
CITY OF KELOWNA
MEMORANDUM

Date: January 16, 2006
File No.: 0760-20
To: City Manager
From: Director of Recreation Parks and Cultural Services
Subject: Early Partnering Agreement for the design of the Mission Recreation Park Aquatic Centre

RECOMMENDATION:

THAT City Council approve the Early Partnering Agreement with PCL Constructors Westcoast Inc. as attached to the January 16, 2006 report from the Director of Recreation Parks and Cultural Services;

AND THAT the Mayor and Clerk be authorized to execute the Agreement on behalf of the City.

BACKGROUND

The City previously conducted a proposal call for the design and construction of the Facility, but we were unsuccessful in securing a partner because of the perceived financial risks associated with the project. These risks are primarily due to rapid inflation in the present construction market and the City's desire to pass on risk to a design/build partner. The proposal call process was concluded and the City then entered into negotiations with PCL to create an Early Partnering Agreement.

PCL was selected to negotiate a partnership because they were evaluated to be the best qualified team available to enter into a design/build contract with the City. This negotiated Early Partnering Agreement is a mechanism for the City and PCL to advance the design work for the facility and to lead toward a design/build contract. It will result in a detailed understanding of the features and appearance of the building; a detailed cost analysis; and a fixed price proposal from PCL to take the project to completion.

The recitals at the beginning of the attached Agreement (immediately following the Table of Contents) provide an excellent summary of the purpose and approach to early partnering. The terms of the Agreement are summarized as follows:

The Agreement:

1. creates a mechanism for the City to purchase design services for the Facility from PCL and to obtain a fixed price proposal for the completion of detailed designs and construction of the Facility;
2. establishes the PCL design team

3. requires the City and PCL to bring all key design professionals, the City, the operator, and the City's cost consultant into an integrated design team and to work as a team to find the best design solutions for the facility;
4. makes PCL accountable for the work of its design team;
5. creates a process for the City to either accept a design, or require changes to the design at certain design milestones;
6. includes an opportunity for public review and comment on designs;
7. sets the project budget at \$30M. and provides a process for City Council to adjust the project budget if it wishes to do so;
8. provides for cost analysis by PCL and the City's cost consultant to be reconciled and for total project costs to be calculated at certain design milestones;
9. states the intent but no obligation for the City and PCL to enter into a conventional design/build contract after City acceptance of a fixed price proposal to complete the project;
10. provides for early termination of the Agreement;
11. provides a mechanism for the City to pay for the design services that it receives;
12. provides for City ownership of the designs created through this process
13. requires any or all contracts between PCL and its design team to be assigned to the City if the Early Partnering Agreement terminates.

The Early Partnering Agreement provides the best available approach to obtaining design services and a fixed price for the completion of the project. It reduces risks to both the City and PCL by advancing the designs to a level where there is a much higher degree of cost certainty. The Integrated Design Team approach will bring highly qualified design professionals into a process intended to trigger innovative design solutions, cost control, and to meet the City's design goals for the facility. As stated previously to Council, we are attempting to develop this facility during a time of very rapid construction cost inflation.

Given inflation that has occurred since our cost projections were completed, we expect challenges in delivering everything we want within the \$30M project budget (\$32.9 total budget including fit up and contingency). If the Integrated Design Team determines that the design cannot be constructed within the budget, it will seek City approval for design changes or budget changes. The City may at its discretion, seek design changes, approve budget changes, or terminate this Agreement.

David Graham
Director of Recreation Parks and Cultural Services

:
Attachment

cc Director of Financial Services
 Civic Properties Manager
 Purchasing Manager
 Program Development Manager

EARLY PARTNERING AGREEMENT

**LEADING TO A
DESIGN/BUILD CONTRACT FOR THE
MISSION RECREATION PARK AQUATIC CENTRE**

BETWEEN

CITY OF KELOWNA

AND

PCL CONSTRUCTORS WESTCOAST INC.

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THIS EARLY PARTNERING AGREEMENT is dated for reference the _____ day of _____, 2006,

BETWEEN:

THE CORPORATION OF THE CITY OF KELOWNA having an address at 1435 Water Street, Kelowna, British Columbia, V1Y 1J4

(the “City”)

AND:

PCL CONSTRUCTORS WESTCOAST INC., a corporation incorporated under the laws of Alberta and having an address at 2365 Gordon Drive, Kelowna, British Columbia, V1W 3C2

(“PCL”)

WHEREAS:

- A. The City and PCL wish to enter into this Agreement to provide for the design of an aquatic recreation facility (the “**Facility**”), to be constructed on the Mission Recreation Park site and, when completed, to be known as the “Mission Recreation Park Aquatic Facility”.
- B. The objective of this Agreement is to collaborate in bringing together the collective expertise of PCL and the City to design a high quality project with innovative architecture and creative construction techniques which when combined will support the effective and efficient use of capital.
- C. The City and PCL have agreed to utilize an integrated team process to ensure that the design of the Facility will be developed using a spirit of consensus. Each member of the Integrated Design Team (the “**IDT**”) will be encouraged to provide meaningful contributions, within the scope of their individual expertise, that will enable the team to achieve its stated objective.
- D. The members at the IDT, representing a diverse group of professionals, will work in a supportive environment to challenge the criteria and problem solve in a way that engages collaboration and accommodation while avoiding confrontation. The members will further employ best practices that offer win/win solutions to both parties.
- E. The design development efforts will recognize and be guided by the constraints of the project pro-forma budget. When adjustments to the program requirement become necessary the members of the IDT will work towards compromise using a good, better, best criteria.
- F. The parties recognize the integrated design process is intended to be carried on having consideration of the following guiding principles as the foundation of this Agreement:
 - (i) the IDT will utilize an open and transparent process;
 - (ii) there will be continuous engagement by all members on the IDT;
 - (iii) decisions will be made by consensus using a good/better/best approach;
 - (iv) stakeholders will receive regular communications updating the progress of the Project (as defined herein);

- (v) risk on the Project must be acceptable to all parties hereto;
 - (vi) decisions must be made in a timely fashion; and
 - (vii) the final design of the Facility must be a design and business success for all parties.
- G. Recognizing that LRG (as defined herein) has the proven expertise to manage the operation of facilities similar to that of the Facility, the City intends to contract with LRG to manage the operation of the Facility on the City's behalf, as provided for under the terms of a separate operating agreement.
- H. The City and PCL are entering into this Agreement in order to provide the process and legal framework that will govern the completion of the transactions contemplated hereunder, and in order to identify the various steps and conditions precedent that must be fulfilled.

NOW THEREFORE, the City and PCL agree as follows:

1. Definitions

In this Agreement, unless otherwise defined, the following words and phrases shall have the following meanings:

- (a) **“Accepted Cost Projection”** means the project cost projection prepared by the IDT and accepted by the City as the cost projection for the Project. Once the City accepts the Schematic Design Estimate it becomes the Accepted Cost Projection;
- (b) **“Accepted Design”** means the design submitted to the City by the IDT and accepted by the City as the design for the Project;
- (c) **“Accepted Performance Specification”** means the performance specifications included within the Accepted Design;
- (d) **“Agreement”** means this Early Partnering Agreement;
- (e) **“Approved Fixed Price”** means the Fixed Price Proposal once accepted in writing by the City;
- (f) **“C.C.A.#14”** means the most recent version of Canadian Construction Association Document #14 as of the date hereof;
- (g) **“City Council”** means the City Council of the City of Kelowna;
- (h) **“Design/Build Contract”** means the proposed contract between the City and PCL that is anticipated to be entered into following completion of the Design Development Stage and approval by City Council, for the completion of design, construction and commissioning of the Facility;
- (i) **“Design Development Stage”** means the second stage of design of the Facility where:

- (i) one Option has been selected by the City and is developed to a point where Project cost, within a risk margin of 5%, can be estimated;
- (ii) geotechnical Site issues are known and the structural engineer has developed an economic and functional response to these soil conditions and this has been confirmed by the geotechnical engineer;
- (iii) all of the functional aspects of the building are firm, and the building form and shape has been agreed as well as a finite Project budget; and
- (iv) value engineering has been done on all aspects of the Project to ensure that it is sustainable, capital cost and life cycle cost effective and that working drawing details can be simple, but effective and can be executed without schedule delays and without compromising the costs;
- (j) “**Facility**” has the meaning ascribed to such term in recital A;
- (k) “**FINA**” means the Federation Nationale de Natation, the international governing body for swimming, water polo, diving and synchronized swimming;
- (l) “**Fixed Price Proposal**” has the meaning ascribed to such term in clause 11;
- (m) “**IDP**” means the integrated design process as described in recital F;
- (n) “**IDT**” has the meaning ascribed to such term in recital C;
- (o) “**LRG**” means the Leisure Recreation Group, a private company which will be contracted by the City to participate on the IDT and to operate the Facility once completed;
- (p) “**Options**” means Schematic Design options;
- (q) “**Peer Review Process**” means the process described in clause 9;
- (r) “**Project**” means the total project including all the design, construction and commissioning work required to complete the Facility and deliver the same fully operational;
- (s) “**Project Budget**” means the budget approved by the City for the Project;
- (t) “**Project Team**” means the team of consultants and professionals assembled by PCL to participate on the IDT to prepare the Accepted

Design and Accepted Performance Specifications;

- (u) “**Quantity Surveyor**” means the City’s Quantity Surveyor and cost consultant for the project, specifically the firm of Spiegel Skillen and Associates;
- (v) “**RFP**” means the Request for Proposals previously issued by the City, a copy of which is attached as Appendix 2;
- (w) “**Schematic Design Stage**” means the initial stage of design of the Facility where the IDT has:
 - (i) confirmed the program of accommodation;
 - (ii) developed various Options that respond to the program of accommodation; and
 - (iii) reviewed the Options and is ready to move forward with a chosen Option that accommodates the program of accommodation, responds well to the Site and Site constraints, and provides a functional and aesthetic response to the Facility;
- (x) “**Schematic Design Estimate**” is a preliminary estimate of the Project costs used to assist in keeping the Project on budget and given to the City upon completion of the schematic design in the Design Development Stage. Once the City accepts this estimate, it becomes the Accepted Cost Projection;
- (y) “**Site**” means the Mission Recreation Park site, as more fully set forth in the RFP; and
- (z) “**Term**” has the meaning ascribed to such term in clause 12.

2. Appendices

The following Appendices are attached to and incorporated into this Agreement:

- Appendix 1 - Composition of Project Team
- Appendix 2 - Request for Proposals
- Appendix 3 - Authorization to Perform Services

3. Purpose and Uses

- (a) The purpose of the Facility is to offer the community of Kelowna a full range of aquatic facilities, including, without limitation:

an Olympic size main tank which conforms to FINA specifications for aquatic sports;

a major leisure waterpark with a wide variety of interactive water features and wave pool;

a large fitness facility;

associated amenities including, without limitation, hot pools, steam rooms, change rooms; and

related commercial spaces,

all of which is to be accessible by people with disabilities.

(b) Following the completion of design, construction and commissioning of the Facility, the Facility is intended to be operated by LRG to provide the City with the following services:

(i) a venue for community based recreational and leisure programming including, without limitation, learn-to-swim lessons for all ages and abilities, aqua-fitness programs, scuba/snorkel diving, physical rehabilitation and therapy swim and exercise programs, public play swimming, lane/fitness swim training, canoe/kayak programs, springboard diving, body surfing, water safety programs, life saving programs, underwater hockey, water sliding, teen splash dancing, circuit training, weight training, exercise programs, pilates, spin aerobic classes, public/team meeting, childcare, relaxing and other public recreational programs or activities; and

(ii) a venue for water sport training, events and competitions such as springboard diving, speed swimming, synchronized swimming, water polo, underwater hockey, kayaking, and scuba/snorkel diving.

4. City Approval of Design of Facility

(a) The City's representative (appointed pursuant to clause 29) will be responsible for obtaining the acceptance of City Council to the Accepted Design and of the Accepted Cost Projection or the acceptance of City Council to changes to the Project Budget.

(b) Prior to City Council approval, the City will obtain stakeholder and public input as required by the City to be obtained within the constraints of the schedule for the design of the Facility developed by the IDT. IDT members will assist with the presentation and interpretation of the previously prepared design materials to the public and the collection of public feedback.

5. City Approval of Project Team

(a) The Project Team will consist of those individuals listed in Appendix 1.

PCL may propose alternate team members for the Project Team and the City may either accept or reject each proposed team member, in its sole discretion. If the City rejects an alternate Project Team member as proposed by PCL it must provide a reason in writing to PCL as to why the alternate was rejected.

- (b) PCL agrees and covenants that it will ensure that the contracts for services with the design professionals who are members of the Project Team and who are performing any part of the Services (as defined herein) will assign appropriate responsibility for those designs and all associated liabilities back to those professionals.

6. Services Provided by PCL

- (a) PCL will undertake the design of the Facility through the IDP.
- (b) PCL shall provide the professional design services (the “**Services**”) at such prices as may be agreed to between the parties and such times as required for PCL to perform its obligations under this Agreement including, without limitation, preparation of the documents referred to in clause 8 and conducting the Peer Review Process.

7. Integrated Design Process

- (a) The IDT will be comprised of the Project Team, representatives of the City as required by the City, and may also include, in the City’s sole discretion a representative of LRG, the Quantity Surveyor and the City’s Director of Recreation Parks and Cultural Services.
- (b) Tim Spiegel will call and chair meetings of the IDT.
- (c) The IDT will use the description of the Project set out in the RFP, and such other parts of the RFP as the IDT may decide, as a reference document in the IDP.
- (d) The IDT will develop a time schedule and list of required participants for regular IDT meetings.
- (e) The primary role of the IDT is as follows:
 - (i) commence a review of the City’s functional requirements leading to a firm list of functional spaces and functional requirements for the Facility which will form the basis of the Schematic Design Stage and the Design Development Stage;
 - (ii) PCL will prepare a predesign order of magnitude cost estimate that will be compared to an updated existing estimate that has been prepared by the Quantity Surveyor. If this process develops a cost

estimate for the Facility that is beyond the Project Budget, then the IDT will identify items in the cost estimate that can be eliminated or postponed or reduced in scope and/or value and these adjustments will be presented to the City for review and approval or rejection;

- (iii) fulfill the role and responsibilities of the IDT pursuant to the Schematic Design Stage;
- (iv) during the Schematic Design Stage, work towards a schematic design from which a detailed Schematic Design Estimate can be prepared that will accurately, and within a risk margin of $\pm 10\%$, confirm a possible value for the Design/Build Contract;
- (v) review the Schematic Design Estimate and associated documents to report to the City as to whether the schematic design can be approved to proceed, if the Facility can be designed and built in accordance with the City's requirements, and within the Project Budget. If this process develops a budget that is beyond the Project Budget, then the IDT will identify items that can be eliminated or postponed or reduced in scope and/or value and these adjustments will be presented to the City for review and approval or rejection;
- (vi) undertake all work and perform all services required to complete the Design Development Stage;
- (vii) work together on a constructive and non-confrontational basis to achieve a design and capital cost for the Facility and to provide technical information to assist the City in life cycle costing for the Facility that will respect all of the City's requirements (including, without limitation, the Accepted Performance Specifications);
- (viii) coordinate and work with the Peer Review Team, as required; and
- (ix) such other matters required to be performed by the IDT pursuant to the terms of this Agreement.

8. Documents to be Prepared During Schematic Design and Design Development Stages

- (a) The documents expected to be produced by PCL during the Schematic Design Stage include:
 - (i) Architectural:
 - Preliminary floor plans indicating the planned layout, general partition layout, doors, and other interior finishing

- Elevations/perspectives showing the design with clear definition of different types of exterior wall finishes
 - Outline specification for exterior wall and roof assemblies
 - Outline specification for interior construction and finishes
- (ii) Structural:
- Structural system description, or sketch plans identifying structural system
 - Preliminary structural grid layout
 - Preliminary slab and beam sizing/structural steel weights (if applicable)
 - Preliminary foundation loads, indication of any known foundation or subsurface conditions
- (iii) Mechanical & Electrical:
- Outline system descriptions
 - Outline site servicing requirements
- (iv) Site Development:
- Existing topographical layout
 - Preliminary site plan
 - Geotechnical report (if available)
 - Indication of any known site or subsurface conditions;
- (b) The documents expected to be produced by PCL at the Design Development Stage include:
- (i) Architectural:
- Final floor plans showing partition layout and differentiating between different types of partition types, doors, preliminary door and hardware schedule
 - Elevations/perspectives clearly indicating the actual materials and their extent, as well as proposed wall assemblies, types of glazing etc.

- Typical building sections with preliminary finished floor elevations
- Clearly articulated specification for exterior wall and roof assemblies
- Clearly articulated specification for interior construction finishes including room finishing schedule, proposed hardware and specialty types etc.

(ii) Structural:

- Structural system description and grid layout as well as design plans, sections and elevations, types of materials, structural and reinforcing steel weights, and full description of structural system to allow for detailed structural pricing
- Slab and beam sizing, structural steel weights (if applicable)
- Clearly articulated foundation description and foundation footing sizes including required reinforcing steel requirements, foundation loads, and a clear indication of any known foundation or subsurface conditions that will have an effect on the project cost

(iii) Mechanical & Electrical:

- Line diagrams of electrical servicing requirements, clearly articulated description of electrical requirements, systems, lighting etc.
- Mechanical proposed HVAC duct distribution and duct sizing, equipment types and sizes, clear articulation of the proposed control system, dehumidification system, and other specialty systems. Clearly articulated description of the fire suppression system, and the plumbing layout and fixture types proposed for the Project
- Clearly articulated site servicing requirements including incoming power, sanitary and storm sewer and incoming water service

(iv) Site Development:

- Existing topographical layout

- Clearly articulated site plan showing all proposed roads, paths, lighting, irrigation, landscaping etc.
- Geotechnical report (mandatory) with recommendations and with a clearly articulated response from the structural engineer to the geotechnical requirements
- Clear indication of any known site or subsurface conditions;

9. Peer Review Process

PCL will conduct a peer review process (the “**Peer Review Process**”) involving professionals selected from among the North America wide PCL network who are not members of the Project Team. The Peer Review Process includes periodic due diligence regarding important design considerations, building functionality and construction costing analysis, and technical information to assist the City in life cycle costing, during both the Schematic Design Stage and the Design Development Stage but in any event prior to PCL making a Fixed Price Proposal. PCL’s statement regarding how the Peer Review Process will function is as follows:

- (a) A dynamic and talented team with experience in design development and construction of large aquatics and public spectator facilities will be assembled by PCL involving no less than four individuals. The peer review team (the “**Peer Review Team**”) will include the above PCL experts and two experts representing the City.
- (b) The Peer Review Team will meet with the IDT at the early stages of the Project and provide comments to the plan and approach for the Project. The Peer Review Team will act solely in a review and suggestion mode to ensure that valuable lessons learned on similar projects are communicated to the IDT. At least two sessions will be held involving both the Peer Review Team and the IDT, with the Peer Review Team remaining available, on a as-needed basis, as the Project moves through construction and the commissioning phases.

10. Project Budget and Cost Estimates

- (a) The total Project Budget including all fees, disbursements, soft costs, hard costs, design costs, profits and overheads, as approved by City Council, is not to exceed \$30 million, unless a change in the Project Budget is approved by City Council.
- (b) Milestones for completion of cost estimates are the completion of the pre-design order of magnitude estimate (referred to in clause 7(e)(ii)), the completion of the Schematic Design Stage and the completion of the Design Development Stage.

- (c) The City's cost analysis and PCL's cost analysis for the Project will be fully detailed and fully available to each other as required or requested throughout the IDP.
- (d) Any variances between the City's cost analysis and PCL's cost analysis shall be identified and the City and PCL will attempt to reconcile the variance and reach a single agreed upon Schematic Design Estimate.
- (e) Upon achieving each milestone referred to in clause 10(b) above, the City must, in its sole discretion either:
 - (i) approve in writing the design prepared during such stage and instruct the IDT to proceed with the next stage of design (which, in the case of completion of the Design Development Stage Design, will mean that the City may proceed to approve the design being adopted as the Accepted Design and approve the Schematic Design Estimate, as such may be revised pursuant to the process in this clause 10, being adopted as the Accepted Cost Projection and proceed to obtain City Council approval for the same);
 - (ii) seek changes in the scope of the Project, the design and resulting cost projections for the Project;
 - (iii) proceed to seek approval from City Council to change the Project Budget; or
 - (iv) terminate this Agreement.

11. Fixed Price Proposal

- (a) After completion of the Design Development Stage and approval by the City of the Accepted Design, PCL will make a fixed price proposal (the "**Fixed Price Proposal**") for the completion of the design, construction and commissioning of the Project. If the Fixed Price Proposal is for the Accepted Design, is within the Project Budget and approved by City Council, then the City and PCL will use reasonable commercial efforts to finalize the Design/Build Contract, based on C.C.A.#14, as amended by such supplementary general conditions as may be agreed to between the parties.
- (b) The Fixed Price Proposal will include all material and supply costs, demolition and construction costs, commissioning costs, labour costs, professional consulting and design costs incurred by PCL, overhead, administrative costs, profit, contingencies, bonding and insurance costs, permit fees, furnishings and equipment, and taxes (excluding GST which will be extra) necessary for the design, construction and commissioning of the Facility, to the standards contained in the Accepted Design and Accepted Performance Specifications. The Fixed Price Proposal will not

include furnishings and portable equipment.

- (c) The obligations of PCL under the Design/Build Contract may be required to be guaranteed by PCL's parent company or bonded, as may be required by the City in its sole discretion.
- (d) The City shall be responsible for arranging all necessary construction loans or other financing for the construction of the Facility (excluding construction loans or financing required by PCL).

12. Term and Termination of this Agreement

- (a) This Agreement shall remain in full force and effect from the date of its execution until completion of the Services required to be provided by PCL and completion of PCL's obligations pursuant to the terms hereof, unless earlier terminated (the "**Term**").
- (b) If PCL fails to perform any of their obligations under this Agreement and to remedy the failure within thirty (30) days of written notice to do so given by the City, the City shall be entitled to terminate this Agreement.
- (c) If the City fails to perform any of its obligations under this Agreement and to remedy the failure within thirty (30) days of notice to do so given by PCL, PCL shall be entitled to terminate this Agreement.
- (d) If the City and PCL are unable to reach agreement on a Fixed Price Proposal, the City or PCL may terminate this Agreement upon notice to the other party.
- (e) The City shall be entitled to terminate this Agreement, in its sole discretion, on 30 days written notice to PCL.
- (f) Should this Agreement be terminated before entering into the Design/Build Contract, the City has the right in its sole discretion to either continue the Project using any method, professional service provider or contractor of its choice or terminate the Project. The City is under no obligation to proceed with the Project with PCL or to accept the Fixed Price Proposal until and unless City Council approves of the Approved Design and the parties successfully negotiate and execute the Design/Build Contract.
- (g) PCL agrees and covenants that all contracts between PCL and the outside consultants, design professionals and companies who are members of the Project Team shall be fully assignable to the City. Upon termination of this Agreement, the City may, in its sole discretion, require that PCL assign its interest in any such contract to the City at no additional cost to the City and PCL acknowledges and covenants to execute any such assignment.

- (h) In the event that the City causes PCL to assign contracts with outside consultants, design professionals or companies on the IDT to the City, the City may seek changes in the terms of such contracts, such terms to be negotiated directly with those outside consultants, design professionals and companies.
- (i) Subject to clause 25, any work produced by any member of the IDT or the Peer Review Team, whether such member is an employee, consultant or contractor of PCL or otherwise, during the term of this Agreement in relation to the Project and paid for by the City in accordance with this Agreement shall be the sole property of the City.

13. Implementation Schedule

- (a) The parties agree that they will negotiate in good faith for the purpose of establishing a timetable for the completion of the Accepted Design, receiving a Fixed Price Proposal from PCL, agreeing to a Fixed Price Proposal, and to finalize the Design/Build Contract.
- (b) The target date for City acceptance of the Fixed Price Proposal is May 31, 2006.
- (c) The target total completion date for the Facility is the spring of 2008.
- (d) The parties acknowledge that dates referred to in this clause are target dates only and that the parties are not bound by such dates or such timetable.

14. Utilization of the Request For Proposals

The parties acknowledge that the RFP is not a binding document but rather intended to be used as a reference document by PCL and the IDT in the development of the design of the Facility.

15. Agreement Subject to *Local Government Act*

The City and PCL acknowledge and agree that this Agreement must comply with the terms of the *Local Government Act*, the Community Charter and other applicable laws. The City and PCL further agree that if a court of competent jurisdiction holds that this Agreement or any part thereof is contrary to the *Local Government Act*, the Community Charter or other applicable law the parties shall in good faith negotiate an amendment to this Agreement, as may be required, in order to limit the City's obligations to those permitted in law, and to the extent reasonably possible, to provide that this Agreement as amended reflects the intention of the parties as to the essential business terms of this Agreement, as expressed hereunder.

16. City Discretion to Approve

The City may in its absolute and unfettered discretion approve, reject or request changes to the Accepted Design submitted for approval by the IDT.

17. Reporting

- (a) PCL covenants and agrees to keep a record of all fees and costs incurred by the Project Team and the Peer Review Team throughout the Term and report such fees and costs on a monthly basis to the City's representative (appointed pursuant to clause 29).
- (b) PCL covenants and agrees to provide to the City, from time to time, a record of fees and costs incurred during such period as may be requested in writing by the City, provided that PCL will provide such record not later than 7 days after a request from the City.

18. Covenants Re: Approved Design and Approved Performance Specifications

PCL will perform the Services in a manner consistent with the highest level of care and skill ordinarily exercised by other firms providing similar services in similar circumstances at the time the Services are performed. PCL agrees and covenants that the Accepted Design (including the Accepted Performance Specifications) will fully comply with all requirements of the British Columbia Building Code, (including, without limitation, any approved equivalencies to or under the British Columbia Building Code) and all other applicable laws, statutes, Codes, Bylaws, regulations and rules governing the design and construction of buildings of a similar nature to the Facility in British Columbia including, without limitation, those of the Architectural Institute of British Columbia.

19. Dispute Resolution

Any dispute or disagreement of any kind (a "**Dispute**") arising with respect to any matter related to this Agreement or the transactions contemplated by it which cannot be resolved among the representative of the City and PCL within 7 days, or such longer period of time as the parties may agree, of the Dispute first arising between the parties shall be determined as follows:

- (a) The City and PCL will first attempt to resolve the Dispute through good faith negotiations between the City manager (or other person designated by such person) on behalf of the City and the chief operating officer of the western building region for PCL Constructors Inc. on behalf of PCL (or other person designated by such person) and shall commence such negotiations within a reasonable period of time (in any event no later than 14 days) after either the City or PCL issues a written request to do so.
- (b) Subject to clause (c) below, if the Dispute is not resolved within 21 days after commencement of the negotiations under clause (a) above, the City

or PCL may terminate this Agreement on a further 10 days notice to the other party.

- (c) If the Dispute relates to fees and/or costs incurred by PCL in performing the Services, whether or not such fees and/or costs have been approved by the City or invoiced to the City, which is not resolved within 21 days after commencement of the negotiations under clause (a) above, then:
- (i) the Dispute shall be determined by arbitration, by a single arbitrator, in accordance with the *Commercial Arbitration Act* (British Columbia) (the “Act”);
 - (ii) if the parties are unable to agree upon an arbitrator, then the arbitrator shall be appointed in accordance with the Domestic Commercial Arbitration Rules of Procedure of the British Columbia International Arbitration Centre and will be a qualified arbitrator experienced in matters of the nature of this Agreement who is disinterested in the Dispute;
 - (iii) the City and PCL will each bear their own costs in connection with the arbitration, provided that, if the arbitrator finds that either of them has acted unreasonably, the arbitrator may, in the discretion of the arbitrator, award costs against them;
 - (iv) the place of arbitration will be Vancouver, British Columbia, and the arbitration will be conducted in the English language;
 - (v) the determination of the arbitrator shall be final and binding upon the parties and there shall be no appeal therefrom, including, without limitation, any appeal to a court on a question of law, question of fact, or a question of mixed law and fact and the parties shall sign a written agreement to exclude the jurisdiction of the court under Sections 31, 33 and 34 of the Act after the arbitration is complete;
 - (vi) any order of an arbitrator may be entered with a court of competent jurisdiction for the purposes of enforcement; and
 - (vii) all aspects of the arbitration will be kept confidential to the fullest extent permitted by law and no individual shall be appointed as arbitrator unless he or she agrees in writing to be bound by this dispute resolution provision.

20. Costs and Expenses of Services

- (a) PCL shall submit to the City (with a copy to the Quantity Surveyor) an authorization to perform Services in the form attached as Appendix 3 (an “Authorization”) for fees and costs for Services at such prices as have

been agreed to between the parties in order that such Services be pre-approved by the City prior to any Services referred to on the particular Authorization are rendered.

- (b) Upon receipt of an Authorization, the City shall approve such Authorization within 7 days or shall advise PCL of its objections to the Authorization and its reasons for so objecting.
- (c) Invoices for fees and costs approved by the City on an Authorization are to be submitted to the City (with a copy to the Quantity Surveyor) after milestones have been reached. The first milestone is the pre-design order of magnitude estimate (referred to clause 7(e)(ii)), the second milestone is the completion of the Schematic Design Stage and the third milestone is the completion of the Design Development Stage.
- (d) Authorizations submitted to the City by PCL shall include such fees and costs and directly related disbursements incurred by the members of the Project Team and PCL members of the Peer Review Team and their respective support staff as required based on the Services to be completed.
- (e) The Quantity Surveyor shall, within 5 days of receipt of an invoice, certify the amount of the invoice for payment by the City or shall advise the City in writing if it is unable to so certify.
- (f) Following certification of an invoice by the Quantity Surveyor, the City shall pay such invoice in accordance with the City's normal procedures for accounts payable, but not to exceed 15 days from certification by the Quantity Surveyor of the invoice or, if any portion of an invoice is disputed, pay such undisputed portion of the invoice and proceed to resolve the dispute for the disputed portion of the invoice in accordance with clause 19.
- (g) Only the fees and costs relating to Services at such prices as have been agreed to between the parties and for which an Authorization has been approved in writing by the City will be paid by the City except such additional Services as approved by the City in writing on an Authorization in advance of the provision of said additional Services.
- (h) Should this Agreement terminate for any reason at any time prior to entering into the Design/Build Contract, then the fees and costs for Services rendered by PCL under the terms of this Agreement up to the date of termination which have been approved by the City on an Authorization and which have reasonably been incurred (and could not have otherwise been avoided) by PCL will be paid, unless otherwise disputed by the City.
- (i) If the City elects not to proceed with the Project following completion of the Design Development Stage, then PCL shall be entitled to submit to the

City (with a copy to the Quantity Surveyor) one invoice for Surplus Fees and Costs, provided that PCL has advised the City in advance of incurring such Surplus Fees and Costs and further provided that such Surplus Fees and Costs have been reported to the City by PCL on a monthly basis or as otherwise requested by the City, in accordance with clause 17. Upon receipt of the invoice for Surplus Fees and Costs, the provisions of clause 20(e) and (f) shall apply. In no event shall such invoice be for an amount in excess of 10% of the aggregate amount of all Authorizations approved by the City. For the purposes of this clause 20(i) only, “**Surplus Fees and Costs**” means fees and costs which have been reasonably incurred (and could not have otherwise been avoided) by PCL for Services which have been approved by the City on an Authorization but which are in excess of the maximum amount specified on such Authorization.

- (j) Notwithstanding any other provision herein but subject to clause 20(i), in no event shall the City be obligated to pay any amount for Services approved by the City on an Authorization in excess of the maximum amount specified on such Authorization.

21. No Assignment

PCL will not assign, delegate or subcontract (except as specifically contemplated herein) its interest in this Agreement or any part thereof without the written consent of the City, which consent may be unreasonably withheld.

22. Notice

- (a) It is hereby mutually agreed that any notice required to be given under this Agreement will be deemed to be sufficiently given if:

- (i) delivered at the time of delivery; and
- (ii) mailed from any government post office in the province of British Columbia by prepaid registered mail addressed as follows:

if to the City:

1435 Water Street
Kelowna, B.C. V1Y 1J4

Attention: David Graham

if to PCL:

2365 Gordon Drive,
Kelowna, B.C. V1W 3C2

Attention: Kevin Kean

- (b) Unless otherwise specified herein, any notice required to be given under this Agreement by any party will be deemed to have been given if mailed by prepaid registered mail, or sent by facsimile transmission, or delivered

to the address of the other party set forth on the first page of this Agreement or at such other address as the other party may from time to time direct in writing, and any such notice will be deemed to have been received if mailed or faxed, 72 hours after the time of mailing or faxing and, if delivered, upon the date of delivery. If normal mail service or facsimile service is interrupted by strike, slow down or other cause, then a notice sent by the impaired means of communication will not be deemed to be received until actually received, and the party sending the notice must utilize any other such services which have not been so interrupted or must deliver such notice in order to ensure prompt receipt thereof.

23. Time

Time is of the essence of this Agreement.

24. Binding Effect

This Agreement will enure to the benefit of and be binding upon the parties hereto and their respective heirs, administrators, executors, successors.

25. Intellectual Property

- (a) PCL shall retain copyright in the design for the Facility produced pursuant to this Agreement subject to the provisions herein. The City shall have the irrevocable, perpetual, royalty-free right and license to use the design and other work product for the Project, and all purposes related to the Project, and to carry out from time to time additions, modifications and alterations to the design, including during subsequent phases of the Project, without the consent or approval of PCL. PCL hereby waives and releases any requirement for such consent or approval. PCL warrants that it has full right and authority to grant and confer upon the City the right and license as previously described. PCL shall obtain such assignments, waivers and releases from its personnel, consultants and contractors, in favour of PCL and the City as may be required to give effect to the foregoing. PCL shall not use the design of the Facility or any component thereof at another location or for another project except with the prior consent in writing of the City.
- (b) Subject to clause (a) above, all Project-related documents in both hard copy and electronic format in the possession of the PCL, are the property of the City. This includes all correspondence, inspection reports, contracts, tendering documents, photographs, site instructions, notes and other documents. Copies of these documents shall be made available to the City upon request, whether before or after completion or termination of the Project or this Agreement. PCL shall not destroy its Project files and documents and files without first notifying the City and providing it with the opportunity to take possession of these files.

26. Confidentiality

- (a) The information, records, books and data to which each party and/or such party's respective representatives are given access will be used by such party solely for the purpose of performing its obligations pursuant to this Agreement and, and will be treated on a confidential basis. Without the prior written consent of the City, PCL will not communicate the details of any negotiations in respect of this Agreement, except to its professional advisors (and then only on a confidential basis). Unless otherwise agreed by the City in writing, all announcements and all communications with third parties regarding the Project and this Agreement will be made solely by the City. All inquiries from third parties regarding the Project and this Agreement will be referred to the City for reply.
- (b) PCL acknowledges that the City is subject to, and must comply with the *Freedom of Information and Protection of Privacy Act* (British Columbia).

27. Entire Agreement

This Agreement when executed will set forth the entire agreement and understanding of the parties as at the date hereof with respect to the subject matter hereof and supersede all prior agreements and understandings among the parties with respect to the subject matter hereof.

28. Relationship of the Parties

PCL shall act solely as an independent contractor in performing the Services and its obligations under this Agreement and nothing contained in this Agreement shall constitute or shall be deemed in any way to create an employment, agency, partnership, joint venture or other legal relationship between the City, on the one hand, and PCL on the other.

29. Representatives of the Parties

The City appoints David Graham, Director of Recreation, Parks and Cultural Services, and PCL appoints Kevin Kean as that party's representative for the purpose of coordinating all matters and obligations of the parties as required by this Agreement. Approval in writing of a matter (other than matters that are determined by the IDT, the Project Team or the Peer Review Team) by the representative of a party shall be deemed to be approval by such party. Each party will advise the other party in writing of the name, telephone number and fax number of its representative and each party may change its representative from time to time by notice in writing to the other.

30. Amendment

No amendment, waiver, termination or variation of the terms, conditions, warranties, covenants, agreements and undertakings set out herein will be of any

force or effect unless they are in writing and duly executed by all parties to this Agreement.

31. Law Applicable

This Agreement is to be construed in accordance with and governed by the laws applicable in the Province of British Columbia.

32. Survival

Notwithstanding the formation of this Agreement for any reason whatsoever, the provisions of clauses 5(b), 9, 12(g),(h) and (i), clauses 18, 25, 26, 27, 31 and this clause 32 shall survive any such termination.

IN WITNESS WHEREOF the parties hereto have set their hands and seals as of the day and year first above written.

THE CORPORATION OF THE CITY OF KELOWNA

By: _____
Mayor

By: _____
City Clerk

PCL CONSTRUCTORS WESTCOAST INC.

By: _____

APPENDIX 1
COMPOSITION OF PROJECT TEAM
(See Attached)

APPENDIX 2
REQUEST FOR PROPOSALS
(See Attached)

APPENDIX 3

AUTHORIZATION TO PERFORM SERVICES # _____

To: _____

This authorization to perform Services is given pursuant to clause 20 of the Early Partnering Agreement dated _____ day of _____, 2006 between the Corporation of the City of Kelowna (the "City") and PCL Constructors Westcoast Inc. ("PCL"), for the design of the aquatic recreation facility to be constructed on the Mission Recreation Park site, in the City of Kelowna and to be known as the "Mission Recreation Park Aquatic Facility".

Services authorized by this Notice:

Approximate time period in which Services to be performed: _ to _____

Maximum amount for which the City shall be liable to PCL for Services authorized pursuant to this notice:

\$ _____

Maximum amounts per previous notices: \$ _____

Total amount for which the City shall be liable to PCL to date: \$ _____

DATE: _____ REQUESTED BY: _____
(PCL)

Distribution :

(The City's Authorized Signature)

APPENDIX 1

Composition of Project Team:

Design Build Contractor

PCL Constructors Westcoast Inc.
Kelowna, BC
Kevin Kean, Regional Manager

Architectural Design Consultants

Cannon Design
Vancouver, BC
J. Terry Barkley, Vice President, Aquatics

Meiklejohn Architects Inc.
Kelowna, BC
Jim Meiklejohn, Principal

Structural Engineer

Read Jones Christoffersen
Victoria, BC
Bruce Johnson, Managing Principal

Mechanical Engineer (HVAC)

STANTEC Consulting
Vancouver, BC
Steve Woodmass, Mechanical Manager

Mechanical Engineer (Plumbing & Aquatic Systems)

STANTEC Consulting
Vancouver, BC
Ron Davis, Principal

Electrical Engineer

Keen Engineering Co. Ltd.
Vancouver, BC
Ahmet A. Ulker, Manager, Electrical Engineering

Civil Engineer

CTQ Consultants Ltd.
Kelowna, BC
Gordon. W. Savage, Principal

Geotechnical

Golder Associates Ltd.
Kelowna, BC
Gerald Imada, Associate Geotechnical Engineer

Aquatic Toy and Equipment Consultant

Whitewater West Industries Ltd.
Richmond, BC
Kristin Turcotte, Manager, Sales
Offices in Kelowna and Vancouver

