

March 2, 2023

Erik Birkeland
City of Duluth – Property & Facilities Management
1532 West Michigan Street
Duluth, MN 55806
ebirkeland@DuluthMN.gov

RE: Landscape Architecture and Civil Engineering Design Services for Baywalk

Mr. Birkeland:

We are pleased to submit this professional services agreement amendment for Landscape Architectural Services as provided herein between the City of Duluth (*Client*) and Confluence (*Landscape Architect*). Please return one copy of the executed agreement to Confluence. We are looking forward to working on your project!

Project

Additional design services for the upland Baywalk project related to Cruise Ship logistics, design modifications related to budget reductions and requested design modifications, and Construction Administration services, staking and observation for both Landscape Architecture and Civil Engineering. The approved concept plan budget is estimated at \$4 million dollars and includes design for all upland features between the Great Lakes Aquarium, and round-a-bout on 5th Avenue, and the Blue Bridge on Harbor Drive. The Landscape Architect will coordinate with the Coastal Engineer, who will lead the Design portion of work. Civil Engineering services will be sub-consulted to Confluence and will be completed by SEH.

Article 1: Landscape Architectural Services

- 1.1 Scope of Services. The Scope of Landscape Architectural Services to be provided under this agreement are detailed in “Exhibit A”.
- 1.2 Supplemental Services. Supplemental Services are detailed in “Exhibit A” – Supplemental Services are beyond the basic Scope of Services, and when requested in writing by the Client, shall entitle the Landscape Architect to additional compensation (either on the hourly basis stated in “Exhibit A” or the basis of a negotiated sum) beyond the Compensation stated in Article 4 Landscape Architect Compensation.
- 1.3 Standard of Care. The Landscape Architectural Services shall be performed with care and diligence in accordance with the professional standards applicable at the time and in the location of the Project and appropriate for a project of the nature and scope of this Project.

- 1.4 Changes to Approved Services. Revisions to drawings or other documents shall constitute Supplemental Services made necessary because of Client-requested changes to previously approved drawings or other documents, or because of Client changes to previous Project budget parameters or Project requirements.
- 1.5 Schedule of Performance. The Client's signature on this Agreement shall be the basis for the Landscape Architect to begin providing services for the Project. The Landscape Architect shall perform the services per the Client's proposed schedule or as expeditiously as is consistent with the standard of care described in section 1.1, above.

Article 2: Client's Responsibilities

- 2.1 Information. The Client shall provide data about the site and other information on which the design is to be based as well as Client's budget parameters for the Project. Some data for the site may be provided as part of the Scope of Services. The Landscape Architect shall be entitled to rely on the accuracy and completeness of information provided by the Client.
- 2.2 Budget. The Landscape Architect shall reasonably strive to propose designs and prepare documents consistent with the Client's budget parameters. If provided by the Landscape Architect as a part of the Scope of Services, opinions of probable construction costs are based on the Landscape Architect's familiarity with the landscape construction industry and are provided only to assist the Client's budget planning. Such opinions shall not be construed to provide a guarantee or warranty that the actual construction costs will be within the Project budget parameters at the time construction bids are solicited or construction contracts negotiated.
- 2.3 Approvals. The Client's decisions, approvals, reviews, and responses shall be communicated to the Landscape Architect in a timely manner so as not to delay the performance of the Landscape Architectural Services.
- 2.4 Project Permit and Review Fees. The Client shall pay all fees required to secure jurisdictional approvals for the Project.

Article 3: Ownership of Documents

- 3.1 The Landscape Architect shall be deemed the author and owner of all document's deliverables developed pursuant to this Agreement and provided to the Client by the Landscape Architect (collectively, the "Design Materials"). Subject to payment by the Client of all fees and Reimbursable Expenses owed to the Landscape Architect, the Landscape Architect grants the Client an irrevocable, non-exclusive license to reproduce the Design Materials solely for to the construction of the Project and for information and reference with respect to the use of the Project.

Article 4: Landscape Architect Compensation

4.1 Compensation for the Scope of Services performed under this agreement shall be the Hourly Fee Not to Exceed listed below plus reimbursable expenses and applicable taxes.

| Phase | Proposed Fee |
|--|--------------|
| Cruise Ship Logistics and Meetings | \$15,750 |
| Site Redesign to accommodate reduced budget and requested design modifications | \$26,250 |
| Construction Administration and Bidding | \$38,400 |
| As Built Drawings for Upland Landscape | \$5,800 |
| SEH Construction Administration | \$22,500 |
| SEH On-Site Observation | \$68,400 |
| SEH Record Drawings | \$7,800 |
| SEH Construction Staking and Layout (additional) | \$13,500 |
| | |

- 4.2 Reimbursable Expenses are expenditures made by the Landscape Architect, its employees, and consultants in the interest of the Project plus an administrative fee of 15%. Reimbursable Expenses include but are not limited to travel expenses, costs of reproduction of documents, postage, services of professional consultants which cannot be quantified at the time of contracting, and other, similar, direct Project related expenditures. See Exhibit A for Confluence standard Reimbursable Expenses.
- 4.3 Supplemental Services, when requested in writing by the Client, shall require additional compensation to be determined on an hourly basis or on the basis of a negotiated fee. See "Exhibit A" for Confluence standard hourly rates.
- 4.4 Monthly payments to the Landscape Architect shall be based on (1) the percentage of Scope of Services completed and shall include payments for (2) Supplemental Services performed, and (3) Reimbursable Expenses incurred.
- 4.5 Payments are due and payable 45 days from the date of the Landscape Architect's invoice. Invoiced amounts unpaid 60 days after the invoice date shall be determined overdue and shall accrue 1.5% simple interest per month. At the Landscape Architect's option, overdue payments may be grounds for termination or suspension of services. In the event any portion or all of an account remains unpaid 120 days after billing, the Client shall pay all costs of collection, including reasonable attorney's fees.

Article 5: Insurance, Indemnification, Consequential Damages & Limitation of Liability

5.1 Insurance. The Landscape Architect shall secure and maintain insurance coverages indicated as follows:

| <u>Coverage:</u> | <u>Liability Limits:</u> |
|-------------------------------------|---|
| Professional Liability: | \$2,000,000 per claim/\$4,000,000 aggregate |
| Commercial General Liability: | \$1,000,000 per claim/\$2,000,000 aggregate |
| Comprehensive Automobile Liability: | \$1,000,000 combined single limit |
| Umbrella Liability: | \$3,000,000 each occurrence/\$3,000,000 aggregate |
| Drone Aviation Liability: | \$1,000,000 per claim |
| Workers Compensation: | \$2,000,000 per claim/\$2,000,000 policy limit |

5.2 Indemnification: Client and Landscape Architect each agree to indemnify and hold harmless the other, and their respective officers, employees, and representatives, from and against liability for losses, damages, and expenses, including reasonable attorney's fees, to the extent such losses, damages or expenses are caused by the indemnifying party's negligent acts, errors, or omissions. In the event losses, damages or expenses are caused by the joint or concurrent negligence of the Client and Landscape Architect, they shall be borne by each party in proportion to its negligence.

5.3 Consequential Damages. The Landscape Architect and the Client waive consequential damages for claims, disputes, or other matters in question which arise of or are related to this Agreement, including but not limited to consequential damages due to the termination of this Agreement by either party in accordance with the provisions of Article 7 thereof.

5.4 Limitation of Liability. To the maximum extent permitted by law, the Client agrees to limit the Landscape Architect's liability for the Client's damages to the sum of \$15,000.00 or the Landscape Architect's fee, whichever is greater. This limitation shall apply regardless of the cause of action or legal theory pled or asserted.

In the event the Client does not wish to limit the Landscape Architect's professional liability, the Landscape Architect agrees to waive this limitation upon written notice from the Client and agreement of the Client to pay, in addition to the agreed upon Landscape Architect's fee, a fee of 10% of the Landscape Architect's previously agreed upon fee within five (5) calendar days after this Agreement is fully executed. This additional fee is in consideration of the greater risk involved in performing work for which there is no limitation of liability.

Article 6: Dispute Resolution

6.1 If a dispute arises out of or relates to this agreement, the parties shall endeavor to resolve their differences first through direct discussions. If the dispute has not been settled within 14 days of the initial discussions, the parties shall submit the dispute to mediation, the cost of which shall be shared equally by both parties.

6.2 For any claim subject to, but not resolved by, mediation pursuant to 6.1, the method of binding dispute resolution shall be as follows:

- Arbitration pursuant to the Construction Industry Mediation Rules of the American Arbitration Association
- Litigation in a court of competent jurisdiction

6.3 Nothing in these provisions shall limit rights or remedies not expressly waived under applicable lien laws.

Article 7: Termination

7.1 This agreement may be terminated by either party on seven (7) days' written notice should the other party fail substantially to perform in accordance with its terms through no fault of the party initiating the termination, provided the defaulting party has not cured or in good faith diligently commenced to cure the breach during the 7-day notice period. If the project is terminated, the Landscape Architect shall be paid their compensation for services performed prior to receipt of written notice from the Client, together with reimbursable expenses and applicable taxes then due.

Article 8: Other Terms & Conditions

- 8.1 Promotional Materials & Images. The Landscape Architect shall have the right to include photographic or artistic representations of the design of the Project among the Landscape Architect's promotional and professional materials. The Landscape Architect shall be given reasonable access to the completed Project to make such representations. However, the Landscape Architect's materials shall not include the Client's confidential or proprietary information if the Client has previously advised the Landscape Architect in writing of the specific information considered by the Client to be confidential or proprietary. The Client shall provide professional credit for the Landscape Architect in the Client's promotional materials for the Project.
- 8.2 Assignment. Neither party shall assign their interest in this Agreement without the expressed written consent of the other, except as to the assignment of the proceeds.
- 8.3 Governing Law. The laws of the State Minnesota shall govern this agreement.
- 8.4 Complete Agreement. This Agreement represents the entire understanding between the Client and Landscape Architect and supersedes all prior negotiations, representations, or agreements, whether written or oral with respect to its subject matter. The person(s) signing this Agreement on behalf of the parties hereby individually warrant that they have full legal power to execute this Agreement on behalf of the respective parties and to bind and obligate the parties with respect to all provisions contained herein. This Agreement may be amended only in writing signed by both the Client and Landscape Architect.

Exhibits

The following Exhibits are incorporated in and made part of this Agreement:

“A” – Scope of Services and Supplemental Services

Offered by:
Confluence, Inc.



Signature & Date

03/02/2023

Terry Minarik | Principal

Printed Name & Title

Confluence
530 N Third Street, Suite 120
Minneapolis, Minnesota 55401

Copy: Matt Bolf – SEH

Accepted By:
City of Duluth

Signature & Date

Printed Name & Title

Exhibit "A": Scope of Services and Supplemental Services

Scope of Supplemental Services

1.0 Confluence

Confluence is requesting supplemental services for work additional to the agreed contract, these services were in response to direction by the city and its representatives for work related to the following:

1.1 Cruise Ship logistics and meetings (\$15,750)

Confluence's assisted AMI and the City in providing multiple design iterations to accommodate Cruise Ships along the waterfront.

The deliverables for this task included:

- Working with Customs requirements for security and access.
- Providing design options for Cruise Ship service, docking requirements, and staging as related to the overall waterfront design.
- Additional meetings, presentations, and coordination with city, consultants, and regulatory agencies.

1.2 Redesign to fit reduced budget and design direction from City. (\$26,250)

Confluence prepared multiple revisions to the drawings to accommodate the reduced budget and city approval of preferred design direction for construction documentation.

The deliverables for this task included:

- Redesign of the waterfront into three concepts that reflected the reduced budget and the existing roadway remaining and the DECC area not being included in this phase of the project.
- Revision of the three concepts into one preferred concept as a plan, and supplemented with precedents, and modelling to represent a realistic visual of the space for final approval.
- Additional meetings, presentations, and coordination with city, consultants and project partners.

This work totaled **\$42,000** to complete these services and would be an amendment to our existing contract.

1.3 Construction Administration and Bidding (\$38,400)

The deliverables for this task include:

- Bidding
- Preconstruction and Site Meetings
- Shop Drawing Review and Approval
- Pay Application and Change Order Review for Landscape Items
- Inspections and Support during Construction

2.3 Record Drawings **(\$5,800)**

Per the City of Duluth Engineering Guidelines manual, record drawings will have to be provided at the end of the project. Our deliverables will include:

- Record Drawings of landscape design in CAD, and pdf preparation for record.

This work would total **\$44,200** to complete these services and would be an amendment to our existing contract.

2.0 SEH

The City of Duluth is now looking for assistance in providing construction services during construction. We understand the AMI will be the lead firm for Construction Administration and that SEH and Confluence will assist with all non-seawall related items. We have developed the following work plan and fee estimate based on our anticipated level of efforts for the street, utilities, and surface treatment portions of the project.

2.1 Construction Administration **(\$22,500)**

The deliverables for this task include:

- Preconstruction and Site Meetings
- Shop Drawing Review and Approval
- Pay Application and Change Order Review for Civil Items
- Engineering Support during Construction

2.2 On-Site Observation **(\$68,400)**

Per City requirements, we're assuming full-time observation during all utility and roadway portions of the project. We have also included 20 hours per week of observation for four (4) months to cover all other grading, boardwalk, surfacing, and miscellaneous items.

Based on this assumption, the deliverables for this task include:

- On-site observation
- Weekly Progress Reports
- Shop Drawing Review
- Project Closeout Documentation (photos, field notes, measurements, etc.)

2.3 Record Drawings **(\$7,800)**

Per the City of Duluth Engineering Guidelines manual, record drawings will have to be provided at the end of the project. Our deliverables will include:

- Record Drawing field survey
- Record drawing GIS, CAD, and pdf preparation and submittal

This work would total **\$98,700** to complete these services and would be an amendment to our existing contract.

3.0 Additional Tasks

Optional Construction Staking

This project will require extensive construction staking for all the site features. SEH is to provide all staking and is conveniently located one (1) block from the project area. The primary staking efforts would include:

- Seawall, bollards
- Curbs, cul-de-sac, surface features
- Utilities
- Lighting and amenities

For this work, we have estimated **\$13,500** to complete the construction staking. This could be adjusted once a contractor is selected and coordination of means and methods has happened.

End of Exhibit "A"