

# *Environmental Due Diligence*

## *Working with Environmental Consultants*

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DAVIES

# Working with Environmental Consultants

- Regardless of who retains consultant to conduct ESA and/or audit, other party should negotiate to have approval over consultant chosen. Similarly, party who did not retain consultant should negotiate to be permitted to rely on consultant's report
- Request proposal from consultant outlining (i) scope of services, (ii) estimated costs, (iii) schedule of completion of services and (iv) any liability cap. If you have not worked with consultant before, request (i) examples of facilities that prospective consultant has audited/assessed in past and (ii) references who are familiar with consultant's work at similar sites
- While most reputable consultants present unbiased review of property or operation, remember that consultant is generally working for just one party. Be aware, therefore, of "loyalties" consultant may have to other party
- All parties should understand legal significance of, and potential risk associated with, preparing written documentation of possible non-compliance or off-site issues
- Consultant's boilerplate terms and conditions often limit consultant's liability under contract to cost of contract or some other limited amount. At a minimum, consultant's liability insurance should be higher of \$1,000,000 or applicable limits under consultant's professional liability insurance – read fine print

# Fine Print - Example #1

Consultant's proposal was prepared for consideration of Client only. Its contents may not be used or disclosed to any party without prior written consent from Consultant

Liability of Consultant or our officers, directors, shareholders or staff will be limited to lesser of \$1,000,000 or damages incurred by Client

# Fine Print - Example #2

**Indemnification by Consultant** – Consultant agrees to indemnify Client and its officers, directors and employees from and against all claims, damages, losses or expenses (including but not limited to reasonable legal fees) arising from personal injury, death or damage to third-party property to extent that all claims, damages, losses or expenses are finally determined to result directly from Consultant's negligence. Such indemnification, as limited by Limitation of Liability, shall be Client's sole and exclusive remedy against Consultant

**Limitation of Liability** – Client agrees to limit liability of Consultant, its affiliates, and their respective employees, officers, directors, agents, consultants and subcontractors to Client, its employees, officers, directors, agents, consultants and subcontractors, whether in contract, tort or otherwise, which arises from Consultant's acts, negligence, errors or omissions, such that total aggregate liability of Consultant to all those named shall not exceed Fifty Thousand Dollars (\$50,000) or Consultant's total fee for Services rendered under Agreement, whichever is greater

# Fine Print - Example #3

**Reliance Letter:** Notwithstanding any statements in report(s) to contrary, Consultant hereby authorizes Lender to rely on report as if report was addressed directly to Lender, provided that Lender hereby irrevocably and unconditionally covenants and agrees that it is bound by limitation and that it will not under any circumstances make any demands or claims, initiate any suits, actions or other proceedings or seek any form of compensation from or against Consultant that would result in Consultant having greater liability than agreed between Consultant and Client in Agreement

**Agreement:** To maximum extent permitted by law and notwithstanding and superseding anything to contrary in Agreement:

- Aggregate liability of Consultant arising in connection with Agreement is limited to (i) amount of professional fees paid to Consultant pursuant to Agreement up to \$100,000, plus (ii) 10% of such fees paid in excess of \$100,000; provided that in no event will Consultant's aggregate liability exceed \$1,000,000; and
- Any claim, action or proceeding against Consultant in connection with Agreement must be made within 12 months of earlier of completion of services and termination of Agreement

# Fine Print - Example #4

Reliance agreement and parties' reliance on report is conditional upon parties agreeing to:

- Terms, conditions and limitations stipulated in contract(s)/agreement(s) with Client and those stipulated in report
- Relying on report for express and sole purpose of financing involving site
- Having no greater rights than those of Client as contained in contract/agreement with Client and those in report, with consultant's total aggregate liability to parties not to exceed \$2,000,000



# Fine Print

## Authorization to Proceed and Consulting Services Agreement

\_\_\_\_\_(Client) and Golder Associates Ltd. (Golder) agree that the following terms and conditions will apply to any services, including subsequent services and charges, collectively ("Services") to be provided by Golder pursuant to Proposal No. \_\_\_\_\_ dated \_\_\_\_\_ (collectively the "Agreement").

1. **Standard of Care - Services performed by Golder will be conducted in a manner consistent with that level of care and skill customarily exercised by other professionals customarily practicing under similar conditions in the same locality, subject to the laws and financial, physical or other constraints applicable to the Services. No warranty, express or implied is made.**

2. **Invoicing and Payment Terms - Unless otherwise specified in the proposal, Golder will submit monthly invoices to Client and a final bill upon completion of Services. Client shall remit to Golder within ten (10) days of receipt of invoice of any dispute with the invoice and the parties shall promptly resolve any claimed items. Full payment is due prior to delivery of Golder's final deliverable. Payment on undischarged invoice amounts is due upon receipt of invoice by Client and it shall be paid due thirty (30) days from the date of the invoice. Client agrees to pay a finance charge of one and one-half percent (1-1/2%) per month (18% per annum), or the maximum rate allowed by law, on past due accounts. If payment remains past due sixty (60) days from the date of the invoice, then Golder shall have the right to suspend or terminate all Services under this Agreement, without prejudice or penalty. Client will pay all reasonable authorization and other suspension or termination costs. Client agrees to pay all legal and collection costs incurred by Golder in pursuit of past due payments. Where the cost estimate for the Services is "not to exceed" a specified sum, Golder shall notify Client before such limit is exceeded, and shall not continue to provide Services beyond such limit unless Client authorizes an increase in the amount of the limitation. If a "not to exceed" limitation is broken down into budgets for specific tasks, the task budget may be exceeded without Client authorization so long as the total limitation is not exceeded.**

3. **Changes - Client and Golder recognize that it may be necessary to modify the scope of Services, schedule, and/or cost estimate proposed in this Agreement. Such changes shall change the Services, schedule, and/or the cost, as may be equitable under the circumstances. If after a good faith effort by Golder to negotiate modifications to the scope of Services, schedule, and/or cost estimate, an agreement has not been reached with the Client, then Golder shall have the right to terminate this Agreement, without prejudice or penalty, upon written notice to the Client.**

4. **Delays and Force Majeure - If site or other conditions prevent or inhibit performance of Services or if unavoidable hazardous waste activities or conditions are encountered, Services under this Agreement may be delayed. Client shall not hold Golder responsible for delays or delays in performance caused by acts or omissions of Client, its subcontractors, governmental authorities, regulatory agencies, civil or labour unrest, acts of God, natural or man-made disasters, or the Internet, Golder's electronic, telecommunications or hosting services or any other events that are beyond the reasonable control of Golder. In the event of any such delay, the contract completion date shall be extended accordingly and Client shall pay Golder for Services performed for the delay (as measured on a daily basis) reschedule delay charges. Delay charges shall include personnel and equipment rescheduling and/or rescheduling adjustments and all other related costs incurred including but not limited to, labour and material escalation, and extended overhead costs, attributable to such delays. Delays in excess of thirty (30) days within the scope of this Article shall, at the option of either party, make this Agreement subject to termination or to renegotiation.**

5. **Independent Judgments of Client - If the Services include the collection of samples and data, then Golder's performance of the Services is subject to Client's acceptance of all Subsurface Risk (as all risks being more fully described in Article 12, Subsurface Risk). Golder will not be responsible for the independent conclusions, interpretations or opinions of Client, or others, relating to the Services. Under no circumstances do Golder's Services include making any recommendations or giving any advice as to whether Client should or should not proceed with any transaction regarding any site related to the Services. Client assumes all responsibility and risk associated with decisions it makes based on the Services.**

6. a) **Indemnification by Golder - Golder agrees to indemnify Client and its officers, directors, and employees from and against all claims, damages, losses or expenses (including but not limited to reasonable legal fees) arising from personal injury, death, or damage to third-party property to the extent that all claims, damages, losses or expenses are not attributable to negligence to result directly from Golder's negligence. Such indemnification, as limited by Article 7 (Limitation of Liability), shall be Client's sole and exclusive remedy against Golder.**

b) **Indemnification by Client - Client shall, at its expense, defend, indemnify and hold harmless Golder and its subcontractors, consultants, contractors, officers, directors and employees from and against all claims, damages, losses and expenses, including but not limited to reasonable attorney's fees, court and arbitration costs, arising out of or resulting from the Services of Golder, including but not limited to claims made by third parties, or any claims**

against Golder arising from the acts, errors or omissions of Client's employees, agents, contractors and subcontractors or others. To the fullest extent permitted by law, such indemnification shall apply regardless of breach of contract or strict liability of Golder. Such indemnification shall not apply to the extent that such claims, damages, losses or expenses are finally determined to result directly from Golder's negligence.

7. **Limitation of Liability - Client agrees to limit the liability of Golder, its affiliates, and shall respect its employees, officers, directors, agents, contractors and subcontractors ("Golder Group") to Client, its employees, officers, directors, agents, consultants and subcontractors, whether in contract, tort, or otherwise, which arises from Golder's acts, negligence, errors or omissions, such that the total aggregate liability of the Golder Group to all those named shall not exceed Fifty Thousand Dollars (\$50,000) or Golder's total fee for the Services rendered under this Agreement, whichever is greater. Neither party shall be responsible to the other for lost revenues, lost profits, cost of capital, claims of contractors, loss of data or any other special, indirect, consequential or punitive damages.**

8. **Insurance - Golder maintains insurance coverage with the following limits:**
- a) Workers' Compensation (statutory limits)
  - b) Automobile Liability: \$1,000,000
  - c) Commercial General Liability:
    - Each Occurrence: \$1,000,000
    - Policy Aggregate: \$2,000,000
  - d) Professional Liability Insurance:
    - Any One Claim: \$1,000,000
    - Policy Aggregate: \$2,000,000

9. **Professional Work Product - The Services provided by Golder are intended for one time use only. All documents, including but not limited to, reports, plans, designs, boring logs, field data, field notes, laboratory test data, calculations, and estimates and all electronic media prepared by Golder are considered as professional work product (the "Documents"). Golder retains all rights to the Documents. Client understands and acknowledges that the Documents are not intended or represented by Golder to be suitable for reuse by any party, including but not limited to, the Client, its employees, agents, subcontractors or subcontract owners or any portions of a specific project not covered by this Agreement or on any other project, whether Client's or otherwise, without Golder's prior written permission. Any reuse unauthorized by Golder will be at Client's sole risk.**

10. **Data and Information - Client shall provide to Golder all reports, data, studies, plans, specifications, drawings and other information ("Project Information") which are relevant to the Services. Golder shall be entitled to rely upon the Project Information provided by Client or others, and Golder assumes no responsibility or liability for the accuracy or completeness of such or the impact any inaccurate Project Information may have on Golder's Services.**

11. **Right of Entry - Client will provide for the right of entry for Golder, its subcontractors, and all necessary equipment in order to complete the Services under this Agreement. If Client does not own the site, Client must obtain permission and execute any required documents for Golder to enter the site and perform Services. It is understood by Client that it is the normal course of work where surface damage may occur, the restoration of which is not part of this Agreement.**

12. **Subsurface Risks - Special risks, including but not limited to injury to underground structures or pipelines and unsuitable soil conditions, occur whenever engineering or related disciplines are applied to identify subsurface conditions. Even a comprehensive sampling and testing program implemented in accordance with a professional Standard of Care may fail to detect actual conditions. The environmental, geological, petrochemical, geotechnical, hydrogeological and other conditions that Golder intends to exist between and beyond sampling points may differ from those that actually exist.**

13. **Disposal of Samples, Materials and Contaminated Equipment - All samples obtained pursuant to this Agreement remain the property and responsibility of Client. Uncontaminated soil and rock samples or other specimens may be disposed of thirty (30) days after submission of the directly related work product, due pursuant to the proposal. All contaminant samples, materials and equipment (containing or potentially containing hazardous constituents), including but not limited to soil corings, contaminated purge water, and/or other environmental samples, shall be retained by Golder for proper disposal. Alternate arrangements to be made with Client with proper disposal of such equipment, materials and/or samples may be made at Client's direction and expense.**

## Authorization to Proceed and Consulting Services Agreement

14. **Control of Work and Job-Site Safety - Golder shall be responsible only for the activities of its employees and subcontractors. Golder's Services under this Agreement are performed for the sole benefit of the Client and no other entity shall have any claims against Golder because of this Agreement or the performance or non-performance of Services hereunder. Golder will not direct, supervise or control the work of other consultants and contractors or their subcontractors, except as job site safety is concerned. Golder is responsible only for the health and safety of its employees and subcontractors. Nothing herein shall be construed to release Client or any other consultants or contractors from their responsibilities for maintaining a safe job site. Golder shall not advise on, issue directions regarding, or assume control over safety conditions and programs for others at the job site.**

15. **Public Responsibility - Golder will endeavor to alert Client to any matter of which Golder becomes aware and believes requires Client's immediate attention to help protect public health and safety, or which Golder believes requires Client to notify others, or to otherwise comply with applicable codes, standards, regulations or ordinances. If Client declines to change Golder's recommendations in these respects, Golder shall determine in its sole judgment if it has a duty to notify public officials, and Golder shall have the right to immediately terminate this Agreement upon written notice to the Client and without penalty.**

16. **Notification and Discovery of Hazardous Materials - Prior to commencing the Services and as part of Project Information defined in Article 9, Data and Information, Client shall furnish to Golder all documents and information known to Client that relate to past or existing conditions of the site and surrounding area, including the history, location, quantity, nature or characterization of any hazardous materials or suspected hazardous materials or substances on-site. Golder may rely on such information and documents. Client hereby warrants that, if it knows or has any reason to believe or suspect that hazardous materials may exist at the project site, it has so informed Golder. Client recognizes that hazardous materials or suspected hazardous materials may be discovered on the project site property or on surrounding properties.**

17. **Termination - Either party may terminate this Agreement as a result of a material breach of the other party if the other party does not commence and continue to cure the breach within thirty (30) days of receipt of written notice of the breach from the non-breaching party. In the event of termination, Golder shall be paid for Services performed to the termination notice date, reasonable termination expenses, and a portion of its anticipated profits not less than the percentage of the contract services performed as of the termination notice date. Golder may complete such analyses and records as are necessary to complete its files and may also complete a report on the Services performed to the date of notice of termination or suspension. The amount of termination or suspension shall include all direct costs of Golder in completing such analyses, records and reports.**

18. **Intellectual Property - To the extent that the Services involve Golder providing Client with the right to use or access proprietary Golder software, programs, information management solutions, testing services, technology, information or data ("Golder Products"), Golder grants Client, during the term of the project a non-exclusive, non-transferable, non-assignable license to use the Golder Products for Client's internal purposes, solely in connection with the Services. Except for the limited license, Golder expressly reserves all other rights in and to the Golder Products. To the extent that the Services involve Client providing Golder with the right to use or access proprietary Client software, programs, technology, information or data ("Client Products"), Client grants Golder a perpetual, non-exclusive, non-transferable, non-assignable, royalty free worldwide license to use and access the Client Products as necessary to provide Client with Services. Golder shall own all Intellectual Property (as hereinafter defined) associated with the Services and the Golder Products together with any modifications, updates or enhancements to said Intellectual Property and grants its right or license to such**

Intellectual Property to Client except as expressly provided in this Agreement. Client conveys to Golder any interest in any such Intellectual Property rights that, notwithstanding the foregoing, would otherwise be owned by law to the Client. "Intellectual Property" includes patents, patent applications, trademarks, trademark applications, copyrights, moral rights or other rights of authorship and applications to protect or register the same, trade secrets, industrial rights, know-how, privacy rights and any other similar proprietary rights under the laws of any jurisdiction in the world. Golder may use and publish the Client's name and give a general description of the Services rendered by Golder for the purpose of informing other clients and potential clients of Golder's experience and qualifications.

19. **Electronic Information - Client acknowledges that electronic media is susceptible to unauthorized modification, deterioration, and inaccessibility and therefore Client cannot rely upon the electronic media versions of the Documents. In the event of any discrepancy, Golder's hardcopy shall prevail.**

20. **Miscellaneous**  
 a) This Agreement supersedes all other agreements, oral or written, and contains the entire agreement of the parties. No cancellation, modification, amendment, addition, deletion, or other change in this Agreement shall have effect unless specifically set forth in writing signed by the party to be bound thereby. This is the Agreement as to controversies only.  
 b) This Agreement shall be binding upon and turn to the benefit of the parties hereto and their respective successors and assigns provided that it may not be assigned by either party without consent of the other. It is expressly intended and agreed that no third party beneficiaries are created by this Agreement, and that the rights and remedies provided herein shall inure only to the benefit of the parties to this Agreement.

c) Client acknowledges and agrees that Golder can retain subcontractors, who may be affiliated with Golder, to provide Services for the benefit of Golder. Golder will be responsible to Client for the Services and work done by all of the subcontractors and subcontractors, collectively to the maximum amount stated in Article 7 (Limitation of Liability). Client agrees that it will only assert claims against and seek to recover losses, damages or other liabilities from Golder and not Golder's affiliated companies. To the maximum extent allowed by law, Client acknowledges and agrees it will not have any legal recourse, and waives any expenses, loss, claims, demands, or cause of action, against Golder's affiliated companies, and their employees, agents, officers and directors.  
 d) No waiver of any right or remedy in respect of any occurrence on any occasion shall be deemed a waiver of such right or remedy in respect of such occurrence on any other occasion.

e) All representations and obligations (including without limitation the obligation of Client to indemnify Golder in Article 6 and the Limitation of Liability in Article 7) shall survive indefinitely the termination of the Agreement. Client acknowledges that it may not use Golder's name or any reference to the Services in any press release or public document without the express, written consent of Golder.

f) Any provision, to the extent found to be unlawful or unenforceable, shall be enforceable without affecting any other provision of the Agreement, so that the Agreement will be deemed to be a valid and binding agreement enforceable in accordance with its terms.  
 g) All questions concerning the validity and operation of this Agreement and the performance of the obligations imposed upon the parties hereunder shall be governed by the laws of Ontario unless the law of another jurisdiction must apply for this Agreement to be enforceable.

h) All notices required or permitted to be given hereunder, shall be deemed to be properly given if delivered in writing via facsimile machine, e-mail, regular mail, hand delivery or express courier addressed to Client or Golder, as the case may be, at the addresses set forth herein in regard to the Client, and as set forth in the Proposal in regard to Golder, with postage thereon duly prepaid if sent by mail or express courier.

21. **Authorization to Proceed - By signing below, Client hereby authorizes Golder to proceed with the Services as outlined in the proposal (referenced above) and in accordance with this Agreement, which includes terms relating to **GENERAL PROTECTION OF PERSONS, ENVIRONMENT AND PROPERTY**, among many other important provisions. Client also represents that any "background data" type documents which Client may issue subsequent to executing this Agreement, shall be for administrative or accounting convenience only, and that any terms or conditions attached thereto shall not apply, and that all services shall be solely governed by the presently executed agreement.**

IN WITNESS WHEREOF, the parties have caused the Agreement to be signed, as of the date and year first set forth above.