

# CONSULTING AGREEMENT

THIS AGREEMENT, effective this 19th day of August 2009, entered into by and between the City of Scandia, Minnesota (“Client”) and EDAW, Inc., an AECOM company with offices located at 161 Cheshire Lane North, Suite 500, Minneapolis, Minnesota, 55441 (hereinafter referred to as the “Consultant”). As provided in this Agreement.

WITNESS THAT

**WHEREAS the Client wishes to retain the Consultant to perform certain services required by the Client or the Client’s Contract with the Tiller Corporation (hereinafter referred to as the Owner)(for the Zavoral Mine and Reclamation Project Environmental Impact Statement (EIS) for a site located in the City of Scandia, Washington County, Minnesota project, and**

WHEREAS, the Consultant is willing to undertake the performance of such services in accordance with the terms and conditions hereinafter set forth,

NOW THEREFORE the parties hereby agree as follows:

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## ARTICLE 1 - THE WORK

- 1.1 **Work to be Performed:** The Consultant shall perform the services set forth in the Consultant's Proposal as Appendix A (the Services), and such additional services as Consultant and Client may jointly agree upon in writing ,at the project site or sites and vicinity as identified in the Consultant Proposal/Statement of Work. The Services, including any additions and modifications, shall be performed in accordance with this Agreement.

## ARTICLE 2 - CONTRACT DOCUMENTS

- 2.1 **Documents and Precedence:** The documents listed in 2.1.1 thru 2.1.3 together with any Change Orders issued in accordance with Article 12 of this Agreement, constitute the "Contract Documents" of this Agreement. Any *preprinted* terms and conditions on forms used by either party in the administration of this Agreement are void and shall not act to supplement or replace the terms and conditions of this Agreement as set forth in the Contract Documents. For the purposes of establishing obligations and the resolution of ambiguities in the Contract Documents, the following order of precedence shall prevail:
- 2.1.1 Appendix A - Consultants Proposal / Statement of Work, dated August 4, 2009.
  - 2.1.2 Appendix B - Cost Proposal, dated August 5, 2009.
  - 2.1.3 This Agreement

## ARTICLE 3 - CONTRACT TIME

- 3.1 **Schedule:** The Consultant shall provide the Services called for by the Contract Documents beginning not earlier than the date of the Notice to Proceed issued by the Client. All Work shall be fully completed no later than August 2010, unless sooner terminated or extended as provided herein.
- 3.2 **Delays:** Consultant shall not be liable for delays or failure to perform its Services caused directly or indirectly by circumstances beyond Consultant's control, including but not limited to, acts of God, fire, flood, war, sabotage, accident, labor dispute, shortage, government action including regulatory requirements, changed conditions, delays resulting from actions or inactions of Client, Owner or third parties, site inaccessibility or inability of others to obtain material, labor, equipment, or transportation. Should any of the above occur, then the date for Completion or any other milestone date shall be adjusted for such delay in accordance with Article 12, provided the Consultant reports the delay to the Client within a reasonable time, or the time required by the Owner Contract, of its' discovery.

## ARTICLE 4 - CONTRACT PRICE

- 4.1 **Consideration:** Consultant will perform the Services in exchange for the following fee: (*select applicable basis of consideration*)
- \_\_\_\_\_ Client will pay on a **time and material** basis. Consultant will invoice according to its Fee Schedule attached to the Proposal at Appendix B.

\_\_\_\_ Client will pay a **lump sum** of \$ \_\_\_\_\_. Consultant will invoice monthly on a percentage completed basis.

X Client will pay on a **time and material basis not to exceed** the sum of \$315,173.00. Consultant will invoice according to its Fee Schedule attached as Appendix B up to the stated limit. Upon reaching the stated limit, Consultant will work with the Client to obtain authorization for any additional services and funding in writing.

## ARTICLE 5 - PAYMENT PROVISIONS

5.1 **Payment:** Consultant will submit invoices to Client monthly. Client recognizes that timely payment is a material part of this Agreement. Each invoice is due and payable within thirty (30) calendar days of the date of the invoice. Client will pay when due that portion of invoice not in dispute. If Client fails to pay any undisputed invoiced amounts within thirty (30) calendar days of the date of the invoice, Consultant may suspend its performance pending payment of all past due invoices or terminate this Agreement without incurring any liability to Client therefore and without waiving any other claim against Client. Any undisputed invoice amount not received by Consultant within thirty calendar days of the invoice shall accrue interest due and payable at the rate of fifteen percent (15%) compounded annually, if allowed by law, otherwise at the highest annual interest allowed by law.

5.2 **Travel:** Approved travel required during the performance of this Agreement will be subject to the terms and conditions and applicable rates as set forth in the Federal Travel Regulations and invoiced as an additional cost.

5.3 **Invoicing Instructions:** The Consultant will submit invoices with at least the following information: the invoice date, title of the Agreement, name and address of Consultant representative to whom payment is to be sent, description of services performed and costs related thereto. In addition to the aforesaid, Consultant shall provide proof of payment for its Subconsultants or Subcontractors upon request by the Client. Furthermore, it is understood, Consultant's payment obligations to the Subconsultants or Subcontractors shall become binding only upon such time as Consultant receives payment in full by the Client. Invoices will be submitted to the Client in duplicate. Invoices and payments will be addressed as follows:

Invoices to: City of Scandia  
company

14727 209<sup>th</sup> Street North  
Scandia, MN 55073

Attn: Ms. Anne Hurlburt

Payments to: EDAW Inc., an AECOM

Dept. 9269-18  
Los Angeles, CA 90084-9269  
303.595.4522

5.4 **Taxes:** Client agrees to pay Consultant, in addition to the Contract Price, all taxes of any type assessed by any governmental taxing authority with respect to the Services, excepting only taxes measured by the income of the Consultant. Client's obligation to pay taxes under this provision includes without limitation the obligation to reimburse Consultant for taxes paid to sub-consultants, subcontractors and other suppliers for work and materials incorporated in the Services.

## ARTICLE 6 - PRELIMINARY MATTERS

- 6.1 **Permits and Licenses:** The Consultant has or will have, prior to the commencement of any work, all necessary business and professional licenses, permits, and other necessary Federal, State, County, Municipal, or other licenses as may be required to enable the Consultant to perform the services required hereunder.
- 6.2 **Agreement Administration:** Consultant contacts with the Client regarding prices, terms, financial actions, etc., shall be made with the Client's authorized Representative. All correspondence between the Consultant and the Client shall be addressed to the Client's designated Representative.
- 6.3 **Communications with Owner:** All of Consultant's written or oral communication with or to the Owner, or Federal, State, or local agencies relative to work under this Agreement must be through or with the authorization of the Client's authorized Representative.
- 6.4 **Documents and Records:** Client acknowledges that Consultants' reports, boring logs, field data, field notes, laboratory test data, calculations, estimates and other similar documents ("Records") are instruments of professional service, not products. All data Consultant prepares for Client under this Agreement shall become the property of the Client upon final payment for services rendered under this Agreement. Such data and work product are intended only for use in connection with the Project, and any reuse by the Client for any purpose other than that for which prepared shall be at Client's sole risk (and EDAW shall have no liability whatsoever for the same).
- 6.5 **Reuse of Project Documents:** The project documents prepared or furnished to Client by Consultant under this Agreement may be based on information obtained from sources outside Consultant's control. Other than the application of prudent professional care in their evaluation, the Consultant does not warrant, expressed or implied the accuracy thereof. All documentation furnished to the Client is intended for the benefit of the Client for the purpose stated herein and is not intended or represented to be suited for reuse by the Client or others. Any reuse without the specific written consent of the Consultant for the specific purposes intended will be at user's sole risk and without liability and legal exposure to Consultant. Client agrees to indemnify and hold Consultant harmless from any and all liabilities, losses, costs, or expenses suffered by Consultant in connection with Client's unauthorized reuse of project documents.

## ARTICLE 7 - AVAILABILITY OF LANDS

- 7.1 **Client Furnished Access to Lands:** The Client will furnish access to the lands upon which the Services are to be performed, rights-of-way for access thereto and lands designated for temporary use. Easements, if required, will be provided by the Client. The Client will allocate the land provided by the Client or Owner for temporary use during construction among project consultants and contractors.

## ARTICLE 8 - RISK ALLOCATION

- 8.1 **Insurance:** During the period that Services are performed under this Agreement, Consultant will maintain, the following insurance: (i) Workers' Compensation coverage in accordance with the

laws of the states having jurisdiction over its employees engaged in the Services and Employer's Liability Insurance (limit of \$1,000,000 each occurrence.); (ii) Commercial General Liability with a limit of \$1,500,000 per occurrence and a \$2,000,000 aggregate; (iii) Commercial Automobile Liability with a limit of \$1,500,000 per occurrence and a \$1,500,000 aggregate; and (iv) Professional Liability coverage with a \$1,500,000 limit on each claim and a \$1,500,000 aggregate.

8.1.1 **Certificates:** Prior to beginning Services, Certificates of insurance shall be furnished to the Client evidencing that the coverage will be in effect throughout the performance of the Services and will not be canceled or materially changed until at least thirty (30) days written notice has been given to the Client. The Consultant will list the Owner as additionally insured.

8.1.2 **Subtier Subconsultants:** The Consultant agrees to flow down these insurance requirements, as applicable, to all Subconsultants and Subcontractors that provide any services or work.

8.2 **Indemnity / limitation of Liability:** Subject to any limitations stated in this Agreement, Consultant will indemnify and hold harmless Client officers, directors, employees from and against all claims and actions, including reasonable attorneys fees, arising out of damages or injuries to persons or tangible property arising out of or caused by a negligent act, error, or omission of Consultant or any of its agents, subconsultants, subcontractors, or employees in the performance of Services under this Agreement. Consultant will not be responsible for any loss, damage, or liability to the extent they arise from any contributing negligent acts by Client or Owner, or their subcontractors, agents, staff, or consultants. Neither party will be responsible to the other for consequential damages including, but not limited to, loss of profit, loss of investment or business interruption. Consultant's liability is limited to the extent claims arise out of its negligent performance of services hereunder.

8.3 **Jobsite Safety:** Unless the specified Services provide otherwise, Consultant is responsible for safety of its own employees within the work zone necessary to perform the Services. This shall not relieve the Owner for maintaining a safe jobsite.

## ARTICLE 9 - CONSULTANTS RESPONSIBILITIES

9.1 **Independent Status / Subcontracting:** Consultant expressly agrees that it is an independent contractor and its employees engaged in the Services are not and shall not be treated or considered employees of the Client or Owner. It is understood that Consultant may retain subcontractors to perform services as presented in Appendix B. Should it be determined appropriate or necessary to rely on a subcontractor not identified in the proposal, Consultant shall obtain the written approval from Client. Consultant retains the responsibility for the conduct of all sub-consultants and subcontractors, and the services provided.

9.2 **Proprietary Information:** The Consultant shall not directly or indirectly or through its employees disclose to any third person or use for the benefit of anyone other than the Client or Owner, either during or after the term of this Agreement (or for the period of time stipulated in the applicable data), any secret or proprietary information provided to the Consultant by the Client or Owner in its possession, whether relating to the Work performed hereunder or to the business and affairs of the Client or Owner, provided such information is clearly designated

secret or proprietary when conveyed to Consultant. Such information shall include, without limitation, Client or Owner manuals, forms or procedures. Disclosure shall not be made without the prior written consent of the Client unless disclosure is required by law or if the proprietary information becomes a part of the public domain, in which case notification of the request for such information shall be provided to the Client and/or Owner prior to release. Information identified in writing by the Consultant as confidential and/or proprietary shall be similarly treated by the Client.

- 9.3 **Publications:** The Consultant shall not publish or publicly disseminate any information or data derived or obtained from or in connection with any services rendered hereunder, without the prior written consent of the Client.

## ARTICLE 10 - WORK BY OTHERS

- 10.1 **Cooperation:** Consultant will cooperate with Client and Owner personnel, contractors and Subconsultants who may be working on the site. Particular attention will be paid to such matters as safety, and use and disruption of utilities.

## ARTICLE 11 - CLIENT RESPONSIBILITIES AND AUTHORITY

- 11.1 **Client's Representative:** Client shall assign a Representative authorized to act on Client's behalf with respect to the project. Client's authorized Representative shall render decisions in a timely manner pertaining to Consultant's Services to avoid unreasonable delay in the orderly and sequential progress of Consultant's Services.
- 11.2 **Inspection:** The Client, through any authorized representatives, shall have the right at all reasonable times to inspect, or otherwise evaluate the quality or any other aspect of the Services performed or the safety measures employed in the work being performed hereunder and the premises in which it is being performed. If any inspection or evaluation is made by the Client on the premises of the Consultant or a Subconsultant, the Consultant shall provide, and shall require its Subconsultants to provide, all reasonable facilities and assistance for the safety and convenience of the Client representatives in the performance of their duties. All inspections and evaluations shall be performed in such a manner as will not unnecessarily delay the Services.
- 11.3 **Audit:** Upon request of the Client, the accounting records, as well as other records maintained by the Consultant directly related to the performance of the Services specified herein, shall be subject, at all reasonable times, to audit by an independent public accounting firm selected by the Client and at the Client's expense. In addition, the Client may have such an audit performed at any time within two years following the completion or termination of Services specified herein.

## ARTICLE 12 - CHANGES

- 12.1 **Change Order Content:** Changes in the terms of this Agreement or the Services may be accomplished without invalidating this Agreement by Change Order, subject only to the limitations of this Article and the requirement that the change be within the general scope of work of this Agreement. A Change Order is an amendment to this Agreement modifying the Services and specifying any or all of the following: (i) a change in terms and conditions or the Scope of

Services; (ii) an adjustment in the Contract Time; and (iii) the amount of the adjustment in the Contract Price.

- 12.2 **Changed Conditions:** The Consultant has relied on the Client's judgment in establishing the scope of work. In the event of changed conditions, Client agrees to negotiate appropriate Change Orders to equitably adjust the price and/or schedule accordingly. Reduction of the Scope of Services by Change Order shall not be the basis of a claim by the Consultant based on loss of anticipated profits from Services not accomplished.
- 12.3 **Issuance of Change Orders:** Consultant will treat as a Change Order any written order (including directions, instructions, interpretations, or determinations) from Client which request changes in the Services. Consultant will give Client written notice within a reasonable time of the receipt of any Change Order of any resulting adjustment in the schedule and price. Unless Client objects in writing within 5 days, the proposed terms of the Change Order with the adjustment in the schedule and price shall become a part of this Agreement.
- 12.4 **Failure to Agree:** If the Client and the Consultant cannot agree upon an equitable adjustment in the Contract Time and or Contract Price, and the Consultant will not sign the Change Order, the disagreement shall be considered a dispute subject to settlement in accordance with the disputes clause at Article 15.

#### **ARTICLE 13 - WARRANTY**

- 13.1 **Standard of Care:** It is understood that Consultant makes no warranty, either expressed or implied, as to the findings, designs, accommodations, specifications, or professional advice or opinion except that Consultant represents that it shall perform its Services in accordance with the standards of care and diligence normally practiced by professional consulting firms performing Services of a similar nature in the same locale.
- 13.2 **Extent of Study:** Client recognizes that actual environmental conditions may vary from conditions encountered at locations where Consultant makes visual observations, obtains samples, or performs other explorations. Consultant does not guarantee the extent or absence of pollution or hazardous materials at a site and failure to discover differing conditions or potential environmental contamination through appropriate and/or mutually agreed-upon investigation and/or sampling techniques shall not impose any liability on the Consultant, unless there has been a breach of required Standard of Care described in Article 13.1

#### **ARTICLE 14 - SUSPENSION AND TERMINATION**

- 14.1 **Suspension of Services:** Consultant will, upon written notice from Client, suspend, delay, or interrupt all or a part of the performance of Services to the extent directed. In such event, Consultant will resume work upon the suspended activities only upon written notice from Client. Where appropriate, an extension of the Contract Time and/or Contract Price will be established as specified in Article 12.
- 14.2 **Termination:** Either party may terminate the Services with or without cause upon 10 days advance written notice. Irrespective of which party shall effect termination, the Client shall within 30 calendar days of termination pay in accordance with Article 5 hereof the Consultant

for services rendered and costs incurred up to the time of termination, as well as those reasonable costs associated with the termination itself, including the costs incurred in the settlement of terminated contracts and subcontractors, suppliers and others, all in accordance with the Consultant's fee schedule in effect for this Agreement and expense reimbursement policy.

## ARTICLE 15 - MISCELLANEOUS PROVISIONS

- 15.1 **Subcontract:** The Consultant shall not further subcontract any Services to be performed under this Agreement, except as specified in the Consultant's proposal or prior written authorization from the Client. Neither this Agreement nor any Subtier Subcontract will create any contractual relationship between any Subtier Subcontractor and Client, nor any liability of Client to any Subtier Subcontractor.
- 15.2 **Assignment:** Neither Party to this Agreement shall transfer, assign or hypothecate its interest in this Agreement without the written consent of the other; which consent shall not be unreasonably withheld. Any attempted transfer, assignment, or hypothecation without such written consent shall be void and confer no rights upon any third person and shall constitute a default hereunder.
- 15.3 **Third Party Liability:** Except as specifically stated in this Agreement, this Agreement does not create any rights or benefits to parties other than Client and the Consultant.
- 15.4 **Dispute Resolution:** Any controversy or claim arising out of or relating to this Agreement, or breach thereof, shall be settled by arbitration in Minnesota in accordance with the then-current Construction Arbitration Rules of the American Arbitration Association. Judgement upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Each party to any arbitration hereunder shall bear its own costs of the proceeding including attorney fees. The Client and the Consultant agree that in the event of a dispute, they will not seek recourse against individual officers, employees, directors, or shareholders of the other party.
- 15.5 **Applicable Law:** In the performance of the Services provided by this Agreement, the Consultant and the Client shall comply with all applicable Federal, State and local laws, rules, and regulations. This Agreement shall be construed, interpreted and applied in accordance with the laws of the State of Minnesota.
- 15.6 **Entire Agreement, Modifications, Headings, Severability:** The parties acknowledge that this Agreement constitutes the entire Agreement between them and supersedes all prior representations, warranties, agreements, and understandings oral or written between the parties with respect to its subject matter. Unless stated otherwise in this Agreement, this Agreement may not be modified except in writing signed by both parties. The headings to this Agreement are for convenience and reference purposes only and shall not constitute a part of the Agreement. If any element of this Agreement is later held to violate the law or a regulation, it shall be deemed void, and all remaining provisions shall continue in force.

Client and Consultant confirm reading this document in full and confirm that they understand the terms of this Agreement. Client and Consultant freely enter into this Agreement. The Agreement becomes effective on the latest date of execution indicated below.

**Consultant: EDAW, Inc an AECOM Company    Client: City of Scandia, Minnesota**

By: _____	By: _____
Name: _____	Name: _____
Title: _____	Title: _____
Date: _____	Date: _____