

MEMO 24-03

RECEIVED

TO: Frank Schulte, City Administrator

JAN 16 2024

FROM: James Kowalski, Director of Public Services *J.K.*

CITY OF GROSSE POINTE WOODS
CLERK'S DEPARTMENT

DATE: January 12, 2024

SUBJECT: Right of Way Acquisition for Vernier & Mack Intersection Improvements
AEW Project no. 0160-0455

On June 5, 2023, Council approved funds for design engineering for Vernier & Mack Intersection Improvements. In addition to the design of the project, AEW assisted in acquiring Highway Safety Improvement Program (HSIP) funds.

Since design efforts began, additional grant funding opportunities have become available, particularly Safe Routes to Schools (SRTS) and Wayne County ARPA funds.

In order to move forward with the Vernier and Mack Intersection Improvements, AEW has identified a need to secure permanent and temporary easements. The acquisitions will impact a total of four parcels with residential and commercial uses. The project is using MDOT funding and must comply with MDOT LAP requirements.

4D Acquisition & Consulting, LLC has provided an estimate to complete the necessary right of way acquisition in the amount of \$20,258.00.

Based upon the recommendation of AEW, I concur that Council approve the right of way acquisition that will be provided by 4D Acquisition & Consulting, LLC, 9253 Onsted Hwy., Onsted, MI 49265 in an amount not to exceed \$20,258.00.

This is not a budgeted item in the Fiscal Year 2023/2024 budget and would require a budget amendment and transfer from account no. 202-000-692.000, Transfer from prior year Reserve Fund Balance into the Major Streets Vernier and Mack Improvements account no. 202-451-977.117.

Please contact me if you have any questions regarding this matter.

I do not believe any benefit will accrue to the City by seeking further bids. Approved for Council consideration.

Frank Schulte, City Administrator

Date

Fund Certification:

Account numbers and amounts have been verified as presented.

Shawn Murphy, Treasurer/Comptroller

Date



PROPOSAL FOR
RIGHT-OF-WAY ACQUISITION SERVICES FOR
CITY OF GROSSE POINTE WOODS
VERNIER ROAD PROJECT

SUBMITTED TO
CITY OF GROSSE POINTE WOODS
Care Of
ANDERSON, ECKSTEIN & WESTRICK, INC.

Submitted by:
4D Acquisition and Consulting, LLC
9253 Onsted Hwy
Onsted, MI 49265

Project Understanding

In association with the Vernier Road project the City of Grosse Pointe Woods, through its engineer AEW, has identified a need to secure permanent and temporary easements. The acquisitions will impact a total of 4 parcels with residential and commercial uses. The engineer has completed easement exhibits identifying easements of varying dimensions. In addition to having prepared easement descriptions, AEW has also obtained title work for the impacted parcels. The project is using MDOT funding and must comply with MDOT LAP requirements.

4D has been asked to provide an estimate to complete the necessary right of way acquisition. The services will generally include: initial contact with the owners to explain the project; preparation of a broker's price opinion (BPO) valuation; presentation offers and good faith negotiations (if required); document management and closings. The City will approve compensation and negotiations in addition to issuing payment to the owner and recording fees.

Work Plan

As a federal aid project subject to MDOT LAP review the project needs to be completed in accordance with the state and federal regulations. A key aspect of the regulations is the valuation and determination of just compensation for which MDOT has provided clarity on the three potential means of valuation: market study, appraisal and review or broker price opinion. Reviewing the project against MDOT's criteria, it appears the most appropriate method is the BPO. However, the acquisition from Charles L Parcels Middle School will likely exceed \$10,000 and the school will have to waive their right to an appraisal; this proposal and valuation method assumes the school will agree to such waiver. If the school elects not to waive their right to an appraisal then an appraisal will be necessary. The preparation of an appraisal has been included as Task 3 of the proposed budget and will be completed if the school elects not to waive the appraisal.

Following authorization to proceed, AEW will provide 4D the title documents and temporary easement agreements (or approve forms provided by 4D). 4D will initiate contact with the owners to inform them of the project, the necessity for the easement and to verify title and property information. 4D will collect information to prepare the BPO. Upon completion of the BPO the recommended values will be provided to AEW/Grosse Pointe Woods for authorization to present offers. When authorized, 4D will present the offers and pursue the easements.

While we aim to secure the easements at the offered amount, 4D will also be prepared to negotiate a settlement with the owners. The negotiations may include revisions to easement, stipulations for construction and restoration and/or the compensation. Project approval will be sought for any changes to the easement or items related to the construction of the project. If additional compensation is required 4D will prepare formal settlement requests in accordance with the regulations for City approval. Once an agreement is reached and approved, 4D will request payment from the City and will exchange payment for executed documents at a meeting with the owner. The permanent easements will be record temporary easements will not be recorded.

4D's has generated the following scope of services, deliverables, schedule, assumptions and cost estimate for the project.

Scope of Services

4D will:

1. Review title, and easements or provide easements for review.

2. Initiate contact with the property owners to introduce the project and discuss project details including impacts to their parcel.
3. Prepare a BPO for the acquisitions. (Or, appraisal of Parcels school if required.)
4. Prepare offers, easements and other acquisition documents as required.
5. Present offers and perform good faith negotiations to secure the rights. If an agreement cannot be reached, prepare an unsecured package and submit it to the City with a recommendation for redesign or condemnation.
6. Coordinate execution of documents and distribution of payment to owners.
7. Maintain files for each parcel and document contact with landowners.
8. Participate in meetings and provide progress reports and communication with the City's project team of the status of each acquisition.

Deliverables

1. Complete file, including executed documents or unsecured package, contact notes, offer, and miscellaneous parcel information.
2. Construction comments/identification of any special agreements or considerations.
3. Progress reports.

Estimated Schedule

4D is prepared to commence the project upon execution of the contract.

Staff

4D proposes to assign the following personnel to this project:

- Tim Davis, SR/WA, Broker
- Other staff as deemed appropriate or necessary

Sub-Contractors

If appraisal services become necessary:

- R.S. Thomas and Associates – Appraisal
- Northern Michigan Real Estate Consultants – Appraisal Review

Assumptions of Estimate

1. The project will involve 4 parcels having 3 owners (GPPS owning two) being impacted by 2 permanent and 4 temporary easements.
2. The grantor of the temporary easement will be the owner or other appropriate party for the property. (i.e. the condo association president)
3. Subordinations will not be pursued if/where mortgage interests exist.
4. AEW will provide title, legal descriptions and exhibits/sketches for the acquired area.
5. The preferred easement document will be provided to 4D. The City will be available to review changes as may be necessary to negotiate settlements.
6. A total of up to three (3) meetings with the owners, in addition to phone calls, emails and mailings, for preliminary interviews, presentation of offer, negotiations and closing will be required and have been included in this scope and budget.

7. 4D is putting forth an experienced, professional acquisition agent/team that will utilize proven approaches to secure the necessary rights however, due to the inability to control or forecast the decisions of individual property owners the result of the acquisition effort cannot be predicted. The file for a property which cannot be secured will be submitted as 'unsecured' for further action or redesign.
8. Work performed after execution of agreements or submission of an unsecured package is not part of the scope/estimate and will require client approval before 4D proceeds.
9. Fees and costs related to closings and actual compensation due to owners are not included in 4D's cost estimate and will be paid by the City.
10. All parties are incentivized to reach conclusion of the project and will work diligently to do so. Any delays which are not caused by 4D which impact the project completion schedule will justify a revision to the budget.
11. If the GPPS elects to not waive the appraisal on the Parcels school parcel then, per Task 3 of the Cost below, 4D will commence the appraisal and review.

Cost

4D has developed the cost of providing the services herein described as:

Task 1: Invoiced upon submission of recommended compensation for approval to present offers.

Task 2: Invoiced upon submittal of parcel file (closed or unsecured).

Task 3: Invoiced upon completion of Appraisal and Review (if required).

<u>Milestone Per Parcel</u>	<u>Temporary</u>
Task 1	\$1,306
Task 2	<u>\$2,425</u>
Total Per Parcel	\$3,730
Total Project	\$14,920
Task 3	<u>\$5,338</u>
Total Project if Appraisal Required	\$20,258

Terms and Conditions

These services will be completed in accordance with the Terms and Conditions for Services Agreement dated 6-1-2021.

Authorization and Acceptance

4D Acquisition & Consulting, LLC

CITY OF GROSSE POINTE WOODS

By: Tim Davis
 Printed Name: Tim Davis
 Title: Vice President

By: _____
 Printed Name: _____
 Title: _____



TERMS AND CONDITIONS FOR SERVICES AGREEMENT

ARTICLE 1 – CONTRACT FORMATION

A legally enforceable Agreement shall arise between 4D Acquisition and Consulting, LLC and the Client upon Client's written acceptance of 4D Acquisition's Proposal. The Agreement shall consist of 4D Acquisition's Proposal, these Terms and Conditions for Services Agreement and any other documents attached to or specifically identified therein. If the Client accepts 4D Acquisition's Proposal by issuing a purchase order or other similar document to authorize Work to begin, the purchase order or similar document shall become part of this Agreement.

ARTICLE 2 – DEFINITIONS

2.01 *Defined Terms*

- A. The following terms used within this Master Agreement shall be defined as follows:
 1. *Agreement* – Defined in Article 1.
 2. *Client* – The individual or entity with which 4D Acquisition has entered into an Agreement and for which 4D Acquisition's services are to be performed.
 3. *4D Acquisition* – 4D Acquisition and Consulting, LLC, with headquarters located at 9253 Onsted Hwy, Onsted Michigan, 49265.
 4. *Constituent of Concern* – Any substance, product, waste, or other material of any nature whatsoever (including, but not limited to, Asbestos, Petroleum, Radioactive Material, and PCBs) which is or becomes listed, regulated, or addressed pursuant to (a) the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§9601 et seq. (“CERCLA”); (b) the Hazardous Materials Transportation Act, 49 U.S.C. §§1801 et seq.; (c) the Resource Conservation and Recovery Act, 42 U.S.C. §§6901 et seq. (“RCRA”); (d) the Toxic Substances Control Act, 15 U.S.C. §§2601 et seq.; (e) the Clean Water Act, 33 U.S.C. §§1251 et seq.; (f) the Clean Air Act, 42 U.S.C. §§7401 et seq.; and (g) any other federal, state, or local statute, law, rule, regulation, ordinance, resolution, code, order, or decree regulating, relating to, or imposing liability or standards of conduct concerning, any hazardous, toxic, or dangerous waste, substance, or material.
 5. *Documents* – Data, reports, drawings, specifications, record drawings, and other deliverables, excluding any proprietary documentation or information of 4D Acquisition, whether in printed or electronic media format, provided or furnished in appropriate phases by 4D Acquisition to Client pursuant to this Master Agreement.
 6. *Effective Date* – The date 4D Acquisition receives Client's written acceptance of 4D Acquisition's Proposal.
 7. *Hazardous Waste* – The term Hazardous Waste shall have the meaning provided in Section 1004 of the Solid Waste Disposal Act (42 USC Section 6903) as amended from time to time.
 8. *Laws and Regulations; Laws or Regulations* – Any and all applicable laws, rules, regulations, ordinances, codes, and orders of any and all governmental bodies, agencies, authorities, and courts having jurisdiction.
 9. *Proposal* – 4D Acquisition's offer to provide services.
 10. *Work* – The scope of services to be provided by 4D Acquisition.



ARTICLE 3 – 4D ACQUISITION’S RESPONSIBILITIES

3.01 General

- A. 4D Acquisition shall perform the services set forth in 4D Acquisition’s proposal with the degree of skill and care ordinarily exercised, under similar circumstances, by similar professionals at the time such services are rendered.
- B. Client agrees that 4D Acquisition can exert such degree of responsibility only where Client permits 4D Acquisition to exercise independent judgement in the performance of its Work. In recognition thereof, Client agrees that 4D Acquisition shall not be liable for any loss or damage resulting from or attributable to:
 - 1. The execution by 4D Acquisition of Client instructions, whether such instructions are of a real estate nature or otherwise; or
 - 2. The incorporation of specific real estate decisions by Client into 4D Acquisition’s work product.

This shall not be interpreted to relieve 4D Acquisition from responsibility resulting from mere approval of concept by Client. 4D Acquisition’s liability and Client’s exclusive remedy are limited to the reperformance of services by 4D Acquisition at its expense of services which are deficient because of 4D Acquisition’s failure to perform said services in accordance with the above standard.
- C. 4D Acquisition shall endeavor to perform the Work according to the schedule identified in 4D Acquisition’s proposal. Dates critical to the Client shall be communicated to 4D Acquisition by the Client.
- D. 4D Acquisition shall designate a project manager to act as 4D Acquisition’s representative and agent with authority to transmit information, receive information and direct 4D Acquisition’s activities. The Client shall direct all communications concerning the Work to 4D Acquisition’s project manager.

ARTICLE 4 – CLIENT’S RESPONSIBILITIES

4.01 General

- A. Client shall provide 4D Acquisition with Work objectives, constraints, performance requirements, budgetary limitations, schedules and other parameters as appropriate that may influence the services to be provided by 4D Acquisition.
- B. Client shall provide, without charge, all data and information in the possession of the Client as may be required by 4D Acquisition to perform its services. If the Client has developed specific standards, policies, protocols and procedures which Client desires 4D Acquisition to follow, then such standards, policies, protocols and procedures shall be furnished to 4D Acquisition, without charge, prior to 4D Acquisition beginning the Work.
- C. Client shall designate a person to act as Client’s representative, who shall have complete authority to transmit instructions, receive information, and interpret and define Client’s policies and decisions with respect to the services performed under this Agreement.
- D. Client shall provide immediate written notice to 4D Acquisition should the Client observe or otherwise become aware of any defect in the services provided by 4D Acquisition.
- E. Client shall provide 4D Acquisition’s personnel, without charge, all necessary access to work sites as required for 4D Acquisition to perform its services.
- F. Client shall be responsible for, and 4D Acquisition may rely upon, the accuracy and completeness of all requirements, programs, instructions, reports, data, and other information furnished by Client to 4D Acquisition pursuant to this Agreement. 4D Acquisition may use and rely upon such requirements, programs, instructions, reports, data, and information in performing or furnishing services under this Agreement.



G. Client shall make decisions and carry out its responsibilities in a timely manner so as not to delay 4D Acquisition's performance of its services.

H. Client shall compensate 4D Acquisition as set forth in Article 6 of this Master Services Terms and Conditions Agreement.

ARTICLE 5 – SCHEDULE FOR RENDERING SERVICES

5.01 Commencement

A. 4D Acquisition will begin providing services after receiving written authorization from the Client to start the Work.

5.02 Time for Completion

A. 4D Acquisition shall complete its obligations within a reasonable time period as is customary in the industry. Specific periods of time for rendering services are set forth or specific dates by which services are to be completed are provided in the Proposal, and are hereby agreed to be reasonable.

B. If, through no fault of 4D Acquisition, such periods of time or dates are changed, or the orderly and continuous progress of 4D Acquisition's services is impaired, or 4D Acquisition's services are delayed or suspended, then the time for completion of 4D Acquisition's services, and the rates and amounts of 4D Acquisition's compensation, shall be adjusted accordingly. 4D Acquisition shall be excused from performance for any period during which, and to the extent that, it or its employees, agents, contractors, subcontractors, consultants, or subconsultants, are prevented from performing any obligation, service or the Work, in whole or in part, as a result of causes beyond its control and without its fault or negligence, including, but not limited to, acts of God, strikes, lockouts, riots, acts of war, epidemics, communication failures, and power failures.

C. If the Client authorizes changes in the scope, extent, or character of the Work, then the time for completion of 4D Acquisition's services, and the rates and amounts of 4D Acquisition's compensation, shall be adjusted accordingly.

D. If 4D Acquisition fails, through its own fault, to complete the performance required in this Agreement within the time periods set forth in the Proposal, as duly adjusted, then Client's sole remedy shall be limited to the recovery of direct damages only, if any, resulting from such failure. Consequential damages as defined in Article 7.10 shall not be considered as direct damages.

ARTICLE 6 – INVOICES AND PAYMENTS

6.01 *Compensation:* Client shall compensate 4D Acquisition for services and expenses as specified in 4D Acquisition's Proposal.

6.02 Invoices

A. *Preparation and Submittal of Invoices:* 4D Acquisition shall prepare invoices in accordance with its standard invoicing practice. 4D Acquisition shall submit its invoices to Client once per month or as specified in the Proposal. Invoices are due and payable within 30 days of receipt.

6.03 Payments

A. *Application to Interest and Principal:* Payment will be credited first to any interest owed to 4D Acquisition and then to principal.

B. *Failure to Pay:* If Client fails to make any payment due 4D Acquisition for services and expenses within 30 days after receipt of 4D Acquisition's invoice, then:

1. Amounts due 4D Acquisition by Client will be increased at the rate of 1.5% per month (or the maximum rate of interest permitted by law, if less) from said thirtieth day; and



2. 4D Acquisition may, after giving seven days written notice to Client, suspend services under this Master Agreement until Client has paid in full all amounts due for services, expenses, and other related charges. Client expressly waives any and all claims against 4D Acquisition for any losses, expenses, damages (whether direct, indirect, exemplary or consequential), or liability in connection with or arising from any such suspension of services.
- C. *Disputed Invoices:* If Client contests an invoice, Client shall promptly advise 4D Acquisition of the specific basis for doing so, and identify that portion of the invoice in dispute, and Client must pay the undisputed portion of such invoice within the time period prescribed in paragraph 6.03B above.
- D. *Legislative Action:* If any governmental entity takes a legislative action that imposes new or additional taxes, fees, or charges on 4D Acquisition's services or compensation under this Agreement, then 4D Acquisition may invoice such new or additional taxes, fees, or charges as an expense that will be paid by the Client at cost and without markup. Client shall reimburse 4D Acquisition for the cost of such new taxes, fees, and charges; such reimbursement shall be in addition to the compensation defined in the Proposal.

ARTICLE 7 – GENERAL CONSIDERATIONS

7.01 *Standards of Performance*

- A. *Standard of Care:* The standard of care for all professional services performed or furnished by 4D Acquisition under this Master Agreement will be the care and skill ordinarily used by members of the same profession practicing under similar circumstances at the same time and in the same locality. 4D Acquisition makes no warranties, express or implied, under this Agreement or otherwise, in connection with 4D Acquisition's services.
- B. *Technical Accuracy:* Client shall not be responsible for discovering deficiencies in the technical accuracy of 4D Acquisition's services. 4D Acquisition shall correct deficiencies in technical accuracy without additional compensation, unless such corrective action is directly attributable to deficiencies in Client-furnished information, or for other circumstances beyond the reasonable control of 4D Acquisition.
- C. *Compliance with Laws and Regulations, and policies and procedures:*
 1. 4D Acquisition and Client shall comply with applicable Laws and Regulations.
 2. 4D Acquisition shall comply with written policies and procedures of Client which have been provided to 4D Acquisition prior to 4D Acquisition performing the services, subject to the standard of care set forth in Paragraph 7.01.A.
 3. This Agreement is based on Laws and Regulations and Client-provided written policies and procedures as of the Effective Date. Changes after the Effective Date of this Agreement to these Laws and Regulations, or to Client-provided written policies and procedures may be the basis for modifications to Client's responsibilities or to 4D Acquisition's scope of services, times of performance, or compensation.
- D. *Use of Documents*
 1. Because data stored in electronic media format can deteriorate or be modified inadvertently or otherwise without authorization of the data's creator, the party receiving electronic files agrees that it will perform acceptance tests or procedures within 60 days, after which the receiving party shall be deemed to have accepted the data thus transferred. Any transmittal errors detected within the 60-day acceptance period will be corrected by the party delivering the electronic files.



2. When transferring documents in electronic media format, the transferring party makes no representations as to long-term compatibility, usability, or readability of such documents resulting from the use of software application packages, operating systems, or computer hardware differing from those used by the documents' creator.

7.02 Insurance

A. 4D Acquisition shall procure and maintain insurance as set forth below. 4D Acquisition shall cause Client to be listed as an additional insured on any applicable general liability insurance policy carried by 4D Acquisition.

1. Workers' Compensation	Statutory
2. Employer's Liability	
a. Each Accident	\$1,000,000
b. Disease, Policy Limit	\$1,000,000
c. Disease, Each Employee	\$1,000,000
3. General Liability	
a. Each Occurrence (Bodily Injury and Property Damage)	\$1,000,000
b. General Aggregate	\$2,000,000
4. Umbrella Liability	
a. Each Occurrence	\$1,000,000
b. General Aggregate	\$2,000,000
5. Automobile Liability - Combined Single Limit (Bodily Injury and Property Damage)	
a. Each Accident	\$1,000,000
6. Professional Liability	
a. Each Claim Made	\$1,000,000
b. Annual Aggregate	\$1,000,000

7.03 Suspension and Termination

- A. *Suspension:* The Client may suspend the Work for up to ninety (90) days upon seven (7) days written notice to 4D Acquisition. Client agrees to compensate 4D Acquisition for services provided up to the date of suspension; reasonable de-mobilization and re-mobilization costs; and any escalation, penalties, lease expenses, or other related expenses that may be incurred by 4D Acquisition as result of such suspension. Upon making such payment, Client may request Documents from 4D Acquisition that are incomplete or unchecked but Client shall be solely responsible for, and shall assume all liability for any damages caused by, the use of incomplete or unchecked Documents.
- B. *Termination:* Either party may at any time, upon 30 days prior written notice to the other party, terminate the Work or any task established under this Proposal. Upon such termination, Client shall pay 4D Acquisition all amounts owing to 4D Acquisition for all Work performed up to the effective date of termination, plus reasonable termination costs. Reasonable termination costs shall include, but not be limited to, the cost of terminating any contracts, leases, or other obligations incurred by 4D Acquisition in connection with the Work. In addition, 4D Acquisition may, upon seven (7) days written notice, terminate the Work if Client demands that 4D Acquisition furnish or perform services contrary to 4D Acquisition's responsibilities as professionals. 4D Acquisition shall have no liability to Client on account of such termination.
- C. *Effective Date of Termination:* The terminating party may set the effective date of termination at a time up to 30 days later than otherwise provided to allow 4D Acquisition to demobilize personnel, facilities and equipment, to complete tasks whose value would otherwise be lost, to prepare notes as to the status of completed and uncompleted tasks, and to assemble Documents into orderly files.



D. *Payments upon Termination:*

1. In the event of any termination, 4D Acquisition will be entitled to invoice Client and to receive full payment for all services performed or furnished in accordance with this Agreement through the effective date of termination. Upon making such payment, Client shall have the limited right to the use of Documents, at Client's sole risk.
2. In the event of termination by Client for convenience, or by 4D Acquisition for cause, 4D Acquisition shall be entitled, in addition to invoicing and payment for those items identified in Paragraph 7.04D.1, to invoice Client and to receive payment for services and expenses attributable to termination, both before and after the effective date of termination, such as reassignment of personnel, relocation expenses, costs of terminating contracts with 4D Acquisition's consultants, lease buy-outs, and other related close-out costs and expenses.
3. The Client shall be solely responsible for, and shall assume all liability for any damages caused by, the use of incomplete or unchecked Documents prepared by 4D Acquisition.

7.04 *Controlling Law*

- A. This Master Agreement shall be governed by the laws of the State of Michigan.

7.05 *Successors, Assigns, and Beneficiaries*

A. Client and 4D Acquisition are hereby bound and the successors, executors, administrators, and legal representatives of Client and 4D Acquisition (and to the extent permitted by Paragraph 7.06.B the assigns of Client and 4D Acquisition) are hereby bound to the other party to this Agreement and to the successors, executors, administrators and legal representatives (and said assigns) of such other party, in respect of all covenants, agreements, and obligations of this Agreement.

B. Neither Client nor 4D Acquisition may assign, sublet, or transfer any rights under or interest (including, but without limitation, moneys that are due or may become due) in this Agreement without the written consent of the other, except to the extent that any assignment, subletting, or transfer is mandated or restricted by law. Unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under this Agreement.

C. Unless expressly provided otherwise in this Agreement:

1. Nothing in this Agreement shall be construed to create, impose, or give rise to any duty owed by Client or 4D Acquisition to any Contractor, subcontractor, supplier, other individual or entity, or to any surety for or employee of any of them.
2. All duties and responsibilities undertaken pursuant to this Agreement will be for the sole and exclusive benefit of Client and 4D Acquisition and not for the benefit of any other party.

7.06 *Dispute Resolution:* Client and 4D Acquisition agree that they shall first submit any and all unsettled claims, counterclaims, disputes, and other matters in question between them arising out of or relating to this Agreement or the breach thereof ("Disputes") to mediation. Client and 4D Acquisition will mutually agree on the forum for such mediation and will participate in the mediation process in good faith. The process shall be conducted on a confidential basis, and shall be completed within 120 days from the date of written notice of the claim, counterclaim, Dispute, or matter in question from the disputing party. If such mediation is unsuccessful in resolving a Dispute, or the parties are unable to mutually agree upon a mediator within thirty (30) days of the date of such written notice, or if either party fails to participate in the mediation process in good faith, then either party may seek and undertake legal action to have the Dispute handled by a court of competent jurisdiction and may further seek all available legal remedies to such party, including, but not limited to, all available remedies at law or in equity.



7.07 *Environmental Condition of the Property*

- A. Client has disclosed to 4D Acquisition in writing the existence of all known and suspected Asbestos, PCBs, Petroleum, Hazardous Waste, Radioactive Material, hazardous substances, and other Constituents of Concern located at or near the property, including type, quantity, and location.
- B. Client represents to 4D Acquisition that to the best of its knowledge no Constituents of Concern, other than those disclosed in writing to 4D Acquisition, exist at the property.
- C. If 4D Acquisition encounters or learns of an undisclosed Constituent of Concern at the Site, then 4D Acquisition shall notify: (1) Client; and (2) appropriate governmental officials if 4D Acquisition reasonably concludes that doing so is required by applicable Laws or Regulations.
- D. It is acknowledged by both parties that 4D Acquisition's scope of services does not include any services related to Constituents of Concern. If 4D Acquisition or any other party encounters an undisclosed Constituent of Concern, or if investigative or remedial action, or other professional services, are necessary with respect to disclosed or undisclosed Constituents of Concern, then 4D Acquisition may, at its option and without liability for consequential or any other damages, suspend performance of services on the portion of the Work affected thereby until Client: (1) retains appropriate specialist consultants or contractors to identify and, as appropriate, abate, remediate, or remove the Constituents of Concern; and (2) warrants that the property is in full compliance with applicable Laws and Regulations.
- E. If the presence of undisclosed Constituents of Concern adversely affects the performance of 4D Acquisition's services under this Agreement, then 4D Acquisition shall have the option of: (1) accepting an equitable adjustment in its compensation or in the time of completion, or both; or (2) terminating this Agreement for cause on 30 day's notice.
- F. Client acknowledges that 4D Acquisition is performing professional services for Client and that 4D Acquisition is not and shall not be required to become an "owner" "arranger," "operator," "generator," or "transporter" of hazardous substances, as defined in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, which are or may be encountered at or near the Site in connection with 4D Acquisition's activities under this Agreement.

7.08 *Indemnification*

- A. *Indemnification by 4D Acquisition:* To the fullest extent permitted by law, 4D Acquisition shall indemnify and hold harmless Client, and Client's officers, shareholders, directors, members, partners, agents, consultants, and employees from those reasonable claims, costs, losses, and damages arising out of or relating to the Work, for any claim, cost, loss, or damage including but not limited to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property, including the loss of use resulting therefrom, but only to the extent caused by any negligent act, error or omission of 4D Acquisition or 4D Acquisition's officers, directors, members, partners, agents, employees, or Consultants.
- B. *Indemnification by Client:* To the fullest extent permitted by law, the Client shall indemnify and hold harmless 4D Acquisition, and 4D Acquisition's officers, shareholders, directors, members, partners, agents, consultants, and employees from those reasonable claims, costs, losses, and damages arising out of or relating to the Work, for any claim, cost, loss, or damage including but not limited to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property, including the loss of use resulting therefrom, but only to the extent caused by any negligent act, error or omission of Client or Client's officers, directors, members, partners, agents, employees, consultants or contractors.
- C. *Environmental Indemnification:* To the fullest extent permitted by law, Client shall indemnify and hold harmless 4D Acquisition and its officers, directors, members, partners, agents, employees, and consultants from and against any and all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys and other professionals, and all court, arbitration, or other dispute resolution costs) caused by, arising out of, relating to, or resulting from, directly or indirectly, a Constituent of Concern at, on, or under the Site, provided that (1) any such claim, cost, loss, or damage is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property, including the loss



of use resulting therefrom, and (2) nothing in this paragraph shall obligate Client to indemnify any individual or entity from and against the consequences of that individual's or entity's own negligence or willful misconduct.

D. *Percentage Share of Negligence:* To the fullest extent permitted by law, a party's total liability to the other party and anyone claiming by, through, or under the other party for any cost, loss, or damages caused in part by the negligence of the party and in part by the negligence of the other party or any other negligent entity or individual, shall not exceed the percentage share that the party's negligence bears to the total negligence of Client, 4D Acquisition, and all other negligent entities and individuals.

7.09 *Consequential Damages:* To the fullest extent permitted by law, neither party shall be liable to the other for any special, exemplary, indirect or consequential damages of any nature including, but not limited to: damages arising from the use or loss of use of any facility; loss of anticipated profits or revenues; costs of replacement services, goods and utilities; costs of purchasing or generating replacement electricity; damages arising from delay; claims of customers; or interest, whether based in contract, tort, strict liability, or any other legal theory, even if such party was advised on the possibility of such damages in advance.

7.10 *Limitation of Liability:* To the fullest extent permitted by law, and notwithstanding any other provision of this Agreement, the total liability, in the aggregate, of 4D Acquisition and 4D Acquisition's officers, shareholders, directors, members, partners, agents, employees, and subconsultants, to Client and any third party including anyone claiming by, through, or under Client for any and all claims, losses, costs, damages, expenses (including but not limited to reasonable attorney fees) whatsoever arising out of, resulting from, or in any way related to the Work or this Agreement from any cause or causes whatsoever, including but not limited to the acts, negligence, professional errors or omissions, strict liability, breach of contract, indemnity obligations, or warranty express or implied of 4D Acquisition or 4D Acquisition's officers, shareholders, directors, members, partners, agents, employees, or subconsultants shall not exceed the aggregate sum of \$500,000.

7.11 *Miscellaneous Provisions*

A. *Notices:* Any notice required under this Agreement will be in writing, addressed to the appropriate party at its address as indicated in the Proposal and given personally, by facsimile, by registered or certified mail postage prepaid, or by a commercial courier service. All notices shall be effective upon the date of receipt.

B. *Survival:* All express representations, waivers, indemnifications, and limitations of liability included in this Agreement will survive its completion or termination for any reason.

C. *Severability:* Any provision or part of the Agreement held to be void or unenforceable under any Laws or Regulations shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon Client and 4D Acquisition, which agree that the Agreement shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.

D. *Waiver:* A party's non-enforcement of any provision shall not constitute a waiver of that provision, nor shall it affect the enforceability of that provision or of the remainder of this Agreement.

E. *Accrual of Claims:* To the fullest extent permitted by law, all causes of action arising under this Agreement shall be deemed to have accrued, and all statutory periods of limitation shall commence, no later than the date the Work is substantially completed.

F. *Entire Agreement:* The Agreement, upon its acceptance by both parties, shall constitute the entire and integrated understanding between the parties and supersede all prior and contemporaneous negotiations, representations, and Agreements, whether written or oral, with respect to the subject matter herein. The Agreement may be amended only by written instrument signed by Client and 4D Acquisition.



7.13 Provisions for Specific Services if Included in 4D Acquisition's Proposal

- A. *Certifications:* Certifications and the use of terms such as “certify”, “declare” or “state” shall be defined as an expression of 4D Acquisition’s professional opinion based on known information and belief, and does not constitute a warranty or guarantee by 4D Acquisition.
- B. *Acquisition:* Acquisition services having a general meaning the securing of any right, authority or interest from an entity. The completion of such services typically includes presenting property owner documentation, utilizing client authorized forms, by which the acquisition would be completed. Such may also include an offer of compensation. Collectively the forms and compensation establish the “terms” of the acquisition. 4D will present the terms of such acquisition in a professional manner and will work diligently in accordance with this Agreement and the description of the Work to complete the acquisition. These are independent property owners that cannot be controlled by 4D Acquisition and as such, 4D Acquisition cannot and does not guarantee that these owners will participate in the acquisition or that the acquisition can be completed by 4D. 4D Acquisition is further not responsible or liable for any delays, and related damages or losses resulting from such acquisition not being completed.
- C. *Licensing and Permitting:* These services generally involve the preparation of permit applications and other documents for submittal to various federal, state and local agencies, railroads etc. These are independent regulatory agencies, entities, organizations and companies that cannot be controlled by 4D Acquisition. As such, 4D Acquisition cannot and does not guarantee that these entities will perform a timely review of 4D Acquisition’s submittal nor can 4D Acquisition guarantee that 4D Acquisition’s submittal will be approved. 4D Acquisition is further not responsible or liable for any delays, and related damages or losses resulting from any such licensing and permitting delays or the failure by any such agency, entity, organization, or company to approve any such submittal.