

SCHEDULE 12

FORM OF ASSIGNABLE SUBCONTRACT AGREEMENT

THIS AGREEMENT is made as of the [•] day of [•], 20[•]

BETWEEN:

THE CITY OF WINNIPEG

(the “City”)

AND:

[[•], a corporation incorporated under the laws of [Manitoba]]

(“Development Partner”)

AND:

[[•], a corporation incorporated under the laws of [Manitoba]]

(the “Subcontractor”)

WHEREAS:

- A. The City and the Development Partner have entered into a development phase agreement, as such agreement may be amended, supplemented or replaced from time to time in accordance with the terms thereof (the “**Development Phase Agreement**”), which requires Development Partner to enter into, and to cause the Subcontractor to enter into this assignable subcontract agreement (the “**Assignable Subcontractor Agreement**”) with the City;
- B. With respect to a portion of the Development Partner Services under the Development Phase Agreement, the Development Partner and Subcontractor entered into the Subcontract; and
- C. The Development Partner has agreed to assign to the City all of its right, title and interest in and to the Subcontract to the City.

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

SECTION A DEFINITIONS

- A1.1 Capitalized terms used in this Assignable Subcontractor Agreement shall have meanings given to them in the Development Phase Agreement unless otherwise

expressly stated in this Assignable Subcontractor Agreement. In this Assignable Subcontractor Agreement, the following terms shall have the following meanings:

- (a) “**Default Details**” has the meaning given in E1.1;
- (b) “**Default Notice**” has the meaning given in E1.1;
- (c) “**Designated Person**” has the meaning given in N1.1;
- (d) “**Novation Notice**” has the meaning given in F1.2;
- (e) “**Party**” means the City, the Development Partner, or the Subcontractor, and “**Parties**” means, collectively, the City, the Development Partner and the Subcontractor;
- (f) “**Subcontract**” means the subcontract [•] *[Note to Proponents: Describe applicable subcontract.]*, such subcontract together with all amendments thereto which hereafter may be made in accordance with the terms thereof; and
- (g) “**Substitute**” has the meaning given in F1.2.

SECTION B INTERPRETATION

B1.1 This Assignable Subcontractor Agreement shall be interpreted according to the following provisions, unless the context requires a different meaning:

- (a) The headings in this Assignable Subcontractor Agreement are for convenience only and do not affect interpretation.
- (b) References to specific Sections, Clauses, Paragraphs, Subparagraphs, and other divisions are references to such Sections, Clauses, Paragraphs, Subparagraphs, or divisions of this Assignable Subcontractor Agreement and the terms “Section” and “Clause” are used interchangeably and are synonymous.
- (c) Words importing persons or parties are to be broadly interpreted and include an individual, corporation, limited liability company, joint stock company, firm, partnership, joint venture, trust, unincorporated organization, Governmental Authority, unincorporated body of persons or association, and any other entity having legal capacity, and the heirs, beneficiaries, executors, administrators, or other legal representatives of a person in such capacity.
- (d) Words denoting the plural includes the singular, the singular includes the plural, and each of the masculine, feminine, and neutral genders include all other genders.
- (e) References to this Assignable Subcontractor Agreement or any contract, standard, principle, agreement, or document, or instrument are deemed to include (subject to all relevant approvals and any other provisions of this Assignable Subcontractor Agreement concerning amendments) references to

this Assignable Subcontractor Agreement or such other contract, standard, principle, agreement, or document, or instrument as amended, novated, supplemented, restated, substituted, assigned, varied, or replaced from time to time.

- (f) References to any party to this Assignable Subcontractor Agreement includes its successors or permitted assigns.
- (g) The words in this Assignable Subcontractor Agreement shall bear their natural meaning.
- (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) References containing terms such as:
 - (i) "hereof", "herein", "hereto", "hereinafter", and other terms of like import are not limited in applicability to the specific provision within which such references are set forth but instead refer to this Assignable Subcontractor Agreement taken as a whole; and
 - (ii) "includes" and "including", whether or not used with the words "without limitation" or "but not limited to", shall not be deemed limited by the specific enumeration of items but shall, in all cases, be deemed to be without limitation and construed and interpreted to mean "includes without limitation" and "including without limitation".
- (k) In construing this Assignable Subcontractor Agreement, the rule known as the *ejusdem generis rule* shall not apply nor shall any similar rule or approach to the construction of this Assignable Subcontractor Agreement and, accordingly, general words introduced or followed by the word "other" or "including" or "in particular" shall not be given a restrictive meaning because they are followed or preceded (as the case may be) by particular examples intended to fall within the meaning of the general words.
- (l) Where this Assignable Subcontractor Agreement states that an obligation shall be performed "no later than" or "within" or "by" a stipulated date or event which is a prescribed number of days after a stipulated date or event, the latest time for performance shall be 4:30 p.m. on the last day for performance of the obligation concerned, or, if that day is not a Business Day, 4:30 p.m. on the next Business Day.
- (m) Where this Assignable Subcontractor Agreement states that an obligation shall be performed "on" a stipulated date, the latest time for performance shall be 4:30

p.m. on that day, or, if that day is not a Business Day, 4:30 p.m. on the next Business Day.

- (n) Any reference to time of day or date means the CST or date in Winnipeg, Manitoba.
- (o) Unless otherwise indicated, time periods will be strictly construed.
- (p) Whenever the terms “must”, “will” or “shall” are used in this Assignable Subcontractor Agreement they shall be construed and interpreted as synonymous and to read “shall”.
- (q) If a word or phrase is defined, then other parts of speech and grammatical forms of that word or phrase have a corresponding meaning.

SECTION C CONFLICT IN DOCUMENTS

C1.1 In the event of ambiguities, conflicts, or inconsistencies between or among this Assignable Subcontractor Agreement and the Development Phase Agreement, this Assignable Subcontractor Agreement shall prevail.

SECTION D AGREEMENTS

D1.1 If the Subcontractor gives the Development Partner any notice of any default(s) under the Subcontract that may give the Subcontractor a right to terminate the Subcontract or to treat it as having been repudiated by the Development Partner or to discontinue the Subcontractor’s performance thereunder, then the Subcontractor shall within two Business Days of providing the Development Partner with any notice of any default(s) provide the City with a copy of such notice and an executed copy of the Subcontract, and set out in reasonable detail the default(s).

SECTION E NO TERMINATION BY SUBCONTRACTOR WITHOUT DEFAULT NOTICE

E1.1 The Subcontractor shall not exercise any right it may have to terminate the Subcontract or to treat it as having been repudiated by the Development Partner or to discontinue the Subcontractor’s performance thereunder unless:

- (a) the Subcontractor first delivers an executed copy of the Subcontract and a written notice (collectively, a “**Default Notice**”) to the City setting out in reasonable detail the default(s) on which the Subcontractor intends to rely in terminating the Subcontract or in treating it as having been repudiated by the Development Partner or to discontinue the Subcontractor’s performance thereunder (collectively, the “**Default Details**”); and
- (b) within a period of five Business Days of the City receiving the Default Notice, the Default Details thereunder have not been remedied; and provided that if, within such period of five Business Days, the City agrees to pay the Subcontractor’s reasonable costs of continued performance, such period of five Business Days shall be extended to 45 days.

SECTION F NOVATION OF THE SUBCONTRACT

- F1.1 The Subcontractor acknowledges and agrees that where the Development Phase Agreement has been terminated by the Development Partner or terminated due to the insolvency of the Development Partner, the Subcontract shall not terminate solely by reason of the termination of the Development Phase Agreement unless the City has failed to request a novation of the Subcontract pursuant to F1.2 within 30 days following the date of such termination.
- F1.2 The City may at any time if:
- (a) the Development Phase Agreement has been terminated; or
 - (b) the City's right to terminate the Development Phase Agreement has arisen and is continuing,
- deliver a notice (a "**Novation Notice**") electing to novate the Subcontract either to:
- (c) the City; or
 - (d) a third party designated by the City in the Novation Notice (the "**Substitute**"), provided that the City can demonstrate to the Subcontractor, acting reasonably, that the Substitute shall have sufficient financial resources, or shall be supported by a satisfactory guarantee, to carry out the obligations of the Substitute under the Subcontract.
- F1.3 Subject to F1.4, upon the later of the date of delivery of a Novation Notice and the effective date of novation specified in a Novation Notice:
- (a) the Development Partner and the Subcontractor will be deemed to be released from their existing and future obligations under the Subcontract to each other (except with respect to any and all indemnities from the Development Partner or the Subcontractor to the other in respect of the period prior to the receipt of the Novation Notice), and the City or the Substitute, as applicable, and the Subcontractor will be deemed to assume those same existing and future obligations towards each other (except in respect of the aforesaid indemnities);
 - (b) the existing and future rights of the Development Partner against the Subcontractor under the Subcontract and vice versa will be deemed to be cancelled (except with respect to any and all indemnities from the Development Partner or the Subcontractor to the other in respect of the period prior to the receipt of the Novation Notice), and the City or the Substitute, as applicable, and the Subcontractor will be deemed to acquire those same existing and future rights against each other (except in respect of the aforesaid indemnities), subject to any applicable credit from the Subcontractor to the City if the City pays for the Subcontractor's reasonable costs of continued performance pursuant to Section E;
 - (c) any guarantee, bond, or covenant in favour of the Development Partner from any third party in respect of any term, provision, condition, obligation, undertaking, or

agreement on the part of the Subcontractor to be performed, observed, or carried out by the Subcontractor as contained in, referred to, or inferred from the Subcontract shall be assigned, novated, or granted, as required by the City or the Substitute, as applicable, each acting reasonably, to the City or the Substitute, as applicable, and the Subcontractor shall cause such assignment, novation, or grant to be on substantially the same terms and conditions as the original guarantee, bond, or covenant, provided, however, that where the Development Partner shall continue to hold, or shall continue to be entitled to or have rights under, such guarantee, bond, or covenant as security for any obligations of the Subcontractor, the assignment, novation, or grant of the guarantee, bond, or covenant to the extent of any such obligations to the Development Partner shall be conditional on the satisfaction of those obligations to the Development Partner; and

- (d) at the City's request, the Subcontractor shall enter into, and shall cause any guarantor, covenantor, or surety under any guarantee, bond, or covenant referred to in F1.3(c) to enter into, or the City shall or shall cause the Substitute to enter into, as applicable, all such agreements or other documents as reasonably necessary to give effect to the foregoing, including an agreement between the City or the Substitute, as applicable, and the Subcontractor, acceptable to the City and the Subcontractor, each acting reasonably, on substantially the same terms as the Subcontract.

- F1.4 The Development Partner shall, at its own cost, cooperate fully with the City and the Substitute in order to achieve a smooth transfer of the Subcontract to the City or the Substitute, as applicable, and to avoid or mitigate in so far as reasonably practicable any inconvenience, including the administration of the Subcontract, ongoing supervisory activities and scheduling. The Development Partner, shall at its own cost, provide to the City and the Substitute, as applicable, within five Business Days copies of all documents and records relating to the Subcontract upon request by the City or the Substitute.
- F1.5 The rights granted by F1.2 shall be of no force or effect if, at any time the Subcontractor receives a Novation Notice, the Subcontractor has already received notice in writing from another entity entitled to the benefit of step-in rights relating to the Subcontract that it is exercising or has validly exercised those step-in rights. If the Subcontractor receives any such notice on the same day as a Novation Notice, only the Novation Notice shall be effective.
- F1.6 If the City gives a Novation Notice within the time provided hereunder at any time after the Subcontractor has terminated the Subcontract or has treated it as having been repudiated by the Development Partner or has discontinued the Subcontractor's performance thereunder in accordance with the terms of this Assignable Subcontractor Agreement, the Subcontractor agrees that the Subcontract shall be reinstated and deemed to have continued despite any termination or treatment as having been repudiated, and the City shall pay the Subcontractor's reasonable costs for re-commencing the obligations it has under the Subcontract and the Subcontractor shall be entitled to reasonable compensation and/or relief for re-commencing such obligations, having regard to the additional costs and delays incurred as a result of having

terminated the Subcontract or having treated it as being repudiated by the Development Partner or having discontinued its performance thereunder.

- F1.7 The Subcontractor acknowledges that if the City novates the Subcontract to itself pursuant to F1.2, the City shall have the right to further novate the Subcontract to a Substitute at any time in accordance with and otherwise on, and subject to, the terms and conditions of this Assignable Subcontractor Agreement.
- F1.8 Unless and until notification is given to the Subcontractor in accordance with any of the notices referred to in F1.2, the Development Partner shall be entitled to enforce all of the benefits and powers under the Subcontract and to deal with, and be obligated to, the Subcontractor in respect of the Subcontract and matters arising therefrom.
- F1.9 Subcontractor agrees, upon the reasonable request of the City from time to time, to provide a certificate to the City setting out the status of the Subcontract, including a description of any events which, with the passage of time or the giving of notice or both, could constitute a default thereunder.

SECTION G SUBCONTRACTOR LIABILITY

- G1.1 The liability of the Subcontractor hereunder shall not be modified, released, diminished, or in any way affected by:
- (a) any independent inspection, investigation, or enquiry into any matter which may be made or carried out by or for the City, or by any failure or omission to carry out any such inspection, investigation, or enquiry; or
 - (b) the appointment by the City of any other person to review the progress of or otherwise report to the City in respect of the Project, or by any action or omission of such person whether or not such action or omission might give rise to any independent liability of such person to the City,

provided always that nothing in this Section G shall modify or affect any rights which the Subcontractor might have otherwise had to claim contribution from any other person whether under statute or common law.

- G1.2 In the event the City delivers a Novation Notice, the Subcontractor shall have no greater liability to the City or any Substitute than it would have had to the Development Partner under the Subcontract, and the Subcontractor shall be entitled in any proceedings by the City or any Substitute to rely on any liability limitations in the Subcontract.

SECTION H DEVELOPMENT PARTNER AND SUBCONTRACTOR CONTRACTOR AS PARTY

- H1.1 The Development Partner acknowledges and agrees that the Subcontractor shall not be in breach of the Subcontract by complying with its obligations hereunder.

SECTION I ASSIGNMENT

- I1.1 The Development Partner shall not, without the prior written consent of the City, assign, transfer, charge, subcontract, subparticipate, or otherwise dispose of any interest in this Assignable Subcontractor Agreement except to the extent it is entitled to do so under Development Phase Agreement.
- I1.2 The City may assign or otherwise dispose of the benefit of the whole or part of this Assignable Subcontractor Agreement to any person to whom the City may assign or otherwise dispose of its interest in the Development Phase Agreement pursuant to Section Y.2 of the Development Phase Agreement but only in conjunction therewith, and shall provide written Notice to the Development Partner and the Subcontractor of such assignment or disposition.
- I1.3 The Subcontractor shall not, without the prior written consent of the City and the Development Partner, assign, transfer, charge, subcontract, subparticipate, or otherwise dispose of any interest in this Assignable Subcontractor Agreement.

SECTION J NOTICES

- J1.1 Any notice, consent, approval or other communication (each a “**Notice**”) under any provision of this Assignable Subcontractor Agreement must be in writing to be effective, and is effective when delivered by any means, including registered mail, email or by hand, (in each case, with a copy by email), to the following respective addresses:

If to the City:

The City of Winnipeg
Water and Waste Department
1199 Pacific Avenue
Winnipeg, Manitoba R3E 3S8

Attn.: Lana Obach, P. Eng., MASc, PMP,
Senior Project Engineer

Email: lobach@winnipeg.ca

With a copy to:

The City of Winnipeg
Water and Waste Department
1199 Pacific Avenue
Winnipeg, Manitoba R3E 3S8

Attn.: Tim Shanks, M. Eng., P.Eng
Director

Email: tshanks@winnipeg.ca

If to Subcontractor:

[•]

Attn.: [•]

Email.: [•]

If to Development Partner:

[•]

Attn.: [•]

Email.: [•]

J1.2 Any communication delivered in accordance with Section J1.1 shall be deemed to have been given or made and to have been received on the day of delivery if delivered, or, if emailed, at the time and date received by the recipient, provided that such day in either event is a Business Day and the communication is so delivered or e-mailed before 4:30 p.m. on such day. Otherwise, such communication shall be deemed to have been given and made and to have been received on the next following Business Day.

SECTION K AMENDMENTS

K1.1 No amendment of this Assignable Subcontractor Agreement is effective unless made in writing and signed by a duly authorized representative of each of the Parties.

SECTION L WAIVER

L1.1 No waiver of any provision of this Assignable Subcontractor Agreement is effective unless made in writing, and any such waiver has effect only in respect of the particular provision or circumstance stated in the waiver. No representation by either of the Parties with respect to the performance of any obligation under this Assignable Subcontractor Agreement is capable of giving rise to an estoppel unless the representation is made in writing.

SECTION M RELATIONSHIP BETWEEN THE PARTIES

M1.1 The Parties are independent contractors. This Assignable Subcontractor Agreement is not intended to and does not create or establish between the Parties any relationship as partners, joint venturers, employer and employee, master and servant, or, except as provided in this Assignable Subcontractor Agreement, of principal and agent.

SECTION N THE CITY DESIGNATE

N1.1 At any time and from time to time, the City may designate any branch, agency, division, department, or office of the City ("**Designated Person**") to carry out administrative responsibility for the rights and obligations of the City under this Assignable Subcontractor Agreement and the Development Partner and the Subcontractor may deal exclusively with the Designated Person in respect of all such matters and is entitled to rely on the actions, directions, requests, notices, consents, approvals, waivers, comments relating to the review of documentation and other administrative matters, and decisions determined by the Designated Person from time to time, until the City has notified the Development Partner and the Subcontractor in writing that the Designated Person is no longer the Designated Person and such notice shall have effect on the later of the date of delivery of such notice and the date specified in the written notice. The City shall advise the Development Partner and the Subcontractor in writing of any designation hereunder. The rights and obligations of the Parties to this Assignable Subcontractor Agreement shall be in no way affected by reason of any such designation. The Development Partner and the Subcontractor acknowledge the right of the City to delegate administrative responsibilities hereunder as set forth in this Section N.

SECTION O ENTIRE AGREEMENT

O1.1 This Assignable Subcontractor Agreement is the entire agreement between the Parties regarding the subject matter of this Assignable Subcontractor Agreement, and supersedes any previous agreements, discussions, negotiations and understandings. There are no agreements, representations, warranties, terms, conditions or commitments regarding the subject matter of this Assignable Subcontractor Agreement except as expressed in this Assignable Subcontractor Agreement.

SECTION P SEVERABILITY

P1.1 Each provision of this Assignable Subcontractor Agreement shall be valid and enforceable to the fullest extent permitted by law. If any provision of this Assignable Subcontractor Agreement is declared invalid, unenforceable or illegal by the courts of a competent jurisdiction, 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 Assignable Subcontractor Agreement. If any such provision of this Assignable Subcontractor 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 Assignable Subcontractor Agreement as near as possible to its original intent and effect.

SECTION Q ENUREMENT

Q1.1 This Assignable Subcontractor Agreement and any other agreement entered into in connection with this Assignable Subcontractor Agreement to which both the Parties are parties shall enure to the benefit of, and be binding on, the Parties and their respective successors and permitted transferees and assigns.

SECTION R GOVERNING LAW AND JURISDICTION

R1.1 This Assignable Subcontractor Agreement shall be governed by the laws in force in the Province of Manitoba, including the federal laws of Canada applicable therein. Manitoba courts shall have exclusive jurisdiction over all matters arising in relation to this Assignable Subcontractor Agreement, and each Party accepts the jurisdiction of Manitoba courts.

SECTION S ADDITIONAL ASSURANCES

S1.1 The Parties each agree to from time to time do all such acts and provide such further assurances and instruments as may reasonably be required in order to carry out the provisions of this Assignable Subcontractor Agreement according to their spirit and intent, but this Section S1.1 shall not in any event be construed as obligating the City to amend or enact any by-law or regulation.

SECTION T LANGUAGE OF AGREEMENT

T1.1 Each Party acknowledges having requested and being satisfied that this Assignable Subcontractor Agreement and related documents be in English. Chacune des parties reconnaît avoir demandé que ce document et ses annexes soient rédigés en anglais et s'en déclare satisfaite.

SECTION U COUNTERPARTS

U1.1 This Assignable Subcontractor Agreement may be executed in counterparts, in which case (i) the counterparts together shall constitute one agreement, and (ii) communication of execution by fax, electronic mail or other electronic transmission shall constitute good delivery.

[SIGNATURE PAGES IMMEDIATELY FOLLOW]

IN WITNESS WHEREOF the Parties have executed this Assignable Subcontractor Agreement as of the date first above written.

THE CITY OF WINNIPEG

Per:

Name: Michael A. Jack

Title: Chief Administrative Officer

I have authority to bind The City of Winnipeg

Reviewed as to Business terms:

Certified as to Contract Details:

Name: Cynthia Wiebe, P.Eng, CAMP
Manager Engineering Services
Water and Waste Department

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

Legally Reviewed and Certified as to Form:

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

[DEVELOPMENT PARTNER]

Per: _____
Name:
Title:

Per: _____
Name:
Title:

I/We have authority to bind the corporation.

[SUBCONTRACTOR]

Per: _____

Name:

Title:

Per: _____

Name:

Title:

I/We have authority to bind the corporation.