

THE CORPORATION OF THE CITY OF MISSISSAUGA



MATERIEL MANAGEMENT

**Professional Services Agreement
(IT)**

2010

March 3, 2010

"The following agreement is strictly for reference only and is subject to change by the City of Mississauga without notice. Without limiting the foregoing, the following agreement should not be relied upon, unless such intention to do so, is expressly and in writing provided by the City of Mississauga. Please always refer to the bid request for the applicable agreement(s) that pertains to each procurement."

PROFESSIONAL SERVICES AGREEMENT - IT

THIS AGREEMENT is made as of [INSERT DATE], 20___. (the "**Agreement**")

BETWEEN:

THE CORPORATION OF THE CITY OF MISSISSAUGA

(hereinafter referred to as the "**City**"),

- and -
-

[**INSERT NAME**], a corporation incorporated under the laws of [INSERT JURISDICTION],

(hereinafter referred to as the "**Vendor**")

RECITALS:

1. On [INSERT DATE], the City issued a detailed request for proposals, Procurement No.: [INSERT NUMBER], setting out the needs and requirements for [INSERT DESCRIPTION], a copy of which has been attached and forms part of Appendix 1 hereto;
2. The City issued addenda [INSERT DESCRIPTION], respectively, a copy of which has been attached and forms part of Appendix 1 hereto (the request for proposals and the addenda being collectively herein called the "**RFP**").
3. Vendor provided a detailed response to the RFP on [INSERT DATE] (the "**Proposal**"), a copy which has been attached and which forms part of Appendix 2 hereto;
4. [INSERT FURTHER RELEVANT PARTICULARS];

NOW THEREFORE, in consideration of the background, the mutual covenants contained in this Agreement and the good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the City and the Vendor agree as follows:

The following schedules ("**Schedules**") and appendices ("**Appendices**") are annexed hereto for identification and form an integral part of this Agreement:

Schedule A - Statement of Work

Schedule B	-	Key Personnel
Appendix 1	-	RFP
Appendix 2	-	Proposal

DEFINITIONS

"**Acceptance**" has the meaning ascribed to it in Section 33.3.

"**Acceptance Testing**" has the meaning ascribed to it in Section 33.2.

"**Applicable Charges**" has the meaning ascribed to it in Section 2.1.

"**Change**" has the meaning ascribed to it in Section 31(a).

"**Change Order**" has the meaning ascribed to it in Section 31(c).

"**Change Request**" has the meaning ascribed to it in Section 31(b).

"**City Contributions**" has the meaning ascribed to it in Section 1.6

"**Confidential Information**" has the meaning ascribed to it in Section 3.5(a)

"**City's Manual**" means the City's Accessibility Standards for Customer Service guide known as "May I help you?: Understanding Accessible Customer Service", as provided by the City to the Consultant and as may be amended from time to time; [Insert this if the Consultant would deal with the public on behalf of the City or assists in developing policies and procedures governing provision of goods and services to the public.]

"**Deliverables**" has the meaning ascribed to it in Section 3.3

"**Detailed Project Plan**" has the meaning ascribed to it in Section 1.2

"**Dispute**" has the meaning ascribed to it in Section 21.1.

"**Indemnified Persons**" has the meaning ascribed to it in Section 4.1.

"**Initial Term**" has the meaning ascribed to it in Section 8.1

"**Intellectual Property Rights**" has the meaning ascribed to it in Section 3.3

"**Key Personnel**" has the meaning ascribed to it in Section 32.1.

"**Performance Milestone**" has the meaning ascribed to it in Section 1.2.

"**Phase 1**" has the meaning ascribed to it in Section 1.3.

"**Phase 2**" has the meaning ascribed to it in Section 1.3.

"**Pricing Guarantee**" has the meaning ascribed to it in Section 2.1(e)

"**Project Manager**" has the meaning ascribed to it in Section 1.4.

“**Service Records**” has the meaning ascribed to it in Section 1.9.

“**Service Performance Reporting**” has the meaning ascribed to it in Section 1.10.

"**Services**" has the meaning ascribed to it in Section 1.1.

"**Subcontractors**" has the meaning ascribed to it in Section 1.5.

"**Taxes**" has the meaning ascribed to it in Section 2.1(c).

“**Vendor Personnel**” means the Vendor, the Vendor’s Project Manager, its officers, employees, agents, contractors, Subcontractors, permitted invitees, consultants, and any other persons that the Vendor involves in the provision of the Services;

"**Warranty Period**" has the meaning ascribed to it in Section 11.2

1. APPOINTMENT/SERVICES

- 1.1 During the Term, as defined below, of this Agreement, the City agrees to retain the Vendor for **[consulting, planning, design, implementation, data migration, training, development and configuration]** of the [•] and related services, including the creation of any documentation and records related to the foregoing (the "**Services**") as set forth in this Agreement, including the attached Schedule A to this Agreement (the "**Statement of Work**") **[Note to Draft – insert “and any statement of work (the "Statement(s) of Work" or that references this Agreement” if drafting a Master Agreement]**. The Vendor agrees to provide, as listed in and for the fees and/or rates identified in the Statement of Work, the Services. The Statement of Work more fully describe the scope, duration, and fees for the Services. Changes to the Statement of Work may be made upon prior written mutual agreement of the parties hereto.
- 1.2 The Vendor agrees that it shall comply with the applicable consulting, design, build and implementation timelines and schedules, delivery priorities, deployment and commercialization milestones, and all other deadlines and time and priority related obligations concerning the provision and performance of the Services and provision of the Deliverables specified in the Statement of Work ("**Performance Milestones**"). Such Performance Milestones shall be delineated in a detailed project plan ("**Detailed Project Plan**") which the Vendor agrees to provide to the City within 5 (five) business days of the Effective Date.
- 1.3 The Vendor agrees that it shall perform the Services in two phases as described in the Project Plan ("**Phase 1**" and "**Phase 2**" respectively). The Vendor agrees that the commencement of Phase 2 shall not commence until the City has provided its Acceptance (as defined below in Section 33.3) the Deliverables provided under Phase 1. For greater certainty, the City shall be under no obligation whatsoever to pay any Applicable Charges for the performance of the Services described under Phase 2 without such prior Acceptance of the Phase 1 Deliverables. The failure or delay of the City to provide such Acceptance shall not result in any deemed acceptance whatsoever. Furthermore, and without limiting Section 9.1, the City may terminate this Agreement immediately upon the completion of Phase 1 in the event the Deliverables provided under Phase 1 are not Accepted by the City for any reason whatsoever, including failures to meet Performance Milestones. **[Note to Draft – Use this provision if there are different phases]**

- 1.4 Each party will appoint an individual who will serve as the primary representative of such party under this Agreement (each a "**Project Manager**"). Each Project Manager shall:
- (a) have overall responsibility for managing and coordinating the performance of the party it represents under this Agreement in a prompt and professional manner;
 - (b) be authorized to act for and on behalf of the party it represents under this Agreement;
 - (c) meet with the other party's Project Manager at regular agreed-upon intervals to review progress and resolve any issues relating to the Services and/or Deliverables, as defined below, which shall be detailed in each Statement of Work; and
 - (d) attempt to resolve disputes in accordance with this Agreement. The City's Project Manager will be available as required under the applicable Statement of Work. Once the City has agreed to the Vendor's Project Manager, the Vendor shall not change said Project Manager unless the City agrees or requires otherwise in writing.
- 1.5 The City shall pre-approve in writing any consultants and/or subcontractor ("**Subcontractors**") to be used by the Vendor to provide the Services and/or the Deliverables, as defined below, and said Subcontractors shall be listed in the applicable Statement of Work. Vendor shall be responsible for the performance of Services by such Subcontractor, and shall be liable for all acts and omissions of Subcontractors in performing the Services to the same extent as if Vendor itself or Vendor's employees had performed such obligations and such work shall be deemed to be work performed by Vendor. The Vendor agrees that it will not change the Subcontractors listed in the applicable Statement of Work unless the City approves such a change in writing or if the City requests such a change in writing. If the City requests such a change in writing then the Vendor shall make the changes as required and pre-approved by the City within five (5) business days and the applicable Statement of Work shall be amended accordingly.
- 1.6 City Contributions. Provided that Vendor is not in default under this Agreement, City agrees that it shall provide Vendor with the contributions and other assistance that are expressly specified the Statement of Work, for the purpose of facilitating the performance of Services and provision of Deliverables by Vendor ("**City Contributions**").
- (a) Vendor's City Contribution Reliance
 - (i) Vendor confirms, acknowledges and agrees that the City Contributions are the complete, definitive, and exhaustive delineation of all of the activities, obligations, duties, contributions, assistance, and cooperation that Vendor requires of, or from, City in any connection with this Agreement, City shall have no further or additional obligations, duties, or responsibilities (whether contractual or otherwise) to assist, facilitate or cooperate with Vendor beyond the City Contributions.

- (ii) City agrees that Vendor shall be relieved and released from any failure to perform, or for any delay in performing, any part of Vendor's obligations under this Agreement only to the limited extent that any such breach of this Agreement by Vendor is directly caused by such failure of City to perform or provide any City Contributions pursuant to this Agreement.
- (iii) The parties acknowledge and agree that any failure or deficiency of City to provide or perform all or any part of the City Contributions shall not, in any manner or to any extent whatsoever, constitute any default or breach of either this Agreement or breach of any other duty (whether in tort, negligence, equity, or otherwise), and that any such failure by City shall not give rise to any liability of City, or of any remedy, compensation right, demand, cause of action, claim, or entitlement by Vendor, or any other person, against City.

- 1.7 The Vendor represents, warrants and covenants that the Services and Deliverables, shall perform and operate at an operational and functional level, including successfully interfacing with third party applications, that is in accordance with or exceeds the operational, technical and functional performance levels and specifications as described in the Statement of Work.
- 1.8 Acceptance Testing Plan. To assist and facilitate the City's Acceptance Testing, the Vendor shall provide the City with a recommended Acceptance testing plan ("**Acceptance Testing Plan**"). For greater certainty, the City is not bound or obligated to perform the Acceptance Testing as defined in the Acceptance Testing Plan, but may perform other verification and testing that it deems reasonable and necessary to verify and assess the applicable Deliverable.
- 1.9 Service Records. Vendor shall create, maintain and deliver (upon request) accurate, complete and current records concerning Vendor performance of the Services ("**Service Records**"). For greater certainty, Service Records shall include all operational and business records, plans, reports, analyses, all notices, technology diagnostic reports, that are required, or otherwise created, in any connection with this Agreement. All Service Records shall be reliable and shall be created and maintained in accordance with generally accepted accounting practices and principles in Canada, as such practices and principles may be applicable and published from time to time by the Canadian Institute of Chartered Accounts.
- 1.10 Service Performance Reports. On at least the timely basis as stipulated in the Statement of Work, Vendor shall create, maintain and deliver to City written reports (the "**Service Performance Report**") containing accurate, complete and current records, files, and information concerning the Services, including performance reports, change reports and reports on resource utilization that document Vendor's delivery of the Services for the previous period of time, in accordance with the reporting requirement stipulated in the Statement of Work, and that is reasonably sufficient to enable City to assess and to review Vendor's compliance with Service operational, functional and technical levels stipulated in the Statement of Work.

Insert the following subsection 1.11 if Vendor deals with the public on behalf of the City or assists in developing policies and procedures governing provision of goods and services to the public:

- 1.11 Accessibility Standards. *Provide training on the City's accessible customer service standards to all Vendor Personnel delivering the Services by, at a minimum, providing a copy of the City's Manual to all such Vendor Personnel and requiring them to review the same before, or as soon as practicable after, they start any work under this Agreement. The Vendor agrees that new training may be required from time to time should the City's Manual be amended, and shall deliver such new training in accordance with the standard of training as provided in this subsection 1.11.*

2. APPLICABLE CHARGES

- 2.1 The City shall pay the Vendor for Services at the rate(s) specified in a Statement of Work. The charges, expenses and/or fees (the "**Applicable Charges**") payable by the City for the performance of a Statement of Work authorized under this Agreement shall be determined in accordance with the following terms and conditions:

- (a) Standard Rates. All Applicable Charges for Services performed or to be performed by the Vendor or its consultants under a Statement of Work shall be identified in a particular Statement of Work or schedules thereto. The Vendor shall not be entitled to charge and the City shall not be responsible or liable for any charges, expenses and/or fees that are not identified under a Statement of Work.
- (b) Invoices. The Vendor will submit invoices of all Applicable Charges incurred by it in respect to the Services performed and Accepted as per the payment milestones described in Section 2.1(d) below (as agreed to in a Statement of Work). Any invoice submitted shall be due and payable within thirty (30) days from the date that the City verifies and then accepts said invoice.
- (c) Taxes. The Applicable Charges are exclusive of all federal, provincial, state or other sales, goods and services, use, excise, or value added taxes and other similar charges ("**Taxes**") payable by City in connection with the receipt of Services and Deliverables. All invoices provided by Vendor with respect to Applicable Charges to be paid by City will separately state and detail the amount of any Taxes that Vendor claims is payable by City in connection with this Agreement.

City shall only be responsible for those Taxes that it is legally required to pay. Vendor shall collect such Taxes from City in the same manner it collects such tax from Vendor's other customers in the ordinary course of its business and Vendor shall be solely and directly responsible for remitting such Taxes to the relevant taxing authority. Each Party will be responsible for its own income taxes, capital taxes, employment taxes, business and property taxes. If it is determined that City paid Vendor an amount for Tax that was not due, Vendor will refund the amount (plus any interest) to City.

Vendor represents, warrants and covenants to City that it is not a non-resident of Canada within the meaning of the *Income Tax Act* (Canada) and that it is duly registered for tax (including GST).

If any taxing jurisdiction imposes after the Effective Date a new sale, value-added, services, consumption, or other Tax on the provision of the Services and/or Deliverables

or any component thereof, the Parties shall cooperate in attempting to reduce the amount of such tax to the maximum extent feasible. Notwithstanding the foregoing, the Vendor shall not flow down or transfer to the City any such new sale, value-added, services, consumption, or other Tax unless legally required to do so.

- (d) Payment Milestones. The Vendor agrees that the City shall only pay Vendor the Applicable Charges that are attributable to, or associated with, any particular and specific Services and Deliverables that are stipulated to be performed and completed in accordance with the Statement of Work, upon Acceptance (as defined in Section 33.3 below) by the City of such Services and Deliverables. The failure or delay of the City to provide such written acceptance shall not result in any deemed acceptance whatsoever.
- (e) Pricing Guarantee. Vendor guarantees that it shall perform and provide the Services and Deliverables in accordance with the fees, fee rates, and pricing that are expressly set out in the Statement of Work ("**Pricing Guarantees**"). Vendor acknowledges and agrees that such Pricing Guarantees constitute a material representation and inducement that City has directly relied upon to enter into this Agreement.
- (f) Holdbacks. The City will hold back an amount equivalent to 10% of each payment for the specified Payment Milestone as a guarantee. The City will release the holdback at the end of the Warranty Period (as defined below in Section 11.2), provided that the Vendor has fully satisfied the City's requirements under this Agreement. **[INSERT if holdback applicable]**
- (g) Right of Set-Off. City shall have right of set-off in respect of Applicable Charges or compensation paid that may be subject to any abatement, reduction, set off, defence, counterclaim or recoupment of any amount due or alleged to be due by reason of any past, present or future claims of the City. Without limiting the foregoing, Vendor acknowledges City's right of set-off in which it may deduct from payments, compensation, Applicable Charges otherwise due to the Vendor, any liability, indemnity, damages, credit or compensation City may be entitled to pursuant to this Agreement, including but not limited to, on account for incompleteness of the Services.

3. CONFIDENTIAL INFORMATION AND INTELLECTUAL PROPERTY RIGHTS

- 3.1 The Vendor shall not use or disclose to a third party any confidential or proprietary information of the City, save for information disclosed to persons who need to know such information in order for the Vendor to provide the Services and the Vendor agrees that such information shall not be used for any other purpose whatsoever.
- 3.2 Neither party will gain by virtue of this Agreement any rights of ownership of copyrights, patents, trade secrets, trademarks or any other intellectual property rights owned by the other, including any Confidential Information owned by the other.
- 3.3 The City will retain exclusive ownership in all deliverables, records, information, software development, reports, innovations, processes, methods, systems, written materials, diagrams, drawings, trade-marks, logos, Service Records and Service Performance Reports (the "**Deliverables**") created under the Statement of Work. For greater certainty, the City shall own all intellectual property rights, title and interest, including any

proprietary interest or right or protection (whether by statute, common law, or otherwise) existing from time to time in a specific jurisdiction, whether registered or not, under any patent law or other invention or discovery law, copyright law, industrial design, moral rights law, confidential information law, trade-mark law, or other similar intellectual property or proprietary laws and includes legislation by governmental authorities and judicial decisions under common law or equity ("**Intellectual Property Rights**"), in any Deliverable, ideas, concepts, know how, documentation, reports, records or techniques developed or created pursuant to this Agreement or related to the Services and Vendor hereby irrevocably assigns and agrees to assign to the City all its right, title and interest in Canada, U.S. and worldwide in the Deliverables, and all Intellectual Property Rights relating thereto. Vendor shall require all other persons (including Subcontractors) to do all things reasonably necessary to protect and perfect City's ownership of Deliverables, including any filings, registrations, execution and delivery of unconditional and irrevocable, moral rights waivers which any person or individual may have in Deliverables.

- 3.4 Without limiting Section 3.2, Vendor hereby grants to City for its own internal business use and operations, a fully paid-up, royalty-free, non-exclusive, perpetual, worldwide license to use and copy any Vendor intellectual property that is (i) used in providing the Services; (ii) is necessarily required for the proper functioning of any Deliverable; or (iii) is embedded into any Deliverable, and Vendor hereby represents and covenants that Vendor has or will obtain all rights to such intellectual property so as to give effect to this Section 3.4 license and (iv) sublicense the rights referred to in this Section 3.4 to authorized representatives (including third parties), to use, or receive the benefit of the use by City.
- 3.5 Subject to the *Municipal Freedom of Information and Protection of Privacy Act*, as amended, both during and after the term of this Agreement, each of the parties agrees:
- (a) that it will be necessary for each of them to disclose or make available to each other, information that may be confidential or proprietary or may contain valuable trade secrets and that some information may already have been disclosed prior to the date hereof (the "**Confidential Information**"). The parties agree that such confidential and proprietary information are Confidential Information, as are any passwords, server logs, and all documentation or other materials provided in connection therewith.
 - (b) to use and reproduce the Confidential Information of the other party only as permitted under this Agreement or as needed to perform its duties hereunder. Except as provided for in this Agreement, each party agrees not to disclose the Confidential Information of the other party without the other party's written consent and agrees to take such care to protect the confidentiality of the Confidential Information as would be taken by a reasonable party to protect its own confidential information from disclosure. Furthermore, each party shall indemnify and save the other harmless from any losses or damages directly or indirectly caused by the disclosure of Confidential Information by the party or any of its agents, Vendors, subcontractors, employees, successors or permitted assigns.
 - (c) that use of the other party's Confidential Information in a manner contrary to the provisions of this Agreement would cause the other party irreparable harm for which money damages could not make the injured party whole and hereby

consents to the full extent that it is able to do so, to any injunctive relief entered by any court of competent jurisdiction prohibiting it from such violation of this Agreement. In addition, the breaching Party agrees that it shall not defend against, oppose or otherwise interfere with any applications by the non-breaching Party to a Court of competent jurisdiction for any equitable relief or remedy associated with any such breach of this Agreement.

- (d) That each party's rights and obligations under this Section shall survive any termination of this Agreement by either party.

3.6 Information will not be considered to be Confidential Information if it:

- (a) becomes publicly available through no fault of the disclosing party;
- (b) is lawfully received from a third-party having the right to disclose the information without restriction; or
- (c) has been independently developed without reference to the Confidential Information.

3.7 Neither party nor their respective agents or Subcontractors shall make, participate in, distribute or cause to permit to be distributed, any announcement, press release, interview, article, story, appearance, marketing material or advisement, whether in print, radio, television or any other medium or media, regarding this Agreement or the terms and conditions hereof without the other party's written consent.

4. GENERAL INDEMNITY

4.1 The Vendor shall, both during and following the Term or any Renewal Term, as defined below, of this Agreement, save harmless and fully indemnify the City and its selected officials, officers, employees, agents, representatives, successors and assigns (in this Agreement collectively called the "**Indemnified Persons**") from and against all costs, actions, suits, claims, and demands whatsoever which may be brought against or upon the City and/or any of the Indemnified Persons against any loss, costs, damages or expenses which the City and/or any of the Indemnified Persons may sustain, suffer, incur or be liable for, resulting from, arising from or in any way incidental to the City as a result of this Agreement or as a result of any negligence or wilful misconduct on the part of the Vendor and/or the Vendor's employees, workers or agents while they are engaged in providing any of the Services or any and all claims which may arise as a result of any installation or removal of hardware and/or software. Without limiting the generality of the foregoing, the Vendor shall indemnify and save harmless the City and the Indemnified Persons against all actions, suits, claims, damages, costs and liabilities arising out of or as a result of:

- (a) any breach, violation, or non-performance of the terms, covenants, representations, warranties and obligations on the part of the Vendor as set out in this Agreement;
- (b) any property damages, either real or personal and either owned by the City or others, howsoever occasioned by the Vendor or its employees or Subcontractor rendering Services under this Agreement or under any related agreement;

- (c) any personal or bodily injury to any person or persons, including death resulting at any time therefrom, howsoever occasioned by the Vendor or its employees or Subcontractor rendering Services under this Agreement or under any related agreement.

5. INTELLECTUAL PROPERTY INDEMNITY

5.1 The Vendor will defend, at its expense, any action brought against the City and/or the Indemnified Persons to the extent that the action is based on a claim that any of the Services or Deliverables or any part thereof infringes any third-party's intellectual property rights including, without limiting the generality of the foregoing, copyright, trade secret, patent or industrial design rights and the Vendor shall indemnify and hold the City and/or the Indemnified Persons harmless with respect to all resulting court costs, damages or settlements awarded against the City provided that:

- (a) the City notifies the Vendor of any matter in respect of which the foregoing may apply and of which the City has knowledge;
- (b) the Vendor has sole control over the defence, settlement or compromise of any such action as long as such defence, settlement or compromise does not place any liability or obligation on the City; and
- (c) the action is not over any content or data provided to the Vendor by the City.

5.2 If any of the Services or Deliverables or any part thereof becomes, or in the Vendor 's opinion are likely to become, the subject of a claim based on an alleged infringement or breach as aforesaid, the Vendor may, at its expense and option, with prior written notice to the City, do one of the following:

- (a) modify the applicable part of the Services or Deliverable so that there is no longer any infringement or breach, provided that such modification does not adversely affect the functional capabilities of the Service or Deliverable as set out herein or in any Statement of Work;
- (b) procure for the City the right to continue to use the applicable part of the Services or Deliverables; or
- (c) substitute for the applicable part of the Services or Deliverables with other components having a capability equivalent to the replaced part of the Services or Deliverables and which would satisfy the Vendor's obligations as set out herein or in any Statement of Work.

6. WORKPLACE SAFETY INSURANCE BOARD

6.1 Throughout the Term and any Renewal Term, as defined below, the Vendor shall remain in good standing with the Workplace Safety and Insurance Board (the "**WSIB**") and shall provide the City with a valid letter of good standing issued by the WSIB upon execution of this Agreement. The Vendor shall provide the City with a current and valid certificate of good standing as issued by the WSIB within seven (7) days upon request by the City at any time during the term of this Agreement.

7. NOTICES

7.1 Where in this Agreement any notice is required to be given or made by either party to this Agreement, it shall be in writing and is effective if delivered in person, sent by ordinary or registered mail, or by facsimile transmission or email addressed to the other party for whom it is intended at the following addresses, and any notice shall be deemed to have been given:

- (a) if delivered personally, on the date of such delivery;
- (b) if by ordinary mail, on the second business day following the date of mailing;
- (c) if by registered mail, on the day the postal receipt is acknowledged by the other party;
- (d) if by facsimile transmission or email, when transmitted (if received before 4:30pm local time at the recipient's office or failing which on the next business day).

Any notices intended for the City shall be delivered and addressed to:

City of Mississauga
[INSERT INFORMATION]
Attention:
Tel: (905) 615-3200 ext.
Fax:
Email:

Any notices intended for the Consultant shall be delivered and addressed to:

[VENDOR'S NAME & ADDRESS]
Attention:
Tel:
Fax:
Email:

The address of either party may be changed by notice in the manner set out in this section.

8. TERM

8.1 This Agreement shall have an initial term of [INSERT TERM] (the "**Initial Term**") and unless terminated earlier in accordance with the terms and conditions contained herein shall terminate on [INSERT DATE].

8.2 The Vendor shall provide the City with written notice at least [INSERT NOTICE PROVISION] days before the expiry of the Initial Term of its option to renew this Agreement for an additional one (1) year renewal period. Upon receiving notice from the Vendor, the City may, upon written notice to the Vendor provided at least [INSERT

NOTICE PROVISION] days before the expiry of the Initial Term, elect to renew this Agreement for an additional one (1) year renewal period (the "**Renewal Term**") upon the same terms and conditions contained herein.

9. TERMINATION

9.1 The following shall constitute an event of default by the Vendor hereunder, and upon the happening of any of the following events the City may upon notice to the Vendor specifying the Vendor's default, terminate this Agreement immediately and may enforce any right or remedy it may have under this Agreement or any related agreement Vendor:

- (a) If the Vendor does not fulfill its obligations to render the Services or provide the Deliverables in accordance with this Agreement or any Statement of Work, including any Performance Milestones; or
- (b) Unless otherwise stipulated in this Section 9.1, If the Vendor is in default in respect of any other material covenant provided herein or any Statement of Work and such default continues for thirty (30) days following notice thereof to the Vendor; or
- (c) If any proceeding in bankruptcy, receivership, liquidation or insolvency in commenced against the Vendor or its property, and the same is not dismissed within thirty (30) days; or
- (d) If the Vendor makes any assignment for the benefit of its creditors, becomes insolvent, commits any act of bankruptcy, ceased to do business as a going concern, or seeks any arrangement or compromise with its creditors under any statute or otherwise; or
- (e) If the Vendor or any of its Subcontractors:
 - (i) is not in compliance with all municipal laws and regulations as they pertain to the City of Mississauga in respect of the operation of its respective business;
 - (ii) is involved in judicial or arbitral proceedings against the City;
 - (iii) is involved in a claim against or by the City;
 - (iv) is charged with a statutory offence relating to the City; or
 - (v) is related to or controlled by another person to which (i), (ii), (iii) or (iv) immediately above applies;
- (f) If the City does not provide Acceptance to the Phase 1 Deliverables as stipulated in Section 1.3; or
- (g) Vendor fails to obtain Acceptance pursuant to Section 33.8.

9.2 Any termination, as described above, shall be without prejudice to any other legal or equitable remedy otherwise available to the City upon such breach or failure.

- 9.3 Without prejudice to any other rights, the Vendor may terminate this Agreement if the City is in material breach of the terms and conditions contained herein and such breach is not cured within thirty (30) days of receiving notice from the Vendor of such breach.
- 9.4 In the event that the City terminates this Agreement as provided in Section 9.1, the following shall apply:
- (a) All payments hereunder by the City to the Vendor shall cease as of the time that such termination becomes effective;
 - (b) The City may replace the Vendor from the time such termination becomes effective;
 - (c) The Vendor shall have no claim against the City except for payment for amounts owing prior to the time that such termination became effective;
 - (d) Such termination shall not relieve the Vendor from liability accrued prior to the time such termination became effective; or
 - (e) Nothing in this Agreement shall limit the rights of the City to recover damages from the Vendor.
- 9.5 Termination for Convenience. City may at any time and without cause terminate this Agreement by giving fifteen (15) days written notice of termination to Vendor without any further financial obligations or other obligation, including any further payment of any Applicable Charges, early termination fees or charges as of the date of termination except for any Applicable Charges related to Services and Deliverables actually Accepted by the City to the date of termination that are not subject to credit or set-off
- 9.6 Upon expiry or termination of this Agreement, each party shall return to the other any Confidential Information in the possession or control of such Party.

10. ACCOUNTS AND RIGHT OF AUDIT

- 10.1 The Vendor shall keep, in accordance with generally accepted accounting principles, consistently applied, such proper accounts, receipts, vouchers and other documents as will record to the satisfaction of the City, the Services performed, items purchased, disbursements made and expenses incurred in respect of a Statement of Work. *[Add in this statement if subsection 1.11 is inserted: The Vendor shall also maintain a record of all training provided to the Vendor Personnel on the City's accessible customer service standards as required under subsection 1.11, which shall include at a minimum the dates on which the training is provided and the number of individuals to whom the training is provided.]* The Vendor shall retain all such accounts, records, receipts, vouchers, records of accessible customer service training (if applicable) and other documents during the term of this Agreement and at least seven (7) years following its termination or expiry.
- 10.2 If requested by the City, the Vendor shall make available to the City such accounts, records, receipts, vouchers and other documents as the Commissioner for the City considers necessary for the purpose of substantiating the Vendor's invoices. Without limiting the generality of the foregoing, the Consultant shall furnish any required records

of accessible customer service training to the City within ten (10) business days of the City's request, unless otherwise agreed upon by the City.

- 10.3 The City may, at any time and from time to time during the Term and any Renewal Term of this Agreement and seven (7) years following its termination or expiry, audit and inspect the Vendor's accounts, records, receipts, vouchers and other similar documents relating to performance of the Services and the provision of the Deliverables and shall have the right to make copies thereof and take extracts therefrom.
- 10.4 The Vendor shall make available to the City the materials referred to in this Section 10 in order that the City may carry out audits and inspections as provided in this Section 10 and shall furnish the City and its authorized representation with all such information as the City or such representations may from time to time require with reference to such materials.

11. VENDOR'S REPRESENTATIONS AND WARRANTIES

- 11.1 The Vendor represents and warrants to and in favour of the City and acknowledges that the City is relying thereon as follows:
- (a) The Vendor has full power and authority and has obtained all necessary approvals to execute, deliver and perform this Agreement.
 - (b) The Vendor's execution, delivery and performance of this Agreement shall not constitute:
 - (i) a violation of any judgment, order or decree;
 - (ii) a material default under any material contract by which it or any of its material assets are bound; or
 - (iii) an event that would with notice or lapse of time, constitute such a default.
 - (c) Any software or hardware that forms part of the Deliverables shall not contain any clock, timer, counter, or other limiting or disabling code in its design or routine that would cause said software to be erased, made inoperable or otherwise rendered incapable of performing in accordance with the City's requirements or otherwise limit or restrict the City's ability to have and use the software.
 - (d) The obligations and Services of the Vendor hereunder will be performed in a professional manner consistent with the highest industry standards reasonably applicable to the performance of such obligations.
 - (e) All Deliverables shall provide the functionality as described in the applicable Statement of Work, shall be in good operating condition and free of defects in workmanship and function and thereafter shall operate in accordance with this Agreement, the applicable Statement of Work and any related agreement.
 - (f) The Service and/or Deliverables may contain or be derived from portions of materials provided by third-party suppliers under license to the Vendor. The Vendor represents and warrants to the City that it has the full and

unencumbered right to grant to the City such materials either through ownership or license, including updates, modifications of and/or enhancements thereto, and that the ownership, license to and use of such materials by the City in accordance with the terms of this Agreement will not violate the terms of its agreements with its third-party suppliers.

(g) The Services and/or Deliverables do not conflict with, infringe upon or violate and are not alleged by any person to conflict with, infringe upon or violate the intellectual property rights of any other person or business. In addition, there are no existing or threatened legal proceedings brought against the Vendor in respect of the Services or Deliverables.

(h) The consideration paid for the Services is the same or less than the generally available price for similar services as at the Effective Date.

11.2 Warranty on Services and Deliverables. Without limiting Section 11.1(e), Vendor agrees that it shall remain fully and solely responsible to correct any mistake, problem, defect, malfunction or deficiency such that (i) the Deliverable does not function correctly or only partially functions when compared to the requirements and specifications stated in this Agreement; or (ii) the Deliverable will not operate in the computer environment described in this Agreement or causes the hardware or software operating in that environment to fail to operate properly, detected in the Deliverables, during the Term and for a period of 90 (ninety) days after the expiration or termination of this Agreement, upon the City's request ("**Warranty Period**").

12. ENTIRE AGREEMENT

12.1 This Agreement and the related Statement of Work(s) and Appendices constitute the entire agreement between the parties with respect to the subject matter of the Agreement and supersede all previous negotiations, proposals, commitments, writings and understandings of any nature whatsoever, whether oral or written, unless they are expressly incorporated by additional reference in the Agreement.

13. INVALIDITY/SEVERABILITY

13.1 If any of the provisions contained in this Agreement is found by a court of competent jurisdiction to be invalid, illegal or unenforceable in any respect, the validity, legality or enforceability of the remaining provisions contained herein shall not be in any way affected or impaired thereby and shall continue in full force and effect.

14. AMENDMENTS

14.1 This Agreement may not be changed or amended except in writing duly executed by the duly authorized representatives of both parties.

15. SUCCESSORS AND ASSIGNS

15.1 This Agreement is binding upon and shall enure to the benefit of the parties and their respective successors and permitted assigns.

16. APPLICABLE LAW

- 16.1 This Agreement shall be governed by and construed in accordance with the laws of Ontario and federal laws of Canada applicable therein and shall be treated in all respects as an Ontario contract. The parties submit to the exclusive jurisdiction of the courts of Ontario for the resolution of any and all disputes relating to this Agreement or any of its terms. The parties have required that this Agreement and all documents relating thereto be prepared in English. Les parties ont demandé que cette convention ainsi que tous les documents qui s'y rattachent soient rédigés en anglais.

17. ASSIGNABILITY

- 17.1 The parties may not assign their rights or duties under this Agreement without the prior written consent of the other, except as provided otherwise herein.

18. FURTHER ASSURANCES

- 18.1 Each party shall do such acts and shall execute such further documents, conveyances, assignments, transfers and the like, and will cause the doing of such acts and will cause the execution of such further documents as are within its power as the other party may in writing at any time and from time to time reasonably request be done and or executed, in order to give full effect to the provisions of this Agreement.

19. CURRENCY

- 19.1 In this Agreement and any related Statement of Work, unless otherwise indicated, the word dollar and the \$ sign refer to Canadian currency. The right of the Vendor to any payment may be subject to any abatement, reduction, set off, defence, counterclaim or recoupment of any amount due or alleged to be due by reason of any past, present or future claims of the City.

20. FREEDOM OF ACTION

- 20.1 This Agreement is non-exclusive and either party may design, develop, manufacture, acquire or market competitive products or services.

21. DISPUTES

- 21.1 **Dispute** - Any dispute, controversy, claim or alleged breach arising out of or in connection with this Agreement that cannot be settled by the City's Project Manager and the Vendor's Project Manager (a "**Dispute**") shall be dealt with in accordance with this Section 21.
- 21.2 **First Level Escalation** - In the event of any Dispute, the Dispute shall first be referred to the City's Purchasing Agent or designate and the Vendor's [Insert Title] ("**First Level**").
- 21.3 **Second Level Escalation** - Should the Dispute not be resolved within five (5) days of its referral to the First Level, the Dispute will be escalated to the City's Director of Information Technology or designate and the Vendor's [Insert Title] ("**Second Level**").

- 21.4 **Third Level Escalation** - Should the Dispute not be resolved within five (5) days of its referral to the Second Level, the Dispute will be escalated to the City's Commissioner of Corporate Services & Treasurer or designate and the Vendor's [Insert Title] ("**Third Level**").
- 21.5 **If No Resolution** - Should the Dispute not be resolved within fifteen (15) days of its referral to the Third Level, either party may exercise its rights available at law.
- 21.6 **Admissibility** - All negotiations and settlement discussions to resolve a Dispute shall be treated as compromise and settlement negotiations between the parties and shall not be subject to disclosure through discovery or any other process and shall not be admissible into evidence in any proceeding.
- 21.7 **Continued Performance** - Except where clearly prevented by the nature of the Dispute or in the event of the City's non-payment of any amounts due and owing to the Vendor, the City and the Vendor agree to continue performing their respective obligations under this Agreement while a Dispute is subject to the terms of this Section 21.7.

22. INSURANCE

- 22.1 At its own expense, the Vendor must provide and maintain appropriate insurance for a prudent operator in its line of business for the duration of the Agreement and any renewals thereof, and with insurers acceptable to the City's Risk Manager. In particular, the Vendor shall provide proof of the following insurance coverage:
- (a) Commercial General Liability - Two million dollars (\$2,000,000.00) per occurrence with a maximum deductible of \$25,000.00, in respect to the repair and replacement of all work the Vendor undertakes under the Agreement against claims for personal injury, death or property damage or loss, indemnifying and protecting the City and the Vendor, their respective employees, servants, agents, Vendors, invitees or licensees. The certificate of insurance shall specifically state that the City is added as an additional insured under the policy,
 - (b) Auto Liability - Two million dollars (\$2,000,000.00) per occurrence with no annual aggregate.
 - (c) Errors and Omissions Insurance - Two million dollars (\$2,000,000.00) with a maximum deductible of \$25,000.00,
 - (d) Crime Insurance - One hundred thousand dollars (\$100,000.00) employee dishonesty coverage with not less than \$50,000.00 broad form money and security coverage.
 - (e) Property Insurance - In such amounts as required to adequately cover the property and equipment, and other such property in the care, custody and control of the Vendor. The policy shall contain a waiver of rights of subrogation against the City.
 - (f) Workers' compensation insurance to meet fully the requirement of any compensation act, plan or legislative enactment applicable in connection with the death, disability or injury of Vendor's officers, agents, servants or employees

arising directly or indirectly out of the performance of the Services herein undertaken.

- (g) All insurance policies shall remain valid and unchanged during the Term and any Renewal Term of this Agreement. Any changes to limits and coverage must be submitted for the City approval, any unauthorized changes may constitute automatic termination of the Agreement at the City's sole discretion.
- (h) Upon receipt of notification by the City to do so, the Vendor must supply a Certificate of Insurance indicating compliance with the specified requirements, prior to execution of this Agreement, and in the event of any/all changes in coverage including expiry, which may occur prior to completion of this Agreement.
- (i) Such policies must not be terminated, cancelled or materially altered unless written notice of such termination, cancellation or alteration is given by the insurers to the City, at least sixty (60) days before the effective date thereof.

23. OCCUPATIONAL HEALTH AND SAFETY ACT REQUIREMENTS

- 23.1 Vendor shall conform to and enforce strict compliance with the *Occupational Health and Safety Act* of Ontario. During the course of performing its obligations under this Agreement and any related agreement, Vendor shall, in a timely manner, furnish the City with a copy of all correspondence, reports, compliance orders or changes or the like under the *Occupational Health and Safety Act* and its regulations that apply to any of the activities conducted under the terms of this Agreement.

24. TIME

- 24.1 Time shall be of the essence in all respects of this Agreement.

25. COMPLIANCE WITH LAWS AND REGULATIONS

- 25.1 The Vendor shall comply with all municipal, provincial and federal laws and regulations including all City by-laws (including but not limited to the City's Respectful Workplace Statement of Commitment which may be found on www.mississauga.ca/tendersandbids), privacy and security laws and the Vendor shall obtain and at all times maintain any and all permits, consents, certificates or licences necessary for the Vendor's provision of the goods and services and the performance of its obligations hereunder.

26. LIMITATION OF LIABILITY

- 26.1 IN NO EVENT SHALL THE CITY, ITS DIRECTORS, OFFICERS, EMPLOYEES, AGENTS, VENDORS OR AFFILIATES, BE LIABLE FOR ANY CLAIM FOR: (A) INDIRECT, SPECIAL, THIRD PARTY, CONSEQUENTIAL OR PUNITIVE DAMAGES; or (B) DAMAGES FOR LOSS OF PROFITS OR REVENUE.

27. SURVIVAL

- 27.1 All of Sections 3, 4, 5 and 10, 26 and specific Sections 9.4 and 9.56 shall survive the termination or expiration of this Agreement.

28. ORDER OF PRECEDENCE

28.1 In the event any conflict between the main body of this Agreement, any Statement of Work, Schedules and Appendices, the provisions of same shall prevail in the following order of precedence: the main body of the Agreement, then the Schedules and then the Appendices.

29. Recitals

29.1 The Recitals form an integral part of this Agreement.

30. Calculations

30.1 Wherever in this Agreement reference is made to a calculation to be made or an action to be taken in accordance with generally accepted accounting principles, such reference will be deemed to be to the generally accepted accounting principles from time to time approved by the Canadian Institute of Chartered Accountants, or any successor institute, applicable as at the date on which such calculation or action is made or taken or required to be made or taken.

31. Contract Change Management

No change to the scope of this Agreement shall be made except as follows:

- (a) either party may submit to the other party in writing, changes, amendments, additions, modifications or enhancements to this Agreement ("**Change**");
- (b) In the event the City proposed the Change, the Vendor shall provide to the City in writing within five (5) business days of receipt, of such change request, a detailed description of the Change to be made and, if so, specifying the estimated cost and time required to implement the Change and the impact, if any, of the Change on the Applicable Charges ("**Change Request**"). In the event the Vendor proposed the Change, the Vendor shall provide to the City in writing along with such Change proposal, a Change Request;
- (c) If the contents of a Change Request is acceptable to the City, then the parties shall set out and describe, in reasonable and necessary written detail, such Change in the form of an amendment to this Agreement that is to be agreed to and which shall be executed and delivered by authorized signing officer(s) on behalf of each party (a "**Change Order**") to authorize the Change. The parties shall use their commercially reasonable efforts to negotiate and attempt to settle all Change Orders expeditiously and not in bad faith. Change Orders signed by the authorized representative of each party shall amend this Agreement in accordance with Section 14 hereof, and the parties shall implement and perform such Change in accordance with the provisions of such Change Order; and
- (d) Any Change Order which has financial implications for the City requires the written approval of the City's authorised agent to be binding on the City.

32. Key Personnel

- 32.1 The persons stipulated in Schedule B are personnel whom the Parties recognize and agree are material and fundamental to the provision of Services in accordance with this Agreement ("**Key Personnel**"). Any replacement or substitution of a new individual for any Key Personnel as advised by Vendor from time to time in writing shall only occur with the prior written approval and consent of the City. City shall be entitled to review, in advance of their assignment to the Services, the resumes of all proposed replacement Key Personnel.
- 32.2 If City determines, acting fairly and reasonably, that the performance or conduct of any Key Personnel employed or retained by Vendor to perform any Services is unsatisfactory for any reason or is not in compliance with the provisions of this Agreement, City shall so notify Vendor in writing, with reasonable information concerning such determination, and upon City's request, Vendor shall replace such individual promptly with another individual who is at least as well qualified and experienced as the individual being replaced.

33. Acceptance Testing.

- 33.1 Upon the completion of each Deliverable, Vendor shall provide City with written notice of such completion and readiness for review, inspection, testing, verification, and acceptance of same by City.
- 33.2 Upon the issuance of the written notice by Vendor pursuant to Section 33.1, City shall, for the purpose of validating such completion and readiness, conduct reasonably diligent empirical verification, assessment and testing thereof that City reasonably determines is necessary and appropriate in relation to such Deliverable ("**Acceptance Testing**").
- 33.3 When City conducts such Acceptance Testing and determines and declares such acceptance of such Deliverable, which shall be referred to as "**Acceptance**".
- 33.4 At any point during the Acceptance Testing, City shall have the right, in City's absolute discretion, to declare deemed Acceptance of any Service that is the subject of Acceptance Testing notwithstanding the failure of City to have completed such Acceptance Testing as at the date of such declaration.
- 33.5 Upon completion of Acceptance Testing, City shall provide Vendor with written notice concerning the results of the Acceptance Testing. The notice shall state either: (i) full Acceptance of the relevant Deliverable; (ii) conditional Acceptance and the nature of the deficiencies to be remedied; or (iii) rejection and the reasons for such rejection including the nature of the deficiencies to be remedied. City's failure to deliver any such notice after completion of the applicable Acceptance Testing Period shall not result in deemed Acceptance.
- 33.6 In the event that Acceptance Testing results in City providing its conditional Acceptance or rejection, Vendor shall remedy the deficiencies within a commercially reasonable period of time and to inform City when such remedies have been completed. City shall then inspect and perform Acceptance Testing pursuant to this Section 33. If City determines that the relevant deficiencies have not been remedied and/or the relevant conditions have not been satisfied, the cycle of conditional Acceptance, and re- Acceptance Testing, will continue until such time as City either provides its Acceptance, or City otherwise claims that

Vendor is in breach of this Agreement concerning such Acceptance Milestone performance obligation or duty.

33.7 Vendor agrees that the aggregate number of days for the completion of all attempts to achieve the correction, completion, delivery and Acceptance of a Deliverable shall not exceed ten (10) business days from the day that City provided its conditional acceptance or rejection pursuant to Section 33.5.

33.8 Vendor agrees and confirms that its failure to obtain Acceptance on any Deliverable in accordance with the time period stipulated in Section 33.7 after it is re-delivered to City pursuant to Section 33.6 hereof shall allow the City to immediately terminate this Agreement.

34. No Implied Terms

No implied representations, warranties, covenants, terms or obligations of any kind by, or on behalf of, any party shall arise from anything in this Agreement and only the express terms and conditions contained in this Agreement shall be binding upon the parties.

35. No Waiver

No waiver of or consent to depart from the requirements of any provision of this Agreement shall be binding against either Party unless it is in writing and is signed by the Party giving it. Such waiver or consent shall be effective only in the specific instance and for the specific purpose for which it has been given and shall not be deemed or constitute a waiver of any other provisions (whether or not similar) nor shall such waiver constitute a continuing waiver unless otherwise expressly provided.

36. No Deemed Acceptance

Notwithstanding any other provision in this Agreement except for Section 33.4, there shall be no deemed acceptance on behalf of the City.

37. Remedies Cumulative

The right and remedies of the Parties hereunder are cumulative and are in addition to, and not in substitution for, any other rights and remedies available at law or in equity or otherwise. No single or partial exercise by a Party of any right or remedy precludes or otherwise affects the exercise of any other right or remedy to which that Party may be entitled.

IN WITNESS WHEREOF, this Agreement has been read, understood, and signed by duly authorized officials of the Vendor and the City.

[INSERT VENDOR'S NAME]

**THE CORPORATION OF THE CITY OF
MISSISSAUGA**

By: _____

Name:

I have authority to bind the Vendor.

By: _____

Name:

I have authority to bind the City.