

September 18, 2024**Addendum No. 03****File Reference Number: RFP 2024 020****Title: Rail Infrastructure Engineering and Consulting Services****RE: Clarifications/Questions**

Please refer to the following information/clarification:

Item 1: Would the ONTC consider removing clause 69 from the draft MSA in Part 5 of the RFP material?**Answer:** ONTC will not agree to remove clause 69 from the MSA in Part 5 of the RFP package.**Item 2:** Regarding clause 72 of the draft MSA in Part 5:

- (a) Can a \$10M aggregate value be assigned for (a) and (b) since unlimited insurance cannot be granted?
- (b) For (c) the \$2M mentioned in writing does not match the \$10M numerically shown within parentheses. Is the annual aggregate amount only meant to equate to \$10M after a 5-year term?

Answer: Clause 72 (a), (b) and (c) shall be amended to read as follows:

- (a) *Commercial General Liability Insurance with a limit of not less than five million dollars (\$5,000,000) inclusive per occurrence, **with an aggregate limit of ten million dollars (\$10,000,000)**, with no limitations on or exclusions from coverage arising from working on or around railway property, including environmental and pollution liability, bodily injury, personal injury, death and damage to property, including loss of use thereof, in a form satisfactory to ONTC and endorsed to provide "Ontario Northland Transportation Commission" with not less than thirty (30) days' notice, in advance, of any cancellation, change or amendment restricting coverage and including "Ontario Northland Transportation Commission" as an additional insured; and,*

- (b) *Automobile Liability Insurance with a limit of not less than two million dollars (\$2,000,000) inclusive per occurrence, **with an aggregate limit of ten million dollars (\$10,000,000)** including bodily injury, death and damage to property, endorsed to provide “Ontario Northland Transportation Commission” with not less than thirty (30) days’ notice, in advance, of any cancellation, change or amendment restricting coverage and in the following forms: standard owner’s form automobile policy providing third party liability and accident benefits insurance and covering licensed vehicles owned or operated by or on behalf of the Consultant, and standard non-owned automobile form policy including standard contractual liability endorsement.*
- (c) *Professional Liability Insurance with a limit of not less than **ten million dollars (\$10,000,000)** inclusive per occurrence; and subject to an annual aggregate of not less than **ten million dollars (\$10,000,000)**”*

Item 3: On page 278 of 316 of the PDF of the RFP, we find Part 4 Reference: Is this the form for the project sheets? If not, could you please clarify how many project sheets you expect, as there is no mention of this in the RFP?

Answer: No, references are separate from project profiles. Project profiles are to be included in qualitative proposal and it is expected Respondents will provide as many projects of similar size and scope as they deem necessary to appropriately present their experience.

Item 4: If we have a subcontractor, can we submit projects from our subcontractor as main projects of our offer and have them considered in the scoring?

Answer: Projects from Respondents and any Subcontractors of the Respondent can be included.

Item 5: Do you expect a minimum or a maximum number of projects that we present to you?

Answer: Project profiles are to be included in qualitative proposal and it is expected Respondents will provide as many projects of similar size and scope as they deem necessary to appropriately present their experience.

Item 6: At the page 276 of 316 of the PDF, there is a Subconsultants chart to fill where we should write the % contract value, do you have a maximum of the % for the implication (contract value) of the sub?

Answer: There is no maximum percent of the contract value.

Item 7: The definition of “Background Intellectual Property” puts at risk the entirety of the Consultant’s IP portfolio unless the Consultant can affirmatively demonstrate its ownership through written records. The Consultant is not able to subject the entire company’s intellectual property portfolio to this standard. Can ONTC review and amend the definition of the “Background Intellectual Property”?

Answer: ONTC is willing to delete the words “through written records” in the definition of Background Intellectual Property.

Item 8: The definition of Work Product includes “Background Intellectual Property.” While that definition indicates that Background Intellectual Property used/incorporated/required for use of the Services is licensed to ONTC, Article 39 conveys total ownership of the Work Product (including the Background Intellectual Property) to ONTC. This is a patent ambiguity, and we suggest that it should be corrected. Please advise if ONTC will correct this definition.

Answer: Section 39 will be amended to read as follows:

39. *Intellectual Property Rights. With the exception of the Background Intellectual Property that shall be licensed to ONTC pursuant to section 41, upon receipt by the Engineering Consultant of the final payment for a Mandate, all rights to the Intellectual Property in the Work Product for that Mandate, unless approved by ONTC in writing to the contrary, shall vest in ONTC and is the sole and absolute property of ONTC as and when created. The Engineering Consultant hereby irrevocably assigns and conveys, and agrees to assign and convey, without further consideration, all right, title and interest in and to the Intellectual Property in the Work Product, in perpetuity and throughout the world, to ONTC and its successors and assigns*

Item 9: Article 41 provides a license to the entirety of Consultant’s extensive IP portfolio to the extent ONTC requires it to use the Work Product for any reason, rather than a limited license to its Background Intellectual Property that is specifically incorporated into the Work Product. This would make the entirety of the Consultant’s intellectual property portfolio open to ONTC, for free—even if that Background Intellectual Property was not provided to ONTC during the scope of work of this Agreement, which is not reasonable. Can ONTC review and amend Article 41?

Answer: ONTC is willing to delete the words “as is required for the use of the Intellectual Property in the Work Product” in paragraph (a) of section 41 and replace it with the wording used in the definition of Background Intellectual Property, namely “*to the extent such Background Intellectual Property incorporates ONTC provided Intellectual Property or ONTC Confidential Information or is part of the Work Product*”.

Item 10: Article 66 (c) imposes indemnification obligations based on third-party claims of infringement when the Work Product and its use by ONTC infringes on IP rights, rather than indemnifying ONTC when the Work Product is used by ONTC in the manner reasonably intended and without combination with other technology/intellectual property that that was not provided by the Consultant. However, the Consultant cannot indemnify ONTC if it becomes subject to an infringement claim because ONTC used the Work Product for another purpose without verifying that use with the Consultant, or because ONTC combined it with another technology that was not reasonably contemplated by the scope of work of this agreement. Please advise if ONTC is open to reword this clause to remove the obligation for third-party claims of infringement?

Answer: ONTC is not willing to remove the indemnification obligations regarding third-party infringement. Work Product should not expose ONTC to third party infringement claims based on change of use. ONTC is willing to add in the following language at the end of paragraph (c): *“except to the extent that such infringement can be directly attributed solely to modifications to the Work Product made by ONTC after the delivery thereof without first obtaining the consent of the Consultant.”*

Item 11: Can ONTC please clarify and confirm the details around subcontractors and whether they need to have exclusive agreements with the consultant's proposal. 'Item 3' in the Addendum No. 2 references subcontractors being able to pursue opportunities not related to RFP 2024 020 whereas 'Item 7' in the same addendum identifies that a subcontractor is part of the Respondents team and as such can only be a part of one submission under this RFP.

This question specifically refers to subcontractors that are used on a task-by-task basis (i.e. surveying, Geotech, specialized services) vs a subcontractor that would be a joint venture scenario.

Answer: Such discretion will be exercised reasonably where there is known scarcity in the pool of qualified technical personnel for specific task-based subcontracts.

This Addendum hereby forms part of the RFP.

Regards,

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