



**THE CITY OF WINNIPEG**

# **REQUEST FOR PROPOSALS**

**RFP NO. 925-2024A**

PROGRESSIVE DESIGN BUILD  
OF  
NORTH END SEWAGE TREATMENT PLANT (NEWPCC) UPGRADE:  
NUTRIENT REMOVAL FACILITIES

## TABLE OF CONTENTS

<b>SECTION A DEFINITIONS .....</b>	<b>1</b>
A1. General .....	1
A2. RFP Definitions .....	1
<b>SECTION B INTRODUCTION .....</b>	<b>6</b>
B1. General .....	6
B2. Proponent Representatives.....	6
B3. Overview of the Stages of Project Procurement and Implementation.....	7
B4. Fairness Advisor .....	8
<b>SECTION C THE RFP DOCUMENTS, MERX and THE DATA ROOM .....</b>	<b>9</b>
C1. RFP Documents .....	9
C2. Conflicts or Inconsistencies in Documents.....	9
C3. Distribution of Documents to Proponents.....	11
C4. MERX.....	11
C5. Data Room .....	12
C6. Proponent Investigations.....	12
<b>SECTION D THE RFP PROCESS .....</b>	<b>13</b>
D1. RFP Process Timetable .....	13
D2. Questions and Draft Agreement Comments .....	13
D3. Communications Restrictions.....	15
D4. Meetings with Proponents .....	17
D5. Changes to Proponents and Proponent Team Members.....	20
D6. Addenda/Changes to the RFP Documents .....	21
D7. Release of Information, Freedom of Information, Confidentiality and Copyright Matters	
22	
D8. Conflict of Interest and Ineligible Persons .....	27
D9. Proponent Costs .....	29
D10. Insurance and Workers Compensation .....	30
<b>SECTION E SUBMISSION FORM AND CONTENT REQUIREMENTS.....</b>	<b>31</b>
E1. Format and Content of the Submission.....	31
<b>SECTION F SUBMISSION, WITHDRAWAL AND MODIFICATION OF Submissions.....</b>	<b>31</b>
F1. Submission of Step 1 Submission and Step 2 Submission.....	31
F2. Withdrawal of Submissions .....	32
F3. Maintaining Submission Commitments .....	32
<b>SECTION G EVALUATION, CLARIFICATION AND VERIFICATION OF SubmissionS.....</b>	<b>32</b>
G1. Evaluation Team and Advisors .....	32

G2. The City's Clarification and Verification of Submissions .....	33
<b>SECTION H GENERAL EVALUATION AND DISQUALIFICATION PROVISIONS .....</b>	<b>33</b>
H1. The City's Discretion in Determining Compliance, Scoring and Ranking .....	33
H2. Disqualification .....	34
<b>SECTION I GENERAL LEGAL MATTERS AND RIGHT TO ACCEPT OR REJECT.....</b>	<b>35</b>
I1. General Rights of the City .....	35
I2. The City's Liability for Proponent's Costs.....	36
I3. Legal Issues, Applicable Law, Attornment and Limit on Liability.....	38
I4. Licenses, Permits, etc. .....	39
I5. Power of Municipal Council of the City.....	39
I6. Trade Agreements .....	39
<b>SECTION J NOTIFICATION AND DEBRIEFING .....</b>	<b>39</b>
J1. Notification and Debriefing .....	39

## REQUEST FOR PROPOSALS

### SECTION A DEFINITIONS

#### A1. General

A1.1 Unless otherwise defined in this RFP Section A, capitalized terms and expressions used in this RFP have the meaning given to them in the Development Phase Agreement or the Project Agreement. In this RFP, the singular shall include the plural, and the plural shall include the singular, except where the context otherwise requires.

A1.2 All references in this RFP to the City's "discretion" or "sole discretion" means in the sole and absolute discretion of the City.

A1.3 All references in this RFP to "day" or "days" mean calendar days, unless otherwise stated.

A1.4 References containing terms such as:

- (a) "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 the RFP taken as a whole; and
- (b) "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".

#### A2. RFP Definitions

*[Note to Proponents: Definitions related to the Step 2 Process to be provided by Addendum.]*

A2.1 Whenever used in the RFP:

**“Acquiree”** is defined in RFP Section D5.8;

**“Acquirer”** is defined in RFP Section D5.8;

**“Ad Hoc CCM”** is defined in RFP Section D4.2(f);

**“Addendum”** means a written addendum to the RFP Documents issued by the City as set out in RFP Section D6;

**“Advisors”** means any person or firm retained to provide professional advice to any one of the City, a Proponent or a Proponent Team Member, as applicable;

**“Affiliate”** is as defined in *The Corporations Act (Manitoba)*;

**“Base Break Payment”** is defined in RFP Section I2.3(b)

**“Break Payment”** means the sum of money referred to in RFP Section I2.3, payable to each Shortlisted Proponent for Proposal development costs in the event that the procurement process is terminated by the City after commencement of the Step 2 Process at a time when the City recognizes that Shortlisted Proponents have expended significant time and effort preparing to respond to the RFP, under the specific conditions set out in RFP Section I2.3;

**“Capital Budget”** means the City’s approved budget for specific capital projects;

**“Commercially Confidential Meetings”** or **“CCMs”** is defined in RFP Section D4.2(a);

**“Commercially Confidential RFIs”** is defined in RFP Section D2.2(a)(i)(B);

**“Confidential Information”** is defined in RFP Section D7.4(a);

**“Confidentiality Agreement”** is defined in RFP Section D7.3;

**“Conflict of Interest”** is defined in RFP Section D8.1;

**“Contact Person”** or **“Contact Persons”** is defined in RFP Section B1.4;

**“Control”** has the meaning ascribed thereto in *The Corporations Act (Manitoba)*;

**“Data Room”** is defined in RFP Section C5.1;

**“Design Builder”** means the entity that will undertake the design and construction services pursuant to the Project Agreement;

**“Development Partner”** is the Preferred Proponent that has executed the Development Phase Agreement with the City;

**“Development Phase”** means the phase of the Project comprising the activities undertaken by the City and the Development Partner pursuant to the Development Phase Agreement;

**“Development Phase Agreement”** or **“DPA”** is defined in RFP Section B1.5;

**“Draft Agreements”** means the Development Phase Agreement as set out in RFP Schedule 4 – Form of Development Phase Agreement and the Project Agreement as set out in RFP Schedule 5 – Form of Project Agreement;

**“Evaluation Team”** is defined in RFP Section G1.1;

**“Execution of the DPA”** means the date the Development Phase Agreement is signed by both the Preferred Proponent and the City;

**“Execution of the DPA Target Date”** means the date set out as the Execution of the DPA Target Date in the Timetable;

**“Fairness Advisor”** is defined in the RFP Data Sheet;

**“FIPPA”** is defined in RFP Section D7.2(a);

**“General RFIs”** is defined in RFP Section D2.2(a)(i)(A);

**“Identified Proponent Parties”** is defined in RFP Section D5.1;

**“Implementation Phase”** means the phase of the Project comprising the activities undertaken by the City and the Design Builder pursuant to the Project Agreement;

**“Ineligible Person’s Affiliate”** is defined in RFP Section D8.3(a);

**“Ineligible Persons”** is defined in RFP Section D8.3(a);

**“Key Individuals”** means those individuals identified in the Proponent’s Step 2 Submission as key individuals;

**“Negotiations Proponents”** is defined in RFP Schedule 3 – Step 2 Process;

**“NEWPCC Facility”** means the lands, buildings, equipment and facilities which comprise the North End Sewage Treatment Plant, and which lands will be further described in the Development Phase Agreement;

**“Person”** means an individual, firm, partnership or corporation, or any combination thereof, or other legal entities and includes heirs, administrators, executors or legal representatives of a person;

**“PIPEDA”** is defined in RFP Section D7.2(a);

**“Preferred Proponent”** is defined in RFP Section B1.2;

**“Project”** is defined in RFP Schedule 1 – RFP Data Sheet;

**“Project Agreement”** is defined in RFP Section B1.5;

**“Project Background Information”** means various types of information provided by the City and is defined in RFP Section C4.1(b);

**“Proponent”** is defined in RFP Section B1.2;

**“Proponent Representative”** is defined in RFP Section B2.1;

**“Proponent Team Members”** means all members of the Proponent team that are identified in the Step 1 Process;

**“Proponents Meeting”** is defined in RFP Section D4.1(a);

**“Proposal Information”** is defined in RFP Section D7.5(e);

**“Proposal Information Licence”** is defined in RFP Section D7.5(d);

**“Proposal Submission Fee”** means the sum of money referred to in RFP Section I2.2, payable to Shortlisted Proponents under the Step 2 Process under the specific conditions set out in RFP Section I2.2;

**“Reserve Shortlisted Proponent”** means any of the Proponents with the next highest-ranking scores after the Shortlisted Proponents, based on the evaluation process in RFP Schedule 2 – Step 1 Process, and as described in Section B3.1(a)(v);

**“RFIs”** is defined in RFP Section D2.2(a);

**“RFP”** means this Request for Proposals;

**“RFP Data Sheet”** is defined in RFP Section B1.1;

**“RFP Documents”** is defined in RFP Section C1.1;

**“RFP Process”** is defined in RFP Section B1.3;

**“Shortlisted Proponent”** and **“Shortlisted Proponents”** are defined in RFP Section B3.1(a)(iii);

**“Step 1 Process”** means the first step of the RFP Process open to all Proponents, as further described in RFP Schedule 2 – Step 1 Process;

**“Step 1 Proponent Team Member Consent Declaration”** means the Proponent Team Member consent declaration attached to RFP Schedule 2 – Step 1 Process;

**“Step 1 Submission”** is the Submission submitted by a proponent during the Step 1 Process in accordance with RFP Schedule 2 – Step 1 Process;

**“Step 1 Submission Deadline”** is the date identified as such in the Timetable;

**“Step 1 Submission Form”** means the Step 1 Submission form attached to RFP Schedule 2 – Step 1 Process;

**“Step 2 Process”** means the second step of the RFP Process open to the Shortlisted Proponents, which will be further described in RFP Schedule 3 – Step 2 Process;

**“Step 2 Proponent Team Member Consent Declaration”** means the Proponent Team Member consent declaration attached to RFP Schedule 3 – Step 2 Process;

**“Step 2 Submission”** is the Submission submitted by a proponent during the Step 2 Process in accordance with RFP Schedule 3 – Step 2 Process;

**“Step 2 Submission Deadline”** is the date identified as such in the Timetable;

**“Step 2 Submission Form”** means the Step 2 Submission form attached to RFP Schedule 3 – Step 2 Process;

**“Submission”** means one or both of the Step 1 Submission or the Step 2 Submission, as the context requires;

**“Submission Deadline”** means one or both of the Step 1 Submission Deadline or the Step 2 Submission Deadline, as the context requires;

**“Submission Requirements”** means one or both of the submission requirements for the Proponents’ Step 1 Submission or Step 2 Submission, as the context requires, as set out in the RFP Documents; and

**“Timetable”** is defined in RFP Section D1.1.

## SECTION B INTRODUCTION

### B1. General

B1.1 This Request for Proposals (“**RFP**”) is issued by The City of Winnipeg in the province of Manitoba, Canada in respect of the project that is briefly described in RFP Schedule 1 to the RFP (the “**RFP Data Sheet**”).

B1.2 In this RFP, proponents that submit documents in response to this RFP are referred to as “**Proponents**”. The entity that is selected by the City to enter into the Development Phase Agreement is referred to as the “**Preferred Proponent**”. For the purposes of convenience, in this RFP the expression Proponents also includes Shortlisted Proponents and the Preferred Proponent.

B1.3 The procurement process to select a Preferred Proponent shall commence with the issuance of this RFP and shall terminate on Execution of the DPA (the “**RFP Process**”).

B1.4 The City shall manage the RFP Process, and the City shall be the single point of contact for Proponents. During the RFP Process, Proponents shall contact the City only through the contact person(s) named in the RFP Data Sheet (the “**Contact Person**” or “**Contact Persons**”) as set out in RFP Section D2.1.

B1.5 A detailed description of the Project is contained in the documentation on MERX. The scope of work and terms and conditions in respect of the Project will be set out in the development phase agreement (“**Development Phase Agreement**” or “**DPA**”) and the project agreement (“**Project Agreement**” or “**PA**”), which will be provided to the Shortlisted Proponents during the Step 2 Process.

B1.6 In 2024, the total cost for the Project was estimated at \$1.491 billion. The budget for the Development Phase (by the Development Partner) and the Implementation Phase (by the Design Builder) is currently estimated at \$1.0–1.1 billion, inclusive of corporate overhead, profit, and risk & contingency. At present, \$28,894,000 has been approved within the City’s Capital Budget. The remaining funding requirements are in progress and are expected to be met through a combination of debt financing, sewer rates, external funding, or other sources. The City confirms that the full project funding plan is under development and may be subject to a community benefits agreement such as a project labour agreement or Manitoba jobs agreement. The plan will be finalized and communicated by notice prior to the issuance of Step 2 of the RFP.

### B2. Proponent Representatives

B2.1 All correspondence from the City to a Proponent will be sent to the person identified, in the Proponent’s Step 1 Submission, to receive information and notices on behalf of the Proponent (the “**Proponent Representative**”). Each Proponent is solely responsible to ensure that all contact information of the Proponent Representative is accurate and updated at all times during the RFP Process. Proponents may update or revise their Proponent Representatives’ information by notifying the Contact Person, in writing.

### **B3. Overview of the Stages of Project Procurement and Implementation**

B3.1 The City will carry out the procurement and implementation of the Project in accordance with the following stages:

(a) Stage 1 – Step 1 Process

- (i) This step is governed by RFP Schedule 2 – Step 1 Process and is intended to result in the identification of the Shortlisted Proponents.
- (ii) As part of the Step 1 Process, all Proponents are invited to submit Step 1 Submissions in accordance with the requirements set out in RFP Schedule 2 – Step 1 Process.
- (iii) Based on evaluation of the Step 1 Submissions in accordance with RFP Schedule 2 – Step 1 Process, the City intends to shortlist up to three Proponents to participate in the Step 2 Process (each, a “**Shortlisted Proponent**” and collectively the “**Shortlisted Proponents**”).
- (iv) The Step 1 Process will be complete once the City announces the Shortlisted Proponents. Only those Shortlisted Proponents will be eligible to participate in the Step 2 Process.
- (v) The City may, in its sole discretion, increase the number of Shortlisted Proponents or replace a Shortlisted Proponent that has been disqualified by the City, has informed the City that it does not intend to continue participating in the RFP Process, or otherwise becomes no longer qualified to participate in the RFP Process, by inviting other Proponents, based on their ranking following the evaluation of the Step 1 Submissions (provided that such Proponents have achieved compliance with all mandatory requirements in the Step 1 Process, in accordance with RFP Schedule 2 – Step 1 Process), to be added to the Shortlisted Proponents and to participate in the Step 2 Process, even if those Proponents were not Shortlisted Proponents in the first instance. Prior to such invitation and identification of a Reserve Shortlisted Proponent as a Shortlisted Proponent, the City may, without limiting the applicability of any other provision of these RFP Documents, require such Reserve Shortlisted Proponent to confirm in writing, in a form satisfactory to the City, that it will participate in the Step 2 Process.
- (vi) The Step 1 Process is described in greater detail in RFP Schedule 2 – Step 1 Process.

(b) Stage 2 – Step 2 Process

- (i) This step will be governed by RFP Schedule 3 – Step 2 Process and is intended to result in the identification of the Preferred Proponent, who will be asked to finalize and enter into the Development Phase Agreement.

- (ii) The Shortlisted Proponents will be invited to submit Step 2 Submissions in accordance with the Submission Requirements which will be set out in RFP Schedule 3 – Step 2 Process.
- (iii) The Shortlisted Proponents will be expected to attend Commercially Confidential Meetings in Winnipeg.
- (iv) The Shortlisted Proponents will be expected to attend an Interview.
- (v) A Preferred Proponent is selected by the City from the Shortlisted Proponents to enter into the DPA.
- (vi) The details with respect to Submission Requirements, evaluation of the Step 2 Submission, Commercially Confidential Meetings and a scenario-based interview will be set out in RFP Schedule 3 – Step 2 Process.

(c) Stage 3 –Development Phase Agreement

- (i) Once the City and the Preferred Proponent have executed the Development Phase Agreement, the terms and conditions of the Development Phase Agreement shall determine how the Project is to proceed. It is intended that the Development Phase Agreement will advance the design to a level of detail where the Development Phase Partner will provide a fixed price for the Project Agreement.

(d) Stage 4 –Project Agreement

- (i) Upon successful completion of the Development Phase, it is intended that the City and the Development Partner will enter into the Project Agreement for the completion of the design and construction of the Project as such an agreement may be amended over the course of the Development Phase. The terms and conditions of the Project Agreement shall govern how the Project will proceed from the date of execution of the Project Agreement until the termination or expiry of the Project Agreement.

**B4. Fairness Advisor**

B4.1 The City has appointed a Fairness Advisor that will oversee the RFP Process.

B4.2 The Fairness Advisor's role is to provide third party independent oversight to confirm the RFP Process is open and transparent and decisions resulting are fair and consistent with the RFP Process evaluation and criteria laid out for the Project in this RFP.

B4.3 The name of the Fairness Advisor is set out in the RFP Data Sheet.

## **SECTION C THE RFP DOCUMENTS, MERX AND THE DATA ROOM**

### **C1. RFP Documents**

C1.1 The RFP Documents (the “**RFP Documents**”) are:

- (a) this RFP;
- (b) RFP Schedule 1 – RFP Data Sheet, including all related appendices and attachments;
- (c) RFP Schedule 2 – Step 1 Process, including all related appendices and attachments;
- (d) RFP Schedule 3 – Step 2 Process, including all related appendices and attachments;
- (e) RFP Schedule 4 – Form of Development Phase Agreement, including all related schedules, appendices and attachments;
- (f) RFP Schedule 5 – Form of Project Agreement, including all related schedules, appendices and attachments; and
- (g) Addenda to the RFP Documents, if any.

C1.2 Subject to RFP Section C2.1, the RFP Documents shall be read as a whole. The RFP Schedules and Addenda, if any, constitute an integral part of this RFP and are incorporated by reference. For greater clarity, Project Background Information documents are not RFP Documents.

C1.3 The following RFP Documents will be distributed via the Data Room to the Shortlisted Proponents upon the commencement of the Step 2 Process:

- (a) RFP Schedule 3 – Step 2 Process;
- (b) RFP Schedule 4 – Form of Development Phase Agreement, including all related DPA Schedules, appendices and attachments;
- (c) RFP Schedule 5 – Form of Project Agreement, including all related PA Schedules, appendices and attachments; and
- (d) Addenda to the RFP Documents issued following the commencement of the Step 2 Process.

### **C2. Conflicts or Inconsistencies in Documents**

C2.1 For the purpose of the RFP Process, if there are any conflicts or inconsistencies among the terms and conditions of the documents comprising RFP Documents the following shall apply:

- (a) in respect of matters of interpretation related to the Step 1 Process, RFP Schedule 2 – Step 1 Process shall prevail over this RFP and all other Schedules to this RFP during the RFP Process;
- (b) in respect of matters of interpretation related to the Step 2 Process, RFP Schedule 3 – Step 2 Process shall prevail over this RFP and all other Schedules to this RFP during the RFP Process;
- (c) subject to RFP Section C2.1(a) and RFP Section C2.1(b), in respect of matters of interpretation related to the RFP Process and all competitive procurement process matters, this RFP shall prevail over the other Schedules to this RFP during the RFP Process;
- (d) in respect of all matters of interpretation of the Project and the Development Phase Agreement during the RFP Process, the Development Phase Agreement shall prevail over this RFP and all other Schedules to this RFP; and
- (e) for the purpose of resolving conflicts or inconsistencies among the documents that constitute the Development Phase Agreement, the provisions of the Development Phase Agreement dealing with conflicts or inconsistencies shall govern.

C2.2 Despite RFP Section C2.1, if the Proponent believes that there is any term or condition in any RFP Document that is ambiguous, or that conflicts or is inconsistent with any other term or condition in the RFP Documents, the Proponent shall notify the City of that ambiguity, conflict or inconsistency in accordance with RFP Section D2.2 and, for greater clarity, by the deadline set out in the RFP Data Sheet for the submission of RFIs.

C2.3 If there is a conflict or inconsistency between:

- (a) the City's electronic version of an RFP Document as contained on MERX, or, during the Step 2 Process, in the Data Room; and
- (b) any other version of the same RFP Document (whether in electronic or hard copy),

the City's latest electronic version as contained on MERX, or, during the Step 2 Process, in the Data Room, shall govern.

C2.4 If there is any conflict or inconsistency between documents, including RFP Documents, contained on MERX, or, during the Step 2 Process, in the Data Room, and documents that are downloaded by the Proponent, the documents contained on MERX, or during the Step 2 Process, in the Data Room, shall govern.

C2.5 If there is any conflict or inconsistency between two versions of the same RFP Document contained on MERX, or, during the Step 2 Process, in the Data Room, the RFP Document of the later date or version number shall prevail over the same

RFP Document of an earlier date or version number. Unless otherwise indicated, for the purposes of this RFP Section C2.5, the date of each RFP Document shall be determined by the date and time when that document was placed on MERX, or, during the Step 2 Process, in the Data Room by the City.

### **C3. Distribution of Documents to Proponents**

C3.1 Except as provided in RFP Section C3.3, during the Step 1 Process the City will circulate this RFP and all other RFP Documents, including Addenda, by placing them on MERX. Proponents are solely responsible to ensure that they review all documents on MERX in accordance with RFP Section C4.3 and, in particular, have reviewed in their entirety, all documents on MERX immediately prior to submitting Step 1 Submissions.

C3.2 Except as provided in RFP Section C3.3, during the Step 2 Process the City will circulate this RFP and all other RFP Documents, including Addenda, by placing them in the Data Room. Shortlisted Proponents are solely responsible to ensure that they review all documents in the Data Room in accordance with RFP Section C5.3 and, in particular, have reviewed in their entirety, all documents in the Data Room immediately prior to submitting Step 2 Submissions.

C3.3 The City may circulate some RFP Documents in paper copy. If the City circulates any RFP Documents in paper copy, Proponents will be notified of a paper copy circulation by way of a notice on MERX, or, during the Step 2 Process, in the Data Room.

### **C4. MERX**

C4.1 During the Step 1 Process, MERX will be used for:

- the distribution of RFP Documents, amended and restated RFP Documents and Addenda;
- the provision of various types of background information for the Proponents' review (**"Project Background Information"**);
- the posting of responses to General RFIs (Commercially Confidential RFI's will be responded to the Proponent Representative by email);
- other correspondence between the Proponents and the City, as indicated in the RFP.

C4.2 The City may add or amend documents from MERX at any time.

C4.3 Each Proponent is solely responsible to ensure that it:

- has the appropriate software which allows the Proponent to access and download RFP Documents and Project Background Information from MERX; and

- (b) checks MERX frequently for the addition, deletion or amendment of RFP Documents, Project Background Information and the posting of responses to RFIs and, at all times during the RFP Process, keeps itself informed of and takes into account the most current RFP Documents, Project Background Information, responses to RFIs, and other correspondence related to the RFP.

## **C5. Data Room**

- C5.1 During the Step 2 Process, the City will establish a secure electronic data room specifically for the Project (the “**Data Room**”), which will be used for:
  - (a) the distribution of RFP Documents, amended and restated RFP Documents and Addenda, as well as blacklined documents provided for information only;
  - (b) the provision of Project Background Information;
  - (c) the receipt of RFIs from Shortlisted Proponents and the posting of responses to RFIs;
  - (d) other correspondence between the Shortlisted Proponents and the City, as indicated in the RFP.
- C5.2 Subject to D7.3, the Data Room will be accessible on approximately the date set out in the Timetable. The City may add, delete or amend documents in the Data Room at any time.
- C5.3 Each Shortlisted Proponent is solely responsible to ensure that it:
  - (a) contacts the Contact Person at the coordinates set out in the RFP Data Sheet to arrange access to the Data Room and receipt of a Data Room password;
  - (b) has the appropriate software which allows the Shortlisted Proponent to access and download RFP Documents and Project Background Information from the Data Room; and
  - (c) checks the Data Room frequently for the addition, deletion or amendment of RFP Documents, Project Background Information and the posting of responses to RFIs and, at all times during the RFP Process, keeps itself informed of and takes into account the most current RFP Documents, Project Background Information, responses to RFIs, and other correspondence related to the RFP.

## **C6. Proponent Investigations**

- C6.1 Except as expressly provided in the Development Phase Agreement, each Proponent and each of its Proponent Team Members is solely responsible, at its own cost and expense, to carry out its own independent research and due diligence and to perform any other investigations, including seeking independent advice, considered necessary by the Proponent to satisfy itself as to all existing conditions affecting the Project or, during the Step 2 Process, the Development Phase Agreement. The Proponents’ and Proponent Team Members’ obligations

set out in this RFP Section C6 apply irrespective of any Project Background Information or information contained in the RFP Documents or in responses to RFIs. The Proponents' and Proponent Team Members' obligation to carry out independent research, investigations, due diligence or to seek independent advice or, if applicable, their ability to rely on information provided by the City will be more particularly set out in the Development Phase Agreement.

C6.2 Except as may be explicitly provided in the Development Phase Agreement, the City does not represent or warrant the accuracy or completeness of any information set out in the RFP Documents or made available to Proponents or Proponent Team Members as Project Background Information or of any other background or reference information or documents prepared by the City or by third parties and which may be made available to Proponents or Proponent Team Members by or through the City. Proponents and Proponent Team Members shall make such independent assessments as they consider necessary to verify and confirm the accuracy and completeness of all such information as any use of or reliance by Proponents or Proponent Team Members on any and all such information shall be at the Proponents' and Proponent Team Members' sole risk and without recourse against the City.

## **SECTION D THE RFP PROCESS**

### **D1. RFP Process Timetable**

D1.1 The general timetable for the RFP Process (the “**Timetable**”) is set out in the RFP Data Sheet.

D1.2 The City may amend the Timetable in its sole discretion:

- (a) at any time before the Step 1 Submission Deadline for events that are to occur on or before the Step 1 Submission Deadline, including the Step 1 Submission Deadline itself;
- (b) at any time before the Step 2 Submission Deadline for events that are to occur on or before the Step 2 Submission Deadline and after the Step 1 Submission Deadline, including the Step 2 Submission Deadline itself; and
- (c) at any time in the RFP Process for events that are to occur after the Step 2 Submission Deadline.

D1.3 The City intends to provide a more detailed Timetable to Shortlisted Proponents as part of the Step 2 Process.

### **D2. Questions and Draft Agreement Comments**

D2.1 Contact Person

- (a) Except as set out in RFP Section D4.2, the Proponents shall submit all questions and other communications regarding the RFP Documents, the RFP Process and their Submissions to the Contact Person or Contact Persons, as applicable,

electronically at the coordinates listed in the RFP Data Sheet and the questions shall be submitted in accordance with RFP Section D2.2 and shall be submitted in the form provided by the City.

D2.2 Clarification/RFI Submission Process

- (a) In addition to the requirement set out in RFP Section D2.1, the following rules shall apply to Proponents when submitting questions or requests for information (“RFIs”) to the City during the RFP Process:
  - (i) Proponents are permitted to submit RFIs categorized as follows:
    - (A) RFIs that are of general application and that would apply to other Proponents (“**General RFIs**”); and
    - (B) RFIs that the Proponent considers to be commercially sensitive or confidential to that particular Proponent (“**Commercially Confidential RFIs**”);
  - (ii) if the City disagrees with the Proponent’s categorization of an RFI as a Commercially Confidential RFI, the City will give the Proponent an opportunity to either categorize the RFI as a General RFI or to withdraw the RFI;
  - (iii) if the City determines, in its sole discretion, that a Commercially Confidential RFI, even if it is withdrawn by a Proponent, is of general application or would provide a significant clarification of the RFP Documents or RFP Process to Proponents, the City may issue a clarification to Proponents that deals with the same subject matter as the withdrawn Commercially Confidential RFI; and
  - (iv) if the City agrees with the Proponent’s categorization of a Commercially Confidential RFI, then the City will provide a response to that RFI to only the Proponent that submitted the RFI.
- (b) Responses to RFIs are not RFP Documents and do not amend the RFP Documents. If, in the City’s sole discretion, responses to RFIs require an amendment to the RFP Documents, such amendment will be made by Addendum in accordance with RFP Section D6. Only an Addendum will modify or amend the RFP Documents and, otherwise, RFI responses will have no force or effect whatsoever and shall not be relied upon by any Proponent.
- (c) Proponents shall submit RFIs in accordance with the deadlines set out in the Timetable.
- (d) Proponents shall submit all RFIs to the Contact Person electronically in accordance with the instructions set out in the RFP Data Sheet.
- (e) The City will respond to RFIs in writing in accordance with the schedule set out in the Timetable. The City may, in its sole discretion, distribute responses to RFIs of

a minor or administrative nature to only the Proponent who submitted the minor or administrative RFI.

(f) It is the Proponent's obligation to seek clarification from the City of any matter it considers to be unclear in accordance with RFP Section D2.2 and, for greater clarity, by the deadline set out in the Timetable for the submission of RFIs. The City is not responsible in any way whatsoever for any misunderstanding by the Proponent or any of its Proponent Team Members of the RFP Documents, Project Background Information, responses to RFIs, any documents placed on MERX, or, during the Step 2 Process, in the Data Room, or any other type of information provided by or communication made by the City.

**D2.3 Draft Agreement Comments**

(a) During the Step 2 Process, the City may, in its sole discretion, request Proponents to submit comments on the Draft Agreements. The submission and the format for the submission of comments are set out in the RFP Data Sheet. The City is not obliged to respond to each comment made by Proponents under this RFP Section D2.3. If the City accepts a comment, or part of a comment, and that acceptance requires a change to the RFP Documents, the City shall implement that change by Addendum.

**D3. Communications Restrictions**

**D3.1 Communications with Municipalities, Other Government Authorities and Utilities**

(a) Subject to the restrictions in RFP Section D3.2 and any special rules set out in the RFP Data Sheet, Proponents, Proponent Team Members and their respective Advisors are not permitted to communicate directly with any municipality, government authority or utility with respect to municipal, utility or other types of governmental requirements related to the Project. Under no circumstances will any special rules set out in the RFP Data Sheet in accordance with this RFP Section D3.1 override the provisions of RFP Section D3.2.

(b) The City is not, in any way whatsoever, responsible for any representations, statements, assurances, commitments or agreements which Proponents, Proponent Team Members or their respective Advisors receive or believe they may have received from a municipality, a government authority, or a utility. Proponents, Proponent Team Members and their respective Advisors rely on any such representations, assurances, commitments or agreements at their sole risk without recourse against the City.

**D3.2 Prohibited Contacts and Lobbying Prohibition**

(a) Proponents and Proponent Team Members and all of their respective Advisors, employees and representatives are prohibited from engaging in any form of political or other lobbying, of any kind whatsoever in relation to the Project, or to influence the outcome of the RFP Process.

(b) Without limiting the generality of RFP Section D3.2(a), neither Proponents or Proponent Team Members or any of their respective Advisors, employees or representatives shall contact or attempt to contact, either directly or indirectly, at any time during the RFP Process, any of the following persons or organizations on matters related to the RFP Process, the RFP Documents, or the Submissions:

- (i) any member of the Evaluation Team, or any member of any sub-team of the Evaluation Team;
- (ii) any Advisor to the City or the Evaluation Team;
- (iii) any person employed or engaged by the City, or any person who has been employed by the City, other than:
  - (A) the Contact Person; and
  - (B) in accordance with RFP Section D3.1.
- (iv) any expert or Advisor assisting the City or the Evaluation Team;
- (v) any member of Council or any member of a councilor's staff;
- (vi) the Mayor of Winnipeg or any member of the Mayor of Winnipeg's staff;
- (vii) any representatives of the Province of Manitoba Environment and Climate Change.
- (viii) any other Proponent or Proponent Representative thereof;
- (ix) any Ineligible Person; or
- (x) any directors, officers or consultants of any entity listed in RFP Sections D3.2(b)(i) to D3.2(b)(ix).

(c) If a Proponent or a Proponent Team Member or any of their respective Advisors, employees or representatives, in the opinion of the City, contravenes RFP Section D3.2(a) or D3.2(b), the City may, in its sole discretion:

- (i) take any action in accordance with RFP Section H2; or
- (ii) impose conditions on the Proponent's or Proponent Team Member's continued participation in the RFP Process that the City considers, in its sole discretion, to be appropriate,

for clarity, the City is not obliged to take the actions set out in RFP Section D3.2(c)(i) or D3.2(c)(ii).

- (a) A Proponent shall not, and shall ensure that its Advisors, employees, representatives and Proponent Team Members, and their respective Advisors, employees and representatives do not, issue or disseminate any media release, public announcement or public disclosure (whether for publication in the press, on the radio, television, internet or any other medium) that relates to the RFP Process, the RFP Documents or the Project or any matters related thereto, without the prior written consent of the City, which consent may be withheld in the City's sole discretion.
- (b) Neither the Proponents or the Proponent Team Members or any of their respective Advisors, employees or representatives shall make any public comment, respond to questions in a public forum, or carry out any activities to either criticize another Proponent or Submission or to publicly promote or advertise their own qualifications, interest in or participation in the RFP Process without the City's prior written consent, which consent may be withheld in the City's sole discretion. Notwithstanding this RFP Section D3.3(b), Proponents, Proponent Team Members and their respective Advisors, employees and representatives are permitted to state publicly that they are participating in the RFP Process.
- (c) For the purpose of greater clarity, RFP Section D3.3(b) does not prohibit disclosures necessary to permit the Proponent to discuss the Project with prospective subcontractors but such disclosure is permitted only to the extent necessary to solicit those subcontractors' participation in the Project.

#### D3.4 Restrictions on Communications between Proponents – No Collusion

- (a) A Proponent shall not discuss or communicate, directly or indirectly, with any other Proponent, any information whatsoever regarding the preparation of its own Submission or the Submission of another Proponent in a fashion that would contravene Applicable Law. Proponents shall prepare and submit Submissions independently and without any connection, knowledge, comparison of information or arrangement, direct or indirect, with any other Proponent.
- (b) For greater clarity, RFP Section D3.4(a) applies to Proponents and Proponent Team Members and their respective Advisors, employees and representatives.

### D4. Meetings with Proponents

#### D4.1 General Proponents Meeting(s)

- (a) The City may, in its sole discretion, convene general Proponents meetings (each, a "**Proponents Meeting**") on the dates and at the location set out in the Timetable in the RFP Data Sheet. While attendance at a Proponents Meeting is not mandatory, Proponents are strongly encouraged to attend. A Proponent's failure to attend a Proponents Meeting is at the Proponent's sole risk and responsibility.
- (b) Proponents may ask questions and seek clarifications at the Proponents Meeting. Notwithstanding that the City may give oral answers at a Proponents

Meeting, those answers shall not be considered final unless issued subsequently in writing. Therefore, Proponents are strongly encouraged to submit these questions in accordance with RFP Section D2.2 for response in accordance with RFP Section D2.2.

- (c) No statement, consent, waiver, acceptance, approval or anything else said or done in any Proponents Meeting by the City or any of its respective Advisors, employees or representatives shall amend or waive any provision of the RFP Documents, or be binding on the City or be relied upon in any way by Proponents, Proponent Team Members or their Advisors, except when and only to the extent expressly confirmed in an Addendum to the RFP Documents issued in accordance with RFP Section D6.

#### D4.2 Commercially Confidential Proponent Meetings

- (a) The City may at any time during the Step 2 Process, in its sole discretion, convene commercially confidential meetings with Shortlisted Proponents (“Commercially Confidential Meetings”). These Commercially Confidential Meetings may be:
  - (i) bilateral meetings between the City (and its representatives and Advisors) and individual Shortlisted Proponents (and their representatives and Advisors), to discuss the Draft Agreements, the Shortlisted Proponent’s suggested amendments to the Draft Agreements, and other matters; or
  - (ii) bilateral, ad hoc Commercially Confidential Meetings between the City (and its representatives and Advisors) and individual Shortlisted Proponents (and their representatives and Advisors), in accordance with Section D4.2(f).
- (b) The dates and approximate location of Commercially Confidential Meetings will be provided during the Step 2 Process. While attendance at Commercially Confidential Meetings is not mandatory, Shortlisted Proponents are strongly encouraged to attend. A Shortlisted Proponent’s failure to attend a Commercially Confidential Meeting is at the Shortlisted Proponent’s sole risk and responsibility.
- (c) The Fairness Advisor will attend all Commercially Confidential Meetings.
- (d) No statement, consent, waiver, acceptance, approval or anything else said or done in any of these Commercially Confidential Meetings by the City or any of its respective Advisors, employees or representatives shall amend or waive any provision of the RFP Documents, or be binding on the City or be relied upon in any way by Shortlisted Proponents, Proponent Team Members or their Advisors except when and only to the extent expressly confirmed in an Addendum to the RFP Documents issued in accordance with RFP Section D6.
- (e) The Shortlisted Proponent, its Proponent Team Members and their respective Advisors and representatives and any of their attendees at Commercially Confidential Meetings acknowledge and agree that:

- (i) any statement made at a Commercially Confidential Meeting by the City or any of its Advisors or representatives is not and shall not be deemed or considered to be an indication of a preference by the City or a rejection by the City of anything said or done by the Shortlisted Proponent, Proponent Team Member or any of their respective Advisors or representatives;
- (ii) any statement made at a Commercially Confidential Meeting by the City or any of their Advisors or representatives shall not and will not be relied upon in any way by the Shortlisted Proponent, Proponent Team Member or any of their respective Advisors or representatives for any purpose, including any purpose in connection with the RFP, the Draft Agreements, the Project or otherwise, except and only to the extent expressly confirmed by Addendum in accordance with RFP Section D6, provided that the City shall not be under any obligation to confirm any information by Addendum;
- (iii) the City may share process related information, including clarifying information, with all Shortlisted Proponents if the need arises; and
- (iv) the Shortlisted Proponent, its Proponent Team Members and their respective Advisors and representatives:
  - (A) shall follow the guidelines, procedures and processes set out in the RFP when participating in Commercially Confidential Meetings;
  - (B) waive any and all rights to contest and/or protest the RFP and the processes and guidelines set out herein, including the Commercially Confidential Meetings, based on the fact that Commercially Confidential Meetings occurred, or on the basis that information may have been received during a Commercially Confidential Meeting by another Shortlisted Proponent, another Shortlisted Proponent's Proponent Team Member, or their respective Advisors or representatives that was not received by the Shortlisted Proponent, its own Proponent Team Member(s) or any of their respective Advisors or representatives; and
  - (C) agree that the Shortlisted Proponent, its Proponent Team Members and their respective Advisors and representatives shall treat information received at a Commercially Confidential Meeting as Confidential Information.

(f) Subject to Section D4.2(f)(ii) of this RFP, ad hoc Commercially Confidential Meetings ("Ad Hoc CCMs") may be requested by the City or the Shortlisted Proponent during the Step 2 Process prior to the Step 2 Submission Deadline, and in accordance with the following:

- (i) the City shall consider all requests for Ad Hoc CCMs made by Shortlisted Proponents pursuant to Section D4.2(f). If the City concludes, in its sole discretion, that a requested Ad Hoc CCM is necessary, the City shall notify the applicable Shortlisted Proponent and the City shall suggest a date, time and location for the Ad Hoc CCM. For clarity, the City has the right to approve or reject any request for an Ad Hoc CCM, and the City shall not be obligated to provide reasons for any such decision; and
- (ii) if the City approves a request by a Shortlisted Proponent to conduct an Ad Hoc CCM pursuant to Section D4.2(f)(i), the Shortlisted Proponent requesting such meeting shall submit the proposed agenda for the meeting at least two Business Days prior to the meeting.

## D5. Changes to Proponents and Proponent Team Members

- D5.1 A Proponent shall not change its shareholders (unless the Proponent is a company whose equity securities are listed on a recognized stock exchange), Proponent Team Members (which includes its proposed subcontractors and proposed sub-consultants), or other parties identified in a Proponent's Step 1 Submission (the "**Identified Proponent Parties**") without the prior written consent of the City.
- D5.2 Proponents are permitted to request a change in their Identified Proponent Parties in accordance with this RFP Section D5.
- D5.3 If, following the Step 1 Submission Deadline, a Proponent wishes to request a change in its Identified Proponent Parties, the Proponent shall notify the Contact Person as soon as possible and, in any event, no later than 10 Business Days prior to the Step 2 Submission Deadline. That notification shall clearly identify the proposed change in the Identified Proponent Party (or Parties) including a proposed substitute and including sufficient documentation to demonstrate that the proposed substitute would have met or exceeded any applicable criteria applied during the Step 1 Process.
- D5.4 In response to a request in accordance with RFP Section D5.3, the City may, in its sole discretion, provide the Proponent with instructions as to the type of information required by the City to consider the proposed change to the Identified Proponent Party (or Parties) as well as the deadlines for submission of information that the Proponent must meet in order to have its request considered by the City.
- D5.5 The Proponent shall provide any further documentation as may be reasonably requested by the City to assess any proposed substitute. If the City, in its sole discretion, considers the proposed substitute to be acceptable, the City may consent to the substitution. The City's consent to such substitution, however, may be subject to such terms and conditions as the City may require. If the proposed substitute is not acceptable to the City, the Proponent shall propose an alternate substitute for review by the City in the same manner as the first proposed substitute. The City may, in its sole discretion, disallow any actual or proposed change.

D5.6 In the case of an actual change in the Identified Proponent Parties previously made by the Proponent without consent by the City or a change proposed after the Step 2 Submission Deadline, the City may, in its sole discretion, disqualify the Proponent and terminate the Proponent's continued involvement in the RFP Process or allow the Proponent to continue under such terms and conditions as the City, in its sole discretion, may require.

D5.7 If, on or after the Step 2 Submission Deadline and prior to Execution of the DPA, there is an actual or proposed addition, deletion, substitution or other change in the membership or effective control of an Identified Proponent Party or if there is a change in circumstances that may materially adversely affect an Identified Proponent Party in a way which could impair the Proponent's or the Identified Proponent Party's ability to perform their respective obligations under the Development Phase Agreement or the Project Agreement, then the Proponent shall promptly notify the City through the Contact Person via the Data Room. The City may, in its sole discretion, refuse to accept a change in an Identified Proponent Party that occurs or is requested by the Proponent after the Submission Deadline and may, in its sole discretion, disqualify the Proponent from continuing in the RFP Process.

D5.8 If, at any time prior to the Execution of the DPA, and notwithstanding any other provision in this RFP, there is a change in Control of a Proponent or of one of its Proponent Team Members (the "**Acquiree**") by one of the other Proponents or one of the other Proponents' Proponent Team Members (the "**Acquirer**"):

- (a) the Acquiree shall be immediately disqualified from further participation in this RFP Process. In the event that a Proponent Team Member is the Acquiree, the affected Proponent may request a replacement of the Acquiree with another Proponent Team Member and the City shall consider such request, in its sole discretion, in accordance with this RFP Section D5. In the event that such request to change the Proponent Team Member is rejected by the City, the City shall disqualify the Proponent from continuing in the RFP Process; and
- (b) the City, in its sole discretion, may allow the Acquirer to continue in the RFP Process; however, the City's consent to continue may be subject to such terms and conditions as the City, in its sole discretion, may require.

## **D6. Addenda/Changes to the RFP Documents**

D6.1 The City may, in its sole discretion, amend or supplement the RFP Documents prior to the date or dates set out in the Timetable. The City shall issue changes to the RFP Documents by Addenda only. No other statement, whether oral or written, made by the City or the City's Advisors, employees or representatives, including, for clarity, the Contact Person, or any other person, shall amend the RFP Documents. The approximate final date that the City will issue an Addendum in respect of the Draft Agreements is set out in the Timetable. The City may issue other Addenda at any time.

D6.2 The Proponent is solely responsible to ensure that it has received all Addenda issued by the City. Proponents may, in writing, seek confirmation of the number of Addenda issued under this RFP from the Contact Person.

D6.3 The City shall issue Addenda by placing them on MERX, or, during the Step 2 Process, in the Data Room.

D6.4 Any reference to any one or all of the RFP Documents in the RFP Documents includes any amendments to the RFP Documents made in accordance with this RFP Section D6.

**D7. Release of Information, Freedom of Information, Confidentiality and Copyright Matters**

D7.1 Release of Information

(a) The following information will be posted to the City's Purchasing website (<https://www.winnipeg.ca/matmgt/>) to the public:

- (i) the initial version of the RFP;
- (ii) the initial draft of the Development Phase Agreement;
- (iii) the initial draft of the Project Agreement;
- (iv) the name of the Preferred Proponent selected for the Project award and party to the Development Phase Agreement with the City; and
- (v) the contract value of the DPA,

after Execution of the DPA.

(b) The RFP draft Development Phase Agreement and draft Project Agreement will be redacted to protect sensitive confidential information about the Project and NEWPCC.

(c) Although not part of the RFP Process, the contract value of the PA will be posted to the City's Purchasing website after execution of the PA.

D7.2 Freedom of Information

(a) The protection of personal information and privacy will be fundamental aspects of the RFP Process and the Project. Proponents and their respective Proponent Team Members shall comply with all applicable privacy legislation, including but not limited to the Personal Information Protection and Electronic Documents Act (Canada) ("PIPEDA"). In addition, Proponents are advised that the City is subject to The Freedom of Information and Protection of Privacy Act (Manitoba) ("FIPPA") and that the Proponent and Proponent Team Members will be expected to comply with the obligations imposed upon the City pursuant to FIPPA.

- (b) Proponents are also advised that The Freedom of Information and Protection of Privacy Act (Manitoba) may provide protection for confidential and proprietary business information. Proponents are strongly advised to consult their own legal Advisors as to the appropriate way in which confidential or proprietary business information should be marked as such in their Submissions.
- (c) Subject to the provisions of The Freedom of Information and Protection of Privacy Act (Manitoba), the City will use reasonable commercial efforts to safeguard the confidentiality of any information identified by the Proponent as confidential but shall not be liable in any way whatsoever to any Proponent or Proponent Team Member if such information is disclosed based on Section 18 of The Freedom of Information and Protection of Privacy Act (Manitoba), or otherwise as required under Applicable Law.

#### D7.3 Confidentiality Agreements

- (a) The Proponent shall cause each of its Proponent Team Members to execute and deliver to the City a Confidentiality Agreement provided by the City as a requirement to gain access to the Data Room and all Confidential Information (the "**Confidentiality Agreement**").
- (b) The Proponent agrees that Confidential Information and access to the Data Room shall not be shared with its employees, representatives and Advisors and its Proponent Team Members and each of their employees, representatives and Advisors until they have been advised of the obligations included in the Confidentiality Agreement and RFP Sections D7.4 and D7.5.

#### D7.4 Confidential Information

- (a) For the purpose of this RFP Process, "**Confidential Information**" means all material, data, information or any item in any form, whether oral or written, including in electronic or hard-copy format, supplied by, obtained from or otherwise provided by the City, its representatives or Advisors in connection with the RFP Process, the RFP Documents or the Project, whether supplied, obtained from or provided before or after the RFP Process. Confidential Information includes information made available to the Proponent Team Member by the City through the Data Room or any other electronic methods, as more fully detailed in the Confidentiality Agreement.
- (b) The Proponent agrees that all Confidential Information:
  - (i) shall remain the sole property of the City and the Proponent shall treat it as confidential;
  - (ii) shall not be used by the Proponent for any purpose other than developing and submitting a Submission in response to this RFP Process or the performance of any subsequent agreement relating to the Project with the City;

- (iii) shall not be disclosed by the Proponent to any person who is not involved in the Proponent's preparation of its Submission or the performance of any subsequent agreement relating to the Project with the City, without prior written consent of the City;
- (iv) shall not be used in any way that is detrimental to the City;
- (v) if requested by the City, all Confidential Information shall be returned by the Proponent to the City no later than five Business Days after that request. However, notwithstanding anything herein to the contrary, the Proponent may retain one copy, either hard copy or electronic copy, of the Confidential Information as required by law or to comply with the requirements of a regulatory body, provided the Proponent certifies that access to such Confidential Information is secured and limited;
- (vi) to the extent Confidential Information resides in electronic backup systems, such Confidential Information may be retained until such time as the Proponent's document retention policies demand the destruction of such documents during the normal course of business; and
- (vii) the City may, upon written request and at any time after the Confidential Information is no longer required to be retained by the Proponent by law, regulatory body, or the Proponent's internal document retention policies, require a senior officer of the Proponent to certify in writing that all Confidential Information retained by it has been returned to the City or securely destroyed in a manner which protects the confidentiality of the Confidential Information..

(c) Each Proponent shall be responsible for any breach of the provisions of this RFP Section D7.4 by any person to whom it discloses the Confidential Information including, for greater clarity, the Proponent's employees, representatives and Advisors and its Proponent Team Members and their employees, representatives and Advisors. Each Proponent shall indemnify the City and its members of council, consultants, employees, agents and representatives and save each of them fully harmless from and against any and all loss, cost, damage, expense, fine, suit, claim, penalty, demand, action, obligation and liability of any kind or nature (including, without limitation, professional fees on a full indemnity basis) suffered or incurred by any of them arising as a result of or in connection with any breach of any of the provisions of this RFP Section D7.4 by the Proponent or by any person to whom the Proponent has disclosed the Confidential Information.

(d) Each Proponent acknowledges and agrees that, if a Proponent, a Proponent Team Member or any of their respective Advisors, prior to or following submission of the Proponent's Submission, discovers a breach of any of the confidentiality obligations set out in RFP Sections D7.3 or D7.4, the Proponent shall promptly disclose all information with respect to such breach to the City in a written statement to the Contact Person.

- (e) Each Proponent acknowledges and agrees that a breach of the provisions of this RFP Section D7.4 would cause the City to suffer loss that could not be adequately compensated by damages, and that the City may, in addition to any other remedy or relief, seek and obtain injunctive relief against the Proponent for any breach or threatened breach of this RFP Section D7.4 by its employees, representatives and Advisors and each of their employees, and enforce any of the provisions of this RFP Section D7.4 upon application to a court of competent jurisdiction without proof of actual damage to the City. Notwithstanding anything else to the contrary in this RFP, the provisions of this RFP Section D7.4 shall survive any cancellation of this RFP Process and the conclusion of the RFP Process and, for greater clarity, shall be legally binding on each Proponent, whether or not it submits a Submission in connection with the RFP.
- (f) The confidentiality obligations of the Proponent shall not apply to any information which falls within the following exceptions:
  - (i) information that is lawfully in the public domain at the time of first disclosure to the Proponent, or which, after disclosure to the Proponent, becomes part of the public domain other than by a breach of the Proponent's confidentiality obligations or by any act or fault of the Proponent;
  - (ii) information which was in the Proponent's possession prior to its disclosure to the Proponent by the City, provided that it was not acquired by the Proponent under an obligation of confidence;
  - (iii) information which was lawfully obtained by the Proponent from a third party without restriction of disclosure, provided such third party was at the time of disclosure under no obligation of secrecy with respect to such information; or
  - (iv) information which is or was independently developed by the Proponent without the use of any Confidential Information.

#### D7.5 Copyright and Use of Information in Submissions

- (a) The City's rights, as set out in this RFP Section D7.5, to the Submission and all Proposal Information submitted by the Proponent during the RFP Process shall be granted to the City upon submission of the Submission.
- (b) Proponents shall not use or incorporate into their Submissions any concepts, products or processes which are subject to copyright, patents, trademarks or other intellectual property rights of third parties unless Proponents have or will procure through licensing without cost to the City, the right to use and employ such concepts, products and processes in and for the Project.
- (c) All requirements, designs, documents, plans and information supplied by the City, its representatives or Advisors to the Proponents in connection with this RFP are and shall remain the property of the City. Upon request of the City, all such requirements, designs, documents, plans and information (and any copies

thereof in any format or medium created by or on behalf of the Proponent) must be returned to the City. However, notwithstanding anything herein to the contrary, the Proponent may retain one copy, either hard copy or electronic copy, of such requirements, designs, documents, plans and information as required by law or to comply with the requirements of a regulatory body, provided the Proponent certifies that access to such requirements, designs, documents, plans and information is secured and limited. To the extent such requirements, designs, documents, plans and information reside in electronic backup systems, they may be retained until such time as the Proponent's document retention policies demand the destruction of such documents during the normal course of business. The City may, upon written request and at any time after the requirements, designs, documents, plans and information are no longer required to be retained by the Proponent by law, regulatory body, or the Proponent's internal document retention policies, require a senior officer of the Proponent to certify in writing that all such requirements, designs, documents, plans and information retained by it have been returned to the City or securely destroyed in a manner which protects the confidentiality of the documents.

- (d) The Proponent shall grant to the City a non-exclusive, perpetual, irrevocable, fully paid and royalty free license (fully assignable without the consent of the Proponent and with the right to sub-license without the consent of the Proponent) to use the Proposal Information for the Project (the "**Proposal Information Licence**"). Without limiting the foregoing, the Proposal Information Licence shall include the right to modify the Proposal Information, and, where applicable, to use it, or any modified form of it. Under no circumstances shall the Proponent, except the Development Partner in relation to this Project, be liable to the City or to any other person or entity for any damages, losses, costs, expenses, claims or actions whatsoever arising directly or indirectly from the use of the Proposal Information pursuant to the Proposal Information Licence.
- (e) For the purpose of this RFP Section D7.5, "**Proposal Information**" includes:
  - (i) all information contained in a Submission or which is disclosed by or through a Proponent to the City during the evaluation of Submissions or during the process of executing any Development Phase Agreement; and
  - (ii) any and all ideas, concepts, products, alternatives, processes, recommendations and suggestions developed by or through a Proponent and revealed to or discovered by the City, including any and all those which may be connected in any way to the preparation, submission, review or negotiation of any Submission or the Development Phase Agreement.
- (f) Proponents shall ensure that all intellectual property rights associated with any and all of the Proposal Information (including copyright and moral rights but excluding patent rights) provide for and give the City the rights set out in this RFP Section D7.5. It is expressly understood and agreed that any actual or purported restriction in the future on the ability of the City to use any of the Proposal Information, or anything else obtained by or through Proponents, shall be

absolutely null and void and unenforceable as against the City and each of its respective Advisors, and that the provisions of this RFP Section D7.5 shall take precedence and govern.

## D8. Conflict of Interest and Ineligible Persons

D8.1 For the purposes of this RFP Process, “**Conflict of Interest**” includes any perceived, potential, or actual situation or circumstance where, in relation to the Project, a Proponent or any Proponent Team Member or Proponent Advisor:

- (a) has other commitments, relationships or financial interests that:
  - (i) could or could be seen to exercise an improper influence over the objective, unbiased and impartial exercise of independent judgment by any personnel of the City or its Advisors; or
  - (ii) could or could be seen to compromise, impair or be incompatible with the effective performance of a Proponent’s obligations under the Development Phase Agreement if that Proponent was determined to be the Preferred Proponent under the RFP Process;
- (b) has contractual or other obligations to the City that could or could be seen to have been compromised or otherwise impaired as a result of its participation in the RFP Process or the Project; or
- (c) has knowledge of confidential information (other than Confidential Information disclosed by the City in the normal course of the RFP Process) of strategic and/or material relevance to the RFP Process or to the Project that is not available to other Proponents and that could or could be seen to give the Proponent an unfair competitive advantage.

D8.2 Conflict of Interest

- (a) If a Proponent, a Proponent Team Member or any of their respective Advisors, prior to or following submission of the Proponent’s Submission, discovers any Conflict of Interest as defined in RFP Section D8.1 the Proponent shall promptly disclose the Conflict of Interest to the City in a written statement to the Contact Person and is under a continuing obligation to declare all Conflicts of Interest that exist.
- (b) Proponents and Proponent Team Members and each of their Advisors shall disclose with the Step 1 Submission and the Step 1 Proponent Team Member Consent Declarations (in respect of Proponent Team Members), all Conflicts of Interest. For clarity, the Proponent, Proponent Team Members and each of their Advisors shall make such disclosures in the Step 1 Submission Form and Step 1 Proponent Team Member Consent Declarations whether or not a Conflict of Interest has been disclosed to the City prior to the submission of Submissions.
- (c) Shortlisted Proponents and Proponent Team Members and each of their Advisors shall disclose with the Step 2 Submission and the Step 2 Proponent

Team Member Consent Declarations (in respect of Proponent Team Members), all Conflicts of Interest. For clarity, the Proponent, Proponent Team Members and each of their Advisors shall make such disclosures in the Step 2 Submission Form and Step 2 Proponent Team Member Consent Declarations whether or not a Conflict of Interest has been disclosed to the City prior to the submission of Submissions.

- (d) At the request of the City, the Proponent shall provide the City with the Proponent's proposed means to mitigate and minimize to the greatest extent practicable any Conflict of Interest. The Proponent shall submit any additional information to the City that the City considers necessary to properly assess the Conflict of Interest.
- (e) The City may, in its sole discretion, exclude any Proponent Team Member or Proponent's Advisor on the grounds of Conflict of Interest.
- (f) Without limiting the generality of RFP Sections D8.2(e) or D8.2(g), the City may, in its sole discretion, require the Proponent, Proponent Team Member or a Proponent's Advisor to substitute a new person or entity for the person or entity giving rise to the Conflict of Interest.
- (g) The City may, in its sole discretion, waive any and all Conflicts of Interest of Proponents or Proponent Team Members, or any of their respective Advisors. A waiver may be upon such terms and conditions as the City, in its sole discretion, requires to satisfy itself that the Conflict of Interest has been appropriately managed, mitigated and minimized, including requiring the Proponent to put into place such policies, procedures, measures and other safeguards as may be required by and be acceptable to the City, in its sole discretion, to manage, mitigate and minimize the impact of such Conflict of Interest.

#### D8.3 Ineligible Persons

- (a) As a result of their involvement in the Project, the persons named in the RFP Data Sheet as "**Ineligible Persons**", their employees, and any of their subcontractors, Advisors, consultants or representatives engaged in respect of this Project and, subject to RFP Sections D8.3(c) and D8.3(d), any person controlled by, that controls or that is under common control with the Ineligible Persons (each an "**Ineligible Person's Affiliate**") are not eligible to participate as a Proponent Team Member or Advisor to the Proponent in respect of this Project.
- (b) The City may amend the Ineligible Persons list in the RFP Data Sheet from time to time during the RFP Process.
- (c) An Ineligible Person's Affiliate may be eligible to participate as a Proponent Team Member or Advisor to the Proponent in respect of this Project only after it has obtained a written consent from the City permitting it to participate as a Proponent Team Member or Advisor to the Proponent in respect of this Project. To obtain consent for an Ineligible Person's Affiliate to participate as a Proponent Team Member or Advisor to the Proponent in respect of this Project, the

Proponent must submit a request for consent to the Contact Person that includes the following information:

- (i) the full legal name of the Ineligible Person's Affiliate that the Proponent wishes to include on its team or as a Proponent Team Member or Advisor to the Proponent;
- (ii) information regarding the Ineligible Person's Affiliate's relationship to the Ineligible Person listed in the RFP Data Sheet; and
- (iii) a description of the policies and procedures that will be put in place to manage, mitigate or minimize the impact of any potential Conflict of Interest;

(d) Upon the Contact Person's receipt of a Proponent's properly completed request for consent in accordance with RFP Section D8.3(c), the City shall, in its sole discretion, make a determination as to whether it considers there to be a Conflict of Interest and whether the impact of such real perceived or potential Conflict of Interest can be appropriately managed, mitigated or minimized. The Proponent shall be notified of the City's decision by means of a consent letter setting out the nature of the consent and the management, mitigation or minimization measures required as a condition of consent. If the Ineligible Person's Affiliate is considered by the City to have a Conflict of Interest, the impact of which cannot be properly managed, mitigated or minimized, the City shall add the Ineligible Person's Affiliate to the Ineligible Persons list by Addendum.

**D8.4 Disclosure**

- (a) Various Persons provided information or services with respect to the NEWPCC Facility which are related to the Work.
- (b) The Persons and additional material are listed in the RFP Data Sheet.
- (c) In the City's opinion, this relationship or association does not create a conflict of interest because of this full disclosure.

**D9. Proponent Costs**

D9.1 The Proponent and the Proponent Team Members shall bear all costs and expenses incurred by them relating to any aspect of their participation in this RFP Process, including all costs and expenses related to the Proponent's involvement in:

- (a) the development and integration of Proponent commercial entity if applicable, and partnering and commercial arrangements between Proponent Team Members, including associated legal and commercial fees;
- (b) the preparation, presentation and submission of its Submission;

- (c) subject to RFP Schedule 3 – Step 2 Process, attendance at any Proponents Meeting, Commercially Confidential Meeting or any other meeting with the City;
- (d) due diligence and information gathering processes;
- (e) preparation of responses to questions or requests for information from the City;
- (f) preparation of the Proponent's own RFIs during the clarification process; and
- (g) negotiations.

D9.2 Except as explicitly provided in Section I2.2, I2.3 and I3.4, the City is not liable to pay any costs or expenses of any Proponent or to reimburse or compensate a Proponent under any circumstances, regardless of the outcome of the RFP Process.

## **D10. Insurance and Workers Compensation**

D10.1 Insurance required during the RFP Process

- (a) During the RFP Process, the Proponent is required to obtain, and to cause all Proponent Team Members and other persons listed in this RFP Section D10.1(a) to obtain, and at all times keep and maintain in force the insurance set out in RFP Sections D10.1(a)(i) and D10.1(a)(ii), whenever the Proponent, a Proponent Team Member, or any of their respective directors, officers, employees, consultants, Advisors, agents or representatives are present at the NEWPCC Facility or at any facilities or premises of the City for any purpose whatsoever:
  - (i) commercial/comprehensive general liability insurance, having an inclusive limit of not less than **\$2,000,000** for each occurrence or accident and covering all sums which the Proponent, a Proponent Team Member or any other persons listed above may become legally obligated to pay for damages as a result of bodily injury (including death at any time resulting there from) sustained by any person or persons or because of damage to, destruction of, or loss of use of property caused by an occurrence or accident arising out of any operations or activities carried out in connection with this RFP or RFP Process. The policy or policies shall include a cross liability clause and as insureds or additional insureds the City (and each of its employees, legislators, members, officials, consultants and agents), and the policy shall be primary and without right of contribution from any insurance otherwise maintained by the City; and
  - (ii) automobile liability insurance, in the amount of **\$2,000,000** per accident, for vehicles used by Proponents or Proponent Team Members (or their respective directors, officers, employees, consultants, Advisors and agents) while on or at the NEWPCC Facility or at any facilities or premises of the City.

- (b) As a condition of allowing access to the NEWPCC Facility or to the facilities or premises of the City, the City may, in its sole discretion, require Proponents to provide evidence acceptable to the City that the insurance required by RFP Sections D10.1(a)(i) and D10.1(a)(ii) is in place.
- (c) If a Proponent proposes to perform any investigations at the NEWPCC Facility the risk related to which may not be fully insured under the policies set out in RFP Sections D10.1(a)(i) and D10.1(a)(ii), the City may, in its sole discretion, require the Proponent, at its own cost and expense, to obtain insurance additional to that specified in RFP Sections D10.1(a)(i) and D10.1(a)(ii).
- (d) All insurance policies required to be obtained by Proponents shall provide that the insurance shall not be cancelled, reduced, restricted, modified or changed in any way without the insurer giving at least 30 days prior written notice to the City.

#### **D10.2 Applicable Law and Insurance During the RFP Process**

- (a) As a condition of allowing access to the NEWPCC Facility or any facilities or premises of the City, the City may, in its sole discretion, require Proponents to provide evidence acceptable to the City that:
  - (i) the Proponent and its Proponent Team Members are compliant with Applicable Law relating to workplace safety, workers compensation and labour relations; and
    - (A) for the Proponent and its Proponent Team Members that are not legislated and do not carry workers' compensation to include employer's liability insurance in D10.1(a)(i) in amounts and on terms and conditions acceptable to the City.

### **SECTION E SUBMISSION FORM AND CONTENT REQUIREMENTS**

#### **E1. Format and Content of the Submission**

- E1.1 Proponents shall submit Step 1 Submissions in accordance with the requirements of and in the format set out in RFP Schedule 2 – Step 1 Submission.
- E1.2 Proponents shall submit Step 2 Submissions in accordance with the requirements of and in the format set out in RFP Schedule 3 – Step 2 Submission.

### **SECTION F SUBMISSION, WITHDRAWAL AND MODIFICATION OF SUBMISSIONS**

#### **F1. Submission of Step 1 Submission and Step 2 Submission**

- F1.1 Each Proponent shall submit, and ensure receipt by MERX, its Step 1 Submission on or before the Step 1 Submission Deadline, and each Shortlisted Proponent shall submit its Step 2 Submission on or before the Step 2 Submission Deadline. MERX will not allow late submissions.

- F1.2 Each Proponent shall submit its Step 1 Submission by uploading electronic copies to MERX at the address set out in the RFP Data Sheet. It is the sole responsibility of the Proponent to ensure that its Step 1 Submission is received by MERX on or before the Submission Deadline.
- F1.3 In respect of the Step 2 Process, the MERX opportunity will be by invitation, which means only the Shortlisted Proponents will have the ability to access and upload documents in response to the Step 2 Process. It is the sole responsibility of the Shortlisted Proponent to ensure that all parts of its Step 2 Submission are received by the City on or before the Step 2 Submission Deadline. The City will not accept Step 2 Submissions which are uploaded to the Data Room or delivered by electronic mail or facsimile.
- F1.4 Each Proponent shall provide its Step 1 Submission in accordance with the requirements of RFP Schedule 2 – Step 1 Process, and each Shortlisted Proponent shall provide its Step 2 Submission in accordance with the requirements of RFP Schedule 3 – Step 2 Process.

## **F2. Withdrawal of Submissions**

- F2.1 A Proponent may withdraw its Submission without penalty at any time during the RFP Process.

## **F3. Maintaining Submission Commitments**

- F3.1 Notwithstanding the absence of a bidding contract set out in RFP Section I3.1 and notwithstanding the right of the Proponent to withdraw its Submission as set out in RFP Section F2.1, the City expects that all commitments made in all Submissions including all prices contained in a Submission, will be maintained by the Proponent for a period of 120 days after the Submission Deadline.

# **SECTION G EVALUATION, CLARIFICATION AND VERIFICATION OF SUBMISSIONS**

## **G1. Evaluation Team and Advisors**

- G1.1 The City will establish an evaluation team (the “**Evaluation Team**”) for the purpose of evaluating Submissions in accordance with the RFP Documents. The City, in its sole discretion, will determine the size, structure and composition of the Evaluation Team and any sub-teams of the Evaluation Team. The Evaluation Team may be assisted by and receive advice from any of the City’s Advisors, and any other employees or representatives of the City in any manner determined necessary or desirable by the City.
- G1.2 If a member of the Evaluation Team or, if applicable, an evaluation sub-team becomes unable to continue serving on the Evaluation Team or evaluation sub-team before the completion of a step in the evaluation process, the evaluation comments and scores of that individual, in respect of the uncompleted steps in the evaluation process only, shall be ignored. For greater clarity, if an Evaluation Team or sub-team member becomes unable to continue serving on the Evaluation Team or a sub-team after the full completion of a step in the evaluation process,

the results of the completed steps of the evaluation process are unaffected and remain valid. Whether or not an Evaluation Team or sub-team member, in these circumstances, is replaced is in the sole discretion of the City.

G1.3 The Submission Requirements and evaluation criteria for the Step 1 Submission are set out in RFP Schedule 2 – Step 1 Process. The Submission Requirements and evaluation criteria for the Step 2 Submission will be set out in RFP Schedule 3 – Step 2 Process.

## **G2. The City's Clarification and Verification of Submissions**

G2.1 The City may:

- (a) require the Proponent to clarify or verify the contents of its Submission or any statement made by the Proponent;
- (b) require the Proponent to submit supplementary documentation clarifying or verifying any matters contained in its Submission;
- (c) seek a Proponent's acknowledgement of the City's interpretation of the Submission or any part of the Submission; and
- (d) allow a Proponent to rectify non-material deficiencies in its Submission.

G2.2 The City is not obliged to seek clarification, verification or rectification of any aspect of a Submission or any statement by a Proponent, including an ambiguity in a Submission or in a statement made by a Proponent.

G2.3 Any written information received by the City from a Proponent pursuant to a request for clarification, verification or rectification from the City as part of the RFP Process may, in the City's sole discretion, be considered as an integral part of the applicable Submission.

## **SECTION H GENERAL EVALUATION AND DISQUALIFICATION PROVISIONS**

### **H1. The City's Discretion in Determining Compliance, Scoring and Ranking**

H1.1 The City shall, in its sole discretion, determine:

- (a) the membership of the Evaluation Team and any sub-teams of the Evaluation Team;
- (b) whether a Step 1 Submission or Step 2 Submission is compliant with the RFP Documents;
- (c) whether a failure to comply constitutes a material deviation;
- (d) whether a Proponent's Submission has achieved a "pass" in respect of any Submission Requirements;

- (e) the rankings of the Submissions; and
- (f) whether a Submission or a Proponent,
  - (i) is disqualified; or
  - (ii) will cease to be considered in the evaluation process;
- (g) the City's discretion in determining compliance, scores, ranking and disqualification of the Shortlisted Proponents and their Step 2 Submissions is not limited or restricted in any way by the fact that the Step 1 Process precedes the Step 2 Process; and
- (h) the City has the right, at any time and in its sole discretion, to consider in the evaluation of the Submissions or in the exercise of any of the City's rights under this RFP:
  - (i) any instances of poor performance by a Proponent or a Proponent Team Member that the City has experienced; and/or
  - (ii) any publicly available information about a Proponent or a Proponent Team Member that is, in the City's sole discretion, credible information.

## **H2. Disqualification**

H2.1 The City may, in its sole discretion, disqualify a Proponent, a Proponent Team Member, or a Submission or reverse its decision to make an award (even if the award has already been made to a Preferred Proponent under this RFP) at any time prior to the Execution of the DPA, if:

- (a) the Proponent fails to cooperate in any attempt by the City to verify any information provided by the Proponent in its Submission;
- (b) the Proponent contravenes RFP Sections D3.2 or D3.3;
- (c) the Proponent fails to comply with Applicable Law;
- (d) the Submission contains false or misleading information or a misrepresentation;
- (e) the Submission, in the opinion of the City, reveals a material Conflict of Interest as described in RFP Section D8 and the Proponent:
  - (i) does not receive a waiver from the City in accordance with RFP Section D8.2(g) or does not receive a consent in accordance with RFP Section D8.3(c), as applicable; or
  - (ii) fails to substitute the person or entity giving rise to the Conflict of Interest in accordance with RFP Section D8.2(f);

- (f) in the opinion of the City, acting reasonably, the Proponent or a Proponent Team Member or any of their respective Advisors, employees or representatives directly or indirectly colluded with one or more other Proponents or its Proponent Team Members or any of their respective Advisors, employees or representatives in the preparation or submission of a Proponent's Submission or otherwise contravened RFP Section D3.4;
- (g) the Proponent has committed a material breach of any existing agreement between the Proponent and the City;
- (h) the Proponent or any Proponent Team Member has been convicted of an offence in connection with any services rendered to the City;
- (i) there are any convictions related to inappropriate bidding practices or unethical behaviour by a Proponent or a Proponent Team Member or any of their Affiliates in relation to a public or broader public sector tender or procurement in any Canadian jurisdiction; or
- (j) the Proponent, any Proponent Team Member or any of their Affiliates have been convicted under the Corruption of Foreign Public Officials Act (Canada).

## **SECTION I GENERAL LEGAL MATTERS AND RIGHT TO ACCEPT OR REJECT**

### **I1. General Rights of the City**

- I1.1 The City may, in its sole discretion:
  - (a) reject any or all of the Submissions;
  - (b) accept any Submission;
  - (c) if only one Submission is received, elect to accept or reject it;
  - (d) waive any informalities, minor irregularities, errors or other anomalies in a Submission and/or waive any informalities or irregularities in this RFP Process;
  - (e) award any resulting contract in whole or in part;
  - (f) elect to discontinue the RFP Process at any time before the end of the RFP Process, including after the identification of a Preferred Proponent but before Execution of the DPA;
  - (g) alter the Timetable, the RFP Process or any other aspect of this RFP; and
  - (h) cancel this RFP Process (including the Step 2 Process) and subsequently advertise or call for new submissions for the same or different subject matter of these RFP Documents with the same or different participants without providing reasons for such cancellation or any subsequent action.

I1.2 Without limitation to any other rights of the City hereunder, in order to ensure the integrity, openness and transparency of the RFP Process, the City may, in its sole discretion:

- (a) impose at any time on all Proponents and any Proponent Team Members additional conditions, requirements or measures with respect to bidding practices or ethical behaviour of the Proponents and Proponent Team Members; and
- (b) require that any or all Proponents and/or any Proponent Team Member at any time during the RFP Process provide the City with copies of its internal policies, processes and controls establishing ethical standards for its bidding practices and evidence of compliance by the Proponent and all Proponent Team Members with such policies, processes and controls.

I1.3 Further to RFP Section I1.2, and in the event that any Proponent and/or Proponent Team Member:

- (a) fails to comply with any requirement prescribed by the City pursuant to RFP Section I1.2; or
- (b) complies with the City's requirement as prescribed in accordance with RFP Section I1.2, but the City determines that any Proponent and/or Proponent Team Member has or may have engaged in inappropriate bidding practices or unethical behaviour,

the City shall have the right, at any time and in its sole discretion to reject and not consider a Submission from a Proponent, or pursuant to RFP Section D5 require the Proponent to remove and/or replace any Proponent Team Member.

## I2. The City's Liability for Proponent's Costs

I2.1 General

- (a) Except as provided in RFP Section I2.2 and I2.3 the City shall not be liable for any expense, cost, loss or damage incurred or suffered by any Proponent, any Proponent Team Member, any Proponent Advisor or any person connected with any one of them, as a result of any action taken by the City in accordance with RFP Section I1.

I2.2 Proposal Submission Fee

- (a) If the City specifies in the RFP Data Sheet that it offers a Proposal Submission Fee for this Project, such Proposal Submission Fee inclusive of any applicable taxes, shall be paid to each unsuccessful Proponent, subject to the following conditions:
  - (i) a Proponent shall submit a full and proper Proposal for that Proponent to be eligible for the Proposal Submission Fee, provided that the City has determined that the Proposal is full and proper based on factors that include whether the Proposal is compliant with this RFP (as

determined in accordance with RFP Schedule 3 - Step 2 Process) and whether the Proponent's Proposal Submission has received a passing score as referenced in Schedule 3 - Step 2 Process;

- (ii) a Proponent shall transfer to the City all intellectual property rights, including waiver of moral rights, contained within the Proponent's Proposal, in accordance with RFP Section D7.5; and
- (iii) a Proponent shall not withdraw from the Step 2 Process after the Step 2 Submission Deadline in contravention of this RFP;

(b) The amount of the Proposal Submission Fee that will be paid to each eligible Proponent in accordance with RFP Section I2.2(a) is set out in the RFP Data Sheet.

(c) Payment of a Proposal Submission Fee shall represent full and final satisfaction of any obligation or liability of the City to the Proponent and Proponent Team Members in connection with this RFP, and the City's obligation to pay the Proposal Submission Fee shall be contingent on the receipt of a waiver, in form and substance satisfactory to the City, from the Proponent and Proponent Team Members to that effect.

### I2.3 Break Payment

- (a) If the City offers a Break Payment for this Project as set out in the RFP Data Sheet, such Break Payment, inclusive of any applicable taxes, shall be paid by the City in accordance with the following:
  - (i) only a Proponent who has demonstrated, to the City's satisfaction, active participation in the Step 2 Process will be eligible to receive a Break Payment;
  - (ii) the City may require a Proponent to substantiate its active participation in the Step 2 Process in order to receive a Break Payment;
  - (iii) if the Step 2 Process is cancelled after the Step 2 Submission Deadline, a Break Payment will be paid to a Proponent that has submitted a full and proper Step 2 Submission; and
  - (iv) for clarity, active participation in the Step 2 Process shall include participation in the Scenario-based Interview set out in RFP Schedule 3 – Step 2 Process.
- (b) The amount of the Break Payment payable to each eligible Proponent will depend on the point in the Step 2 Process that cancellation occurs, in accordance with the principles set out in the RFP Data Sheet. The base amount of the Break Payment (the "**Base Break Payment**") is set out in the RFP Data Sheet.

- (c) Payment of a Break Payment shall represent full and final satisfaction of any obligation or liability of the City to the Proponent and Proponent Team Members in connection with this RFP, and the City's obligation to pay the Break Payment shall be contingent on the receipt of a waiver, in form and substance satisfactory to the City, from the Proponent and Proponent Team Members to that effect.
- (d) For greater certainty, a Proponent shall not be eligible to receive both a Break Payment and a Proposal Submission Fee relating to the Proponent's participation in the RFP Process for this Project.

### **I3. Legal Issues, Applicable Law, Attornment and Limit on Liability**

- I3.1 This document is a request for proposals in respect of the Project and is not a tender. Neither these RFP Documents nor any submission of any Submission in response to these RFP Documents shall, in any way whatsoever, create a binding agreement between the City and any Proponent. For clarity, these RFP Documents are not intended to be an offer to enter into a bidding contract with Proponents (often referred to as "Contract A") and no agreement exists between any Proponent, including the Preferred Proponent, and the City unless and until the Development Phase Agreement has been formally executed by the Preferred Proponent and the City.
- I3.2 This RFP shall be governed and construed in accordance with Applicable Law as defined in the Development Phase Agreement.
- I3.3 The Proponent agrees that:
  - (a) any action or proceeding relating to this RFP Process shall be brought in any court of competent jurisdiction in the province of Manitoba and for that purpose the Proponent irrevocably and unconditionally attorns and submits to the jurisdiction of that Manitoba court;
  - (b) it irrevocably waives any right to and shall not oppose any Manitoba action or proceeding relating to this RFP Process on any jurisdictional basis, including forum non conveniens; and
  - (c) it shall not oppose the enforcement against it, in any other jurisdiction, of any judgement or order duly obtained from a Manitoba court as contemplated by this RFP Section I3.
- I3.4 Notwithstanding that in accordance with RFP Section I2.2 and I2.3, this RFP is not a tender and is not intended to create "Contract A", the Proponent agrees that if the City or the City's Advisors are to be found liable, in any way whatsoever, for any act or omission in respect of this RFP Process, the City's liability to the Proponent and the aggregate amount of damages recoverable against the City for any matter relating to or arising from any act or omission by the City or the City's Advisors, whether based upon an action or claim in contract, warranty, equity, negligence, intended misconduct or otherwise, including any action or claim arising from the acts or omissions, negligent or otherwise, of the City, shall be no

greater than the Submission preparation costs that the Proponent seeking damages from the City can demonstrate.

**I4. Licenses, Permits, etc.**

I4.1 If a Proponent is required by Applicable Law to hold or obtain a licence, permit, consent or authorization to carry on an activity contemplated in its Submission or in the Draft Agreements, neither acceptance of the Submission nor Execution of the DPA by the City shall be considered to be approval by the City of carrying on such activity without the requisite licence, permit, consent or authorization and the Proponent will not undertake or perform any activity until it has obtained all licenses, permits, consents or authorizations required under Applicable Law or the Draft Agreements.

**I5. Power of Municipal Council of the City**

I5.1 Applicants are advised that no provision of this RFP (including a provision stating the intention of the City) is intended to operate, nor shall any such provision have the effect of operating, in any way, so as to interfere with or otherwise fetter the discretion of the municipal council of the City in the exercise of its statutory powers.

**I6. Trade Agreements**

I6.1 This RFP Process will be consistent with the *Canadian Free Trade Agreement*, the *Comprehensive Economic and Trade Agreement* and the *New West Partnership Trade Agreement* as they apply, or may apply in the future, however the rights and obligations of the parties are governed by the specific terms of this RFP.

**SECTION J NOTIFICATION AND DEBRIEFING**

**J1. Notification and Debriefing**

J1.1 Any time after the Shortlisted Proponents are identified, the City will publish a list of the Shortlisted Proponents.

J1.2 Any time after the Preferred Proponent has been identified, the City will formally notify all Shortlisted Proponents who were not successful in the Step 2 Process that they have not been selected.

J1.3 After the publication of the Shortlisted Proponents, upon request to the City from a Proponent which was not identified as a Shortlisted Proponent, the City will provide such Proponent with an explanation of the reasons the Proponent was not selected.

J1.4 After Execution of the DPA, upon request to the City from an unsuccessful Shortlisted Proponent, the City will provide the unsuccessful Shortlisted Proponent with an explanation of the reasons the Shortlisted Proponent was not selected.

- J1.5      The City is not obliged to debrief the Preferred Proponent, who enters the Development Phase Agreement, with respect to their participation in the RFP Process.
- J1.6      The information provided to a Proponent in the debriefing will relate solely to that Proponent and its Submission, and not to any other Proponent or Submission.