*

11.5 If more than one Bid is submitted by the same Bidder for the same Quotation, the Bid received by the Bidding System bearing the latest date and time shall be considered the intended Bid.

**12. WITHDRAWAL OF BIDS DURING PUBLIC BID OPENING**

12.1 In some instances, the Bids for more than one Quotation are opened at the same public meeting. At such public meeting, at the conclusion of the reading out of Bids for the first Quotation, the low Bidder on that Quotation may withdraw any of their remaining Bids relative to those other Quotations which have not yet been opened by advising the City's representative. The City's representative shall read out the Bidder's name and announce that the Bid has been withdrawn.

12.2 Bids withdrawn under this procedure cannot be reinstated.

**13. WITHDRAWAL OF BIDS AFTER THE CLOSING TIME**

Withdrawal requests received after the Quotation Closing Time shall NOT be permitted.

**14. NOTICE**

14.1 Every notice, including any addendum, that the City may be required to give to the Bidder *prior to* the Closing Time shall be deemed to have been properly given if forwarded through the Bidding System or to the email address provided when the Quotation was downloaded from Biddingo.com or obtained from the City. Bidders are requested to acknowledge receipt of addenda as indicated in the Quotation.

14.2 Every notice, including any addendum, that the City may be required to give to the Bidder *after* the Closing Time shall be deemed to have been properly given if forwarded by the Bidding System or by email to the address provided in the Bid.

**15. ACCEPTANCE / REJECTION OF BIDS**

15.1 The City reserves the right, in its sole discretion, and without incurring any liability whatsoever, to accept or reject any or all Bids, or to cancel the Quotation process at any time, without cause, if deemed in the best interests of the City to do so.

15.2 Unless otherwise specified in the Quotation, Bids which are qualified or restricted by any statement added to the Bid or a covering letter shall be rejected as non-compliant.

15.3 Any Bid which is incomplete, illegible, which contains alterations not called for, fails to comply with the requirements of the Quotation, or is otherwise



irregular in any way (collectively, “Irregularities”), may be rejected as non-compliant by the City. The City reserves the right, in its sole discretion, to waive minor Irregularities and seek clarification from the Bidder regarding such minor Irregularities.

- 15.4 The City reserves the right, in its sole discretion, to ask for clarification regarding or to solicit additional information regarding any information included in a Bid, or (except for MANDATORY requirements) to request that a Bidder provide information not included in the Bid.
- 15.5 If the City is unable to verify bonding requirements, upon request by the City, the Bidder shall be given five (5) business days to remedy the verification to the City’s satisfaction.

## **16. DISQUALIFIED VENDORS**

The City, in its sole discretion, may disqualify a vendor from participation in a Quotation process, or place a vendor’s name on a list of disqualified vendors for a period of two (2) years on the basis of documented poor performance, non-performance, Conflict of Interest (including, without limitation, involvement in any litigation or contractual dispute with the City), or failure to accept a Contract Award. This information may be obtained from within the City or through reference checks. A written notice of the decision shall be provided to the vendor by the City. From and after the delivery of such notice, the disqualified vendor shall not be eligible to participate in any Quotation process, or to provide goods or services to the City for so long as the supplier remains on the list of disqualified vendors (as applicable). After the two (2) year period referred to above, disqualified vendors, who are otherwise in good standing, may request that their name be removed from the list. Removal of names from the list shall be at the sole discretion of the City.

## **17. CONTRACT AWARD**

- 17.1 The award of a Contract is based on the best value for the City based upon quality, service and price. The award is subject to the City’s budget restrictions, limitations and approvals.
- 17.2 The City reserves the right, in its sole discretion, to negotiate with the lowest priced Bidder / highest ranked Bidder (as applicable, and whose reference checks meet or exceed the expectation of the City in accordance with Section 17.4 below) in the event that the Bid Prices submitted by the Bidders exceed the City’s budget. If an acceptable contract cannot be concluded with such Bidder, the City reserves the right to negotiate a contract acceptable to the City with the next lowest priced Bidder(s) / highest ranked Bidder(s) (as applicable) in succession.

- 17.3 The City reserves the right, in its sole discretion, to award in whole or in part (including, without limitation, by part, item or group of items), or to award to more than one Bidder.
- 17.4 The City reserves the right, in its sole discretion, not to award to the lowest priced Bidder, the highest ranked Bidder or to any Bidder whose reference checks do not meet or exceed the expectations of the City (as determined by the City in its sole discretion) regarding past performance, timely project completion, health and safety performance, experience, qualifications, financial standing, appropriate manpower, equipment and/or facilities, or any other criteria deemed necessary by the City to meet the requirements of the Quotation.
- 17.5 The acceptance of a Bid and Contract Award to the Successful Bidder shall be indicated by notice in writing signed by a duly authorized representative of the City. No other act of the City shall constitute the acceptance of a Bid and Contract Award.
- 17.6 Upon acceptance of a Bid and Contract Award by the City, and upon submission by the Successful Bidder of all documents required by the Quotation, a Purchase Order shall be issued to the Successful Bidder.
- 17.7 In the event that the Successful Bidder fails to accept the Contract Award or fails to submit to the City all documents required by the Quotation within ten (10) Business Days of notification, the City may, in its sole discretion:
- (a) Grant additional time to fulfill the requirement; or
  - (b) Cancel the Contract Award, award to another Bidder which meets the Quotation requirements, and exercise any remedies available to the City (including, without limitation, forfeiture of any bid deposit or enforcement of any bid bond).

## **18. NO LIABILITY**

The City, its affiliates, elected officials, directors, officers, employees and agents shall not be liable (in contract, tort or otherwise) for any costs, expenses, losses or damages incurred, sustained or suffered by any Bidder or any third party, prior or subsequent to, or by reason of the acceptance or rejection by the City of any Bid, by reason of any award decision (or delay thereof) by the City, by reason of the cancellation of the Quotation process, or by reason of the exercise by the City of any of its rights specified in the Quotation or the City's *General Terms and Conditions*.

## **PART III – CONTRACT TERMS AND CONDITIONS – CONSULTANT (ITS)**

### **1. CONTRACT**

- 1.1 The purpose of this Contract is to set out the terms and conditions which shall govern the Work to be performed by the Consultant for the City.
- 1.2 This Contract shall be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein.
- 1.3 This Contract shall consist of the following (collectively, the “Contract Documents”):
- (a) the terms and conditions of the main body of this Contract (Sections 1-21);
  - (b) the terms and conditions of this Contract;
  - (c) the City’s Purchase Order No.;
  - (d) the Consultant’s proposal submitted in response to the City’s Request For Proposal; and
  - (e) the City’s Request For Proposal .
- 1.4 In the event of a conflict or inconsistency among the Contract Documents, the provision in the document first listed above shall prevail, unless otherwise expressly provided in any Contract Document.

### **2. WORK**

- 2.1 The Consultant shall perform the work detailed in the Contract Documents (the “Work”).

### **3. TERM**

- 3.1 **Contract Term:** The term of the Contract shall be as specified in the Contract, unless otherwise extended or amended by mutual written agreement of the City and the Contractor (“Contract Term”). Notwithstanding the expiry of the Contract Term, the terms and conditions of the Contract shall continue to apply during the Warranty Period.

### **4. PERFORMANCE**

- 4.1 Upon the City issuing a Purchase Order, the Consultant will undertake the performance of the Work, and thereafter carry the Work on to completion with due diligence and in a proper professional manner in accordance with generally accepted professional standards.
- 4.2 Consultant agrees to immediately report all notifications, advice or other contact, whether verbal or written, received from governmental officials (whether federal, provincial or local) relating to the provision of the Work to the City.

4.3 The Consultant shall acquaint itself with the job site and with all conditions pertaining to the performance of the Work. The City accepts no responsibility for the failure of the Consultant to familiarize itself as required, and is not prepared to allow any claim for an increase in fees or compensation arising from any failure of Consultant to reasonably anticipate difficulties.

## 5. **DUTIES OF CONSULTANT**

5.1 In the performance of the Work, the Consultant shall:

- (a) Before starting the Work, appoint a competent, authorized representative acceptable to the City to represent and act for the Consultant, inform the City in writing of the name and address of such representative.
- (b) Furnish at its own expense and cost any and all necessary labour, machinery, equipment, tools, transportation, permits, materials, and whatever else is necessary in the performance and completion of the Work other than such items therefore as the City specifically agrees in writing to furnish.
- (c) Comply with all applicable legislation, regulations, codes and rules of any governmental body having jurisdiction. In addition to the foregoing and not in substitution, the Consultant must fully comply with all applicable safety legislation, regulations, codes and bylaws, whether Federal, Provincial, or local, including without limitation the *Occupational Health and Safety Act* (Ontario) and the *Workplace Safety and Insurance Act*. In case of any overlap the more stringent will apply. It is the responsibility of the Consultant to ensure that all sub consultants, subcontractors, suppliers, agents, and employees employed by the Consultant in the performance of its obligations herein are aware of and conform to all applicable Federal, Provincial and local safety legislation, regulations, codes and rules. Upon request by the City, the Consultant shall provide certification, satisfactory to the City, stating that the Consultant is compliant with the terms of the *Workplace Safety and Insurance Act*.
- (d) Cause a minimum of interference with the City's operations and the operations of other Consultants on the premises, take all necessary precautions to protect the premises and all persons and property thereon from damage, and, on completion of the Work, leave the premises clean and free of all tools, equipment, waste material, and rubbish.
- (e) Pay and discharge all valid taxes, lienable claims, charges or other impositions imposed or to be imposed by law on the Consultant or the City arising out of, in connection with, or resulting from the Work performed. The Consultant agrees to indemnify the City against any liability for any such taxes, lienable claims, charges

or impositions except taxes imposed on the Work that the City has specifically agreed to pay for.

**6. PAYMENT**

- 6.1 The Consultant shall be paid for the Work in accordance with the Acceptance criteria and Payment Schedule outlined in the SOW (if applicable), or as agreed by both parties.
- 6.2 Payment shall be made thirty (30) calendar days after receipt of an approved invoice by the City. All invoices submitted by the Consultant to the City require the Purchase Order Number as assigned by the City to be included.
- 6.3 The Work involves progress payments, and the invoice schedule shall be based on the Payment Schedule and milestones as outlined in the SOW (if applicable), and upon Acceptance of such Work by the City. The City will provide "Acceptance" of Work completed based on the acceptance criteria of each milestone identified in the Payment Schedule. Upon completion of each milestone, the Consultant will submit a "Request for Acceptance" to the City, whereby the City will provide a written response within ten (10) business days after receipt thereof, accepting or rejecting the milestone or advising that an extended testing/review period is required. If the City does not accept the milestone, reasons for rejection must be clearly noted. The Consultant will then work with the City to come to agreement on obtaining acceptance. If the City (acting reasonably) advises that an extended testing/review period is required, the Consultant will work cooperatively with the City to come to an agreement on the extended testing/review period. For greater certainty, it is the parties intent that the ten (10) business day period should be sufficient for the City to review/test the Deliverables, but that an extended testing/review period may be necessary for complex Deliverables, or to address unusual or unforeseen circumstances. If the City does not provide a written response within ten (10) business days after receipt of a Request for Acceptance, the Consultant will submit a "Notice of Deemed Acceptance" to the City. The City shall be deemed to accept any such milestone if the City does not provide a written response within ten (10) business days after receipt of a "Notice of Deemed Acceptance". The "Acceptance" of a milestone by the City will initiate the invoice for the applicable milestone and the invoice will be reviewed / approved (as appropriate) without delay.
- 6.4 The Work involves a fixed fee consultant contract and the fees payable shall not exceed the fixed fee amount, unless the City has provided prior written approval.
- 6.5 Where there is a question of non-performance by the Consultant, payment in whole or in part may be withheld by the City. In the event that the City is entitled to a discount for prompt payment, the withholding of payment as provided herein shall not deprive the City from taking such discount.
- 6.6 All prices are in Canadian dollars and exclude applicable taxes. Where applicable, taxes shall be shown separately on all invoices. If HST is applicable, the Consultant agrees to

include its Business Number on all invoices and remit to the Canada Revenue Agency (“CRA”).

- 6.7 The Consultant acknowledges that the City is obligated to deduct a percentage specified by the CRA from certain taxable payments to non-residents, as defined in the *Income Tax Act* (Canada) (as amended) , unless the Consultant provides the City with a waiver letter from the CRA.

## **7. CONFIDENTIALITY**

- 7.1 “City Confidential Information” means: (i) Personal Information, confidential, secret or proprietary information, including data, technical information, financial information, business information (including business plans, strategies and practices) of the City which is disclosed to or obtained by the Consultant in connection with the fulfillment of its obligations hereunder; (ii) all information related to the operations of the City which comes to the attention of the Consultant in the course of performing the Work, but excludes any such information which: (A) is or becomes publicly available; (B) is already rightfully in the possession of the Consultant and not subject to any pre-existing obligation of confidentiality; (C) is independently developed by the Consultant outside the scope of this Contract; or (D) is rightfully obtained by the Consultant from third parties.

- 7.2 The Consultant agrees to protect the City Confidential Information at all times and in the same manner as the Consultant protects the confidentiality of its own proprietary and confidential information, but in no event with less than a reasonable standard of care. The Consultant shall not disclose any City Confidential Information to any persons nor use any City Confidential Information other than for the benefit of the City in connection with the Work or otherwise for the benefit of the City as may be approved in advance in writing by the City.

## **8. PRIVACY**

- 8.1 The Consultant agrees and acknowledges that the City is bound by the *Municipal Freedom of Information and Protection of Privacy Act* (“MFIPPA”) and any other Provincial or Federal privacy legislation that may be in effect during the term of this Contract. The Consultant agrees to be bound by the City’s privacy policy and agrees that it shall not directly or indirectly disclose, distribute or destroy any personal information provided to it by the City pursuant to this Contract, without first obtaining the prior written consent of the City. “Personal Information” means information which relates to an individual and allows that individual to be identified, and includes any information defined from time to time as “personal information” under MFIPPA and any other Provincial or Federal privacy legislation.

## **9. PRESS RELEASES**

- 9.1 Neither party shall issue any press release concerning the Work without the other party's

consent. Commencing the Effective Date, the Consultant may identify the City as a client of the Consultant and generally describe the nature of the Work in promotional material.

## **10. INSURANCE**

10.1 The Consultant shall purchase and maintain in force, at their own expense (including the payment of all deductibles), during the Contract Term and the Warranty Period (unless otherwise stated), the following policies of insurance underwritten by insurers licensed to conduct business in the Province of Ontario and satisfactory to the City (unless otherwise specified in the Contract):

- (a) Commercial General Liability Insurance (satisfactory to the City and underwritten by insurers licensed to conduct business in the Province of Ontario). The policy shall include coverage for Bodily Injury, Property Damage with a minimum amount of \$2,000,000.00 for each occurrence, and include:
  - (i) an endorsement certifying that **The Corporation of the City of Markham** is included as an additional insured;
  - (ii) a cross liability clause;
  - (iii) Non-owned automobile coverage including legal liability for damage to hired automobiles; and
  
- (b) Information Technology Professional Liability Insurance in an amount not less than \$2,000,000 per claim. Such insurance shall provide coverage for all errors and omissions made, including a network security or computer incident or privacy breach defined as:
  - (i) the transmission of malware to a third party's computer system;
  - (ii) the Consultant's computer systems being used to carry out a denial of service attack or any loss caused by a denial of service attack;
  - (iii) the Consultant's failure to prevent unauthorized access to information stored or applications hosted on the Consultant's computer systems or a cloud computing provider's system: and
  - (iv) identity theft, experienced by any user, or an actual or suspected disclosure of or unauthorized access to any personally identifiable information;
  - (v) the Consultant's failure to adequately warn affected individuals of a privacy breach, including the failure to provide a data breach notification in a timely manner;arising from the provision of any Work Product/equipment/software/system, or in the rendering of, or failure to render, professional services in connection with the Work. Upon completion of the Work the policy shall remain in force for twelve (12) months.

The policies shall be endorsed to the effect that such insurance policies shall not be altered, cancelled or allowed to expire without thirty (30) days advance written notice to the City. All policies shall apply as primary and not as excess of any insurance available to the City.

Upon request by the City, the Consultant shall furnish the City with a certificate of insurance (in a form satisfactory to the City, in its sole discretion) confirming that the Consultant has in place the required insurance.

If applicable, and based upon the operations of the sub-consultant, sections 10.1 shall apply in the same manner to any sub-consultant as it would to the Consultant. Further, it is the Consultant's obligation to ensure that the sub-consultant is aware of these obligations. Upon request, the Consultant shall provide to the City confirmation of the sub-consultant's insurance.

- 10.2 Upon request by the City, the Consultant shall furnish the City with a certificate of insurance (in a form satisfactory to the City, in its sole discretion) confirming that the Consultant has in place the required insurance. The certificate of insurance shall also contain an endorsement to the effect that such insurance policies shall not be altered, cancelled or allowed to expire without thirty (30) days advance written notice to the City.

## **11. INDEMNITY**

- 11.1 The Consultant shall indemnify, defend and hold harmless the City, its directors, officers, elected officials, employees and agents ("Indemnified Parties") from and against all actions, claims, demands, losses, costs, damages, suits or proceedings whatsoever which may be brought against or made upon the Indemnified Parties, and against all losses, liabilities, judgements, claims, suits, demands or expenses which the Indemnified Parties may sustain, suffer or be put to resulting from or arising out of: (i) the Consultant's (or the Consultant's representatives or employees) (A) breach of its confidential information or privacy obligations hereunder, (B) wilful misconduct, (C) negligent actions, omissions, or failure to exercise reasonable care, skill or diligence in the performance of the Work, or (D) failure to comply with applicable laws; or (ii) a claim by a third party that any Work Product infringes upon such third party's intellectual property rights, provided that, as a condition precedent:
- (a) the City promptly notifies the Consultant following receipt of the claim providing the Consultant with all information reasonably available to the City and any assistance in the claim as the Consultant reasonably requires from time to time;
  - (b) the City gives the Consultant full and exclusive authority in the defence and settlement of the claim; and
  - (c) the City makes no admission or in any other way prejudices the Consultant's defence of the claim and provides the Consultant with sole control of the defence of the claim and all related settlement negotiations.



- 11.2 The Consultant shall have no liability for any claim of infringement based on or to the extent arising from:
- (a) use by the City of an outdated or unaltered release of any Software against the written advice of the Consultant (if such infringement would have been avoided by use of updated and amended Software which had been offered to the City (at no specific additional cost to the City); or
  - (b) combination or use of the Software with hardware or software not approved in writing by the Consultant; or
  - (c) use of any Software that has been modified or altered other than by the Consultant or without the Consultant's prior written permission; or
  - (d) use of any Software that has been modified or altered at the City's request but against the written advice of the Supplier.
- 11.3 The City shall indemnify the Consultant against any and all damages or legal costs awarded against the Consultant as a result of any third party claim incurred as a result of modification or alteration or any work done to the Software at the City's request, against the advice of the Consultant (provided the Consultant was not aware that such modification, alteration or City requested work may infringe any third party's rights).
- 11.4 The City shall not be liable nor responsible for any bodily or personal injury or property damage of any nature that may be suffered by the Consultant, its employees, agents or sub-consultants in the performance of the Work, except to the extent of any negligence or wilful misconduct on the part of the City.
- 11.5 EXCEPT FOR THE PARTIES INDEMNIFICATION OBLIGATIONS HEREUNDER AND EXCEPT IN THE CASE OF GROSS NEGLIGENCE AND WILFUL MISCONDUCT, IN NO EVENT SHALL EITHER PARTY, NOR THEIR RESPECTIVE EMPLOYEES, OFFICERS, DIRECTORS AND ELECTED OFFICIALS BE LIABLE FOR CONSEQUENTIAL, SPECIAL, INDIRECT, INCIDENTAL, PUNITIVE OR EXEMPLARY DAMAGES, COSTS, EXPENSES, OR LOSSES (INCLUDING, WITHOUT LIMITATION, LOST PROFITS AND OPPORTUNITY COSTS).

## **12. INDEPENDENT CONSULTANT**

- 12.1 The Consultant is an independent Consultant with respect to all Work performed under this Contract, and neither the Consultant nor anyone used or employed by the Consultant to perform the Work may be deemed for any purpose to be the agent, employee, servant or representative of the City in performance of such Work or in any matter dealt with herein. The City will have no direction or control of the Consultant or its employees, agents, subcontractors and subconsultants, except in the results to be obtained. Neither party will assume any liability for the actions or omissions of the other party except as stated in this Contract.

### **13. CONFLICT OF INTEREST**

- 13.1 During the Term of this Contract, the Consultant must not engage in or provide, to any other person or company or entity, any service or act which would be reasonably perceived to be in conflict with the interest of the City in respect of the Work being provided by the Consultant to the City. For additional clarity, the engagement by the Consultant with another client in connection with its standard solution will not be considered a conflict of interest by the City.
- 13.2 The Consultant must provide timely disclosure of any actual or potential conflict of interest, including any arising from any common ownership or association with any party that has worked on or is working on any part of the Work.
- 13.3 Any failure to provide timely disclosure of any potential conflict of interest, or failure to avoid engaging in or providing to any other company or entity any service or act which could be reasonably perceived to be in conflict with the interest of the City in respect of the Work being provided by the Consultant to the City or in violation with any legislation regarding fair competition, will be grounds for terminating this Contract.

### **14. SECURITY / DATA SECURITY**

- 14.1 “City Data” means all data, text, images, video, audio, content, materials and information provided by the City to the Consultant in connection with the Contract, or submitted by the City or a user through the Work Product.
- 14.2 The City Data shall be independent from all other databases stored by the Consultant. The City shall have the right (at any time and in its sole discretion) to have access to or request the return of City Data from the Consultant. The City shall have the right to inspect the Consultant’s premises where City Data is stored / servers are located.
- 14.3 The Consultant shall implement appropriate technical and organizational measures to protect the City Data against accidental or unlawful destruction or accidental loss, alteration, or unauthorized disclosure or access (the "Security Measures"). As of the Effective Date of the Contract, the Consultant has implemented the Security Measures detailed in the Contract Documents. The Consultant may update or modify such Security Measures from time to time provided that such updates and modifications do not result in the material degradation of the security of the City Data, and the Consultant continues to adhere to such Security Measures then in effect.
- 14.4 The Consultant shall obtain the prior written approval of the City prior to disclosing City Data to any third party. City Data shall not be accessed for purposes not related to the performance of the Contract, including any disclosure or access by Consultant employees, a foreign-based parent company, other affiliates, or third parties such as subcontractors and

agents not directly involved in the performance of the Contract and approved in writing by the City.

- 14.5 The Consultant shall keep an audit trail to confirm that those who accessed City Data had the authority to do so, and shall enable the City to conduct audits of such audit trail (at any time and in its sole discretion).
- 14.6 If the Consultant becomes aware of a breach of its confidentiality obligations under the Contract, the Consultant shall notify the City immediately. The Consultant accepts the responsibility of wrongful disclosure (by the Consultant, its employees and subcontractors) and shall pay the direct costs associated with the appropriate notification of individuals whose information may have been disclosed.

**15. REPORTING**

- 15.1 The Consultant shall provide to the City on a timely basis such deliverable or deliverables, or written confirmation of delivery thereof, in respect of the Work as is agreed to by the parties and confirmed in writing. A deliverable may be in any form that is mutually agreed to, including without limitation a design, plan, set of record drawings, or report.

**16. INTELLECTUAL PROPERTY**

- 16.1 “Work Product” shall mean all Work deliverables originally created by the Consultant for delivery to the City in accordance with its obligations under the Contract, and for greater certainty shall not include any Consultant software (and related documentation) licensed to the City or third-party software (and related documentation) licensed to the Consultant or licensed directly to the City, or any modifications or enhancements thereto or derivatives thereof. Upon full payment for each Work Product, unless otherwise expressly provided for herein, such Work Product will become the property of the City, and the Consultant hereby assigns all rights (including, without limitation, intellectual property rights) to the City with respect to such Work Product. The Consultant shall have the right to retain a copy of each Work Product for its records.
- 16.2 To the extent that any pre-existing materials owned or licensed by the Consultant are incorporated into the Work Product (the “Consultant Materials”), the ownership rights granted to the City under this section will not extend to the Consultant Materials, but the Consultant hereby grants the City, upon full payment for such accepted Work Product, a royalty-free, paid-up, perpetual, worldwide, non-exclusive licence to use the Consultant Materials to the extent reasonably necessary or convenient to use or receive/enjoy the benefits of the Work Product.
- 16.3 Notwithstanding ownership by the City of the Work Product, the Consultant and its personnel shall be free to use and employ its and their general skills, know-how, and expertise, and to use, disclose, and employ any generalized ideas, concepts, know-how, methods, techniques, or skills gained or learned during the course of any assignment, so

long as it or they apply such information without disclosure of any City Confidential Information.

## **17. LICENSING OF CITY DATA**

- 17.1 If the Consultant needs access to data of the City in order to carry out the Work, the City will grant a non-exclusive, non-assignable license to have access to and to use the data in accordance with one or the other of the following subsections, at the sole discretion of the City in accordance with the sections that follow in this Section 17:
- 17.2 Subject to the terms of this Contract, the City grants and the Consultant accepts a non-exclusive, non-assignable license for access to and use of data of the City for the purpose of performing the Work.
- 17.3 The Consultant may only use the data of the City necessary for the purpose of performing the Work (the “Data”), and for no other purpose. Any documentation provided by the City may be used only as needed in accordance with the authorized use of the Data.
- 17.4 Title to and ownership of the Data and any modifications made to the Data will at all times remain with the City. The Consultant does not have any right or interest in the Data except as specifically provided in this Contract. The Consultant acknowledges that there are no limits to the number of licenses or rights that the City may grant to third parties in respect of the Data.
- 17.5 The Consultant is entitled to make copies of the Data for back-up, disaster recovery, or archival purposes, so long as each copy remains under the Consultant’s control and is used only to replace an operating copy if the operating copy is destroyed or becomes unusable or inaccessible for any legitimate reason. The Consultant shall maintain and place a suitable copyright notice in favour of the City on any report or other document that contains a complete copy of, or substantially all of, the Data. The Consultant shall not remove such copyright notice, or any other copyright notice, from the Data.
- 17.6 The City does not represent or warrant that the Data will be correct or that use of the Data will be uninterrupted or error free. The City disclaims any and all warranties and conditions concerning the Data, including any and all warranties and conditions of merchantability and fitness for any particular purpose, performance, and any and all warranties or implied warranties that might arise during the use of the Data. This Section 17.6 sets out the entire extent of all warranties and conditions in respect of the Data.
- 17.7 Upon the termination or expiry of this Contract, or the completion of the Work, the Consultant must promptly discontinue use of the Data, and return the same to the City or in the alternative certify to the City in writing as to such destruction of the Data.

## **18. RECORDS / AUDIT**

- 18.1 The Consultant, for a period of seven (7) years after the performance of the Work, shall maintain a true and correct set of records pertaining thereto including, without limiting the generality of the foregoing the date and time worked, the location of the Work and the type of Work and invoices issued to the City. The Consultant shall allow the City to audit such records upon reasonable request, provided however, that the Consultant shall have the right to exclude any trade secrets, formulas, or processes from any such audit. The Consultant must require each of its subcontractor/subconsultant to keep such records which similarly are to be open to inspection and audit by or on behalf of the City.

## **19. TERMINATION**

- 19.1 This Contract may be terminated by either party, with cause, if either party fails to materially perform its obligations under this Contract. The non-breaching party shall give the breaching party written notice of its failure to perform. The breaching party shall have thirty (30) days after receipt of such notice to cure the breach. If the breach is not cured within such thirty (30) day period, the non-breaching party may terminate this Contract upon written notice to the breaching party. Upon receipt of such notice, the breaching party shall cease performance under this Contract.
- 19.2 This Contract may be terminated by either party by, with cause effective immediately, by written notice to the other party, if a petition in bankruptcy is filed by or against the other party, or the other party is adjudicated a bankrupt or insolvent, or shall have made an assignment for the benefit of creditors or shall take advantage of any law for the benefit of debtors, or if any action is commenced against the other party to cause its assets to be placed under trusteeship or receivership or liquidated for the benefit of creditors, or if the other party shall transfer, or by operation of law lose control of its business.
- 19.3 Upon six (6) months prior written notice to the Consultant, the City shall have the right to terminate this Contract in the event that City Council does not approve the budget for any year of the Contract Term, as set out in Section 3.1. Upon such termination, the City shall pay to the Consultant all amounts owing for Work performed by the Consultant up to the effective date of termination.
- 19.4 Upon six (6) months prior written notice to the Consultant, the City shall have the right to terminate this Contract in the event that the Consultant fails to perform three (3) or more of any of the following during any twelve (12) month period during the Contract Term; any material performance metric, any material service level metric, or any material technology requirement set out in the Contract Documents, providing that, as a condition precedent, the City has formally notified the Consultant in writing of each such material breach within 30-days of its occurrence so that the Consultant can implement a remedial action plan or dispute the breach as each case may be.

## **20. FORCE MAJEURE**

20.1 Neither the City nor the Consultant shall be liable for default or delay in the performance of obligations under the Contract due to causes beyond the reasonable control of (and not due to the fault or negligence of) the party affected, including, without limitation, natural disasters, plagues, epidemics, war, insurgence, terrorism, and power outages. The Consultant shall give the City prompt written notice when any such cause has or appears likely to delay deliveries and/or performance of the Work, and shall take appropriate action to avoid or minimize such delay. If any such default or delay threatens to impair the Consultant's ability to meet delivery requirements for materials, supplies and/or Work, the City shall have the right, without any liability to the Consultant, to terminate the portion or portions of the Contract so affected upon written notice to the Consultant.

## **21. GENERAL**

21.1 This Contract shall be governed and construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein and each of the parties irrevocably attorns to the jurisdiction of the courts of the Province of Ontario.

21.2 No waiver of any of the covenants, agreements or obligations herein contained by either of the parties hereto shall be construed as a waiver of any succeeding breach thereof or of any other covenant, agreement or obligation contained in this Contract and no delay or omission on the part of either party hereto to exercise any right acquired through default of the other shall be construed as a waiver of or shall impair such right.

21.3 If any provision of this Contract is determined by a court of competent jurisdiction to be invalid, illegal or unenforceable in any respect, such determination shall not impair or affect the validity, legality or enforceability of the remaining provisions hereof, and each provision is hereby declared to be separate, severable and distinct.

21.4 Neither Party shall assign, transfer or delegate any of its rights or obligations under this Contract, without the prior written consent of the other party. This Contract shall enure to the benefit of and be binding upon the parties hereto and their respective successors and permitted assigns.

21.5 The Consultant shall not assign or sublet the Contract (or any part thereof) or subcontract any portion of the Work without the prior written consent of the City. No subcontractor/subconsultant shall, under any circumstances, relieve the Consultant of its liabilities and obligations under the Contract. Should any subcontractor/subconsultant fail to perform the Work in a satisfactory manner, the City may, in its sole discretion, require the Consultant to replace such subcontractor/subconsultant. The City shall have no obligation to deal directly with any subcontractor/subconsultant. The Consultant shall be solely responsible for the payment of all amounts owing to subcontractor/subconsultant. The Consultant shall coordinate the provision of the products and/or Work by

subcontractors/subconsultants in a manner acceptable to the City, and shall ensure that subcontractors/subconsultants comply with the terms and conditions of the Contract. The Consultant shall be liable to the City for all costs or damages arising from the acts, omissions, negligence or willful misconduct of subcontractors/subconsultants.

- 21.6 This Contract constitutes the entire agreement between the parties with respect to the subject matter herein and supersedes all previous written or oral communications, understandings and agreements. Any amendment of this Contract shall not be binding upon the parties unless made in writing and executed by the parties.
- 21.7 Any terms and provisions of this Contract that by their nature operate beyond the term or expiry of this Contract shall survive the termination or expiry of this Contract.