

SCHEDULE 20

REFEREE AGREEMENT

THIS AGREEMENT is made as of the _____ day of _____, 20____

BETWEEN:

THE CITY OF WINNIPEG

(the “**City**”)

AND:

[INSERT NAME],

(collectively “**Design Builder**”)

AND:

[INSERT NAME],

(the “**Referee**”)

WHEREAS:

A. The City and Design Builder (collectively, the “Parties” and each, a “Party”) have entered into an agreement on the _____ day of _____, 20____ to undertake the Design Build of North End Sewage Treatment Plant (NEWPCC) Upgrade: Biosolids Facilities RFP NO. 779-2021B, which includes but is not limited to, the design and construction of a new biosolids facility, modifications to the existing primary clarification facility, and modifications to the existing centrate treatment facility, as set out in the agreement, as such agreement may be amended, supplemented or replaced from time to time in accordance with the terms thereof (the “**Design Build Agreement**”).

B. Pursuant to the terms of the Design Build Agreement, the Parties wish to appoint the Referee, and the Referee wishes to accept such appointment, to perform certain services in connection with the Design Build Agreement.

C. The Parties and the Referee wish to enter into this Referee Agreement in order to record the terms by which the Referee shall perform such services.

NOW THEREFORE in consideration of the mutual covenants and agreements of the Parties and the Referee herein contained and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties and the Referee covenant and agree as follows:

SECTION A DEFINITIONS

A1. Capitalized Terms

A1.1 Capitalized terms used in the Referee Agreement have the meanings set out in the Design Build Agreement, unless otherwise defined in this Referee Agreement.

A2. Definitions

A2.1 In this Referee Agreement, the following terms shall have the following meanings:

- (a) **“Contract Material”** means all material:
 - (i) provided to the Referee or created or required to be created by either Party; and
 - (ii) provided by or created or required to be created by the Referee as part of, or for the purpose of, performing the Referee Services, including documents, equipment, reports, technical information, plans, charts, drawings, calculations, tables, schedules and data (stored and recorded by any means);
- (b) **“Design Build Agreement”** has the meaning given in the Recitals;
- (c) **“Fee”** means the fees payable by the City and Design Builder to the Referee for the Referee Services, as such fees are specified and made payable in accordance with Appendix A to this Referee Agreement;
- (d) **“X Project”** as used in RFP ##-2022 has the same meaning as Project as defined in the Design Build Agreement and used in this Referee Agreement;
- (e) **“Initial Term”** has the meaning given in Section H1.1(c) of this Referee Agreement;
- (f) **“Intellectual Property”** means any and all intellectual property rights, whether subsisting now or in the future, including rights of any kind in inventions, patents, copyright, trademarks, service marks, industrial designs, integrated circuit topography rights, applications for registration of any of the foregoing, and know-how, trade secrets, confidential information and trade or business names;
- (g) **“Parties”** and **“Party”** have the meaning given in the Recitals;
- (h) **“Referee Notice”** has the meaning given in Section D1.1;
- (i) **“Referee Process”** means the process by which the Referee will review Disputes pursuant to Section D of this Referee Agreement;
- (j) **“Referee Services”** means:

- (i) all of the functions and obligations described in the Design Build Agreement as being the responsibility of the Referee;
- (ii) all of the functions and obligations conferred on the Referee under this Referee Agreement, including in particular those functions and obligations of the Referee pursuant to the Referee Process; and
- (iii) all other things or tasks which the Referee must do to comply with its obligations under this Referee Agreement;
- (k) “**Renewal Term**” has the meaning given in Section H1.2 of this Referee Agreement; and
- (l) “**RFP ##-2022**” means the Request for Proposal for Professional Consulting Services for Referee Services for the [name] Project.

SECTION B INTERPRETATION

B1. Interpretation

B1.1 In this Referee Agreement, unless the context indicates a contrary intention:

- (a) words denoting the singular number include the plural and vice versa;
- (b) words denoting individuals include corporations and vice versa;
- (c) headings are for convenience only and do not affect interpretation;
- (d) references to Clauses, Sections or Parts are references to Clauses, Sections or Parts of this Referee Agreement;
- (e) references to this Referee Agreement or any contract, agreement or instrument are deemed to include references to this Referee Agreement or such other contract, agreement or instrument as amended, novated, supplemented, varied or replaced from time to time;
- (f) references to any party to this Referee Agreement includes its successors or permitted assigns;
- (g) words denoting any gender include all genders;
- (h) references to any legislation or to any section or provision of any legislation include any statutory modification or re-enactment of any statutory provision substituted for legislation, section or provision, and ordinances, by laws, regulations and other statutory instruments issued under that legislation, section or provision;
- (i) a reference to “\$” is to Canadian currency;
- (j) the terms “including” and “include” mean “including” or “include” (as applicable) without limitation;

- (k) if a word or phrase is defined, then other parts of speech and grammatical forms of that word or phrase have a corresponding meaning; and
- (l) unless otherwise indicated, all time periods will be strictly construed.

B2. Obligations and Exercise of Rights by Parties

- B2.1 The obligations of the Parties under this Referee Agreement shall be several.
- B2.2 Except as specifically provided for in this Referee Agreement or the Design Build Agreement, the rights of the Parties under this Referee Agreement shall be jointly exercised by the Parties.

SECTION C ROLE OF THE REFEREE

C1. Engagement

- C1.1 The Parties hereby appoint the Referee, and the Referee hereby accepts such appointment, to carry out the Referee Services in accordance with this Referee Agreement. The Referee shall perform the Referee Services in accordance with this Referee Agreement.
- C1.2 Neither Party shall, without the prior written consent of the other Party, enter into any separate agreement with the Referee in connection with the Project, and Design Builder shall ensure that no Design Builder Party enters into any separate agreement with the Referee in connection with the Project.

C2. Acknowledgement of Referee

- C2.1 The Referee hereby acknowledges in favour of the Parties that it has received a copy of the Design Build Agreement.

C3. Standard of Care

- C3.1 The Referee must exercise the standard and skill, care and diligence in the performance of the Referee Services that would be expected of an expert professional experienced in providing services in the nature of the Referee Services for projects similar to the Project.

C4. Duties of Referee

- C4.1 In performing the Referee Services, the Referee must:
 - (a) act impartially, honestly, fairly and independently in the performance of the Referee Services in accordance with the terms of the Design Build Agreement and this Referee Agreement;
 - (b) act reasonably and professionally;
 - (c) act in a timely manner in accordance with the terms of this Referee Agreement and the Design Build Agreement;

- (d) familiarize itself with the requirements of the Design Build Agreement, generally, and particularly insofar as they may be relevant to any Dispute referred to the Referee pursuant to the Referee Process;
- (e) in making any communications with the Parties pursuant to the Referee Process, the Referee shall use professional, concise, plain language, and shall, if issuing a recommendation pursuant to the Referee Process, identify the reasons for its decision; and
- (f) act in accordance with the joint directions of the Parties provided that the directions are not inconsistent with the other terms of this Referee Agreement or the terms of the Design Build Agreement and do not vary or prejudice the Referee's authority or responsibilities or the exercise by the Referee of its professional judgment in the Referee Services under this Referee Agreement.

C5. Authority to Act

C5.1 The Referee:

- (a) is an independent consultant and is not, and must not purport to be, a partner, joint venture party or agent of either Party;
- (b) other than as expressly set out in this Referee Agreement or the Design Build Agreement, has no authority to give any directions to a Party or its officers, directors, members, employees, contractors, consultants or agents; and
- (c) has no authority to waive or alter any terms of the Design Build Agreement, nor to discharge or release a party from any of its obligations under the Design Build Agreement unless jointly agreed by the Parties in writing.

C6. Knowledge of the Parties' Requirements

C6.1 The Referee warrants that:

- (a) it has informed and will be deemed to have informed itself fully of the requirements of the Design Build Agreement;
- (b) it will inform itself fully of the requirements of such other documents and materials as may become relevant from time to time to the performance of the Referee Services;
- (c) without limiting Sections C6.1(a) or C6.1(b) of this Referee Agreement, it has and will be deemed to have informed itself fully of all time limits and other requirements for any Referee Services which the Referee carries out under the Design Build Agreement and this Referee Agreement;
- (d) it has and will be deemed to have informed itself completely of the nature of the work necessary for the performance of the Referee Services and the means of access to and facilities at the Lands and the Infrastructure including restrictions on any such access or protocols that are required;

- (e) it has satisfied itself as to the correctness and sufficiency of its proposal for the Referee Services and that the Fee covers the cost of complying with all of the obligations under this Referee Agreement and of all matters and things necessary for the due and proper performance and completion of the Referee Services;
- (f) it has sufficient qualifications and experience in providing services similar to the Referee Services for similar projects as the Project in order to provide the Referee Services in accordance with this Referee Agreement; and
- (g) the Referee is impartial as between the Parties, independent of the City and Design Builder and suitably qualified and experienced with respect to the design and construction of projects similar to the Project or Dispute subject.

C7. Conflict of Interest

C7.1 The Referee warrants that:

- (a) at the date of this Referee Agreement, no conflict of interest exists or is likely to arise in the performance of its obligations under this Referee Agreement, and the Referee further warrants that it has not been retained as an advisor to either of the Parties or any of their respective related entities in respect of the Design Build Agreement (including, but not limited to, acting as a transaction advisor to either Party); and
- (b) if, during the term of this Referee Agreement, any such conflict or risk of conflict of interest arises, the Referee will notify the Parties immediately in writing of that conflict or risk of conflict and take such steps as may be required by either of the Parties to avoid or mitigate that conflict or risk.

C8. Referee Personnel

C8.1 The Referee shall make reasonable efforts to ensure that the individuals listed in Appendix B remain involved in the performance of the Referee Services and, in particular, will not, for the duration of this Referee Agreement, require or request any such person to be involved in any other project on behalf of the Referee if, in the reasonable opinion of the Parties, such involvement would have a material adverse effect on the performance of the Referee Services.

C8.2 If any alternate individual than listed in Appendix B is required, the Referee shall:

- (a) submit the experience and qualifications as required in RFP ~~##-2022~~ [NTD] for all requested replacement(s); and
- (b) not replace individuals listed in Appendix B throughout the duration of the term of the Referee Agreement without the written approval of the Parties.

C8.3 The Referee shall ensure that all of its personnel providing the Referee Services shall:

- (a) have sufficient qualifications and experience in providing services similar to the Referee Services for a similar project as the Project in order to provide the Referee Services in accordance with this Referee Agreement;
- (b) be impartial as between the Parties, independent of the City and Design Builder and be suitably qualified and experienced with respect to the design, construction, testing and commissioning of projects similar to the Project; and
- (c) have an understanding of the appropriate standards, guidelines, best practices, and policies applicable to the Referee Services and the Project.

C8.4 The Referee shall ensure that its team lead providing the Referee Services shall possess a current professional designation of not less than membership in The Association of Professional Engineers and Geoscientists of Manitoba, operating as Engineers Geoscientists Manitoba (EGM) or such similar professional designation recognized in North America.

C8.5 During the term of this Referee Agreement, the Referee shall be in good standing under The Corporation Act (Manitoba), or properly registered under The Business Name Registration Act (Manitoba), or otherwise properly registered, licensed or permitted by law to carry on business in Manitoba, or it the Referee does not carry on business in Manitoba, in the jurisdiction where the Referee does carry on business;

C8.6 The Referee shall furnish the Parties evidence satisfactory to the Parties of any such personnel's compliance with the foregoing requirements within a reasonable time prior to the proposed commencement of the Referee Services.

SECTION D REFEREE PROCESS AND SERVICES

D1. Description of Referee Process and Services

D1.1 The Referee Services will begin when the Referee receives a written notice indicating such from either of the Parties pursuant to Section B3 of Schedule 7 – Dispute Resolution Procedure of the Design Build Agreement (“Referee Notice”).

D1.2 The Referee will, as soon as reasonably possible upon receipt of the written notice, conduct a review of the Dispute in the manner which the Referee decides is most suitable, including on-site inspections (subject to the requirements of Section D2) and discussions with any persons.

D1.3 The Referee may make reasonable requests to the Parties for additional information and documents which the Referee considers necessary for the review, provided that any information given to the Referee by a Party will be given to the other Party and all information disclosed in accordance with this Referee Agreement shall be deemed “Confidential Information” for purposes of the Design Build Agreement.

D1.4 In the event the Referee provides any written materials or communications to one Party, the Referee shall also provide the same written materials and communications to the other Party.

- D1.5 The Referee may, with the prior written approval of the Parties, retain others to assist with the review.
- D1.6 The Referee shall deliver to both of the Parties a brief written recommendation on the Dispute within 10 Business Days of Referee's receipt of the Referee Notice, or such longer period as agreed to in writing by both Parties.
- D1.7 The recommendation shall contain the Referee's suggested resolution, and rationale for the resolution, including details of any material evidence, documents, or clauses of the Design Build Agreement which the Referee relied on in reaching the resolution, and shall also include any cost and schedule implications, or other material considerations or impacts of such recommended resolution.
- D1.8 If during the evaluation of the Dispute, the Referee finds the Dispute is without grounds, is false in nature, or shares similar grounds for striking out documents as set out in the Court of Queen's Bench Rules (Manitoba), the Referee shall identify same in its written recommendation.
- D1.9 In the event that either Party submits a request for clarification on the Referee's written recommendation within 5 Business Days of the issuance of the Referee's recommendation, the Referee shall provide a written clarification to both Parties within 10 Business Days of the receipt of the request for clarification. The Referee shall not permit additional clarifications by either Party.
- D1.10 If the Party Representatives agree to a resolution of the Dispute by accepting the recommendation(s) of the Referee, a written legible summary of the agreed-to resolution shall be drafted by a City Party in the presence of both Party Representatives and the Referee in duplicate, and signed and dated by both Party Representatives, all within 5 Business Days after receipt of the Referee's written final recommendation. An original copy of the summary of the resolution shall be provided to both Party Representatives. For clarity, this summary is only intended to be the basis for a Change Order and will not amend the Design Build Agreement.
- D1.11 The resolution of the Dispute will be formalized using the process set out in Schedule 17 – Change Orders of the Design Build Agreement within 5 Business Days. If the Parties are unable to formalize the resolution with a Change Order, the Dispute will be resolved in accordance with Section B4 of Schedule 7 – Dispute Resolution of the Design Build Agreement.
- D1.12 Unless otherwise agreed by the Parties in advance of the Referee's review, a recommendation of the Referee is not binding on the Parties, and the Referee's review will be sought only for the purpose of assisting the Parties to reach agreement with respect to the Dispute.
- D1.13 The Referee may not be retained by either Party and may not be called by either Party to give evidence with respect to the Dispute in any subsequent arbitration or court proceeding to resolve the Dispute, unless required by Applicable Law or by a court of competent jurisdiction.

D2. Right to Enter and Inspect

D2.1 Further to Section D1.6, upon giving reasonable notice to Design Builder Representative, the Referee (and any person authorized by it) may enter and inspect the Lands, the design and construction or the Infrastructure at any reasonable time in connection with the Referee Services, subject to:

- (a) observance of the reasonable rules of Design Builder as to safety and security for the Lands, the design and construction, or the Infrastructure;
- (b) not causing unreasonable delay to the carrying out of the design and construction by reason of its presence on the Lands or the Infrastructure; and
- (c) not causing any damage to the Lands, the design and construction or the Infrastructure.

D3. Parties Not Relieved

D3.1 Neither Party shall be relieved from performing or observing its obligations, or from any other liabilities, under the Design Build Agreement as a result of either the appointment of, or any act or omission by, the Referee.

D4. Parties not Liable

D4.1 On no account will a Party be liable to another Party for any act or omission by the Referee whether under or purportedly under a provision of the Design Build Agreement, this Referee Agreement or otherwise, provided that any such act or omission shall not extinguish, relieve, limit or qualify the nature or extent of any right or remedy of either Party against or any obligation or liability of either Party to the other Party which would have existed regardless of such act or omission.

SECTION E SUSPENSION

E1. Notice

E1.1 The Referee Services (or any part) may be suspended at any time by the Parties:

- (a) if the Referee fails to comply with its obligations under this Referee Agreement, immediately by the Parties giving joint notice in writing to the Referee; or
- (b) in any other case, by the Parties giving 7 Calendar Days joint notice in writing to the Referee.

E2. Costs of Suspension

E2.1 The Referee will have no entitlement to be paid any costs, expenses, losses or damages arising from a suspension under this Referee Agreement.

E3. Recommencement

E3.1 The Referee must immediately recommence the carrying out of the Referee Services (or any part) on receipt of a joint written notice from the Parties requiring it to do so.

SECTION F INSURANCE AND LIABILITY

F1. Referee's Insurance

F1.1 The Referee must have in place at all times during the term of this Referee Agreement:

- (a) an annual term professional liability insurance policy:
 - (i) in the amount of \$2,000,000 per claim and \$4,000,000 in the aggregate, including 30 days written notice of cancellation from an insurer licensed to carry on business in the Province of Manitoba and on terms satisfactory to each of the Parties. Such policy shall continue for twenty-four (24) months after Final Completion or contain an extended reporting period of twenty-four (24) months following Final Completion; and
 - (ii) covering liability which the Referee might incur as a result of a breach by it of its obligations owed by the Referee in a professional capacity to the Parties, or either of them, under or in connection with this Referee Agreement or the provision of the Referee Services; and
- (b) commercial general liability insurance in the amount of \$2,000,000 per occurrence and in the aggregate, for bodily injury and property damage including a cross liability clause, contractual liability, the City and Manitoba and its Ministers, officers, employees and agents shall be added as additional insureds and 30 days written notice of cancellation with an insurer licensed to carry on business in the Province of Manitoba and on terms satisfactory to each of the Parties.

F1.2 The Referee must provide evidence of coverage in the form of a certificate of insurance to each of the Parties and Manitoba upon execution of this Referee Agreement, and the commencement of any Renewal Term, and, at least 5 Business Days prior to the expiry date of any such insurance policy. The Referee must provide evidence of the renewal of any such insurance policy satisfactory to the Parties, acting reasonably.

F2. Workers' Compensation Insurance

F2.1 The Referee must, at its own cost and at all times during the term of this Referee Agreement, insure its liability (including its common law liability) as required under any applicable workers compensation statute or regulation in relation to its employees engaged in the Referee Services, or provide evidence of employer's liability insurance under Section F1.1(b) above.

SECTION G PAYMENT FOR SERVICES

G1. Payment of Fee

- G1.1 In consideration of the Referee performing the Referee Services in accordance with this Referee Agreement, each Party shall pay one-half of the Fee to the Referee in accordance with the payment schedule specified in Appendix A.
- G1.2 The obligation of each Party to pay one-half of the Fee to the Referee is a several obligation, and neither Party shall have any liability in respect of the non-payment by the other Party of any fees or costs payable by such other Party under this Referee Agreement.

SECTION H TERM AND TERMINATION

H1. Term

- H1.1 Subject to earlier termination, this Referee Agreement will commence on the date it is executed and continue in full force until the earlier of:
- (a) completion of the Referee Services set forth herein;
 - (b) the termination of the Referee Agreement;
 - (c) the 7th anniversary of the date of this Referee Agreement (the “Initial Term”), unless renewed in accordance with Section H1.2; or
 - (d) such other date as may be mutually agreed between the Parties and the Referee.
- H1.2 The Initial Term may be renewed, in the Parties’ discretion, for up to 5 one-year renewal terms (each, a “Renewal Term”) by the Parties providing written notice to the Referee not less than 120 Calendar Days prior to the expiration of the Initial Term or Renewal Term, as applicable.

H2. Notice of Breach

- H2.1 If the Referee commits a breach of this Referee Agreement, the Parties may give written notice to the Referee:
- (a) specifying the breach; and
 - (b) directing its rectification in the period specified in the notice being a period not less than 7 Calendar Days from the date of service of the notice.

H3. Termination for Breach

- H3.1 If the Referee fails to rectify the breach within the period specified in the notice issued under Section H2 of this Referee Agreement, the Parties may, without prejudice to any other rights of the Parties or either of them, immediately terminate this Referee Agreement.

H4. Termination for Financial Difficulty or Change in Control

H4.1 The Parties may, without prejudice to any other rights which the Parties or either of them may have, terminate this Referee Agreement immediately if:

- (a) events have occurred or circumstances exist which, in the opinion of the Parties, may result in or have resulted in an insolvency or a Change in Control of the Referee; or
- (b) the Referee has communications with its creditors with a view to entering into, or enters into, any form of compromise, arrangement or moratorium of any debts whether formal or informal, with its creditors.

H5. Termination for Convenience

H5.1 Notwithstanding anything to the contrary in this Referee Agreement, the Parties may, at any time, jointly terminate this Referee Agreement upon 30 Calendar Days' written notice to the Referee. The Parties and the Referee agree that, notwithstanding the 30 Calendar Days' notice of termination, the Referee shall continue on a day-to-day basis thereafter until a new Referee is appointed.

H6. Referee's Rights upon Termination for Convenience

H6.1 Upon a termination under Section H5 of this Referee Agreement, the Referee will:

- (a) be entitled to be reimbursed by the Parties for the value of the Referee Services performed by it to the date of termination; and
- (b) not be entitled to any damages or other compensation in respect of the termination and (without limitation) any amount in respect of:
 - (i) the lost opportunity to earn a profit in respect of the Referee Services not performed at the date of termination; and
 - (ii) any lost opportunity to recover overheads from the turnover which would have been generated under this Referee Agreement but for it being terminated.

H7. Procedure upon Termination

H7.1 Upon completion of the Referee's engagement under this Referee Agreement or earlier termination of this Referee Agreement (whether under Section H3, Section H4 or Section H5 of this Referee Agreement or otherwise), the Referee must:

- (a) cooperate with the Parties with respect to the transition of the Referee Services to a replacement referee;
- (b) deliver to the Parties all Contract Material and all other information concerning the Project held or prepared by the Referee during the execution of work under this Referee Agreement; and

- (c) as and when required by the Parties, meet with them and such other persons nominated by them with a view to providing them with sufficient information to enable the Parties to execute the Project or the persons nominated to provide the Referee Services.

H8. Effect of Termination

- H8.1 Except as otherwise expressly provided in this Referee Agreement, termination of this Referee Agreement shall be without prejudice to any accrued rights and obligations under this Referee Agreement as at the date of termination (including the right of the Parties to recover damages from the Referee).

H9. Survival

- H9.1 Termination of this Referee Agreement shall not affect the continuing rights and obligations of the Parties and the Referee under Section F, Section G, Section I, and Section J of this Referee Agreement or under any other provision which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

SECTION I INDEMNITY

I1. Parties to Save Referee Harmless

- I1.1 The Parties hereby indemnify and save the Referee completely harmless from any actions, causes of action, suits, debts, costs, damages, expenses, claims and demands whatsoever, at law or in equity, arising directly or indirectly in whole or in part out of any action taken by the Referee within the scope of its duties or authority hereunder.
- I1.2 The indemnity provided under this Section I1 of this Referee Agreement shall not extend:
 - (a) to any breach of this Referee Agreement, or any part or parts hereof, by the Referee, its employees, servants, agents or persons for whom it is in law responsible, or any negligent or unlawful act or omission or willful misconduct of the Referee, its employees, servants or persons for whom it is in law responsible (in respect of which the Referee shall indemnify the Parties, as referred to in Section I2 of this Referee Agreement);
 - (b) to any action taken by the Referee outside the scope of authority set forth in this Referee Agreement, or any part or parts hereof; or
 - (c) to any debt, cost, expense, claim or demand for which insurance proceeds are recoverable by the Referee.
- I1.3 This indemnity shall survive the termination of this Referee Agreement.

I2. Referee to Save Parties Harmless

- I2.1 The Referee hereby indemnifies and saves the Parties, and their affiliated entities, subsidiaries and their respective directors, officers, employees, agents, permitted successors and assigns, completely harmless from any actions, causes of action, suits, debts, costs, damages, expenses, claims and demands whatsoever, at law or in equity, arising directly or indirectly in whole or in part out of any breach of this Referee Agreement, or any part or parts hereof, by the Referee, its employees, servants, agents or persons for whom it is in law responsible, or any negligent or unlawful act or omission or willful misconduct of the Referee, its employees, servants or persons for whom it is in law responsible.
- I2.2 The indemnity provided under this Section I2 to a Party shall not extend:
- (a) to any negligent or unlawful act or omission or willful misconduct of such Party, its employees, servants or persons for whom it is in law responsible (in respect of which such Parties shall indemnify the Referee, as referred to in Section I1 of this Referee); or
 - (b) to any debt, cost, expense, claim or demand for which insurance proceeds are recoverable by such Party.
- I2.3 This indemnity shall survive the termination of this Referee Agreement.

I3. Conduct of Claims

- I3.1 Claims made by a third person against a party having, or claiming to have, the benefit of an indemnity pursuant to this Referee Agreement shall be conducted in accordance with the conduct of claims procedure described in Appendix C – Conduct of Claims to this Referee Agreement.

SECTION J GENERAL

J1. Entire Agreement

- J1.1 Except where provided otherwise in this Referee Agreement, this Referee Agreement constitutes the entire agreement between the parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings, whether oral, written, express or implied, concerning the subject matter of this Referee Agreement.

J2. Independent Contractor

- J2.1 The Referee, its officers, directors, members, employees, servants and agents and any other persons engaged by the Referee in the performance of the Referee Services will not by virtue of this Referee Agreement or the performance of the Referee Services become in the service or employment of the Parties for any purpose.

J2.2 The Referee will be responsible for all matters requisite as employer or otherwise in relation to such officers, directors, members, employees, servants and agents and other persons who are engaged by the Referee.

J3. Waiver

J3.1 No waiver made or given by a party under or in connection with this Referee Agreement shall be binding or effective unless the waiver is in writing, signed by an authorized representative of the party giving such waiver, and delivered by such party to the other parties. No waiver made with respect to any right, power or remedy in one instance will be deemed to be a waiver with respect to any other instance involving the exercise of such right, power, or remedy or with respect to any other right, power, or remedy.

J3.2 Failure by any party to exercise any of its rights, powers or remedies hereunder or its delay to do so shall not constitute a waiver of those rights, powers or remedies. The single or partial exercise of a right, power or remedy shall not prevent its subsequent exercise or the exercise of any other right, power or remedy.

J4. Records

J4.1 The Referee shall, during the term of this Referee Agreement, as extended, and for a period of 6 years thereafter, maintain in an appropriate form, full accounting and other records in respect of performance by it of its obligations under this Referee Agreement and keep those records available for inspection by the City (including any representative designated by the City for that purpose), at all reasonable times upon reasonable notice, for the purpose of determining Referee's compliance with this Referee Agreement. Those records bearing original signatures or professional seals or stamps must be preserved in paper form; other records may be retained in electronic form.

J5. Notices

J5.1 All notices, requests, demands, instructions, certificates, consents and other communications required or permitted under this Referee Agreement shall be in writing (whether or not "written notice" or "notice in writing" is specifically required by the applicable provision of this Referee Agreement) and served by sending the same by registered mail or by hand, (in each case, with a copy by electronic transmission), as follows:

If to the City: The City of Winnipeg
Water and Waste Department
1199 Pacific Avenue,
Winnipeg, Manitoba, R3E S38

Attn: Lana Obach, P.Eng. MASc., PMP
Project Engineer
Email: lobach@winnipeg.ca

With a copy to: The City of Winnipeg

Water and Waste Department
Director's Office
1199 Pacific Avenue
Winnipeg, Manitoba R3E 3S8
Attn: Tim Shanks, M.Eng, P. Eng, Director
Email: TShanks@winnipeg.ca

If to Design Builder: [NTD]

With a copy to: [NTD]

If to the Referee:

Address [NTD: to populate]

Attn.:

Email:

J5.2 Any party to this Referee Agreement may, from time to time, change any of its contact information set forth in Section J5.1 of this Referee Agreement by prior notice to the other Parties, and such change shall be effective on the Business Day that next follows the recipient party's receipt of such notice unless a later effective date is given in such notice.

J5.3 Subject to Sections J5.4 and J5.5 of this Referee Agreement:

- (a) a notice given by registered mail shall be deemed to have been received on the 3rd Business Day after mailing; and
- (b) a notice given by hand delivery shall be deemed to have been received on the day it is delivered.

J5.4 If the party giving the notice knows or ought reasonably to know of difficulties with the postal system which might affect negatively the delivery of mail, any such notice shall not be mailed but shall be made or given by personal delivery in accordance with this Section J4.

J5.5 If any notice delivered by hand is so delivered either on a day that is not a Business Day or on a Business Day after 4:00 p.m. (recipient's local time), then such notice shall be deemed to have been received by such recipient on the next Business Day.

J6. Transfer and Assignment

J6.1 The Referee:

- (a) must not assign, transfer, mortgage, charge or encumber any right or obligation under this Referee Agreement without the prior written consent of the Parties, which each Party may give or withhold in its absolute discretion; and
- (b) agrees that any assignment, transfer, mortgage, charge or encumbrance will not operate to release or discharge the Referee from any obligation or liability under this Referee Agreement.

J6.2 For the purposes of this Section J6, an assignment will be deemed to have occurred where there is a Change in Control of the Referee after the date of this Referee Agreement.

J6.3 Each of the Parties may assign, transfer, mortgage, charge or encumber any right or obligation under this Referee Agreement in accordance with the terms of the Design Build Agreement.

J7. Governing Laws and Jurisdictions

J7.1 This Referee Agreement shall be governed by and construed in accordance with the laws of Manitoba and the laws of Canada applicable therein and shall be treated in all respects as a Manitoba contract, without regard to conflict of laws principles.

J7.2 The Parties and the Referee agree that the courts of the Province of Manitoba and all courts competent to hear appeals therefrom shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Referee Agreement and hereby irrevocably attorn to the exclusive jurisdiction of such courts.

J8. Confidentiality

J8.1 The Referee must ensure that:

- (a) neither it nor any of its officers, directors, members, employees, servants and agents disclose, or otherwise make public, any Contract Material or any other information or material acquired in connection with or during the performance of the Referee Services without prior written approval of the Parties; and
- (b) no Contract Material is used, copied, supplied or reproduced for any purpose other than for the performance of the Referee Services under this Referee Agreement.

J8.2 The Parties may at any time require the Referee to give and to arrange for its officers, directors, members, employees, servants and agents engaged in the performance of the Referee Services to give written undertakings, in the form of confidentiality agreements on terms required by the Parties, relating to the non-disclosure of confidential information, in which case the Referee must promptly arrange for such agreements to be made.

J9. Contract Material

- J9.1 The Parties and the Referee agree that the Referee does not and will not have any rights, including any Intellectual Property, in any Contract Material provided to the Referee or created or required to be created by either Party.
- J9.2 As between the Parties and the Referee, all title and ownership, including all Intellectual Property, in and to the Contract Material created or required to be created by the Referee as part of, or for the purposes of performing the Referee Services, is hereby assigned jointly to the Parties on creation, or where such title, ownership and Intellectual Property cannot be assigned before creation of the Contract Material, it will be assigned to the Parties on creation. In addition, to the extent that copyright may subsist in such Contract Material so created by the Referee, the Referee hereby waives all past, present and future moral rights therein and the Referee shall ensure that any agent or employee of Referee shall have waived all such moral rights. The Parties acknowledge and agree that as between the Parties, title, ownership and other rights to the foregoing shall be governed by the Design Build Agreement.
- J9.3 The Referee will do all such things and execute all such documents as reasonably requested by either of the Parties in order to confirm or perfect the assignment of Intellectual Property in the Contract Material referred to in Section J9.2 of this Referee Agreement.

J10. Public Disclosure of Design Build Agreement and Project Information

- J10.1 The Parties and the Referee acknowledge and agree that this Referee Agreement, including any appendices hereto, may be made available upon request to the City under FIPPA, subject to the applicable provisions of FIPPA.
- J10.2 The Referee agrees that the City will be at liberty to make public disclosure of this Referee Agreement, excepting only any appendices or portions thereof that the Referee has, prior to signing of this Referee Agreement, established to the satisfaction of the City, acting reasonably, would be exempted from disclosure under the provisions of FIPPA with respect to the governing business interests of third parties.
- J10.3 Notwithstanding Section J10.2, where a compelling public interest in the disclosure of the information clearly outweighs the public interest in limiting the disclosure of the information supplied by the Referee, the Referee acknowledges and agrees that the City may disclose such information.

J11. Amendment

- J11.1 This Referee Agreement may not be varied, amended or supplemented except by an agreement in writing signed by duly authorized representatives of the Parties and the Referee and stating on its face that it is intended to be an amendment, restatement or other modification, as the case may be, to this Referee Agreement.

J12. Severability

J12.1 Each provision of this Referee Agreement shall be valid and enforceable to the fullest extent permitted by law. If the courts of a competent jurisdiction shall declare any provision of this Referee Agreement invalid, unenforceable or illegal, such provision may be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Referee Agreement. If any such provision of this Referee Agreement is invalid, unenforceable or illegal, the parties shall, acting in good faith, promptly negotiate new provisions to eliminate such invalidity, unenforceability or illegality and to restore this Referee Agreement as near as possible to its original intent and effect.

J13. Enurement

J13.1 This Referee Agreement shall enure to the benefit of, and be binding on, each of the parties and their respective successors and permitted transferees and assigns.

J14. Counterparts

J14.1 This Referee Agreement may be executed in counterparts, in which case (i) the counterparts together shall constitute one agreement, and (ii) communication of execution by Portable Document Format (PDF) transmission shall constitute good delivery.

J15. Joint and Several

J15.1 Where two or more persons execute this Referee Agreement as Design Builder or as Referee, as the case may be, the liability under this Referee Agreement of such persons executing this Referee Agreement shall be joint and several to the Design Builder and the Referee, respectively.

J15.2 The Parties have therefore signed this Referee Agreement, by their respective duly authorized officers, on the respective dates shown below.

J16. Document Management

J16.1 The City's Document Management System for the Project is Aconex. Should the Parties to this Referee Agreement require additional means than e-mail or hard copy to communicate or transmit documents, then the City will provide the Referee with any necessary training along with the associated protocols to use the Aconex system for such communication or document transmission.

SECTION K THIRD PARTY AGREEMENTS – FUNDING AND/OR CONTRIBUTION AGREEMENT OBLIGATIONS

K1.1 If funding for the Referee Services is provided to the City of Winnipeg by the Government of Manitoba and/or the Government of Canada, Referee is advised that the following terms shall immediately be incorporated into the Referee Agreement:

- (a) In the event that the obligations in Section K1.1 apply, actual costs legitimately incurred by the Referee as a direct result of these obligations

("**Funding Costs**") shall be determined by the actual cost to the Referee. In all other respects Funding Costs will be addressed by an amendment to this Referee Agreement.

- (b) For the purposes of Section K1.1:
 - (i) "**Government of Canada**" includes the authorized officials, auditors, and representatives of the Government of Canada; and
 - (ii) "**Government of Manitoba**" includes the authorized officials, auditors, and representatives of the Government of Manitoba.
- (c) Indemnification by Referee
 - (i) The Referee agrees to indemnify and save harmless the Government of Canada and the Government of Manitoba and each of their respective Ministers, officers, servants, employees, and agents from and against all claims and demands, losses, costs, damages, actions, suit or other proceedings brought or pursued in any manner in respect of any matter caused by the Referee or arising from this Referee Agreement or the Referee Services, or from the goods or services provided or required to be provided by the Referee, except those resulting from the negligence of any of the Government of Canada's or the Government of Manitoba's Ministers, officers, servants, employees, or agents, as the case may be.
- (d) Records Retention and Audits
 - (i) The Referee shall maintain and preserve accurate and complete records in respect of this Referee Agreement and the Referee Services, including all accounting records, financial documents, copies of contracts with other parties and other records relating to this Referee Agreement and the Referee Services during the term of the Referee Agreement and for at least six (6) years after Final Completion. Those records bearing original signatures or professional seals or stamps must be preserved in paper form; other records may be retained in electronic form.
 - (ii) The Referee shall keep available for inspection and audit at all reasonable times while this Referee Agreement is in effect and until at least six (6) years after Final Completion, all records, documents, and contracts referred to in Section K1.1(d)(i) inspection, copying and audit by the City of Winnipeg, the Government of Manitoba and/or the Government of Canada and their respective representatives and auditors, and to produce them on demand; to provide reasonable facilities for such inspections, copying and audits, to provide copies of and extracts from such records, documents, or contracts upon request by the City of Winnipeg, the Government of Manitoba, and/or the Government of Canada and their respective representatives and auditors, and to promptly provide such other information and explanations as may be reasonably requested by the City of

Winnipeg, the Government of Manitoba, and/or the Government of Canada from time-to-time.

(e) Other Obligations

- (i) The Referee consents to the City providing a copy of the Referee Agreement documents to the Government of Manitoba and/or the Government of Canada upon request from either entity.
 - (ii) If the Lobbyists Registration Act (Manitoba) applies to the Referee, the Referee represents and warrants that it has filed a return and is registered and in full compliance with the obligations of that Act, and covenants that it will continue to comply for the duration of this Referee Agreement.
 - (iii) The Referee shall comply with all applicable legislation and standards, whether federal, provincial, or municipal, including (without limitation) labour, environmental, and human rights laws, in the course of providing the Referee Services.
 - (iv) The Referee represents and warrants that no current or former public servant or public office holder, to whom the Value and Ethics Code for the Public Sector, the Policy on Conflict of Interest and Post Employment, or the Conflict of Interest Act applies, shall derive direct benefit from this Contract, including any employment, payments, or gifts, unless the provision or receipt of such benefits is in compliance with such codes and the legislation.
 - (v) The Referee represents and warrants that no member of the House of Commons or of the Senate of Canada or of the Legislative Assembly of Manitoba is a shareholder, director or officer of the Referee or of a Subcontractor, and that no such member is entitled to any benefits arising from this Contract or from a contract with the Referee or a Subcontractor concerning the Referee Services.
 - (vi) The Referee represents and warrants that any contract entered into with any third party for products or services related to the Project shall not establish a partnership, joint venture, principal-agent relationship or employer-employee relationship in any way or for any purpose whatsoever between Canada and a third party or between Manitoba and a third party.
 - (vii) The Referee represents and warrants that any contract entered into with any third party for products or services related to the Project shall not be construed as authorizing any person, including a third party, to contract for or to incur any obligation on behalf of Canada or on behalf of Manitoba, or to act as an agent for Canada or as an agent for Manitoba.
- (f) The Referee shall properly account for the Referee Services provided under this Referee Agreement and payment received in this respect, prepared in

accordance with generally accepted accounting principles in effect in Canada, including those principles and standards approved or recommended from time-to-time by the Chartered Professional Accountants of Canada or the Public Sector Accounting Board, as applicable, applied on a consistent basis.

IN WITNESS WHEREOF the parties have executed this Referee Agreement as of the date first above written.

THE CITY OF WINNIPEG

Per:

Michael A. Jack

Chief Administrative Officer

I have authority to bind The City of Winnipeg

Reviewed as to Business terms:

Certified as to Contract Details:

Cynthia Wiebe, P.Eng., CAMP
Manager of Engineering
Water and Waste Department

Tim Shanks, M.Eng., P.Eng,
Director
Water and Waste Department

Legally Reviewed and Certified as to Form:

Lisa R. Rowswell, BA, LLB
Sr. Solicitor (Team Lead – Procurement)
for Director of Legal Services and City
Solicitor

DESIGN BUILDER

Per:

Name:

Title:

Per:

Name:

Title:

I/We have authority to bind Design Builder

REFEREE

Per:

Name:

Title:

Per:

Name:

Title:

I/We have authority to bind Referee

APPENDIX A

REFEREE FEE

SECTION A REFEREE FEE

A1. Referee Services Hourly Rate:

A1.1 The Referee shall be entitled to a blended hourly rate of \$x [NTD to populate] (excluding GST and RST) to a total upset limit of \$x, for a professional providing the Referee Services as identified in this Referee Agreement (the “Hourly Rate”).

A1.2 The provision of Referee Services must be pre-approved by the Parties in writing. If the Parties decide to proceed with such Referee Services, the Referee will be reimbursed at the Hourly Rate.

A1.3 The Hourly Rate includes overheads and profit, all labour and materials, insurance costs, and all other overhead including any fees or other charges required by law to perform the Referee Services, except those disbursements permitted under Section A2 of this Appendix.

A2. Referee Services Travel and Disbursements:

A2.1 In addition to the Hourly Rate, the Referee shall be entitled to claim for reasonable travel expenses incurred by a professional providing the Referee Services (“Referee Travel Fee”) to a total upset limit of \$x [NTD to populate]. Any such Referee Travel Fees must be pre-approved by the Parties in writing, prior to the Referee incurring same.

A2.2 The Referee Travel Fee shall be paid monthly in arrears, subject to the Parties receiving invoices reflecting the Referee Services which are in form and substance satisfactory to the Parties.

A3. Invoicing and Payment:

A3.1 The Hourly Rate and Referee Travel Fee shall be paid monthly in arrears, subject to the Parties receiving invoices reflecting the Referee Services which are in form and substance satisfactory to the Parties.

A3.2 The Referee shall invoice each Party separately for their 50% share of the above costs, providing disclosure to both Parties of the total cost of the Referee. However, if during the evaluation of the Dispute, the Referee finds the Dispute is without grounds, is false in nature, or shares similar grounds for striking out documents as set out in the *Court of Queen’s Bench Rules* (Manitoba), the costs associated with the Referee shall be borne completely by the Party who initiated the particular Referee Services, and the Referee shall provide an invoice indicating as such to both Parties.

- A3.3 The City and Design Builder shall provide the Referee with an invoice template to be used.
- A3.4 Invoices shall be submitted in both PDF and Native Formats.

APPENDIX B

REFEREE PERSONNEL

SECTION A REFEREE PERSONNEL

The following personnel shall be involved in the performance of the Referee Services:

Name	Title

APPENDIX C

CONDUCT OF CLAIMS

SECTION A CONDUCT OF CLAIMS

A1. Process

- A1.1 This Appendix C shall apply to the conduct of claims, made by a third person against a party having, or claiming to have, the benefit of an indemnity pursuant to this Referee Agreement. The party having, or claiming to have, the benefit of the indemnity is referred to as the “Beneficiary” and a party giving the indemnity is referred to as an “Indemnifier”.
- A1.2 If the Beneficiary receives any notice, demand, letter or other document concerning any claim for which it appears that the Beneficiary is, or may become entitled to, indemnification under Section I of the Referee Agreement, the Beneficiary shall give written notice to each Indemnifier potentially obligated in respect thereof, as soon as reasonably practicable and in any event within 10 Business Days of receipt of the same. Such notice shall specify with reasonable particularity, to the extent that information is available, the factual basis for the claim and the amount of the claim.
- A1.3 Subject to Sections A1.4, A1.5 and A1.6 of this Appendix C, on the giving of such notice by the Beneficiary, where it appears that the Beneficiary is or may be entitled to indemnification from an Indemnifier in respect of all, but not part only, of the liability arising out of the claim, such Indemnifier shall (subject to providing the Beneficiary with a secured indemnity to the Beneficiary’s reasonable satisfaction against all costs and expenses that the Beneficiary may incur by reason of such action) be entitled to dispute the claim in the name of the Beneficiary at the Indemnifier’s own expense and take conduct of any defence, dispute, compromise, or appeal of the claim and of any incidental negotiations. The Beneficiary shall give such Indemnifier all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim. The Beneficiary shall have the right to employ separate counsel in respect of such claim and the reasonable fees and expenses of such counsel shall be to the account of the Indemnifier only where representation of both the Indemnifier and the Beneficiary by common counsel would be inappropriate due to any actual or potential conflicting interests between the Indemnifier and the Beneficiary. If and to the extent that both the City and Design Builder are given notice in respect of the same claim, they shall cooperate in the conduct of the claim and give each other such reasonable access and assistance as may be necessary or desirable for purposes of considering, resisting and defending such claim.
- A1.4 With respect to any claim conducted by an Indemnifier:
- (a) the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;
 - (b) the Indemnifier shall not bring the name or reputation of the Beneficiary into disrepute;

- (c) the Indemnifier shall not pay, compromise or settle such claims without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed;
- (d) the Indemnifier shall not admit liability or fault to any third party without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed; and
- (e) the Indemnifier shall use commercially reasonable efforts to have the Beneficiary named as a beneficiary under any release given by the persons bringing the claim to which this Section 3 relates.

A1.5 The Beneficiary shall be free to pay or settle any such claim on such terms as it thinks fit and without prejudice to its rights and remedies under this Referee Agreement if:

- (a) none of the Indemnifiers is entitled to take conduct of the claim in accordance with Section A1.3;
- (b) none of the Indemnifiers notifies the Beneficiary of its intention to take conduct of the relevant claim as soon as reasonably practicable and in any event within 10 Business Days of the notice from the Beneficiary under Section A1.2 or each of the Indemnifiers notifies the Beneficiary that it does not intend to take conduct of the claim; or
- (c) none of the Indemnifiers complies in any material respect with Section A1.4.

A1.6 The Beneficiary shall be free at any time to give notice to the applicable Indemnifier that the Beneficiary is retaining or taking over, as the case may be, the conduct of any defence, dispute, compromise or appeal of any claim, or of any incidental negotiations, to which Section A1.3 applies. For greater certainty, the Referee acknowledges and agrees that where the City is the Beneficiary, the City may retain or take over such conduct in any matter involving Personal Information (as it is defined in the Design Build Agreement) or any matter involving public policy. On receipt of such notice the applicable Indemnifier shall promptly take all steps necessary to transfer the conduct of such claim to the Beneficiary, and shall provide to the Beneficiary all relevant documentation and all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim. If the Beneficiary gives any notice pursuant to this Section A1.6, then the applicable Indemnifier shall be released from any liabilities arising under the applicable indemnity hereunder in respect of the applicable claim.

A1.7 If an Indemnifier pays to the Beneficiary an amount in respect of an indemnity and the Beneficiary subsequently recovers, whether by payment, discount, credit, saving, relief or other benefit or otherwise, a sum or anything else of value (the "**Recovery Amount**") which is directly referable to the fact, matter, event or circumstances giving rise to the claim under the indemnity, the Beneficiary shall forthwith repay to that Indemnifier whichever is the lesser of:

- (a) an amount equal to the Recovery Amount less any out-of-pocket costs and expenses properly incurred by the Beneficiary in recovering the same; and

- (b) the amount paid to the Beneficiary by such Indemnifier in respect of the claim under the relevant indemnity;

provided that there shall be no obligation on the Beneficiary to pursue any Recovery Amount and that the Indemnifier shall be repaid only to the extent that the Recovery Amount, aggregated with any sum recovered from the Indemnifier, exceeds the loss sustained by the Beneficiary except, however, that if the Beneficiary elects not to pursue a Recovery Amount, the Indemnifier shall be entitled to require an assignment to it of the right to do so.

- A1.8 Any person taking any of the steps contemplated by this Appendix C shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Referee Agreement.