

CHAPTER 2.9.0
LEGAL RELATIONS
REVISED SPECIFICALLY FOR
WP-308: LINNWOOD BACK UP POWER GENERATION PROJECT

2.9.1 Laws and Regulations

The Contractor, the Contractor's agents, and employees, shall at all times observe and comply with all Federal laws, rules and regulations, statutes, codes, rules and regulations of the State of Wisconsin, and all applicable charter provisions, codes, regulations, and ordinances of the City of Milwaukee, all amendments thereto, and all the provisions of the contract documents, which in any manner affect the conduct of the work and all such orders or decrees as exist at the present and which may be enacted later of bodies or tribunals having jurisdiction or authority over the work. The Contractor shall protect and save harmless the City, its officers, and representatives, against any claim or liability arising from the violation of any such law, ordinance, code, rule, regulation, or order.

2.9.2 Assignment and Subletting

Any subcontracting of this agreement is mutually recognized by all parties only to the extent of its approval and acceptance by the Commissioner at the time of the award of this contract. The Contractor shall not subsequently assign this contract or any interest therein, nor subcontract the work or any part thereof, without written consent of the Commissioner having first been obtained. If the Contractor submits subsequent written request to the Commissioner for substitution(s) of listed subcontractor(s), the Contractor shall give the Commissioner written assurance that the Contractor will save the City, **Consulting Engineer, and their officers, agents, servants, and employees harmless** from any damages which may arise from litigation between the original subcontractor(s) and the Contractor as a result of such substitution(s). The decision of the Commissioner shall be final in determining consent for said substitution(s). It is incumbent upon the Contractor to notify the Surety of such consent granted by the Commissioner for said substitution(s).

If the Contractor shall so assign or subcontract without such consent, the Commissioner shall have the right to rescind this contract and to declare the same null and void or to re-let the work to some other competent party, thereupon adjusting and determining the damages to the City arising thereby, and the Contractor shall be liable to the City for such damages as the Commissioner shall so adjust and determine, which adjustment and determination thereof, shall be final and conclusive on the parties thereto.

The Contractor assumes full liability for all acts and omissions of any

subcontractor or of anyone employed directly or indirectly by either said Contractor or any subcontractor, and this liability shall be in addition to any other legal liability of the Contractor. Neither the approval nor endorsement of the Commissioner nor anything contained in the contract documents shall be construed as creating any contractual relationship between any subcontractor and the City.

Consent to the assignment or subletting of this contract or of any part thereof or any alterations which may be made in the terms of this contract or in the work to be done under it or the granting of any extension of time for the performance of the contract or any other forbearance on the part of either the Commissioner or Contractor to the other shall not in any way release the Contractor or Surety or their heirs, executors, administrators, successors, or assigns from their liability hereunder.

The Contractor, to the extent practicable, shall maintain a list of all subcontractors and suppliers performing work or furnishing materials under each formal contract. This list must be submitted to the Commissioner upon request.

2.9.3 Patents and Trade Secrets

The Contractor shall hold and save the City, **Consulting Engineer, and their officers, agents, servants, and employees harmless** from liability of any nature or kind, including cost and expenses for or on account of any patented or unpatented invention process, article, or appliance manufactured or used in the performance of the contract, including its use by the City, unless otherwise specifically stipulated in the contract documents.

If the Contractor uses any design, device, or materials covered by letters, patent or copyright, the Contractor shall provide for such use by suitable agreement with the owner of such patented or copyrighted design, device, or material. It is mutually agreed and understood, that without exception, the contract prices shall include all royalties or costs arising from the use of such design, device, or materials, in any way involved in the work. The Contractor and/or Contractor's Sureties shall indemnify and save harmless the City from any and all claims for infringement by reasons of the use of such patented or copyrighted design, device, or materials or any trademark or copyright in connection with work agreed to be performed under this contract and shall indemnify the City for any cost, expense, or damage which it may be obliged to pay by reason of such infringement at any time during the prosecution of the work or after the completion of the work.

License and/or Royalty Fees for the use of a process which is authorized by the City must be reasonable and paid by the Contractor to the holder of the patent or authorized licensee.

2.9.4 Liens and Taxes

Any and all taxes and license or permit fees imposed by the Federal, State, and local municipalities are the sole responsibility of the Contractor. Any and all liens or claims of damages which may be chargeable to the Contractor are the sole responsibility of the Contractor. Commissioner reserves the right to withhold a sufficient amount from the contract payment to indemnify the City against such liens or claims of damages.

No materials or supplies for the work shall be purchased by the Contractor or by any subcontractor subject to any chattel mortgage or under a conditional sale contract or other agreement by which an interest is retained by the seller. The Contractor warrants that the Contractor has good title to all materials and supplies used in the work, free from all liens, claims, or encumbrances.

2.9.5 Sales Tax

The City is exempt from Wisconsin Use, Sales Tax, and the .5% County Tax. Bidders, therefore, shall not add sales tax to their proposals when bidding to the City but shall include in their lump sum bids only the sales tax they will be required to pay directly as a consumer when obtaining materials, etc., to fulfill the contract requirements should they be the successful bidder.

2.9.6 Protection Against Liability

Contractor covenants and agrees that Contractor shall save and indemnify and keep harmless the City, **Consulting Engineer, and their officers, agents, servants, and employees harmless** against all liability, judgments, costs, and expenses, which may in any way come against the City in consequence of the granting of the contract, or which in anyway results from the carelessness or neglect of the Contractor or the agents, employees, or workers of the Contractor or Subcontractors in any respect whatever, and in every such case where judgment is recovered against the City by reason of the carelessness or negligence of the Contractor or the Contractor's agents, employees or workers, or Subcontractors, such judgments shall be conclusive against the Contractor, not only as to the amount of damages, but as to Contractor's liability to the City.

2.9.7 Liability and Insurance

The Contractor shall be responsible for and shall save the City, **Consulting Engineer, and their officers, agents, servants, and employees harmless** from, and defend the City against all liability for damages occasioned by the digging up, use or occupancy of the street, alley, highway, public grounds, and

private grounds, or which may result therefrom or which may result in any way from the negligence or carelessness of the Contractor, the Contractor's agents, employees, workers, by reason of the elements, unforeseen or unusual difficulties, obstructions, or obstacles encountered in the prosecution of the work, and they shall indemnify the City for and save it harmless from all claims and liabilities, actions, causes of action, and liens for materials furnished or labor performed in the construction or execution of the work and from all costs, charges, and expenses incurred in defending such suits or actions and from and against all claims and liabilities for injury or damage to persons or property emanating from defective or careless work methods, or from and against all claims or liabilities for royalties, license fees, actions, suits, charges, and expenses or damage from infringement for reason of the use of any invention or improvement in tools, equipment or plant or any process, device or combination of devices used in the construction of the work.

Each Prime Contractor must furnish to the City of Milwaukee, prior to the start of work, certificates of insurance which confirm that the Prime Contractor has the types and amounts of insurance referenced in Sections (a) through (d). The Prime Contractor shall require all of its subcontractors to carry the same types and amounts of coverage as required of the Prime or may instead provide the coverage for any or all subcontractors. The Prime Contractor is fully responsible for assuring subcontractor compliance with all the insurance requirements specified herein.

a) WORKER'S COMPENSATION AND EMPLOYEES LIABILITY

Coverage Amounts

Worker's Compensation		Statutory
Employer's Liability		
Bodily Injury by Accident	each accident	\$100,000
Bodily Injury by Disease	each employee	\$100,000
Bodily Injury by Disease	policy limit	\$500,000

To Include

Other state's coverage
 United States Longshoremen and Harbor
 Worker's Endorsement (Required only when the
 contract Involves work on navigable bodies of water)

b) COMMERCIAL GENERAL LIABILITY

Limits of Liability

Bodily Injury/Property Damage	each occurrence	\$1,000,000
----------------------------------	-----------------	-------------

	general aggregate	\$1,000,000
	products/completed	
	Operations aggregate	\$1,000,000
Personal Injury	aggregate	\$1,000,000

To Include

Occurrence form
Premises/operations coverage
Products/completed operations coverage including extension of coverage for two (2) years after acceptance of work by the City of Milwaukee
Independent contractors (Owners/Contractors Protective) coverage
Contractual liability for risks assumed in this agreement
No exclusion for explosion, collapse, or underground occurrences

c) AUTOMOBILE LIABILITY

Limits of Liability

Bodily Injury/Property		
Damage	each accident	\$1,000,000

To Include

Coverage on all owned, non-owned, and hired vehicles

d) UMBRELLA LIABILITY

Limits of Liability

Personal Injury/Property		
Damage	each occurrence	\$2,000,000
	aggregate	\$2,000,000

To Include

Occurrence form
First dollar defense coverage
Insuring agreement which will provide excess protection to the primary coverages

For coverages referred to in section 2.9.7.(b), (c), and (d), the City of Milwaukee shall be named as an additional insured.

The worker's compensation and employers liability certificate should confirm that thirty (30) days notice of cancellation must be provided. For all other insurance coverages referenced above, sixty (60) days

notice of cancellation must be provided.

A separate certificate need not be filed if the Prime Contractor has a current certificate on file with the City of Milwaukee. It is the responsibility of the Prime Contractor to make this determination and to provide evidence of coverage if a previous certification has been filed. No Prime Contractor or Subcontractor shall perform any work under the contract after a certificate has expired or been canceled unless a new or renewal certificate is provided prior to the expiration or cancellation date of the previous certificate. The Prime Contractor shall have the responsibility of ensuring that valid certificates are on file for itself and all Subcontractors it plans to use.

2.9.8 Performance Bond and Payment Bond

For all Public Works contracts over \$25,000, the contractor is to submit to the Commissioner, prior to or at the time of execution of the contract, a performance bond and a payment bond in an amount equal to 100% of the Contract price. For contracts of \$10,000 or more, but not over \$25,000, the contractor may be requested, in lieu of 100% bonds, to provide an irrevocable letter of credit or a performance bond and a payment bond in an amount equal to 50% of the contract price. The bonds required on any contract will be based on the estimated contract amount and will be specified in the bid specifications. All bonds must be executed by a surety company authorized to do business in the State of Wisconsin and must be accompanied by a Power-of-Attorney for the Attorney-in-Fact. The performance bond and the payment bond must be submitted as separate instruments. The performance bond shall also cover all work required under the guarantee provisions of the contract.

2.9.9 Unforeseen Delay

If the City is prohibited or enjoined from proceeding with the work or from authorizing its prosecution, either before or after its commencement, by reason of any litigation or otherwise, the Contractor shall not be entitled to any damages by reasons of the delays thereby caused, except for the actual cost of protection of such work as the Contractor may have underway for the cost of removal and replacement of such tools, plant, and materials, as the Contractor may have delivered upon the work site, and such cost is to be determined by the Commissioner. The time of completion may be extended for such time, as in the judgement of the Commissioner, shall be equal to the aggregate delay.

2.9.10 Default, Neglect, or Delay Shall Not Render the City Liable

The default, neglect, or delay of any other Contractors, or the extension of time to any of them by the City for the completion of their work, shall not render the City liable to the Contractor or its Surety nor relieve them or either of them in any manner or sum whatsoever.

2.9.11 Termination of Contract for Cause

If, through any cause, the Contractor shall fail to fulfill in a timely and proper manner its obligations under this contract, or if the Contractor shall violate any of the covenants, agreements, or stipulations of this Contract, the City shall thereupon have the right to terminate this Contract by giving written notice to the Contractor of such termination, specifying the effective date thereof, at least five (5) days before the effective date of such termination. The City may relet the work to be performed under this Contract to some other competent party, or employ persons and secure material for the completion of same, and charge the costs thereof to the Contractor. In such event, all finished or unfinished work accomplished by the Contractor under this Contract shall, at the option of the City, become its property and the Contractor shall be entitled to receive just and equitable compensation for any work satisfactorily completed hereunder.

Notwithstanding the above, the Contractor shall not be relieved of liability to the City for damages sustained by the City by virtue of any breach of the Contract by the Contractor, and the City may withhold any payments to the Contractor for the purpose of set-off until such time as the exact amount of damages due to the City from the Contractor is determined.

2.9.12 Termination for Convenience of the City

The City may terminate this Contract at any time for any reason by giving at least ten (10) days notice in writing to the Contractor. If the Contract is terminated by the City as provided herein, the Contractor will be paid an amount which bears the same ratio to the total compensation as the work actually performed bears to the total work of the Contractor covered by this Contract, less payments of compensation previously made. However, if less than sixty percent (60%) of the work covered by this Contract has been performed upon the effective date of such termination, the Contractor shall be reimbursed (in addition to the above payment) for that portion of the actual out-of-pocket expenses (not otherwise reimbursed under the Contract) incurred by the Contractor during the Contract period which are directly attributable to the uncompleted portion of the work covered by this Contract.

2.9.13 Collusive Agreements - Prohibited

Each bidder submitting a bid for any portion of the work contemplated by the documents on which bidding is based shall execute, and attach thereto, an affidavit substantially in the form provided to the effect that the bidder has not entered into a collusive agreement with any other person, firm, or corporation in regard to any bid submitted and also include therein compliance with Sec. 3.29, Milwaukee City Charter, such forms of affidavit being on file in the office of the Commissioner.

Before executing any subcontract, the successful bidder shall submit the name of any proposed subcontractor for prior approval and a non-collusive affidavit substantially in the form provided.

2.9.14 Progress Payments

If the Contractor shall proceed properly and with diligence to perform and complete this contract, the Commissioner may, from time to time as the work progresses, grant to the Contractor a payment for the estimated amount already earned, reserving five percent thereof, except that at any time after fifty percent of the work is completed and the Commissioner finds that satisfactory progress is being made, remaining progress payments may be paid in full, which shall entitle the holder thereof to receive the amount due thereon, when the conditions, if any, annexed to such estimate shall have been complied with, and that a payment may be granted by the Commissioner for any fabricated or manufactured materials and components specified, previously paid for by the Contractor and delivered to the work site or properly stored and suitable for incorporation in the work embraced in the contract. The granting of any such estimate shall not be construed as an acceptance of the work or any portion thereof. Generally, payments will be made not more than once a month or for less than \$5,000.

Nothing herein shall prevent the Commissioner from withholding additional retainage if work on the project is not satisfactory. In no event, however, shall more than ten (10) percent of the value of the work completed be retained.

For contracts involving \$10,000 or more, the City reserves the right to pay the Contractor with checks that are made payable to the Contractor and one or more subcontractors.

2.9.15 Final Payment

Upon the completion of the work by the Contractor pursuant to the terms of this contract and according to the contract documents and the true intent and

meaning of this contract and after the acceptance of the work by the Commissioner, the City shall pay the Contractor, subject to any retainer or guarantee provisions in the contract documents, any balance then remaining due and payable by the terms of this contract.

Final payment may be withheld if prevailing wage statements are not filed or if there is noncompliance with requirements concerning the hiring of residents, disadvantaged businesses and apprentices. If these deficiencies are not satisfied within one (1) year of completion of the work, the department, following a final notification to the prime contractor, may close out the contract account and retain the contract proceeds permanently.

All monies paid or owed by the City to the Contractor shall be and constitute a trust fund, in the hands of the Contractor only, to the amount of all claims due and to become due or owing from the Contractor for lienable labor and materials until all such claims have been paid. The using of such monies by the Contractor for any other purpose until all such claims have been paid is, as declared by Section 779.02(5), and 779.16 Wisconsin Statutes, punishable as therein provided by law.

2.9.16 Final Payment to Terminate Liability of City

- a) The acceptance by the Contractor of the "Final Payments" provided for in the contract shall operate as, and shall be, a release to the City and its representatives from all claims by the Contractor for anything done or furnished for or relating to the work or for any act or neglect of the City or of any person relating to or affecting the work.
- b) Prompt Payment In accordance with Common Council File 900859, the provisions of 66.285 and 66.286 Stats., relating to prompt payment are modified as follows: The City of Milwaukee as a matter of policy shall strive to pay all invoices within 30 days. Payment to contractors will be deemed timely if the payment is mailed, delivered or transferred within 60 calendar days after receipt of a properly completed invoice (including all required attachments such as stored material forms, guarantees, manuals, as-build plans, etc.), or receipt and acceptance of the property or service, or the date of final completion as determined by the City when all corrective measures are complete on punch list items under the order or contract, whichever is later. If the City does not make payment by the 60th calendar day, the City shall pay simple interest beginning with the 31st calendar day at the rate of one percent per month, unless the City disputes the amount of the invoice. No interest will be paid on final payments of 10% of the contract or \$1,000, whichever is greater.

2.9.17 Time for Completion

The time specified for the completion of the work is of the essence of this contract, and the Contractor shall not be entitled to claim performance of this contract unless the work is satisfactorily completed in every respect within the time herein specified.

2.9.18 Contractor/City Relationship

The relation of the Contractor to the City is and shall be that of an independent Contractor.

2.9.19 Special Conditions - Federally-Aided Projects

Any special conditions relating to contracts involving the Economic Development Administration (EDA), the Department of Housing and Urban Development (HUD), or federally-assisted projects are subject to the special conditions attached hereto, which special conditions insofar as inconsistent with the provisions and general conditions heretofore stated shall be controlling.

2.9.20 Assignment of Payments

All monies payable under the contract, or any part thereof, will be paid to the contractor in accordance with the provisions of this section, and no assignment or order executed by the contractor directing payment of any portion or all of such funds to any other person or persons will be recognized by the City unless such assignment or order is given and shall have attached thereto, by endorsement or otherwise, the consent of the surety, and any designated assignee. No such assignment or order shall be binding on the City.

2.9.21 Records

Both parties understand that the City is bound by the Wisconsin Public Records Law, and as such, all of the terms of this Agreement are subject to and conditioned on the provisions of Wis. Stat. § 19.21, *et seq.* Contractor acknowledges that it is obligated to assist the City in retaining and producing records that are subject to Wisconsin Public Records Law, and that the failure to do so shall constitute a material breach of this Agreement, and that the Contractor must defend and hold the City harmless from liability under that law. Except as otherwise authorized, those records shall be maintained for a period of seven (7) years after receipt of final payment under this Agreement.

2.9.22 Audit

Audits and Inspections. At any time during normal business hours and as often as the City, or if federal or state grants or aids are involved, as the appropriate state or federal agency may deem necessary, there shall be made available to the City or such agency for examination all of its records with respect to the matters covered by this Contract and the Contractor shall permit the City or such agency and/or their representatives and agents to audit, examine, and make excerpts or transcripts from such records, and to make audits of all contracts, invoices, materials, payrolls, records of personnel, conditions or employment, and other data relating to all matters covered by this contract.