## First Nations – Municipal Community Infrastructure Partnership Program

## Issues to Consider in Drafting a Joint Service Agreement

This document outlines a series of questions to consider in developing a joint service agreement. Each primary question includes additional considerations to reflect upon.

1. **Who are the parties to the agreement?**
   * Presumably this will be a First Nation and a Municipality, but consider whether there are additional parties that should be included. This might include AANDC (who might be supplying financial resources), a regional government, or other neighbouring communities. Think also if there are any private businesses involved, for example a company that runs the sewage treatment plant.
2. **When will the agreement start?**
   * When does the agreement go into effect? Examples might include immediately upon signing, a specific date in the future (i.e., Thursday March 31, 2016), or upon something else happening (i.e., two days after the treatment plant is completed and has passed inspection). Answers to this question are dependent on many factors including whether infrastructure is already in place, whether there is already informal sharing of services, or whether you need time to get things ready for implementation.
3. **When does the agreement end?** 
   * You may want to include a specific end date for the agreement, perhaps because you want to see how it works before committing to a long term open ended agreement.
   * Or perhaps you are comfortable working together and are happy to sign a long term agreement with no specified end date, but that can be cancelled by either party with sufficient notice.
4. **Can the agreement be renewed?**
   * Consider whether you want to include the possibility of the agreement being renewed. If yes, there are many ways this can be addressed in the document. This could include automatic renewal after a certain time period unless one of the partners objects. Perhaps you want to include a date when the agreement will come up for review (i.e, three years after it was signed the agreement will be reviewed by all parties and either renewed or cancelled at that time).
5. **Can the contract be amended?**
   * If yes, how are changes to be made to the contract? Following notice from one party to the other of the desire to amend the agreement? After discussion between the parties? Are amendments to be made in writing?

Do amendments have to be approved by Councils? Should amendments be signed by the original parties? Should the amendments be attached to the original agreement?

1. **Who will sign the contract binding the First Nation and the municipality?**
   * Think about who has authority to sign a contract binding your community. Is it the Chief and Mayor? Is it a Band Manager or Chief Administrative Officer? Do all members of the council for the municipality and the First Nation have to sign?
   * This is also the time to think about what evidence of approval for the contract might be necessary in addition to a signature. Council resolutions or by-laws approving the agreement can be attached to the contract as an appendix as this kind of evidence.
2. **To who should communications be made and in what form?**
   * Think about whom is the best person to receive notice about what. For example, the need for repairs might best be directed to the system manager, but a request for additional time to pay a bill might best be directed to the Chief Administration Officer. In small communities it might make sense for one person to receive all communications no matter the issue.
   * Think also about what form communications should take. Is a phone call sufficient, is an email adequate notice, do some things require a registered letter? The answer to this may depend on the nature of the issue to be discussed in the correspondence. For example, a phone call to the system manager may be the best way to deal with a frozen pipe, but a registered letter may be required to confirm intention to withdraw from the agreement.
   * Be sure to provide the full name, position, address, phone number, email, etc. for communications between the parties.
3. **What goods and services are you expecting to share?**
   * Be as specific as you can about exactly what is being supplied by whom. For example it is not sufficient to say ‘drinking water’, if you are in fact expecting a certain amount of water at a particular time. If for example you are expecting 1,000 litres of potable water, that meets provincial and federal standards, every day, be sure to say exactly that in the agreement. Further, it is not enough to identify how much water you are to receive if you don’t also identify how you will get it, for example via truck, via water mains (whose water mains?) etc.
   * In addition to water, are there other services you are interested in sharing. What are they? Do they need a separate agreement or can they be brought together in a comprehensive agreement?
4. **Who is going to do what?**
   * Think through all the elements of supplying drinking water or treating contaminated water.

For example, who is going to supply what to whom, who is responsible for running the operation and maintaining the service, who is responsible if services break down, who is responsible for construction of new infrastructure or upgrades to existing infrastructure? Be sure you think through the whole supply chain and identify responsible parties.

1. **Who owns what?**
   * Is it necessary to spell out in the agreement who owns what infrastructure? For example, does the municipality own the water treatment plant and the First Nations own all the underground pipes inside the reserve boundary? If new infrastructure is to be built is it owned by whoever’s land it is sitting on? What if both parties kick in money for new infrastructure – who owns it then?
2. **Is new infrastructure contemplated?**
   * If yes, what is to be built, who pays for it, who builds it, when, construction standards, etc.
3. **Who is responsible for operations and maintenance?**
   * If a system is already up and running perhaps there may be no need to consider this further because responsibility will remain with whoever is currently doing this work.
   * Perhaps it would be helpful to share O&M, providing back up support for holidays or emergencies, or possibly as a means to build capacity or share the expenses
   * Who do you contact if there is a problem or an emergency?
   * Who is responsible for paying for repairs or making repairs?
   * Does failure to maintain the system constitute breach of the agreement?
4. **What happens if one party does not fulfill its side of the bargain?**
   * Is there a procedure in the agreement about what to do if one party fails to meet their side of the agreement? Under what conditions does the agreement become null and void? Under what conditions is the agreement redeemable?
   * Failure to pay on time (or at all) – what happens? Is there a late fee penalty? Is the contract automatically terminated? Under what circumstances would it be acceptable for a late payment?
   * Failure to provide the service or goods – what happens? Is the contract automatically null and void? Should there be a procedure for advising the other side about a perceived failure to meet the obligations? Should there be a dispute resolution process spelled out in the agreement? If yes, what would it look like (i.e. go directly to court; hire a mediator or arbitrator; use a talking circle to work through the issue, etc.)? Who pays for these services?
5. **Who is liable for problems?**
   * While the contract will spell out who is responsible for what, it is common to limit liability in certain circumstances.
   * For example, the parties may want to agree that damages resulting from failure to provide services would not be compensated (i.e., loss of income to a restaurant that had to close because the water pipes were frozen). So called “Acts of God” might also be excluded, for example, if there is a major flood, neither party is liable for damages resulting from the failure of the treatment plant.
6. **What about rights of access?**
   * Does one party have the right to trespass on territory of the other in order to repair or maintain the system? If yes, under what circumstances (i.e., as a matter of course in the context of regular work; upon one day’s notice to the other party; only in special circumstances; etc.)? If no, how do the parties inform the other of the need for access, under what circumstances will permission be granted, how much notice is required for obtaining permission, etc?
7. **Do you need to include provision for future legislative changes?**
   * Laws change from time to time, which may affect contracts. For example, higher standards for sewage treatment at the provincial or federal level may require improvements to infrastructure. What happens to your agreement if a law changes that affects your agreement? Do you have to provide each other notice that the laws have changed? Should you agree to meet to discuss matters including changes to infrastructure? Who is responsible for making and paying for the improvements if the law changes?
8. **Should you include provisions for consultation?**
   * If the construction of new infrastructure or the replacement of existing infrastructure is contemplated in the agreement it might be worthwhile including a provision that allows for consultation and consent between the parties about the details of the construction This might include agreement on the type of sewage treatment system to be installed or replaced, time construction will take place, discussions with contractors, etc.
   * A provision like this could also include consultation on other related matters such as economic development, environmental sustainability, or land management. This would only be necessary if there was no other agreement between the parties on consultation.
   * This might also be the time to think about developing a communication protocol or friendship agreement separate and apart from a service agreement.
9. **Can the agreement be assigned?**
   * This question deals with situations where other parties might become responsible for fulfilling the contract. For example, if a municipality were to be amalgamated into a larger body, such as a regional government, does the new regional government automatically become responsible for the municipality’s obligations under the contract or only if it agrees to take on this responsibility?
10. **Does the contract inure to successors?**
    * The issue to consider here is whether the agreement is binding on subsequent Chiefs, Mayors and Councils. For example, does this agreement only last until the next election, or is it expected to continue to be binding on the municipality and First Nation despite who is elected in the future? If the contract is open ended without a set end date, it would be worthwhile including an inurement clause that makes it clear the agreement is binding on future councils.
11. **Should you include ‘boiler plate’ clauses?**
    * These are standard clauses in these types of contracts. Draft language for common standard clauses is provided below.
      1. Headings: “Headings that precede sections are provided for the convenience of the reader only and shall not be used in constructing or interpreting this agreement.”
      2. Entire agreement: “This agreement constitutes the entire Agreement between the parties and there are no undertakings, representations or promises express or implied, other than those expressly set out in this agreement; this agreement supersedes, merges, and cancels any and all pre-existing agreements and understandings between the parties on this subject.”
      3. Gender: “Any reference to one gender in this agreement also includes reference to the other gender” (helps get around the awkwardness of having to write he/she all the time).
      4. Governing Laws: “The provisions of this agreement will be governed and interpreted in accordance with the laws of the province or Canada, as applicable.”
      5. Severance: “In the event that any provision of the agreement should be found to be invalid, the provision shall be severed and the agreement read without reference to that provision; if a severance materially affects the implementation of this agreement, the parties agree to meet to resolve any issues that arise as a result of that severance and to amend the agreement accordingly.”

1. **Are there specific terms that should be defined in the agreement?**
   * A definition section is sometimes included in the contract to either provide greater clarification of a term (for example, “reserve” means R1 and R2 at ABC First Nation) or to create short forms for complex ideas that are contained in the agreement (for example, “agreement” means this agreement including all the recitals and schedules hereto, as amended and supplemented from time to time).
   * There is no need to define every term, just those that might cause confusion or would make the agreement easier to read and follow.