Note: This version is same as original in content except that names and locations have been changed or redacted (Sept. 26, 2014) for privacy protection purposes.

CONFIDENTIAL CONFIDENTIAL

Arbitration Award

[Claimant]
XXXXXXXXXXXXXXX
(hereinafter referred to as the 'Claimant')

-and-

[Respondent]
XXXXXXXXXXXXXXX
(hereinafter referred to as the 'Respondent')

Hearing date: February 20-21, 2013

Arbitrator: Dr. Nick Tywoniuk, Ph.D., P.Eng., Chartered Arbitrator

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Appearances:

Claimants:

aaaaaaa (Claimant's representative, also witness).

bbbbb: legal counsel for claimant.

Also present: ccccccc (only to assist with documents).

Respondents:

ddddddd (Respondent's representative, also witness).

eeeeeee (Respondent's representative, also witness).

fffffffff (observer, first half day only).

ggggggg (observer, first half day only).

Exhibits:

Exhibit	Date	Description
1	January 29, 2013	Claimant's submission material.
2	January 24, 2013	Respondent's submission material.
3	February 20, 2013	May 24, 2006, letter from Mr. xxxxx
4	February 20, 2013	May 12, 2006, letter from xxxxx.
5	February 20, 2013	January 16, 2007, email from xxxxx.
6	February 20, 2013	May 19, 2009, letter from xxxx.
7	February 20, 2013	October 3, 2012, email from xxxxxx.
8	February 21, 2013	xxxxxx, invoice, May 27, 2008.
9	February 21, 2013	xxx, preliminary plan.
10	February 21, 2013	Real Estate listing.
11	March 4, 2013	Claimant's information regarding Notice of Undertaking to Provide Information.
12	March 27, 2013	[Respondent] response to information provided.
13	March 27, 2013	Claimant's rebuttal.
14	April 8, 2013 (10:50 am)	Claimant's submission per Interim Award, Part 1.
15	April 8, 2013 (10:51 am)	Claimant's submission per Interim Award, Part 2.
16	April 9, 2013 (3:08 pm)	Respondent's submission per Interim Award, Part 1.
17	April 9, 2013 (4:51 pm)	Respondent's submission per Interim Award, Part 2.
18	April 16, 2013	Claimant's April 15, 2013, email and attachments of a letter and 'as built drawing'.
19	April 19, 2013	Extra invoices per tab k.

A. INTRODUCTION:

1. The Claimant, [Claimant], also referred to throughout this report as '[Claimant]', applied in December, 2012, for arbitration of a dispute with the [Respondant] (also referred to as 'the County', and as 'the Respondent'). The dispute was with regard to an agreement between the Parties, dated May 19, 2006, which involved the construction and surfacing of public roads, in the [County of xxxx], Province of Alberta.

2. Also in December, 2012, the Parties requested Dr. Nick Tywoniuk, Chartered Arbitrator, to arbitrate the dispute.

3. A pre-hearing teleconference was held on December 12, 2012, to discuss any relevant, preliminary matters and to schedule a date for the arbitration hearing.

4. The Parties agreed on dates for the 'submissions' and set the hearing dates for February 20 and 21, 2013.

5. The Parties defined the scope of the arbitration to be as follows:

   'The purpose of the arbitration is to determine the amount of 'recovery' costs owing [Claimant], pursuant to an agreement between the Parties, dated May 19, 2006, which involved the construction and surfacing of public roads along Range Road xxxxxxxxxxxxxxxxxxx.

   Given the history, the scope of the arbitration also includes the following questions:

   1. *A Construction Completion Certificate (CCC) was issued by [Respondent] on July 6, 2012 and no Final Approval Certificate (FAC) has yet been issued for the landscaping and subgrade work on hhhhhh Road. When should a FAC be issued by [Respondent]? When should a CCC and a FAC have been issued respecting the landscaping and sub-grade for gggggg Drive and at which date should interest have started to accrue?*
   2. *Per Sec. 7.2 of the Development Agreement signed by both parties, when is the start date for calculating interest on road recovery costs as per the Agreement?*
   3. *What invoices and interest payments were paid from The Claimant's Security funds pursuant to the Development Agreement signed by both parties?*
   4. *What funds has the County received from other developers pursuant to the Agreement and should these amounts be paid to The Claimant?*

5. *How did the County calculate the amount spent by The Claimant on the construction in order to collect from the other developers. Was this calculation correct?*
6. *Per the Development Agreement signed by both parties was the proper percentage collected by the County from the other developers pursuant to the Agreement?*
7. *Does The Claimant require an engineer's stamp on the accounting of actual costs of the construction from which the County can calculate amounts owing by other developers?*
8. *Have all subcontractors – and suppliers – related to the claimed construction activity (to date) been paid?*
9. *Per Schedule F of the Development Agreement signed by both parties: have all claimed construction costs been calculated correctly?*
10. *Have all costs associated with the claim noted in #9 (above) been prepared consistent with accepted industry practice?*
11. *Which consulting firm provided the necessary accredited engineering services for the road construction?'*

6. The arbitration hearing was held on February 20 and 21, 2013.

7. The Claimant, as a preliminary matter, requested that this arbitration be conducted as a mediation/arbitration (med/arb) since some of the issues could be settled easily by the Parties and that the Alberta Arbitration Act, section 35, allows for this. The County agreed this would be advantageous to both Parties. The Arbitrator agreed to proceed in this med/arb manner; the issues that could not be resolved by the Parties through discussion would be 'decided' by the Arbitrator. Messrs. xxx, vvvvv and bbbbb were 'sworn' for this med/arb hearing so that all discussions were made under oath.

8. This report is my decision which includes my reasons for my decision and which is based on the information and exhibits submitted, on the representations made during the hearing, and submissions resulting from an 'interim award'.

B. OPENING COMMENTS:

9. Claimant's opening statements: In the opening statements, the Claimant indicated they have tried to resolve the issues by negotiation; these negotiations have taken much too

long. The Claimant has a lot of money 'tied up' in this project and is seeking to recover costs. Resolution of the issues will require the analysis and interpretation of the agreement. The Claimant will argue that 'parol evidence' should not be accepted here unless there is obvious ambiguity. The Claimant will be asking the Arbitrator to analyse the facts in the context of the spirit and intent of the agreement; put the road in now and pay for it, later the abutting lands would pay their share.

10. The Respondent's opening statements: The Respondents, in their opening statements, also indicated that the agreement should be the basis for settling the disputes; contract interpretation is critical to the County. In order to be able to defend its agreements, the County needs to be comfortable with costs. The Arbitrator needs to determine 'fair costs' so that we can move on with the agreement. A fundamental concern for the County is 'defensible' costs; costs for improvements to RRxxx and, costs for the construction of xxxxx Drive.

B. THE EVIDENCE:

11. Since the issues were dealt with in sequential order and, since there was a 'discussion' component, only the most relevant discussion points are summarized in the following paragraphs.

12. [Claimant], during examination by counsel, provided background information about the project. [Claimant] was the general contractor for this project. He indicated he has road construction and subdivision development experience; he does one of these in about every two years, such projects having a value of several million dollars to 120 million dollars. He has dealt with many municipalities and finds that the wording of agreements is very important to him.

13. [Claimant] stated that the County had created the subdivision in 1958; the lots and road allowance were defined at this time. The Claimant purchased four lots from Mr. xxx and had an agreement that Mr. xxx would cooperate with respect to road and utility construction (Exhibit 3). The Claimant approached the County to cost share the road construction; this was denied by the County on May 12, 2006 (Exhibit 4), with the suggestion that a Development Agreement would be required. A development agreement was entered into

on May 19, 2006 (Exhibit 1, tab 1), the required security was provided and the construction was begun shortly afterwards.

14. By the end of August, 2006, both roads RRxxx and xxx Drive were built completely, except for deficiencies, landscaping and paving. Paving was delayed due to deficiencies with gravel provided and due to a stop work order with respect to widths of road allowance. [Claimant] emphasized that clause 4.3 of the agreement (Exhibit A, tab A) provides for a range of stop work orders that could be issued by the County; the stop work order that was issued by xxx was outside of this scope of stop work orders. Paving was completed in 2012.

15. [Claimant] also provided information (much of which is outlined in Exhibit A) about the CCCs and FACs; this oral testimony is discussed below to the extent that it was relevant to the specific issues.

16. Background information and clarifications were also provided by County representatives Mr. xxx and Mr. zzz.

17. With regard to Exhibit 3, Mr. xxx explained that this pertained to an agreement external to the County; the County was not a signatory and, therefore, the agreement described in Exhibit 3 is of no relevance. The widening of the road allowance was an issue for [Respondent] from the start and it was made clear that the County would not take responsibility for acquiring road widening/easements/utility right-of-ways (Exhibit 2, tab 20). Similarly, Exhibit 5 is of no value because it is only one of three pages and lacks context.

18. The Med/Arb proceedings continued from this point on an issue by issue basis. The pertinent points are summarized below.

Issues 1 and 2:

19. Issues 1 and 2 were discussed together because they are closely related. The issues were defined by the Parties as follows:

> Issue 1. A Construction Completion Certificate (CCC) was issued by [Respondent] on July 6, 2012 and no Final Approval Certificate (FAC) has yet been issued for the landscaping and subgrade work on xxx Road. When should a FAC be issued by [Respondent]? When should a CCC and a FAC have been issued respecting the landscaping and sub-grade for Xxx Drive and at which date should interest have started to accrue?
>
> Issue 2. Per Sec. 7.2 of the Development Agreement signed by both parties, when is the start date for calculating interest on road recovery costs as per the Agreement?

20. The Parties agreed that the dates for RRXXX construction were as follows: the effective CCC date is Nov 1, 2006, (interest starts at this time); the effective FAC date is Nov 1, 2007, (the warranty period ends on this date).

21. With respect to Xxx Drive, both Parties agree landscaping and drainage are considered to be separate from the road construction components (fills and cuts, base course preparation) which are required prior to paving, and the paving. The Parties did not agree as to effective dates for the CCC and FAC for the road construction (excluding landscaping and drainage and paving). The Parties agreed that the effective dates for the paving component of Xxx Drive were July 6, 2012, for the CCC, and July 6, 2013, for the FAC, the latter assuming that there will be no outstanding warranty work required.

22. The Claimants position was that, since the roadway was constructed in 2006, the effective date of the CCC, and hence, start of interest calculation should be Nov. 1, 2006; all asphalt was done in 2012 and interest calculation should start July 1, 2012. Supporting arguments included the following:

    1. The paving of Xxx Drive was delayed as a result of a stop work ordered issued by the County in the fall of 2006, followed by inclement weather and then by the onset of winter (Exhibit 1, forward, clause 10). The stop-work order was with regard to a right-of-way issue; it was lifted a short time later when the issue could not be resolved, however, by this time it was too late for the paving to proceed.

    2. The stop work order was outside of the provisions of clause 4.3 of the agreement, however, [Claimant] felt it was best to observe the order even though it caused delays.

    3. The CCC for Xxx Drive was applied for at the same time as for RRXXX. The County did not want to sign off on the CCC for Xxx Drive at this time because the paving was not completed.

    4. Xxx Drive was open to use by the public in 2006.

    5. The County released $298,200.00 of the $423,200.00; the remaining $125,000.00 was left as security for the paving of Xxx Drive only.

    6. [Claimant] applied for a CCC for the subgrade and landscaping of Xxx Drive in 2006 and then again in 2007. When there was no response from the County within 45 days, [Claimant] assumed it was accepted as per the terms of the Agreement.

23. The County position was that the interest applies July 1, 2012, for everything except landscaping and drainage; landscaping and drainage includes topsoil and seeding and does not include the subgrade. The County arguments in support of their position included:

    1. The Development Agreement is clear, it says that a CCC may be applied for when the road base and the paving is completed; paving of Xxx Drive was done in July, 2012. The CCC was effective on July 6, 2012; the FAC will be effective on July 6, 2013.

    2. With respect to the stop work order (issue of right-of-way requirements) the County has always made it clear that the acquisition of right-of-ways is the responsibility of the Developer (Exhibit 2, tab 20, email dated September 29, 2006).

    3. The CCC and FAC applications, November 6, 2006, were reviewed by the County, were not accepted and were returned to the Claimant (Exhibit 2, Tab 5).

Issue 3:

24. This issue was defined by the Parties as: What invoices and interest payments were paid from The Claimant's Security funds pursuant to the Development Agreement signed by both parties?

25. The County provided a summary of the invoices and interest payments (Exhibit 2, tab 15). The Parties agreed with the amounts shown on this summary, except for an amount shown as $991.10, invoice date 2007/04/18, for work described as 'install signs at TRxxx/RRXXX' and for the amount of the interest charges.

26. The [Claimant] argued that this amount, $991.10, should be excluded from the invoicing because:

    1. The subject stop signs were off the development property and were not the responsibility of the developer. Reference was made to clause 6.8 of the Development Agreement; [Claimant] argued that this clause makes it clear that these signs were the responsibility of the County.

    2. [Claimant] also argued that Mr. xxx had said that [Claimant] did not need to put up the signs as these were off the job site; these signs were not identified on the design drawings submitted.

    3. [Claimant] also indicated that 'neighbours kept cutting down the signs', these signs were replaced several times and that [Claimant] should not be responsible for this type of vandalism.

27. The County argued that the $991.10 invoice was legitimate because the intersection at which the signs were placed was 'one of the three legs of the intersection' and this intersection, therefore, needed the signs. Clause 6.7 of the Development agreement requires that the Developer pay for the signs.

28. With respect to the issue of the amount of the interest charges, [Claimant] argued that:

    1. There should be no interest charges because the County should have taken the amounts owing from the security provisions.

    2. The interest rate charged by the County, 1.5% per month, is punitive; in a contractual agreement the rate that should be charged is the 'actual' interest rate that the County pays; this would be an equitable approach.

    3. The interest rate is not specified in the Development Agreement, therefore, if the Arbitrator determines that this interest is 'chargeable', then [Claimant] requests that the Arbitrator also rule that the rate per the Interest Judgement Act be applied.

29. The County argued that the interest charged was correct and reasonable; the County argued that:

    1. The interest rate is set by Council and is a County policy.

    2. The County had made many efforts to collect the moneys owing; invoices were sent out monthly, the requests for payment were ignored over the 6 or 7 years. Thus, the developer had many opportunities to pay the invoices to avoid interest penalties.

Issue 4:

30. Issue 4 was defined by the Parties as: What funds has the County received from other developers pursuant to the Agreement and should these amounts be paid to The Claimant?

31. Exhibit 2, tab 19, shows that the County has received $875.31 and that this money has been paid to the Claimant.

Issues 5 and 6:

32. Issues 5 and 6 were defined by the Parties as follows:

> Issue 5: How did the County calculate the amount spent by the Claimant on the construction in order to collect from the other developers. Was this calculation correct?

Issue 6: Per the Development Agreement signed by both parties was the proper percentage collected by the County from the other developers pursuant to the Agreement?

33. In response to issue 5, the County gave information on how they calculated $875.31 (Exhibit 2, tab 19). The County considers that their calculation as shown (except for a % sign which should not be in the calculations) was correct. In November, 2011, the County initiated an independent cost study as it wanted a cost estimate of road building and wanted to review the road conditions to determine if anything needed to be done to get the road ready for paving (Exhibit 2, tab 9). Appendix B of the Ccccc report (Exhibit 2, tab 10) provided the cost estimate that was used in the 'recovery' calculations. The Ccccc assessment was made using design drawings and on-site observations.

    The Claimant argued that, while the calculation 'formula' was fine, the County should be using the actual costs as provided by the Claimant and, further, both portions of the subdivided 'benefited lands' should have been subject to cost recovery. This argument relates to issue 6 which is discussed in the following paragraphs.

34. In response to issue 6, the Claimant argued that the Development Agreement does not talk about a 'pro-rata' cost and, therefore, the entire 1/3 of the cost should have been recovered for the SW x-x-x-W4M parcel of land at the time that it was subdivided. The Claimant argued that the Development Agreement is clear in how 'benefited lands' are defined and in stating that if any one of the three parcels of land identified as benefited lands are subdivided, then the cost recovery is 'triggered'. If this were not the case, then some of the Developers costs may never be recovered. Since the 'letter of the agreement' is clear, there is no reason to look for an answer beyond the agreement, the intent is to be interpreted as that which is clearly defined by the agreement.

    The County agreed that the Development Agreement is key in determining the issue of benefited lands; clause 7.1 addresses this, for example, it states that other Developers (of the identified lands) would be required to pay their 'proportionate share' of the front-ending costs. The County argued that the industry standard and industry practice is to treat the benefited lands and cost recovery issues in the way that the County has demonstrated in this case (Exhibit 2, tab 19).

35. The Claimant, with reference to case law provided in Exhibit 1, tab J, argued that this case was similar to the issues before us. The Claimant highlighted clause 36 of this case law: 'The law is clear that the intent of the leases must be determined from the words actually used in the written documents, and cannot be supplemented by the parties' evidence of what they intended or understood the leases to mean unless there is a true ambiguity.' The

Claimant argued that, since the County has not made any submissions on this (they only presented facts), the Arbitrator should 'rule' on the basis of what has been presented.

The County argued that 'true ambiguity' means different things to different persons; the County would like the Arbitrator to consider specific matters as well as the broad perspective.

Issue 7:

36. Issue 7 was defined as: Does the Claimant require an engineer's stamp on the accounting of actual costs of the construction from which the County can calculate amounts owing by other developers?

37. The Claimant's position on this issue was that, while it is reasonable for the County to ask for an engineer's stamp on 'as built' drawings, it is unreasonable to ask for an engineer's stamp on cost accounting information. The Claimant argued that:

    1. The accountants are professionals that are familiar with cost details, engineers would not have knowledge of actual costs.

    2. It is impractical, perhaps impossible, for the Claimant to get an engineer to stamp such a document as the production of such documents is clearly an accounting function.

    3. The Development agreement requires that the Developer provide 'actual costs', the only person who knows this is the accountant.

38. The County argued that the County must have confidence in the 'numbers' and that it was industry practice to go with an engineer's verification of costs (engineer's stamp) or with tender documents. Further arguments included the following:

    1. It is the engineers that oversee that construction is in conformity with plans and specifications and design standards and, therefore, engineers are familiar with the costs associated with the construction; it is easy for the engineer to certify that invoices are directly related to the work done (Exhibit 2, tab a, clause 2.2, clause 2.16).

    2. In this case, the Claimant did not have an engineer on site but this does not exclude the Claimant from providing an accounting of costs that is defensible, the County must be able to defend the numbers.

Issue 8:

39. The Parties defined this issue as follows: Have all subcontractors – and suppliers – related to the claimed construction activity (to date) been paid?

40. The Claimant provided the required information in the submission, Exhibit 1, page 14, clause 6.1. The Claimant confirmed that, for the period 2006 to now, there are no outstanding invoices except as identified in clause 6.1.

Issues 9 and 10:

41. These issues were discussed together as they are closely related. The Parties defined these issues as follows:

> Issue 9: Per Schedule F of the Development Agreement signed by both parties: have all claimed construction costs been calculated correctly?
>
> Issue 10: Have all costs associated with the claim noted in #9 (above) been prepared consistent with accepted industry practice?

42. These issues arise from the County not accepting some of the construction costs being claimed by the Developer. The Claimant position is that cost information has been presented as required under the terms of the Development Agreement, these costs are shown in Exhibit 1, tab K. The County position is that the County requires detailed cost information consistent with industry practice, information that is reliable and defendable and that the Claimant has not provided such information.

43. The County representatives outlined the deficiencies, the problems they are having, with the cost information as submitted. These included the following:

    1. Since December, 2012, the Claimant has submitted three cost summaries, each having a higher total than the previous; January 30, 2012, $666,845.50; February 13, 2012, $951,253.00, and March 15, 2012, $1,036,627.20 (Exhibit 2, page 2).

    2. In July, 2006, the security provided to the County by the Developer was $425,000.00; this amount was based on the estimated total cost of the construction (Exhibit 2, page 1). In November, 2011, an independent review of costs resulted in a total of $278,736.00 (Exhibit 2, tab 10). Based on this information, the Claimants costs are unreasonably high.

    3. The formula for the recovery of costs is different for RRXXX and for Xxx Drive; hence the construction costs must be identified specific to each segment; this has not been done.

4. Some of the costs being claimed (electrical power and natural gas services) are costs which are solely the Developer's responsibility; it has always been County policy that these costs are not 'recoverable' because the utilities are not a County asset. The Claimant may want to recover these costs from the utility companies. Schedule F to the agreement clearly states that the recovery amounts will be determined '…using the actual road construction cost…'; utility costs are not road costs. Schedule D to the Development Agreement specifies the items that will be included in determining the recovery costs.

5. Some of the costs claimed are not substantiated by invoices and many of the invoices do not show where services were rendered or where materials were delivered. Many invoices do not show dates, hours worked, rates, etc., such information would show that the invoices represent real costs related to this project.

44. The Claimant argued that the Development Agreement is basically a cost plus contract. Schedule F of the agreement outlines the work that is to be done (Exhibit 1, tab A); the Agreement provides for the recovery of 'actual costs', not estimated costs, tender document costs, or costs determined in some other, indirect way. The Claimant's arguments in response to the County concerns above included the following:

    1. The Claimant explained that the first costs submitted were based on information available at the time. The financial records had been stored in archives; when the County asked for this information, boxes were removed from archives, information quickly collated and submitted. Later it was found that there was more information; this was added. Similarly, this happened once again. As a result, the County got three statements of costs. The Claimant then got the accountant to review the six years of books; the final accounting is shown in Exhibit 1, tab K, page 2; these figures show the actual costs, not estimates, and are supported by actual invoices.

    2. The Claimant argued that the Development Agreement deals with actual costs, not estimates, tenders, quotes, etc.. Exhibit 1, tab K, is the entire submission on this issue.

    3. The Claimant submits that the ratio of the cost of the total work for each of RRXXX and Xxx Drive is 1/3 for RRXXX and 2/3 for Xxx Drive (Exhibit 1, page 9).

    4. With respect to power and gas utilities, the Claimant argued that there is nothing in the Development Agreement that indicates that cost recovery would not apply to gas and power. In Schedule E the utilities are just 'broken out' from Schedule D (road costs) and, therefore, utility costs are included for cost recovery. Exhibit 8 was

provided to show that electricity is being provided to property owners in the development and to show actual construction costs.

5. The Claimant argued that the invoices represented actual costs as required pursuant to the Development Agreement and offered to discuss each invoiced item to clarify what it is.

45. The Parties discussed other specific items shown in the 'road cost recovery' submission (Exhibit 1, tab K, page 2). These discussions and arguments are summarized as follows:

    1. With respect to item 13, [Respondent], $22,355.30, the Parties agree with this amount except for interest charges (see issue 3, above); a decision is required from the Arbitrator.

    2. With respect to item 15, xxxx, $132.93, the County opined this should be part of the administrative costs.

    3. With respect to item 16, Spearhead Contracting, $126,107.75, this was the sum of two separate invoices: invoice 1320, September 14, 2006, $117,318.15, and invoice 1343, September 30, 2006, $8,649.60. The County asked for clarification with respect to what this was for (road bed, surfacing, lot grading?) and where this work took place as the invoices did not provide this detail. The County indicated that invoice 1343 cannot be accepted because it shows no connection to Xxx Drive, or to what equipment was used, hourly rates, etc., such as is shown on invoice 1320.

       The Claimant clarified that xxxxx came in after the road was already prepared; [Claimant] already had his equipment there and much of the road bed was in place. xxxxx helped complete the roadbed, then came back to do grading (invoice 1343). There was no grading of specific lots; these were all bush. The Claimant argued that this project was the Claimants sole project, therefore, all the invoices related to this project.

    4. With respect to item 18, vvvvvvv Sand and Gravel, $42,287.27, the County commented that the invoice needs to specify delivery location; material was delivered to 'somewhere', a link needs to be made to this project.

    5. With respect to item 11, xxxxx Paving Alberta, $137,022.94, the County indicated that this cost was significantly higher than the provincial average, $180 per tonne ECP as compared to $95 to $115 per tonne, depending on type used. The County noted that the Claimant had obtained quotations for this work and asked for copies of the quotations as this information would help the County understand the high cost and to ensure that due diligence was done on the part of the Claimant. The

County has to 'defend' the costs as being reasonable and the quotation information may help to do so.

The Claimant argued that the xxxxx Paving Alberta was the lowest of quotes received; the highest was for $200,000.00. The invoice submitted is for work actually done and includes more than just material costs, but costs for labour, experience, profit, etc.. Since these are actual costs, these are the costs that are recoverable. The Development Agreement does not require the Claimant to submit quotes or tenders, only invoices for actual costs and this is what has been done. The Claimant further argued, with reference to Exhibit 2, tab 7, that the County makes reference to costs for RRXXX in 'Reasons for Decision'; since Xxx Drive is longer, costs can be expected to be more than for RRXXX and within the range of costs that were actually incurred.

6. With respect to item 3, [Claimant], General Contracting & Consulting, $339,500.00, the three invoices are very problematic to the County because of the high dollar value, no supporting documentation, lack of clarity as to what was actually done, the appearance of redundancy and 'double-dipping', and the lack of clarity with respect to what was done having the role of 'developer' and what was done in the role as a 'contractor'. The County cannot accept these invoices as being legitimate; the invoices need to be substantiated with detail such as work done, labour used, equipment types and rates, time sheets, etc. Industry practice is that contractors provide this detail of information.

   The Claimant explained that the invoices are for actual work done, such work included brushing and burning of brush piles, road preparation using [Claimant]'s machinery and labour, preparation for asphalting, and on-site supervision ([Claimant] was on site for about 70% of the time). The invoices also include 'profit', as this is standard practice for contractors.

46. The Claimant, with the cooperation of the County, undertook to provide more information, to 'give [Respondent] the most defensible numbers possible to support the invoices'. This undertaking was confirmed by a 'Notice of Undertaking to Provide Information' dated February 22, 2013, and issued by the Arbitrator to the Parties; this notice outlined the purpose, the schedules for submissions and reviews, and other procedural matters.

Issue 11:

47. The Parties defined this issue as follows: Which consulting firm provided the necessary accredited engineering services for the road construction?

48. The Claimant provided the required information in the submission, Exhibit 1, page 15, clause 6.5.

D. CLOSING COMMENTS:

49. The Parties indicated that they had ample time to make their comments during the proceedings as this Mediation/Arbitration process allows this to happen. Neither Party had any further closing comments.

E. ANALYSIS:

Issues 1 and 2:

50. Issues 1 and 2: For ease of reference, these issues are re-stated herein:

> Issue 1. A Construction Completion Certificate (CCC) was issued by [Respondent] on July 6, 2012, and no Final Approval Certificate (FAC) has yet been issued for the landscaping and subgrade work on Xxx Road. When should a FAC be issued by [Respondent]? When should a CCC and a FAC have been issued respecting the landscaping and sub-grade for Xxx Drive and at which date should interest have started to accrue?
>
> Issue 2. Per Sec. 7.2 of the Development Agreement signed by both parties, when is the start date for calculating interest on road recovery costs as per the Agreement?

51. With respect to RRXXX, the Parties agree that the CCC was issued On November 1, 2006, and, therefore, interest on the Developer's front-ending costs is to be calculated from this date forward to the 'interest termination date'.

52. With respect to Xxx Drive, the Claimant argued that, since the road (less paving) was also completed before November 1, 2006, interest calculations on these costs should also begin on this date; the asphalt was completed by July, 2012, therefore the interest calculations for the paving cost should start on this date; landscaping and drainage (topsoil costs and seeding excluded).

53. The Claimant argued that the paving could not be completed in 2006 as planned because the agreement was 'frustrated' by the County failing to register documents in a timely fashion and by the County imposing a verbal stop work order (Exhibit 1, page 9, line 28).

54. The Respondent's position was that the 'agreement' is clear that interest applies when a CCC is issued (subgrade and paving both need to be completed), in this case on July 1, 2012.

55. Refer to paragraphs 19 to 23 inclusive for a full description of arguments presented at the hearing.

56. In my interpretation of the evidence submitted, article 7.2 of the agreement reads: '…interest…shall be calculated…from the date that a Construction Completion Certificate…has been accepted by [Respondent]…'. There were to be three separate CCC and FACs, one each for RRXXX, Xxx Drive and 'Landscaping and Drainage'.

57. With respect to 'frustrated the agreement', the verbal, stop-work order may have prevented paving of Xxx Drive in the fall of 2006, however, there was nothing to stop the Claimant from doing the paving in 2007. Furthermore, the stop-work order is provided for in section 4.3 of the 'agreement' in a situation that: '…is likely to damage some existing public work in a manner not contemplated by this Agreement.' Although the stop work was related to a right-of-way issue, inadequate right-of-way provisions have the potential of causing harm to landowners or can result in requiring changes to design plans. This verbal stop-work was 'lifted' in early fall of 2006; there appears to be no reason for paving to have been postponed beyond spring of 2007. Since 'frustration' with respect to contracts refers to actions which hinder or prevent the contract terms to be implemented, I do not see that the stop-work order was a case of 'frustration'.

58. The other component to the frustration argument relates to the County failing to register documents in a timely fashion. The evidence shows that the County has always made it clear that the acquisition of right-of-ways is the responsibility of the Developer (Exhibit 2, tab 20, email dated September 29, 2006).

59. From this I conclude that the interest start date for Xxx Drive is July 1, 2012.

Issue 3:

60. Issue 3 was defined by the Parties as: What invoices and interest payments were paid from the Claimant's Security funds pursuant to the Development Agreement signed by both parties?

61. Paragraphs 24 to 29 above outline the arguments regarding this presented by the Parties; Exhibit 2, tab 15 provides the details of the invoices and payments. Outstanding

disagreements included an invoice for installation of signs at TRxxx/RRXXX in the amount of $991.10 and, the interest charges shown as 'penalties for customer'.

62. With regard to the first item, the installation of signs, the evidence that I am relying on is the agreement, specifically, clause 2.2 as related to Schedule "D", item 6: 'The installation of traffic control signage as required by the County', and, clause 6.7 which requires the Developer to maintain the local improvements (Exhibit 2, tab 1). This evidence indicates that the $991.10 invoice is properly attributed to the Claimant. I am disregarding the evidence from the hearing (see paragraph 26 above): '…Mr. Xxxx had said that [Claimant] did not need to put up the signs as these were off the job site; these signs were not identified on the design drawings submitted…', since Mr. Xxxx was not called as a witness and there was nothing in writing to indicate that this occurred. Although the signs were allegedly vandalised on several occasions, they were, nevertheless, required to be maintained by the developer.

63. With regard to the second item, the interest charges shown as 'penalties for customer', I am again relying on the terms of the agreement. Clause 2.10, provides for the County to rectify defaults and associated costs incurred by the County: '…[Respondent] shall be entitled from time to time to immediate payment from the Developer or from the security provided by the Developer…'. I conclude that the 'penalties for customer' are overly punitive and that these costs should not be attributed to the Claimant. The County should have taken payment for these costs directly from the security provided within the time frames provided in the agreement. The County argued that these interest charges or 'penalties for customer' were based on County policy; if this is the case, then such provisions should have been provided for in the agreement or in amendments to the agreement.

Issue 4:

64. Issue 4 was defined by the Parties as: What funds has the County received from other developers pursuant to the Agreement and should these amounts be paid to The Claimant?

65. Exhibit 2, tab 19, shows that the County has received $875.31 and that this money has been paid to the Claimant.

Issues 5 and 6:

66. Issues 5 and 6 were defined by the Parties as follows:

> Issue 5: How did the County calculate the amount spent by the Claimant on the construction in order to collect from other developers? Was this calculation correct?

Issue 6: Per the Development Agreement signed by both parties was the proper percentage collected by the County from the other developers pursuant to the Agreement?

67. The arguments in paragraphs 32 to 35 above relate to these issues.

68. With regard to Issue 5, the Respondent provided the details of the calculation (Exhibit 2, tab 19). The 'formula' used for this calculation was seen to be acceptable; the figure amounts used in the calculations, however, were in dispute. Issue 6 was meant to clarify these disputed amounts.

69. Issue 6 had two components: a) when lands became developed or subdivided, would recovery of costs be pro-rated or would the full costs be recovered? and b) how is the term 'land benefited' interpreted in considering the recovery of costs?

70. It is useful to look at the definition of 'land benefited' first.

71. Clause 7.1 of the Agreement states: 'The Developer acknowledges its agreement with and acceptance of the descriptions of the benefiting lands and the percentages set out in Schedule "F"'. Schedule "F" identifies three parcels of land to be benefiting land:

    Plan xxx KS, Lots 1, 2, 5, and 6

    Pt. x-x-x-W4M, and

    SW x-x-x-W4M

72. Clause 7.1 also states: '…[Respondent] shall, at such time as other land benefited by that portion of the road is developed or subdivided, as the case may be, enter into agreements…'. It is not clear to me, nor was this clarified at the hearing, what is meant by 'other' in the phrase 'other land benefited'. 'Other' appears to refer to one or more of the land parcels listed in Schedule "F".

73. The Claimant argued that it is the three parcels of land identified in Schedule "F" that each becomes the 'benefited land', and not the subdivided portions of each of the lands.

74. The County's position that benefited land can only occur with respect to the subdivided portions within each of the identified parcels of land and, only when the subdivided portion is developed or improved (such as a residence being constructed); that this is the traditional or standard definition of 'benefited land'. Presumably, the development or improvement that occurs would be for the benefit of the land (this land use now has the benefit of the road that is being upgraded or constructed) and not for the personal benefit of the land owner.

75. I believe that there is sufficient ambiguity with respect to what 'benefited land' means within Clause 7.1 that there is merit in looking at the intent of the Agreement. The purpose, or intent, of the Agreement was to enable the 'developer' to build the roadways now at the developers cost and for the County to recover and repay these costs to the developer at a later time. Most agreements are intended to be reasonably 'implementable'. The County's approach has the potential of producing 'stale' lands for which recovery of costs will take a long time or not at all. The Claimant's interpretation is more likely to produce timely results and is more consistent with the 'letter of' the agreement.

76. The second part of the issue is: when lands became developed or subdivided, would recovery of costs be pro-rated or would the full costs be recovered?

77. I have accepted, above, that 'benefited land' refers to each of the three parcels of land identified in Schedule "F'. It follows, therefore, that cost recovery relates to these three parcels of land and not to subdivisions of these lands.

Issue 7:

78. Issue 7 was described by the Parties as: Does The Claimant require an engineer's stamp on the accounting of actual costs of the construction from which the County can calculate amounts owing by other developers? Clauses 36 to 38 inclusive summarize the Party's arguments with regard to this issue.

79. The County (and other government entities) are required to conduct their business consistent with what is in the 'public interest'. For this reason alone, the County's position that the Claimant provide financial information that is 'defensible' is a reasonable request.

80. Industry practice is that engineers oversee the construction, are familiar with costs, certify as-built plans, and otherwise take professional responsibility and accountability for the project.

81. In this case, there was no on-site engineering supervision. Therefore, it would not be reasonable for an engineer to certify that the Claimant's costs, as provided, are attributable to the project. This does not exclude the Claimant from providing the quality of financial information being requested by the County. This requirement is articulated more fully in the clauses below which deal with issues 9 and 10.

Issue 8:

82. Issue 8: This issue was described as: Have all subcontractors – and suppliers – related to the claimed construction activity (to date) been paid? This issue was clarified by the information provided by the Claimant (Exhibit 1, page 14, clause 6.1).

Issues 9 and 10:

83. Issues 9 and 10 were described as:

> Issue 9: Per Schedule F of the Development Agreement signed by both parties: have all claimed construction costs been calculated correctly?
>
> Issue 10: Have all costs associated with the claim noted in #9 (above) been prepared consistent with accepted industry practice?

Refer to paragraphs 41 to 46 above for summary of evidence and arguments.

84. The Claimant provided a list of 'road recovery costs' in its submission to the arbitration (Exhibit 1, tab K).

85. The County accepted some of these costs as being reasonable; for the most part, the County found that the costs were not properly attributed to the construction components, invoices were lacking in detail and, generally the financial information provided was not to industry standard. The County lacked confidence in the information and said it was not 'defendable'.

86. The Claimant undertook to provide additional information (see Appendix A: Notice of Undertaking to Provide Information). Additional information was provided on March 4, 2013, (Exhibit 11).

87. The County's response to Exhibit 11 was that, even with this further information, the financial information was inadequate. The County indicated that the Claimant was in default of the agreement by refusing to produce as-built plans required for the evaluation of the work done. The County requested that the arbitration hearing be reopened for purposes of directing that the as-built plans be produced (Exhibit 12).

88. It was evident to me from Exhibits 11 and 12 that the issues with regard to the quality of financial information were not resolved by the undertaking to provide further information. Also, from Exhibit 1, tab K, it was evident that, although produced by an accounting firm, this 'listing' of invoices does not have the authenticity of an audit or certification that invoices clearly related to work done.

89. I have also considered the Claimants argument that the Agreement is similar to a cost-plus contract and, therefore, the costs claimed are the costs that are 'recoverable'. Clause 3.1 of the agreement provides for the Developer to provide security '…in the amount of 100% of

the estimated cost for the road construction…'. Exhibit 2, tab 2, shows a June 1, 2006, memorandum from the County to the Claimant which states:

> 'Mr. [Claimant] provided a suggested amount of security to [Respondent] based on quotes provided to him. It is the opinion of this office that the suggested amount is very low and would not provide enough security to cover the potential construction of the above noted roads.
>
> The amount of security that must be provided will be $425,000.00.'

I conclude from this that the Agreement is not a 'cost plus' arrangement; the developer was obliged to build the roads within the costs budgeted, the maximum being $425,000.00.

90. Instead of convening a hearing (as suggested by the County, Exhibit 12) for the as-built plans issue, I felt this could be done by an order to have the as-built plans produced by the Claimant. I issued an interim award, Appendix B, Interim Award, on April 5, 2013, requiring the Claimant to produce the required plans. I felt this was justified on two points: the Agreement requires that the Claimant provide the as-built plans within specified times; the information would provide a useful 'check' on the cost information in dispute. This interim award also asked the County analyze the plans and to provide a summary of accepted costs claimed and of costs which the County cannot accept.

91. Responses to the Interim Award were received from the Claimant on April 8, 2013, (Exhibits 14 and 15) and from the County on April 9 (Exhibits 16 and 17). An as-built plan was provided by the Claimant; the Respondent noted numerous deficiencies (Exhibit 16) and indicated that the as-built plan submitted was unacceptable. The Respondent provided examples of industry-standard plans.

92. On April 12, 2013, I asked the Claimant to clarify whether or not industry-standard, as-built plans would be provided (Appendix C). The Claimant's response on April 15, 2013, indicated: 'We were not able to merge the design of xxxxxxxxxxx with the as-built drawing stamped by xxxxxxxxxx as the County would have liked. The Engineer was not willing to merge the documents and then stamp the whole package because in effect, he would be stamping the initial design that was done by another engineer.'

93. On April 16, 2013, I asked the Parties if they wanted a further Mediation/Arbitration session to resolve the as-built plans issue, and other issues (Appendices D and E). Both Parties declined the offer.

94. From these efforts I conclude that the Claimant is unable to, or chooses not to, provide as-built plans to the standard required by the County. I believe that the production of as-built plans is not a difficult task, it simply requires a different approach. Since the initial designer

is not available, this task requires a fresh start, proper coordination with the County, some field work, and final drafting of as-built plans; there are many engineering firms that have the capability to do this.

95. The issue of as-built plans might seem to be a 'diversion' from the real issue of assessment of recoverable costs. This is not the case. This is another 'tool' that is available to assess costs in situations where invoices lack detailed information. As-built plans are usually provided for other than financial assessment uses; confirmation of project completion, documentation of changes from initial design, use for maintenance and repair, etc.

96. On the other hand, as-built plans will not provide absolute cost figures, such plans are a tool and are a good way of checking on the reasonableness of the cost claims. In the final analysis, financial information (even when lacking in detail) is used together with other project information to determine what is reasonable and fair.

97. Appendix F, Table 1: Analysis of Recovery Costs, with the accompanying notes, provides a summary of 'recovery costs' which I believe to be 'reasonable and fair'. This analysis was based on the written information provided to me by the Parties and, on the oral evidence presented at the hearings.

98. The 'engineering and admin' costs in part two of the table are included in the 15% 'engineering and admin' fee in part one of the table. Of the $56,280.62 'net allowed', the Claimant has only provided invoices for $2, 295.34. I have taken into account the Claimant's oral testimony: much of the administration, hiring and coordination of contractors, etc., was done by [Claimant] personally. Since the issue of as-built plans has not been resolved, the future costs of producing this should be included under this category and should not change the total 'recovery costs'.

99. The largest change to 'net claimed' occurs to 'general contracting/consulting', line 3 (Appendix F, Table 1). Please see note 3 of Appendix F for the reasons for this.

100. The second largest change occurs to 'inspections, ….', line 13; refer to line 13 of notes and to paragraph 63, above, for reasons.

101. The third largest change is with respect of 'engineering and admin fee'; however, the percentage (15%) remains unchanged.

102. Hence, most of the invoiced 'net claimed' was allowed as invoiced; although the County argued that some of these invoiced amounts exceeded industry market values, I accepted the Claimant's arguments that this was a small job and average costs do not necessarily apply. Overall, I am satisfied that the Claimant has tried to keep these costs reasonable.

103. The issue of which costs were for construction of RRXXX and which were for Xxx Drive were also not resolved because of lack of specific details in the financial accounting. Because the detail in the financial accounting is, evidently, not available or, cannot or will not be produced, the Parties must resort to a 'best estimate'.

104. Some of the estimates provided in the evidence include:

a. RRXXX: 1/3; Xxx Drive: 2/3; Exhibit 1, clause 29.

b. RRXXX: 27.3%; Xxx Drive: 72.7%; Exhibit 2, page 2, also tab 10.

c. RRXXX: 37%; Xxx Drive: 63%; Exhibit 2, tab 13.

105. Items 104a and c are not explained and are believed to be estimates only. Item b is the result of a 'geometric assessment' (Xxxx report, Exhibit 2, tab 10). The Xxxx report was prepared in January, 2011, and, therefore, is not based on as-built information (appears to exclude paving works done in 2012). The Xxxx numbers are also, at best, an estimate since the report used market value costs and not the actual costs. I am recommending that the Parties use the 1/3:2/3 ratio as there is no use in refining an estimate which, in the end, will still be an estimate because of inadequate cost information.

106. The cost information shown in Table 1, Appendix F, includes 'unpaid invoices'; the Claimant is in default of the Agreement and this needs to be taken into account in the consideration of the eleven issues dealt with during the course of this arbitration.

Issue 11:

107. Issue 11 was defined by the Parties to be: Which consulting firm provided the necessary accredited engineering services for the road construction?

108. The Claimant provided information on which firms were used (Exhibit 1, page 15). This issue was thus resolved.

F: THE AWARD:

109. This Award is final and binding on the Parties. The reasons for this award are outlined in the 'Analysis' part of this document.

Issues 1 and 2:

> Issue 1: A Construction Completion Certificate (CCC) was issued by [Respondent] on July 6, 2012 and no Final Approval Certificate (FAC) has yet been issued for the landscaping and subgrade work on Xxx Road. When should a FAC be issued by [Respondent]?
>
> Issue 2: Per Sec. 7.2 of the Development Agreement signed by both parties, when is the start date for calculating interest on road recovery costs as per the Agreement?

110. This Award confirms that the Parties agreed that, with respect to construction work done on roadway RRXXX, the effective date of the CCC is November 1, 2006 and, the effective date of the FAC is November 1, 2007. Interest on this part of the construction costs, therefore, begins on November 1, 2006.

111. With respect to construction work on Xxx Drive, the effective date of the CCC is July 6, 2012, and the effective date of the FAC is anticipated to be July 6, 2013, if there will be no warranty issues. The interest start date is July 6, 2012.

Issue 3:

> Issue 3: What invoices and interest payments were paid from The Claimant's Security funds pursuant to the Development Agreement signed by both parties?

112. The County provided a statement dated 2012/08/01 (Exhibit 2, tab 15) summarizing the invoices and penalties (interest payments) which were paid from the Claimant's Security funds. Since I have discounted the 'penalties' as being overly punitive, the following amounts are allowed: $1574.10 (reference 43333), $991.10 (reference 43934), $514.10 (reference 45632), $5605.55 (reference 46106) and $901.00 (reference 46298), for a total of $9585.85, this amount includes a GST amount of $524.60.

Issue 4:

> Issue 4: What funds has the County received from other developers pursuant to the Agreement and should these amounts be paid to The Claimant?

113. This award confirms that the County has provided information that the County has collected $875.31 with regards to the front-ending costs for RRXXX from Lot 1, Block1, Plan 122 1697, and that this amount has been paid by the County to the Claimant.

Issues 5 and 6:

> Issue 5: How did the County calculate the amount spent by The Claimant on the construction in order to collect from the other developers. Was this calculation correct?
>
> Issue 6: Per the Development Agreement signed by both parties was the proper percentage collected by the County from the other developers pursuant to the Agreement?

114. With respect to issue 5, This Award confirms that County provided information on how the calculations are made (Exhibit 2, tab 19); the Parties agreed that the 'formula' used for the calculations was correct.

115. Issue 6 required a determination of lands that are the 'lands benefited' and of the amounts of costs that are recoverable.

116. I have determined 'lands benefited' pertaining to RRXXX road construction to mean the three parcels of land identified in Schedule F to the agreement and, pertaining to Xxx Drive construction to mean the two parcels of land identified in Schedule F.

117. It follows, therefore, with respect to RRXXX, the County should have recovered the full 33 1/3 % of the applicable construction costs from SW x-x-x-W4M. The amounts of costs that are recoverable are addressed under Issue 9 below.

Issue 7:

> Issue 7: Does The Claimant require an engineer's stamp on the accounting of actual costs of the construction from which the County can calculate amounts owing by other developers?

118. My ruling is that the Claimant does not need to provide and engineer's certification of construction costs for reasons shown in paragraphs 79 to 81 inclusive, above, and also because the cost issues are being dealt with in this Arbitration.

Issue 8:

> Issue 8: Have all subcontractors – and suppliers – related to the claimed construction activity (to date) been paid?

119. This Award confirms that information was provided by the Claimant (Exhibit 1, Page 14, clause 6.1) which listed which invoices have not been paid. Further information was subsequently provided (Exhibit 19); it was not clear if these were paid invoices or not-paid invoices.

120. Since the question of what to do with unpaid invoices was not identified as an issue for this arbitration, this award deals only with disclosure of unpaid invoices. Since there may now be additional unpaid invoices, I order the Claimant to update the list of unpaid invoices shown in Exhibit 1, page 14, within 10 working days of receipt of this Award, and to provide this updated list to the [Respondant].

Issues 9 and 10:

Issue 9: Per Schedule F of the Development Agreement signed by both parties: have all claimed construction costs been calculated correctly?

Issue 10: Have all costs associated with the claim noted in #9 (above) been prepared consistent with accepted industry practice?

121. With respect to these issues, I have determined that the costs being claimed have not been prepared to the standard used in these types of projects. Because the invoices supporting cost claims lack detail normally provided, I have concluded that the claimed construction costs have not been 'calculated correctly'.

122. Appendix F, Table 1: Analysis of Recovery Costs, and the notes, show the costs which I have determined can be reasonably attributed to this project, consistent with the terms of the agreement.

123. My 'award' is, therefore, that the Parties use the figures calculated as shown in Table 1: net allowed, $431,484.74; GST amount, $19,866.07; and total, $450,859.68. In addition, I am requesting that the County calculate and add the accrued interest to this amount, consistent with the provisions of clause 7.2 of the Agreement and with the interest start dates for the road segments as determined in this Award with respect to Issue 2 above.

124. Further, of the total costs above, before calculation of accrued interest (since interest start dates are different for the respective road segments), I direct the Parties to attribute costs as follows: 1/3 to the RRXXX portion, 2/3 to the Xxx Drive portion.

125. Further, because the issue of as-built plans arose from issues 9 and 10 and, because the Claimant has not been able to provide these per terms of the Agreement, I am allowing the [Respondant] to produce the as-built plans and to claim the cost of producing these plans

from the Claimant (from the Security fund or otherwise). Because this cost falls into the 'engineering and admin costs' category, the cost of producing these plans will be included as part of the allowed 'engineering and admin costs' already allowed per Table 1.

Issue 11:

Issue 11: Which consulting firm provided the necessary accredited engineering services for the road construction?

126. This Award confirms that the Claimant provided information regarding the engineering firms used during this project.

127. I retain jurisdiction, for 90 calendar days from the date of this Award, to deal with any errors or omissions in this Arbitration Award report.

128. I retain jurisdiction, for six months from the date of this Award, to deal with final cost-recovery-costs calculations and schedules issues which may arise with respect to this Arbitration Award.

129. I take this opportunity to express my appreciation to counsel and to the Parties for the courtesy and co-operation shown at the arbitration hearing and for the thoroughness of their preparations and presentations.

Dated in the City of Edmonton, in the Province of Alberta, this 16th day of May, 2013.

_____

Nick Tywoniuk, Chartered Arbitrator

Appendix A:

Notice of Undertaking to Provide Information

Notice of Undertaking to Provide Information

In the matter of an Arbitration between

[Claimant]
xxxxxxxxxxxxxxxxxxxx
Contact person: Mr. [Claimant], representing Mr. xxxxxxx, President
(hereinafter referred to as the 'Claimant')

-and-

[Respondent]
xxxxxxxxxxxxxxxxxxxxxxxxx
Contact person: Mr. xxxxxxx, Manager of Planning and Development
(hereinafter referred to as the 'Respondent')

1. This notice is to confirm that, during the arbitration proceeding held on February 20 and 21, 2013, the Parties have undertaken to provide information as follows:

2. With reference to Exhibit 1, Tab K, the Claimant has undertaken to make a submission for their costs, by March 18, 2013; this submission will be forwarded to the Respondent and to the Arbitrator on this date. The intent of this new submission is to allow the claimant to clarify costs by providing details additional to that found in Tab K.

3. The Respondent has agreed to review this submission and to comment, by April 1, 2013; these comments to be forwarded to the Claimant and the Arbitrator on this date.

4. The Claimant will review the Respondents comments and provide a 'rebuttal' to the Respondent and to the Arbitrator, by April 8, 2013.

5. The Arbitrator will do a 'document review' of all this information and will give it consideration in the preparation of the decision.

6. The Parties suggested that a further 'hearing' would not be required but left this decision to the discretion of the Arbitrator.

Dated at Edmonton, this 22th day of February, 2013.

Signed: _____
Chartered Arbitrator
Nick Tywoniuk
131 Weaver Drive
Edmonton, AB T6M2J3
Phone: (780) 487-8410; cell: (780) 914-3274
Email: ntywon@atymes.ca

Appendix B

Interim Award

Interim Award

In the matter of an Arbitration between

[Claimant]
xxxxxxxxxxxxxxxxxxxxxx.
Contact person: Mr. [Claimant], representing Mr. xxxxxxxxxx, President
(hereinafter referred to as the 'Claimant')

-and-

[Respondent]
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
Contact person: Mr. xxxxxxxxx, Manager of Planning and Development
(hereinafter referred to as the 'Respondent')

1. Whereas the Claimant had undertaken to provide information with respect to project costs outlined in Exhibit 1, Tab K, and has provided information (Exhibit 11).

2. And whereas the Respondent has responded to the new information (Exhibit 12) and, whereas the Claimant has provided a rebuttal (Exhibit 13).

3. And whereas the Respondent has indicated that the invoices submitted by the Claimant 'do not correspond with the Construction Drawings' and that 'as built' drawings are required to better understand the cost claims, such drawings being a requirement of the 2006 Memorandum of Agreement.

4. Therefore, I order that [Claimant] provide 'as built' plans as required pursuant to Clause 2.16 of the May 19, 2006, Memorandum of Agreement. Further, I order that these plans be provided to the Respondent, copy to the Arbitrator, on, or before, May 31, 2013; that these plans be prepared by, or under the supervision of, a Professional Engineer, and be certified ('stamped') by the Professional Engineer. The costs of producing these plans are to be borne by the Claimant as per May 19, 2006, Memorandum of Agreement; the recovery of these costs, together with other costs claimed, will be subsequently assessed and defined in the final arbitration award.

5. Further, I order that the Respondent, within 15 working days of receipt of the as-built plans, undertake an analysis of the plans, and provide a summary of accepted costs claimed and of costs claimed which, in their view, are not acceptable and why they are not acceptable.

6. When items 4 and 5 above are completed, the Arbitrator, in consultation with the Parties, will provide further direction with respect to arbitration 'process' requirements (rebuttals, further submissions, hearing, or moving straight to final award).

Dated at Edmonton, this 5th day of April, 2013.

Signed: _____
Chartered Arbitrator

Nick Tywoniuk
131 Weaver Drive
Edmonton, AB T6M2J3
Phone: (780) 487-8410; cell: (780) 914-3274
Email: ntywon@atymes.ca

Appendix C

Request to Clarify Submissions

Request to Clarify Submissions

In the matter of an Arbitration between

[Claimant]
xxxxxxxxxxxxxxxxxxxx
Contact person: Mr. [Claimant], representing Mr. xxxxxxxxx, President
(hereinafter referred to as the 'Claimant')

-and-

[Respondent]
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
Contact person: Mr. xxxxxxxx, Manager of Planning and Development
(hereinafter referred to as the 'Respondent')

1. Whereas the Claimant has responded to the Interim Award by two emails, each dated April 8, 2013, one of which had attached to it 'Site and Topographic Survey of Xxx Drive and Range Road 260' (Exhibits 14 and 15).

2. And whereas the Respondent responded with two email submissions dated April 9, 2013, outlining deficiencies with respect to the Claimant's submissions and providing examples of 'as built', industry-standard plans (Exhibits 16 and 17).

3. And whereas the Claimant has not indicated whether or not Exhibits 14 and 15 are partial or full responses to the Interim Award; the Claimant has referred to Exhibit 15 as the 'as built plans' thus implying that a further response may not be forthcoming.

4. And whereas the Parties appear to have reached an impasse with regard to the standard of Plans to be produced.

5. Therefore, I request the Claimant to clarify, by, or before, April 19, 2013, whether or not the Claimant is able to, and intends to, provide industry-standard, as-built plans as outlined in the Interim Award and as shown by the Respondent's examples (Exhibit 17).

Dated at Edmonton, this 12th day of April, 2013.

Signed: _____
Chartered Arbitrator

Nick Tywoniuk
131 Weaver Drive

Edmonton, AB T6M2J3
Phone: (780) 487-8410; cell: (780) 914-3274
Email: ntywon@atymes.ca

Appendix D

Memorandum to Parties, April 16, 2013

Memorandum to Parties, April 16, 2013

In the matter of an Arbitration between

[Claimant]
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
Contact person: Mr. [Claimant], representing Mr. xxxxxxxxxxxx, President
(hereinafter referred to as the 'Claimant')

-and-

[Respondent]
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
Contact person: Mr. xxxxxxxxxxxx, Manager of Planning and Development
(hereinafter referred to as the 'Respondent')

1. Whereas the Claimant provided additional plans (Exhibit 18), these being virtually identical to Exhibit 15, and has indicated that the Claimant is unable to, and does not intend to, provide further responses to the Interim Award.

2. And whereas the Respondent indicated in a previous email (Exhibit 16) that the County cannot '…rely on the December 07, 2012 survey to resolve the cost matters associated with this Arbitration as it lacks the necessary supervision of a professional engineer, and fails to provide the details necessary to confirm or substantiate financial claims made (thus far) by [Claimant] in regards to this matter.'

3. And whereas Exhibits 16 and 17 are the Respondent's response to Exhibit 15.

4. Therefore, I will not require further submissions from the Respondent on the matters arising from the Interim Award.

5. In keeping with the Parties desire to resolve issues amicably if possible (their request for a Mediation/Arbitration process), I am asking both Parties to consider whether or not they wish to have a further, half or full day, session to try to resolve this outstanding issue (production of industry-standard plans) and any other matters (examples, these are suggestions only: look at options for recovery of costs, options for dealing with unpaid invoices). Please respond to this question by Friday evening, April 19, 2013.

6. In the meantime, I am proceeding to draft the final award on the basis of facts and arguments presented in submissions, oral testimony at the hearing and the subsequent Exhibits.

Dated at Edmonton, this 16th day of April, 2013.

Signed: _____
Chartered Arbitrator

Nick Tywoniuk
131 Weaver Drive
Edmonton, AB T6M2J3
Phone: (780) 487-8410; cell: (780) 914-3274
Email: ntywon@atymes.ca

Appendix E

Memorandum to Parties, April 23, 2013

Memorandum to Parties, April 23, 2013

In the matter of an Arbitration between

[Claimant]
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
Contact person: Mr. [Claimant], representing Mr. xxxxxxxxxxx, President
(hereinafter referred to as the 'Claimant')

-and-

[Respondent]
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
Contact person: Mr. xxxxxxxxxx, Manager of Planning and Development
(hereinafter referred to as the 'Respondent')

1. On April 16 I asked for a response to this item: 'In keeping with the Parties desire to resolve issues amicably if possible (their request for a Mediation/Arbitration process), I am asking both Parties to consider whether or not they wish to have a further, half or full day, session to try to resolve this outstanding issue (production of industry-standard plans) and any other matters (examples, these are suggestions only: look at options for recovery of costs, options for dealing with unpaid invoices). Please respond to this question by Friday evening, April 19, 2013'.
2. Both Parties indicated they would respond early this week (Claimant, on Monday; Respondent on Tuesday, today).
3. I felt it would be reasonable to wait for your responses.
4. I have not heard from either Party.
5. If I do not hear from you by noon Friday, April 26, 2013, I will assume that you do not want a further Mediation/Arbitration hearing and I will proceed to finalizing the Arbitration Award on the basis of facts and arguments that the 'process' has provided to date.

Dated at Edmonton, this 23th day of April, 2013.

Signed: _____
Chartered Arbitrator

Nick Tywoniuk

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Edmonton, AB T6M2J3
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Appendix F

Table 1: Analysis of Recovery Costs

Table 1: Analysis of Recovery Costs as [corrected June 17, 2013]

Vendor	Description	Net Claimed	Net Allowed	GST	Total	Note
1. xxxxxx Supply Ltd.	road signs	$ 437.75	$ 437.75	$ 26.27	$ 464.02	1
2. xxxxxxx Eng. Inc.	analysis/testing	$ 5,305.00	$ 5,305.00	$ 290.60	$ 5,595.60	2
3. xxxxxxxxx	general contracting/consulting	$ 339,500.00	$ 33,950.00	$ -	$ 33,950.00	3
4. xxxx Signs	signs	$ 775.88	$ 775.88	$ 38.79	$ 814.67	4
5. xxx Alberta	power line placment	$ 27,494.70	$ -	$ -	$ -	5
6. xxxxxx Sales Ltd.	equipment rentals	$ 6,099.27	$ 6,099.27	$ 387.91	$ 6,487.18	6
7. xxxxx Ltd.	cat rental	$ 12,610.00	$ 12,610.00	$ 756.00	$ 13,366.00	7
8. xxxxx Ltd.	surveying	$ 9,332.13	$ 9,332.13	$ 558.81	$ 9,890.94	8
9. xxxxx	review of engineering	$ -	$ -	$ -	$ -	9
10. xxxxx	design/drafting	$ 3,360.00	$ 3,360.00	$ -	$ 3,360.00	10
11. xxxxx Paving Alberta	paving	$ 130,498.04	$ 130,498.04	$ 6,524.90	$ 137,022.94	11
12. xxxxx	cat rental	$ 425.00	$ 425.00	$ 25.50	$ 450.50	12
13. xxxxx County	inspections, eng/survey, signs	$ 21,807.58	$ 9,043.25	$ 524.60	$ 9,567.85	13
14. xxx Surveys Ltd.	surveying	$ 4,031.55	$ 4,229.15	$ 239.39	$ 4,468.54	14
15. xxxxx	prints	$ -	$ -	$ -	$ -	15
16. xxxxx Contracting	road construction/grading	$ 118,969.58	$ 118,837.50	$ 7,130.25	$ 125,967.75	16
17. xxxxx	seed	$ 457.50	$ 305.00	$ 18.30	$ 323.30	17
18. xxxxx Sand & Gravel	sand and gravel	$ 39,893.65	$ 39,893.65	$ 2,393.62	$ 42,287.27	18
19. Claimant	administrative fee	$ 111,337.18	$ -	$ -	$ -	19
20. Items per Exhibit 11		$ -	$ -	$ -	$ -	20
21. xxxxx invoice 47011060	office work	$ -	$ -	$ -	$ -	21
22. xxxxx 47011915/2844	printing	$ -	$ -	$ -	$ -	22
23. xxxxx County #2349582	sign post	$ 102.50	$ 102.50	$ 5.13	$ 107.63	23
24. Costs -- Interim Award		$ -	$ -	$ -	$ -	24
25. xxxxx	printing	$ -	$ -	$ -	$ -	25
26. G S Engineering	engineering	$ -	$ -	$ -	$ -	26
Sub-totals		$ 832,437.31	$ 375,204.12	$ 18,920.07	$ 394,124.19	
Engineering and admin fee	15 percent		$ 56,280.62	$ 946.00	$ 57,226.62	
Totals			$ 431,484.74	$ 19,866.07	$ 451,350.81	

Vendor	Description	Net Claimed	Net Allowed	GST	Total	Note
Engineering and Admin Costs						
xxxxx	review engineering	$ 500.00	$ 500.00	$ -	$ 500.00	9
xxxxx	prints	$ 126.60	$ 126.60	$ 6.33	$ 132.93	15
xxxxx invoice 47011060	see note 21	0	0	0	0	21
xxxxx 47011915/2844	printing	$ 94.95	$ 94.95	$ 4.75	$ 99.70	22
xxxxx	printing	$ 73.79	$ 73.79	$ 3.69	$ 77.48	25
xxxxx	engineering	$ 1,500.00	$ 1,500.00	$ 75.00	$ 1,575.00	26
Total			$ 2,295.34			

Notes:

1. As invoiced (Exhibit 1, tab K).
2. As invoiced.
3. The three invoices are most problematic in that there is virtually no substantiation of type and amount of work done, location and time, there are no time sheets, no indication of type of equipment used, if any. The costs claimed are unreasonably high for the size of project. Even the invoice number sequence seems to be inconsistent with the times of billing: Invoice 283001, January 1, 2008; invoice 283026, March 1, 2012; invoice 283002, August 12, 2012. The 'Undertaking to Provide Information' should have resulted in supporting detail. It did not. In oral testimony, we heard from the Claimant that the work included brushing, burning of trees, and excavation and placing of soil materials as well as the work of general contractor. This invoicing lacks credibility and is, simply, unacceptable. On the other hand, the evidence (oral testimony) indicates that [Claimant] was actively involved in this construction work and there should be some compensation for it. In the absence of supporting documentation to these invoices, I am allowing 10% of the invoiced amount on the basis of my experience with construction project work and on the basis of what I believe to be 'reasonable'.
4. As invoiced.
5. This cost falls outside of the agreement (refer to analysis of text of Award).
6. As invoiced
7. As invoiced.
8. As invoiced.
9. As invoiced.
10. As invoiced.
11. The County had asked the Claimant to provide details and quotes for this job (the Claimant had indicated during the hearing that he had obtained quotes); the Claimant, in his offer to undertake to provide supporting information, provided xxxxx Paving quote, but not other quotes. The County indicated that the provincial average was $95 to $115 per tonne ECP whereas the xxxxx Paving invoice works out to a cost of $180. This appears high, however, contractors generally bid high for small projects.
12. As invoiced.
13. As invoiced, less penalties and interest charges.
14. As invoiced, less interest charges.
15. These are engineering and admin costs (reference Exhibit 1 tab K).

16. As invoiced.
17. As invoiced. Note that there were two invoices, not three.
18. As invoiced.
19. This amount is reassessed below.
20. The items below arise from the Claimant's 'Undertaking to Provide Information'.
21. Claimant suggested this was admin cost (Exhibit 11); this amount was moved to admin and is included in the sum of Xxxxx invoices (per Exhibit 1, tab K).
22. Per invoices Exhibit 11; these costs are part of engineering and admin.
23. Reference Exhibit 1, tab K, also Exhibit 11.
24. The costs below resulted from the Interim Award
25. These are engineering and admin costs (Exhibit 19).
26. These are engineering and admin costs (exhibit 19).

THE END