



# 975-2024 ADDENDUM 5

## PEMBINA HIGHWAY OVERPASS AT ABINOJII MIKANAH REHABILITATION AND RELATED WORKS

### URGENT

**PLEASE FORWARD THIS DOCUMENT TO  
WHOEVER IS IN POSSESSION OF THE  
BID/PROPOSAL**

ISSUED: April 1, 2025  
BY: Bill Ebenspanger  
TELEPHONE NO. 204 977-8370

**THIS ADDENDUM SHALL BE INCORPORATED  
INTO THE BID/PROPOSAL AND SHALL FORM  
A PART OF THE CONTRACT DOCUMENTS**

Template Version: Add 2024-02-01

**Please note the following and attached changes, corrections, additions, deletions, information and/or instructions in connection with the Bid/Proposal, and be governed accordingly. Failure to acknowledge receipt of this Addendum in Paragraph 10 of Form A: Bid/Proposal may render your Bid/Proposal non-responsive.**

### PART D – SUPPLEMENTAL CONDITIONS

Revise D31.2 to read:

The amounts specified for liquidated damages in D31.1 are based on a genuine pre-estimate of the City's losses in the event that the Contractor does not achieve Substantial Performance or Total Performance by the days fixed herein for same, but shall be subject overall to a maximum limit of 10% of the Contract Price. Without diminishing the Contractor's obligations or the City's powers anywhere else in this Contract, the Liquidated Damages represent the City's sole financial remedy for delays in the Contractor's achievement of Substantial Performance or Total Performance under this Contract, and shall not exceed the sum of \$10,000.00 per Calendar Day of delay.

ADD: D48

#### **D48 LIMITATION OF LIABILITY AND WAIVER OF CONSEQUENTIAL DAMAGES**

**D48.1** Notwithstanding C17, the indemnities under C17 this Contract shall not apply and there shall be no right to claim damages for breach of this Contract, in tort or on any other basis whatsoever to the extent that loss claimed by either Party is:

- (a) for punitive, exemplary or aggravated damages;
- (b) for loss of profit (but does not include the Parties' rights to payments expressly provided for in this Contract), loss of use, loss of production, loss of business, claims of customers or loss of business opportunity; or
- (c) is a claim for consequential loss or for indirect loss of any nature suffered or allegedly suffered by either Party, (collectively, "**Indirect Losses**"),

**D48.2 Subject to D48.3 and D48.5, the maximum aggregate liability of:**

- (a) Contractor in respect of all claims under or in connection with the Contract shall not exceed the sum of 50% of the Contract Price;
- (b) Contractor in respect of indemnity obligations to the City pursuant to C17.1 shall not exceed the amount of twice the Contract Price or five million dollars (\$5,000,000), whichever is greater:

- (i) up to a maximum of ten million dollars (\$10,000,000.00) where the Contract Price is twenty million dollars (\$20,000,000.00) or less, or
- (ii) to a maximum of twenty million dollars (\$20,000,000.00) in all other cases,
- (c) The City, in respect of all claims under or in connection with the Contract (except for the obligation to make payment to the Contractor for Work performed pursuant to the Contract) shall not exceed the sum of 50% of the Contract Price.

**D48.3:** The limits set out in D48.2 shall be exclusive of any insurance proceeds received or which will be received pursuant to policies maintained in accordance with this Contract, or which would have been received if the Contractor had complied with its obligation to insure under this Contract or the terms of any policy of insurance required under this Contract each in the “not less than” value as set out in the Contract; and shall not apply in cases of gross negligence or wilful misconduct.

**D48.4:** The Contractor’s obligation to indemnify the City pursuant to C17.1 shall only be triggered in the event that said costs, damages or expenses arising from actions, claims, demands and proceedings, by whomsoever brought, made or taken are brought as a result of negligent acts or omissions of the Contractor, their Subcontractors, employees or agents in the performance or purported performance of the Work; or from breach of this Contract by same; or from wilful misconduct by same, and provided that the City has, before settling any such claim pursuant to C17.2, given the Contractor reasonable notice of same.

**D48.5:** For the avoidance of doubt, the above limitations shall not apply to any obligations of the Contractor to indemnify third parties as required by applicable funding agreements pursuant to D45.

**ADD D49**

**D49.1:** C13.2.2 is modified to the following:

If all outstanding defects or deficiencies have not been corrected to the satisfaction of the Contract Administrator by at least two (2) weeks prior to the date on which the warranty would expire except for this C13.2.2, then the Contract Administrator may require the Contractor to extend the warranty period for a further period of one (1) year for those defects or deficiencies in the Work identified by the Contract Administrator as still outstanding and uncorrected or for any portion of the Work whose use or operation is prevented by such defects or deficiencies. In no event shall the warranty period be extended beyond a further one (1) year period.

**PART E – SPECIFICATIONS**

Revise: E42.1(a) to read: The asphalt pavement Special Provisions found in Appendix ‘H’ apply to the Work.

**APPENDICES**

Add: 975-2024 Addendum 5- Appendix H

**QUESTIONS AND ANSWERS**

- Q1: **Liquidated Damages:** Liquidated damages are cumulative and there is no maximum amount of liquidated damages that can be assessed at any given time.
- A1: See wording added above
- Q2: **Indemnity C17:** Request confirmation that the City is willing to revise this clause to reflect the clause included in the North Garage Replacement Tender #593-2024B, which indicates the cap on liability is no more than \$20M.
- A2: See wording added above and modifications to the indemnity section.

- Q3(a): **Modifications to Contractor's Indemnity obligations under D45 with respect to Manitoba and Canada:** While we recognize a requirement to indemnify the Government based on funding for a particular tender this indemnification should align with the indemnity provision within each tender. Request confirmation that the City is willing to revise this clause to include similar language that has already been included under Indemnity. Currently as this clause is written it requires the Contractor to indemnify the Government for non-fault based indemnity.
- Q3 (b): **Modifications to Audit requirements under D45:** While we recognize the government's ability to audit (city, provincial or federal), the City of Winnipeg's timeline to perform and audit is quite extensive with 6 years from Total Performance. Additionally, audit rights should only be permissible if such contract is a cost-plus arrangement or at a minimum audit rights will not apply to any lump sum or unit price work
- A3: The City is required to include these clauses as they are by applicable funding agreements and will not modify them for this procurement. However, proponents are advised that the City's Chief Construction Officer intends to assess these in the future, and consequently the City may make revisions to the global General Conditions with respect to same.
- Q4. **Contractor Termination Right:** Currently this tender does not include Contractors right to terminate for non-payment from the City. If unpaid Contractor ought to have the right to terminate the contract.
- A4: See wording added in Addendum 4.
- Q5: **Warranties:** Contractual warranty period is 2 years from Total Performance and can be extended for a further period of 1 year for defects and deficiencies. However, this is not clear that the extended warranty will only extend for 1 additional year maximum. Request confirmation that the City is willing to cap the additional warranty period at no more than 1 additional year.
- A5: See modification to C13.2.2 added above.
- Q6: **Waiver of Consequential Damages:** Proponent requires a mutual waiver of consequential damages.
- A6: See wording added above.
- Q7: **Aggregate Limitation of Liability:** Proponent requests an aggregate limitation of liability of 50% of the contract value for all circumstances, no matter the cause subject to standard exceptions (willful misconduct, receipt of proceeds of insurance, etc). Proponent also should only indemnify for third party damages to the extent cause by our negligence, for injury, death, and destruction of tangible property. Proponent should not be liable for trespass (especially for property not owned by the City), lien (without reference to City's obligation to pay), IP, inaccuracies of information given to the City (regardless of intent). The City currently has unilateral control to settle such claims, and Proponent requests some control over this process.
- A7: See wording added above. Proponents are advised that the City's Chief Construction Officer intends to assess the City's claim process in the future, and consequently the City may make revisions to the global General Conditions with respect to same.
- Q8: **Relief/Compensation Events:** other events causing delay need to be included, including City/Contract Administrator caused delays by other contractors, stop work orders not caused by Proponent, discover of artifacts, pre-existing hazardous substances, etc. Determination of Contract Time is subjective to Contract Administrator, not objectively entitled. Proponent needs to have a right to dispute such determination.
- Q8: The City does not consider it necessary to make an amendment. Any events causing delay can be dealt with under the Change in Work process under C7 on a case by case basis. The opportunity to dispute such a determination is (a) partially granted within C7 and (b) granted within the dispute resolution clause of the General Conditions
- Q9: **Investigation of Site/Concealed Conditions:** Proponent requests industry standard wording similar to what is found in the CCDC contracts indicating that subsurface conditions are Owner's risk.
- A9: The City believes D4.1 addresses the Proponent's concerns. D4.1 overrides C3 by the inclusion of the word "notwithstanding". In the event of inconsistency, D4.1 prevails. The City does not believe any change is necessary.

Q10: **Defects and Deficiencies:** C13 needs to tie to the requirements of the contract otherwise it is subjective and unreasonable determination of the Contract Administrator. A 'defect or deficiency" could be a design error which is not Proponent's scope. Proponent requests those terms to be defined and tied to performing the Work in accordance with the Contract Documents.

A10: C13 requires the Work to be free from defects and deficiencies. Work is defined as:

*"Work" means the carrying out and the doing of all things, whether of a temporary or permanent nature, that are to be done by the Contractor pursuant to the Contract and, without limiting the generality of the foregoing, includes the furnishing of all Plant, Material, labour and services necessary for or incidental to the fulfilment of the requirements of the Contract, including all Changes in Work which may be ordered as herein provided;*

The definition of Work already envisions that it only includes such things as are the Contractor's responsibility under the Contract. As such, the City does not believe a change is necessary.