

**Infrastructure  
ONTARIO**



**Infrastructure Ontario**

**Design, Build and Finance**

**ADVANCE TUNNEL FOR THE SCARBOROUGH SUBWAY  
EXTENSION REQUEST FOR PROPOSALS**

**RFP No. 20-002**

**(RFP Version 1.0)**

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**REQUEST FOR PROPOSALS****1 INTRODUCTION****1.1 General**

- (1) This Request for Proposals (“**RFP**”) is issued by Ontario Infrastructure and Lands Corporation, a Crown agent, continued under the *Ontario Infrastructure and Lands Corporation Act, 2011* (“**Infrastructure Ontario**”, also known as “**OILC**” and “**IO**”) in conjunction with the client or clients (referred to collectively as the “**Client**”) named in the RFP Data Sheet. Infrastructure Ontario and the Client are collectively referred to as the “**Sponsors**” for the purposes of this RFP.
- (2) In this RFP, Prequalified Parties that submit documents in response to this RFP are referred to as “**Proponents**” and their submissions, as may be revised by RFP Sections 5.3 and 5.5, if applicable, are referred to as “**Proposals**”. The entity that is selected by the Sponsors to enter into the Project Agreement is referred to as the “**Preferred Proponent**”. For the purposes of convenience, in this RFP the expression “**Proponents**” also includes Prequalified Parties prior to the submission of their Proposals.
- (3) Except as provided in RFP Section 1.1(3)(a), the procurement process to select a Preferred Proponent shall commence with the issuance of this RFP and shall terminate on Financial Close or on the expiration of the Proposal Validity Period (or extended Proposal Validity Period, if applicable) whichever is first (the “**RFP Process**”). Except as provided in RFP Section 10.3.3, only Proponents that submit a Proposal in accordance with this RFP will acquire any rights under the RFP. Except as provided in RFP Sections 3.8.2 3.8.3 and 8.2.2, and except for the Sponsors’ obligation to pay a Break Fee or a Proposal Fee, as applicable, all rights and obligations arising out of the RFP (the bidding contract or “**Contract A**”) terminate either on the cancellation of this RFP Process by the Sponsors, if such cancellation occurs, or,
  - (a) for the Preferred Proponent, on Financial Close (providing Commercial Close is reached prior to the expiration of the Proposal Validity Period, or extended Proposal Validity Period, if applicable); and
  - (b) for the Proponents that are not the Preferred Proponent, on the expiration of the Proposal Validity Period (or extended Proposal Validity Period, if applicable) or Financial Close, whichever occurs first.
- (4) Infrastructure Ontario will manage the RFP Process on behalf of the Sponsors and Infrastructure Ontario shall be the single point of contact for Proponents on behalf of the Sponsors. During the RFP Process, Proponents shall contact Infrastructure Ontario only through the Contact Person as set out in RFP Section 3.2.1.
- (5) The Project to which this RFP applies has been approved by the Ministry of Infrastructure (“**MOI**”) to proceed as a public-private partnership project. As a result, the Project shall follow five fundamental principles for the procurement of public infrastructure, which include:
  - (a) The public interest is paramount;
  - (b) Value for the investment of public money must be demonstrated;

- (c) Appropriate public control and ownership must be maintained;
  - (d) Accountability must be maintained; and
  - (e) Fair, transparent and efficient processes must be used.
- (6) A brief description of the project that is the subject of this RFP (the “**Project**”) is set out in the RFP Data Sheet. A detailed description of the Project is contained in the documentation in the Data Room.
- (7) While the Sponsors will manage the procurement process in respect of the Project, the Preferred Proponent, subject to the requirements and conditions of the RFP Documents, would actually enter into the Project Agreement with the party or parties named as the signing party or parties in the RFP Data Sheet (the “**Signing Parties**”). Unless listed as Signing Parties to the Project Agreement in the RFP Data Sheet, neither Infrastructure Ontario, nor the Government of Ontario will be parties to the Project Agreement.

## 1.2 Prequalified Parties and Proponent Representatives

- (1) Subject to RFP Section 3.6, only those parties that were prequalified through the Project’s Request for Qualifications (“**RFQ**”) process that preceded this RFP are eligible to participate in the RFP Process. The prequalified parties are listed in the RFP Data Sheet (“**Prequalified Parties**”). The prequalification documents submitted by each of the Prequalified Parties in the RFQ process that preceded and was with respect to this RFP Process are referred to as a Prequalified Party’s “**Prequalification Submission**”.
- (2) All correspondence from the Sponsors to a Proponent will be sent to the person identified, in the Proponent’s Prequalification Submission, to receive information and notices on behalf of the Proponent (the “**Proponent Representative**”). Each Proponent is solely responsible to ensure that all contact information of the Proponent Representative is accurate and updated at all times during the RFP Process. Proponents may update or revise their Proponent Representatives’ information by notifying the Contact Person, in writing.

## 1.3 Overview of the Stages of Project Procurement and Implementation

- (1) The Sponsors will carry out the procurement and implementation of the Project in accordance with the following stages:

(a) Stage 1 – Prequalification Stage

The prequalification stage (“**Prequalification Stage**”) preceded the RFP Process and identified the Prequalified Parties. The Prequalification Stage is a stand-alone independent stage and is complete once the Prequalified Parties are identified by the Sponsors (whether identified initially as Prequalified Parties or added subsequently in accordance with the RFQ documents) and have received notification by the Sponsors that they are prequalified for the RFP Process.

(b) Stage 2 – RFP Procurement Process

The RFP procurement process is the competitive procurement process described in detail in this RFP.

- (c) Stage 3 – Implementation of the Project Agreement

Once the Signing Parties and the Preferred Proponent have executed the Project Agreement, the terms and conditions of the Project Agreement shall determine how the Project is to proceed.

#### **1.4 Fairness Monitor**

- (1) The Sponsors have retained the Fairness Monitor named in the RFP Data Sheet to monitor the RFP Process.

## **2 THE RFP DOCUMENTS AND THE DATA ROOM**

### **2.1 RFP Documents**

- (1) The RFP Documents (the “**RFP Documents**”) are:
- (a) this RFP;
  - (b) Schedule 1 – RFP Data Sheet;
  - (c) Schedule 2 – Proponent Consultation Process;
  - (d) Schedule 3 – Submission Requirements and Evaluation Criteria consisting of:
    - (i) Part 1 – Technical Submission Requirements;
    - (ii) Part 2 – Financial Submission Requirements;
    - (iii) Part 3 – [Not Used]
    - (iv) Part 4 – Proposal Format and Evaluation;
  - (e) Schedule 4 – Proposal Submission Forms;
  - (f) Schedule 5 – Participant Conflict Screening List;
  - (g) Schedule 6 – Proponent Team Member Declaration;
  - (h) Schedule 7 – Certificate of Officer;
  - (i) Schedule 8 – Guaranteed Price Form;
  - (j) Schedule 9A – Standby Letter of Credit;
  - (k) Schedule 9B – Surety’s Consent;
  - (l) Schedule 10 – Form of Escrow Closing Procedure Agreement;
  - (m) Schedule 11 – Form of Project Agreement (including all related Schedules appendices and attachments) as listed in the RFP Data Sheet; and



- (n) Addenda to the RFP Documents, if any.
- (2) Subject to RFP Section 2.2(1), the RFP Documents shall be read as a whole. The Schedules and Addenda, if any, constitute an integral part of this RFP and are incorporated by reference. For greater clarity, Background Information documents are not RFP Documents.

## 2.2 Conflicts or Inconsistencies in Documents

- (1) For the purpose of the RFP Process, if there are any conflicts or inconsistencies among the terms and conditions of the documents comprising RFP Documents the following shall apply:
  - (a) in respect of matters of interpretation related to the RFP Process and all competitive procurement process matters, this RFP shall prevail over the Schedules to this RFP during the RFP Process;
  - (b) in respect of all matters of interpretation of the Project and the Project Agreement during the RFP Process, the Project Agreement shall prevail over this RFP and all other Schedules to this RFP; and
  - (c) for the purpose of resolving conflicts or inconsistencies among the documents that constitute the Project Agreement, the provisions of the Project Agreement dealing with conflicts or inconsistencies shall govern.
- (2) Despite RFP Section 2.2(1), if the Proponent believes that there is any term or condition in any RFP Document that is ambiguous, or that conflicts or is inconsistent with any other term or condition in the RFP Documents, the Proponent shall notify the Sponsors of that ambiguity, conflict or inconsistency in accordance with RFP Section 3.2.2 and, for greater clarity, by the deadline set out in the RFP Data Sheet for the submission of RFIs.
- (3) If there is a conflict or inconsistency between:
  - (a) the Sponsors' electronic version of an RFP Document as contained in the Data Room; and
  - (b) any other version of the same RFP Document (whether in electronic or hard copy),the Sponsors' electronic version as contained in the Data Room shall govern.
- (4) If there is any conflict or inconsistency between documents, including RFP Documents, contained in the Data Room and documents that are downloaded by the Proponent, the documents contained in the Data Room shall govern.
- (5) If there is any conflict or inconsistency between two versions of the same RFP Document contained in the Data Room, the RFP Document of the later date or version number shall prevail over the same RFP Document of an earlier date or version number. Unless otherwise indicated, for the purposes of this RFP Section 2.2(5), the date of each RFP Document shall be determined by the date and time when that document was placed in the Data Room by Infrastructure Ontario.

### 2.3 Distribution of Documents to Proponents

- (1) Except as provided in RFP Section 2.3(2), Infrastructure Ontario will circulate this RFP and all other RFP Documents, including Addenda, by placing them in the Data Room and notifying the Proponent Representatives by e-mail that RFP Documents or Addenda, as applicable, have been added to the Data Room. Notification to Proponents by Infrastructure Ontario that documents have been added to the Data Room is a courtesy only and Proponents are solely responsible to ensure that they reviewed all documents in the Data Room in accordance with RFP Section 2.4(3) and, in particular, have reviewed all documents in the Data Room immediately prior to submitting Proposals.
- (2) The Sponsors may circulate some RFP Documents in paper copy. If the Sponsors circulate any RFP Documents in paper copy, Proponents will be notified of a paper copy circulation by way of a notice in the Data Room.

### 2.4 Data Room

- (1) The Sponsors have established an electronic data room (the “**Data Room**”) at a secure website address for:
  - (a) the distribution of RFP Documents and Addenda (including “black-lined” RFP Documents revised by Addenda);
  - (b) the provision of various types of background information for the Proponents’ review (“**Background Information**”); and
  - (c) the receipt of RFIs from Proponents and the posting of responses to RFIs.
- (2) The Data Room will be accessible on approximately the date set out in the Timetable. The Sponsors may add, delete or amend documents in the Data Room at any time.
- (3) Each Proponent is solely responsible to ensure that it:
  - (a) contacts the Contact Person at the coordinates set out in the RFP Data Sheet to arrange access to the Data Room and receipt of a Data Room password;
  - (b) has the appropriate software which allows the Proponent to access and download RFP Documents and Background Information from the Data Room; and
  - (c) checks the Data Room frequently for the addition, deletion or amendment of RFP Documents, Background Information and the posting of responses to RFIs and, at all times during the RFP Process keeps itself informed of and takes into account the most current RFP Documents, Background Information and responses to RFIs.

### 2.5 Proponent Investigations

- (1) Each Proponent and each of its Proponent Team Members is solely responsible, at its own cost and expense, to carry out its own independent research and due diligence and to perform any other investigations, including seeking independent advice, considered necessary by the Proponent to satisfy itself as to all existing conditions affecting the Project or the Project

Agreement. The Proponents' and Proponent Team Members' obligations set out in this RFP Section 2.5 apply irrespective of any Background Information in the Data Room or information contained in the RFP Documents or in responses to RFIs. The Proponents' and Proponent Team Members' obligation to carry out independent research, investigations, due diligence or to seek independent advice or, if applicable, their ability to rely on information provided by the Sponsors is more particularly set out in the Project Agreement. If, as a result of any independent research, investigations, due diligence, or independent advice, a Proponent believes that there is any insufficiency in the Lands for the purpose of performing the Works, the Proponent shall immediately, and at its own cost and expense, notify the Sponsors and provide all details the Sponsors may request in considering the issue.

- (2) Except as explicitly provided in the Project Agreement, the Sponsors do not represent or warrant the accuracy or completeness of any information set out in the RFP Documents or made available to Proponents or Proponent Team Members in the Data Room as Background Information or of any other background or reference information or documents prepared by the Government of Ontario or by third parties and which may be made available to Proponents or Proponent Team Members by or through the Sponsors. Proponents and Proponent Team Members shall make such independent assessments as they consider necessary to verify and confirm the accuracy and completeness of all such information as any use of or reliance by Proponents or Proponent Team Members on any and all such information shall be at the Proponents' and Proponent Team Members' sole risk and without recourse against the Sponsors or the Government of Ontario.

### 3 THE RFP PROCESS

#### 3.1 RFP Process Timetable

- (1) The deadline for the submission of the Technical Submission (the "**Technical Submission Deadline**"), the deadline for the submission of the Financial Submission (the "**Financial Submission Deadline**") and the general timetable for the RFP Process (the "**Timetable**") are set out in the RFP Data Sheet.
- (2) The Sponsors may amend the Timetable in their sole discretion:
  - (a) at any time prior to the Technical Submission Deadline or the Financial Submission Deadline for events that are to occur prior to or on the Technical Submission Deadline or the Financial Submission Deadline, as applicable, including the Technical Submission Deadline itself or the Financial Submission Deadline itself; and
  - (b) at any time in the RFP Process for events that are to occur after the Financial Submission Deadline.

#### 3.2 Questions and RFP Documents Comments

##### 3.2.1 Contact Person

- (1) Except as set out in RFP Section 3.4.2, the Proponents shall submit all questions and other communications regarding the RFP Documents, the RFP Process and their Proposals to the contact person or contact persons named in the RFP Data Sheet (the "**Contact Person**" or "**Contact Persons**", as applicable) electronically at the coordinates listed in the RFP Data Sheet

and the questions shall be submitted in accordance with RFP Section 3.2.2 and shall be submitted in the form provided in the Data Room.

### 3.2.2 Clarification/RFI Submission Process

- (1) In addition to the requirement set out in RFP Section 3.2.1, the following rules shall apply to Proponents when submitting questions or requests for information (“**RFIs**”) to the Sponsors during the RFP Process:
  - (a) Proponents are permitted to submit RFIs categorized as follows:
    - (i) RFIs that are of general application and that would apply to other Proponents (“**General RFIs**”); and
    - (ii) RFIs that the Proponent considers to be commercially sensitive or confidential to that particular Proponent (“**Commercially Confidential RFIs**”);
  - (b) if the Sponsors disagree with the Proponent’s categorization of an RFI as a Commercially Confidential RFI, the Sponsors will give the Proponent an opportunity to either categorize the RFI as a General RFI or to withdraw the RFI;
  - (c) if the Sponsors determine, in their sole discretion, that a Commercially Confidential RFI, even if it is withdrawn by a Proponent, is of general application or would provide a significant clarification of the RFP Documents or RFP Process to Proponents, the Sponsors may issue a clarification to Proponents that deals with the same subject matter as the withdrawn Commercially Confidential RFI; and
  - (d) if the Sponsors agree with the Proponent’s categorization of a Commercially Confidential RFI, then the Sponsors will provide a response to that RFI to only the Proponent that submitted the RFI.
- (2) Responses to RFIs prepared and circulated by the Sponsors are not RFP Documents and do not amend the RFP Documents. If, in the Sponsors’ sole discretion, responses to RFIs require an amendment to the RFP Documents, such amendment will be prepared and circulated by Addendum in accordance with RFP Section 3.7. Only a response to an RFI that has been incorporated into or issued as an Addendum will modify or amend the RFP Documents and, otherwise, RFIs will have no force or effect whatsoever and shall not be relied upon by any Proponent.
- (3) Proponents shall submit RFIs in accordance with the deadlines set out in the Timetable.
- (4) Proponents shall submit all RFIs to the Contact Person electronically in accordance with the instructions set out in the RFP Data Sheet.
- (5) The Sponsors will respond to RFIs in written responses circulated to Proponents in accordance with the schedule set out in the Timetable. The Sponsors may, in their sole discretion, distribute responses to RFIs of a minor or administrative nature to only the Proponent who submitted the minor or administrative RFI.

- (6) It is the Proponent's obligation to seek clarification from the Sponsors of any matter it considers to be unclear in accordance with RFP Section 3.2.2 and, for greater clarity, by the deadline set out in the Timetable for the submission of RFIs. Neither the Sponsors nor the Government of Ontario are responsible in any way whatsoever for any misunderstanding by the Proponent or any of its Proponent Team Members of the RFP Documents, Background Information, responses to RFIs, any documents placed in the Data Room or any other type of information provided by or communication made by the Sponsors or the Government of Ontario.

### **3.2.3 RFP Documents Comments**

- (1) The Sponsors may, in their sole discretion, request Proponents to submit comments on the RFP Documents and, in particular, comments on the Project Agreement. Whether the Sponsors intend to permit or require the submission of such comments and the schedule and format for the submission of those comments is set out in the RFP Data Sheet. The Sponsors are not obliged to respond to each comment made by Proponents under this RFP Section 3.2.3. If the Sponsors accept a comment, or part of a comment, and that acceptance requires a change to the RFP Documents, the Sponsors shall implement that change by Addendum.

## **3.3 Communications Restrictions**

### **3.3.1 Communications with Municipalities, Other Government Authorities and Utilities**

- (1) Subject to the restrictions in RFP Section 3.3.2 and any special rules set out in the RFP Data Sheet, Proponents, Proponent Team Members and their respective Advisors are permitted to communicate directly with any municipality, government authority or utility with respect to municipal, utility or other types of governmental requirements related to the Project. Under no circumstances will any special rules set out in the RFP Data Sheet in accordance with this RFP Section 3.3.1(1) override the provisions of RFP Section 3.3.2.
- (2) Neither the Sponsors nor the Government of Ontario are, in any way whatsoever, responsible for any representations, statements, assurances, commitments or agreements which Proponents, Proponent Team Members or their respective Advisors receive or believe they may have received from a municipality, a government authority, or a utility. Proponents, Proponent Team Members and their respective Advisors rely on any such representations, assurances, commitments or agreements at their sole risk without recourse against the Sponsors or the Government of Ontario.

### **3.3.2 Prohibited Contacts and Lobbying Prohibition**

- (1) Proponents and Proponent Team Members and all of their respective Advisors, employees and representatives are prohibited from engaging in any form of political or other lobbying, of any kind whatsoever, to influence the outcome of the RFP Process.
- (2) Without limiting the generality of RFP Section 3.3.2(1), neither Proponents nor Proponent Team Members nor any of their respective Advisors, employees or representatives shall contact or attempt to contact, either directly or indirectly, at any time during the RFP Process, any of the following persons or organizations on matters related to the RFP Process, the RFP Documents, or the Proposals:
- (a) any member of the Evaluation Committee;

- (b) any Advisor to the Sponsors or the Evaluation Committee;
  - (c) any employee or representative of:
    - (i) the Sponsors;
    - (ii) MOI, MTO or any other Ministry, agency or entity listed in the RFP Data Sheet;
    - (iii) the Premier of Ontario's office or the Ontario Cabinet office;
  - (d) any Member of the Provincial Parliament (including the Premier) or his or her staff or representatives; or
  - (e) any directors, officers or consultants of any entity listed in RFP Sections 3.3.2(2)(a) to 3.3.2(2)(d).
- (3) If a Proponent or a Proponent Team Member or any of their respective Advisors, employees or representatives, in the opinion of the Sponsors, contravenes RFP Section 3.3.2(1) or RFP Section 3.3.2(2), the Sponsors may, in their sole discretion,
- (a) take any action in accordance with RFP Section 7.1.2; or
  - (b) impose conditions on the Proponent's or Proponent Team Member's continued participation in the RFP Process that the Sponsors consider, in their sole discretion, to be appropriate.

For clarity, the Sponsors are not obliged to take the actions set out in RFP Section 3.3.2(3)(a) or RFP Section 3.3.2(3)(b).

### **3.3.3 Media Releases, Public Disclosures and Public Announcements**

- (1) A Proponent shall not, and shall ensure that its Advisors, employees, representatives and Proponent Team Members, and their respective Advisors, employees and representatives do not, issue or disseminate any media release, public announcement or public disclosure (whether for publication in the press, on the radio, television, internet or any other medium) that relates to the RFP Process, the RFP Documents or the Project or any matters related thereto, without the prior written consent of the Sponsors.
- (2) Neither the Proponents or the Proponent Team Members or any of their respective Advisors, employees or representatives shall make any public comment, respond to questions in a public forum, or carry out any activities to either criticize another Proponent or Proposal or to publicly promote or advertise their own qualifications, interest in or participation in the RFP Process without the Sponsors' prior written consent, which consent may be withheld in the Sponsors' sole discretion. Notwithstanding this RFP Section 3.3.3(2), Proponents, Proponent Team Members and their respective Advisors, employees and representatives are permitted to state publicly that they are participating in the RFP Process.
- (3) For the purpose of greater clarity, RFP Section 3.3.3(2) does not prohibit disclosures necessary to permit the Proponent to discuss the Project with prospective subcontractors but such disclosure is permitted only to the extent necessary to solicit those subcontractors' participation in the Project.

### 3.3.4 Restrictions on Communications between Proponents – No Collusion

- (1) A Proponent shall not discuss or communicate, directly or indirectly, with any other Proponent, any information whatsoever regarding the preparation of its own Proposal or the Proposal of the other Proponent in a fashion that would contravene Applicable Law. Proponents shall prepare and submit Proposals independently and without any connection, knowledge, comparison of information or arrangement, direct or indirect, with any other Proponent.
- (2) For greater clarity, RFP Section 3.3.4(1) applies to Proponents and Proponent Team Members and their respective Advisors, employees and representatives.

## 3.4 Meetings with Proponents

### 3.4.1 General Proponents Meeting(s)

- (1) The Sponsors may, in their sole discretion, convene general Proponents meetings (each, a “**Proponents Meeting**”) on the dates and at the times set out in the Timetable and at the location and for the purposes set out in the RFP Data Sheet. While attendance at a Proponents Meeting is not mandatory, Proponents are strongly encouraged to attend. A Proponent’s failure to attend a Proponents Meeting is at the Proponent’s sole risk and responsibility.
- (2) The Sponsors shall communicate locations and particulars with respect to Proponents Meetings to the Proponents in advance. The Sponsors reserve the rights, in their sole discretion, to limit the number of Proponent attendees that may attend any Proponents Meeting. The Sponsors shall notify the Proponents in advance in the event any such limitation is to be imposed.
- (3) Proponents may ask questions and seek clarifications at a Proponents Meeting. Notwithstanding that the Sponsors may give oral answers at a Proponents Meeting, those answers shall not be considered final unless issued in writing. Therefore, Proponents are strongly encouraged to submit these questions in accordance with RFP Section 3.2.2 for response in accordance with RFP Section 3.2.2.
- (4) No statement, consent, waiver, acceptance, approval or anything else said or done in any Proponents Meeting by the Sponsors or any of their respective Advisors, employees or representatives shall amend or waive any provision of the RFP Documents, or be binding on the Sponsors or be relied upon in any way by Proponents, Proponent Team Members or their Advisors, except when and only to the extent expressly confirmed in an Addendum to the RFP Documents issued in accordance with RFP Section 3.7.

### 3.4.2 Commercially Confidential Proponent Meetings

- (1) The Sponsors may, in their sole discretion, convene commercially confidential meetings with individual Proponents (“**Commercially Confidential Meetings**”), which may include the Consultation Sessions described in Schedule 2 – Proponent Consultation Process to this RFP and additional Commercially Confidential Meetings between the Sponsors (and their representatives and Advisors) and individual Proponents (and their representatives and Advisors) to discuss other matters related to the RFP Process or the Proponents’ Proposals.
- (2) Whether the Sponsors intend to hold Commercially Confidential Meetings and the location of those meetings is set out in Schedule 2 – Proponent Consultation Process to this RFP and in the

RFP Data Sheet. The approximate date and time of Commercially Confidential Meetings is described in Schedule 2 – Proponent Consultation Process to this RFP and, if applicable, set out in the Timetable. While attendance at Commercially Confidential Meetings by Proponents is not mandatory, Proponents are strongly encouraged to attend. A Proponent’s failure to attend a Commercially Confidential Meeting is at the Proponent’s sole risk and responsibility.

- (3) If the Sponsors hold Commercially Confidential Meetings, the Fairness Monitor may be present during some or all of those meetings.
- (4) No oral or written statement, consent, waiver, acceptance, approval or anything else said or done by the Sponsors or any of their respective Advisors, employees or representatives or by any stakeholder of the Project during any Commercially Confidential Meeting or otherwise pursuant to Schedule 2 – Proponent Consultation Process shall amend or waive any provision of the RFP Documents, or be binding on the Sponsors or be relied upon in any way by Proponents, Proponent Team Members or their Advisors, except when and only to the extent expressly confirmed in an Addendum to the RFP Documents issued in accordance with RFP Section 3.7.
- (5) The Proponent, its Proponent Team Members and their respective Advisors and representatives and any of their attendees at Commercially Confidential Meetings acknowledge and agree that:
  - (a) any oral or written statement made by the Sponsors or any of their Advisors or representatives or by any stakeholder of the Project during any Commercially Confidential Meeting or otherwise pursuant to Schedule 2 – Proponent Consultation Process is not and shall not be deemed or considered to be an indication of a preference by the Sponsors or the Government of Ontario or a rejection by the Sponsors or the Government of Ontario of anything said or done by the Proponent, Proponent Team Member or any of their respective Advisors or representatives;
  - (b) any oral or written statement made by the Sponsors or any of their Advisors or representatives or by any stakeholder of the Project during any Commercially Confidential Meeting or otherwise pursuant to Schedule 2 – Proponent Consultation Process shall not and will not be relied upon in any way by the Proponent, Proponent Team Member or any of their respective Advisors or representatives for any purpose, including any purpose in connection with the RFP, the Project Agreement, the Project or otherwise, except and only to the extent expressly confirmed by Addendum in accordance with RFP Section 3.7 provided that the Sponsors shall not be under any obligation to confirm any information by Addendum;
  - (c) the Sponsors may share process-related information, including clarifying information, with all Proponents if the need arises; and
  - (d) the Proponent, its Proponent Team Members and their respective Advisors and representatives:
    - (i) shall participate in the Commercially Confidential Meetings in accordance with the guidelines, procedures and processes set out in the RFP;
    - (ii) waive any and all rights to contest and/or protest the RFP and the processes and guidelines set out herein, including the Commercially Confidential Meetings, based on the fact that such Commercially Confidential Meetings occurred or on



the basis that information may have been received during a Commercially Confidential Meeting by another Proponent, another Proponent's Proponent Team Member, or their respective Advisors or representatives that was not received by the Proponent, its own Proponent Team Member(s) or any of their respective Advisors or representatives; and

- (iii) agree that the Proponent, its Proponent Team Members and their respective Advisors and representatives must treat information received at a Commercially Confidential Meeting as Confidential Information.

### 3.5 Visiting the Lands

#### 3.5.1 Scheduled Visits

- (1) If the Sponsors have established scheduled dates and times for visits to see the Lands (“**Scheduled Visits**”) for all Proponents, Proponent Team Members and their respective representatives and Advisors, the dates and times of the Scheduled Visits will be set out in the Timetable. If the Sponsors have established rules for Scheduled Visits, the rules for Scheduled Visits will be set out in the RFP Data Sheet. For clarity, Scheduled Visits are in addition to any Proponent visits scheduled in accordance with RFP Section 3.5.2.
- (2) The provisions of RFP Sections 3.5.2(3), 3.5.2(4) and 3.5.2(5) will, in each case to the extent applicable, apply to Scheduled Visits.
- (3) Any statement made by Infrastructure Ontario, the Client or any of their respective Advisors or representatives during any Scheduled Visit or any additional visit to the Lands, if any, shall not and will not be relied upon in any way by the Proponent, Proponent Team Member or any of their respective Advisors or representatives for any purpose, including any purpose in connection with the RFP, the Project Agreement, the Project or otherwise, except and only to the extent expressly confirmed by Addendum in accordance with RFP Section 3.7 provided that neither Infrastructure Ontario nor the Client shall be under any obligation to confirm any information by Addendum.

#### 3.5.2 Additional Visits to the Lands

- (1) Except for Scheduled Visits, Proponents are not permitted to access any part of the Lands or Existing Infrastructure except by prior written arrangement with the Contact Person.
- (2) The Sponsors may allow the Proponents to arrange a visit to access the Lands or a portion thereof which is not accessible by the general public, other than a Scheduled Visit (an “**Additional Visit**”). Whether or not the Sponsors intend to allow Additional Visits will be set out in the RFP Data Sheet. For each Additional Visit, the Proponent shall submit a request to the Contact Person at least two Business Days prior (or such other time as is set out in the RFP Data Sheet) to the Proponent's proposed date and time for an Additional Visit. The request shall set out the:
  - (a) proposed date and time, and alternate date and time, of the proposed Additional Visit;
  - (b) purpose of the Additional Visit;
  - (c) areas of the Lands which are not accessible by the general public for which access is requested; and

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- (d) names, titles and contact information of the Proponent's representatives who will be attending the Additional Visit.
- (3) If the Proponent has received approval for and written confirmation of an Additional Visit from the Contact Person, unless otherwise set out in the Contact Person's confirmation the following shall apply to the Additional Visit:
- (a) all Proponent and Proponent Team Member representatives shall strictly obey all instructions from the Sponsors' representatives during the visit and shall comply with all site-specific security, safety or other types of requirements;
- (b) all Proponent and Proponent Team Member representatives shall, at all times, make reasonable efforts to avoid disturbing or infringing upon the privacy of any persons occupying, residing or working in close proximity to any part of the Lands which are not accessible by the general public, as applicable;
- (c) the Proponent and Proponent Team Member representatives shall visit only those specific areas of the Lands which are not accessible by the general public, as applicable, to which the Proponent has been granted access in the Contact Person's confirmation;
- (d) the Proponent and Proponent Team Member representatives shall not take photographs without the prior written consent of the Contact Person. If photographs are permitted by the Contact Person, they may be taken by the Proponent and Proponent Team Member representatives only in the specific areas of the Lands which are not accessible by the general public, for which consent to photograph has been given; and
- (e) the Proponent shall comply with any supplementary rules set out in the RFP Data Sheet for Additional Visits.
- (4) Each Proponent acknowledges that because portions of the Lands which are not accessible by the general public, or portions thereof, may be in use, unforeseen circumstances can arise and the Sponsors may, in their sole discretion, cancel or reschedule any Additional Visit, change the areas of access of any Additional Visit or otherwise change any Additional Visit on short notice or no notice to the Proponent and Proponent Team Members or their representatives.
- (5) Infrastructure Ontario or the Client may, in its sole discretion and through the Contact Person, require that an Infrastructure Ontario or Client representative be present to monitor the Proponent's activities during the Additional Visit. The Contact Person will confirm whether an Infrastructure Ontario or Client representative will be present at the Additional Visit at the time the Additional Visit is approved and scheduled. The period(s) during which Additional Visits will be permitted is set out in the Timetable.

### **3.5.3 Ownership of the Metrolinx Lands**

- (1) The Proponent acknowledges and agrees that, as of the date of the issuance of this RFP, the Client owns or has access to some, but not all, of the Metrolinx Lands that will ultimately be owned by it or to which it will ultimately have access for the Project. The Client's acquisition of and access to all of the Metrolinx Lands will not be completed until after Financial Close. The Sponsors will only be able to provide the Proponents with access to those portions of the Metrolinx Lands that have been acquired by the Client or to which the Client has access.

### 3.6 Changes to Identified Proponent Parties

- (1) A Proponent shall not change its shareholders (unless the Proponent is a company whose equity securities are listed on a recognized stock exchange), Proponent Team Members, proposed subcontractors, those individuals identified in the Proponent's Prequalification Submission as key personnel, Key Individuals, or other parties identified in the Proponent's Prequalification Submission (the "**Identified Proponent Parties**") without the prior written consent of the Sponsors.
- (2) Without limiting the generality of the foregoing, Proponents are permitted to request a change in their Identified Proponent Parties in accordance with this RFP Section 3.6.
- (3) No later than the deadline set out in the Timetable, a Proponent may request a change in its Identified Proponent Parties, including any proposed withdrawal from, addition to, or substitution of the Identified Proponent Parties (each, a "**Proposed Change in Identified Proponent Party**") by delivering a request notice to the Contact Person, requesting the Sponsors' consent to such Proposed Change in Identified Proponent Party.
- (4) If an Identified Proponent Party withdraws from the RFP Process in a manner that does not make it possible for the Proponent to deliver the request notice in advance of obtaining the Sponsors' prior consent, the Proponent shall notify the Sponsors of the withdrawal as soon as the Proponent becomes aware of the withdrawal and shall deliver a further request notice to the Contact Person, requesting the Sponsors' consent to a Proposed Change in Identified Proponent Party, either by substituting, or by proceeding without any substitute of the withdrawn Identified Proponent Party, such request notice to be delivered no later than six weeks after the occurrence of the date of withdrawal or 21 days before the Technical Submission Deadline, whichever is earlier.
- (5) A request notice delivered under either RFP Section 3.6(3) or RFP Section 3.6(4), as applicable, shall:
  - (a) clearly identify the Proposed Change in Identified Proponent Party (including, as applicable, a statement of the Proponent's intention to continue in the absence of a withdrawn Identified Proponent Party, or any proposed additional or substitute Identified Proponent Party);
  - (b) attach and provide sufficient documentation to demonstrate to the satisfaction of the Sponsors, in their sole discretion, that the Proposed Change in Identified Proponent Party will not materially adversely affect the Proponent's ability to submit a complete and compliant Proposal or impair the Proponent's or the Identified Proponent Party's ability to perform their respective obligations under the Project Agreement; and
  - (c) attach and provide sufficient documentation to demonstrate to the satisfaction of the Sponsors in their sole discretion, that the reconstituted Proponent team (whether through addition, substitution or continuation without replacement of a withdrawal of one or more of the Identified Proponent Parties, as applicable) would have met or exceeded any applicable criteria applied during the RFQ process.
- (6) In reviewing a request made in accordance with RFP Section 3.6(5) the Sponsors may, in their sole discretion and at any time, instruct the Proponent to deliver further documentation or additional information as may be reasonably requested by the Sponsors to assess any Proposed

Change in Identified Proponent Party. When a request for further documentation or additional information is made by the Sponsors, the Proponent shall deliver such information and documentation as soon as possible and in any event no later than the deadlines set out in RFP Section 3.6(3) or RFP Section 3.6(4), as applicable. The Sponsors are under no obligation to consider any further documentation or additional information delivered after the applicable deadline.

- (7) With respect to any request for a Proposed Change in Identified Proponent Party, the Sponsors may, in their sole discretion, do any one or more of the following, as applicable:
- (a) consent to or reject the Proposed Change in Identified Proponent Party;
  - (b) impose such other terms and conditions as the Sponsors may require in connection with any consent to a Proposed Change in Identified Proponent Party; and/or
  - (c) following a rejection of a Proposed Change in Identified Proponent Party (where such Proposed Change in Identified Proponent Party involves a substitution of an Identified Proponent Party), permit the Proponent to deliver a further request notice for a Proposed Change in Identified Proponent Party identifying an alternate substitute for review by the Sponsors, subject to the same deadlines, terms and conditions and standard of review as set out in this RFP Section 3.6.
- (8) The Sponsors may, at any time before Commercial Close and in their sole discretion, disqualify a Proponent and terminate a Proponent's continued involvement in the RFP Process or allow a Proponent to continue under such terms and conditions as the Sponsors may require, in their sole discretion, in the event of any of the following:
- (a) an actual change in any Identified Proponent Party is made at any time during the RFP Process by the Proponent without obtaining prior consent of the Sponsors (including any withdrawal of an Identified Proponent Party described in RFP Section 3.6(4));
  - (b) a Proposed Change in Identified Proponent Party is made after the deadlines set out in RFP Section 3.6(3) or RFP Section 3.6(4), as applicable; or
  - (c) a change in circumstances with respect to a Proponent after the Technical Submission Deadline that may materially adversely affect an Identified Proponent Party in a way which could impair the Proponent's or the Identified Proponent Party's ability to perform their respective obligations under the Project Agreement.
- (9) If, at any time prior to Commercial Close, and notwithstanding any other provision in this RFP, there is a Change in Control of a Proponent or of one of its Proponent Team Members (the "**Acquiree**") by one of the other Proponents or one of the other Proponent's Proponent Team Members (the "**Acquirer**"):
- (a) the Acquiree shall be immediately disqualified from further participation in this RFP Process. In the event that a Proponent Team Member is the Acquiree, the affected Proponent may request a change of the Acquiree and the Sponsors shall consider such request, in their sole discretion, in accordance with this RFP Section 3.6. In the event that such request to change the Proponent Team Member is rejected by the Sponsors, the Sponsors shall disqualify the Proponent from continuing in the RFP Process; and

- (b) the Sponsors may, in their sole discretion, allow the Acquirer to continue in the RFP Process, however, the Sponsors' consent to continue may be subject to such terms and conditions as the Sponsors may require.
- (10) If, after identification of the Preferred Proponent pursuant to RFP Section 9.1, the Sponsors determine, acting reasonably, that it is in the best interests of the Sponsors that any individual proposed as a Key Individual in the Preferred Proponent's Proposal be substituted, the Sponsors shall notify the Preferred Proponent (including a detailed explanation of the reasons for such determination), and, within 10 days following receipt by the Preferred Proponent of such notice, the Preferred Proponent shall provide the Sponsors with relevant information on the proposed substitution and shall consult with the Sponsors before finalizing the appointment of such substitution. The proposed substitution must have equal or better qualifications than the qualifications of the Key Individual that they are replacing.

### 3.7 Addenda/Changes to the RFP Documents

- (1) The Sponsors may, in their sole discretion, amend or supplement the RFP Documents prior to the Technical Submission Deadline (for matters relating to the Technical Submission) and prior to the Financial Submission Deadline (for all other matters). The Sponsors shall issue changes to the RFP Documents by Addenda only. No other statement, whether oral or written, made by the Sponsors or the Sponsors' Advisors, employees or representatives, including, for clarity, the Contact Person, or any other person, shall amend the RFP Documents. The approximate final date that the Sponsors will issue an Addendum in respect of the Project Agreement is set out in the Timetable. The Sponsors may issue other Addenda at any time.
- (2) The Proponent is solely responsible to ensure that it has received all Addenda issued by the Sponsors. Proponents may, in writing, seek confirmation of the number of Addenda issued under this RFP from the Contact Person.
- (3) The Sponsors shall issue Addenda by placing them in the Data Room and notifying the Proponents' Representatives by e-mail that an Addendum has been placed in the Data Room.
- (4) Any reference to any one or all of the RFP Documents in the RFP Documents includes any amendments to the RFP Documents made in accordance with this RFP Section 3.7.

### 3.8 Freedom of Information, Confidentiality and Copyright Matters

#### 3.8.1 Freedom of Information and Protection of Privacy Acts

- (1) Proponents are advised,
- (a) that the Sponsors may be required to disclose the RFP Documents and a part or parts of any Proposal pursuant to the *Freedom of Information and Protection of Privacy Act* (Ontario), as amended from time to time ("FIPPA"); and
- (b) because this Project includes New Third Party Infrastructure, the applicable owners of such New Third Party Infrastructure may be required to disclose a part or parts of any Proposal pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (Ontario), as amended from time to time ("MFIPPA").

- (2) Proponents are also advised that FIPPA does provide protection for confidential and proprietary business information. Proponents are strongly advised to consult their own legal Advisors as to the appropriate way in which confidential or proprietary business information should be marked as such in their Proposals.
- (3) Subject to the provisions of FIPPA, the Sponsors will use reasonable commercial efforts to safeguard the confidentiality of any information identified by the Proponent as confidential but shall not be liable in any way whatsoever to any Proponent or Proponent Team Member if such information is disclosed based on an order or decision of the Information and Privacy Commissioner or otherwise as required under Applicable Law.

### 3.8.2 Confidentiality Agreements

- (1) Each Prequalified Party has executed a submission form to the RFQ that states that they agree to be bound by the confidentiality provisions set out in the RFQ. If the Sponsors, in their sole discretion, require a separate confidentiality agreement from Proponents, no later than five days after a request by the Sponsors, the Proponent shall cause each of its employees, representatives and Advisors and its Proponent Team Members and each of their employees, representatives and Advisors who are in receipt of Confidential Information, to execute and deliver to the Sponsors a confidentiality agreement in a form prescribed by and with terms and conditions acceptable to the Sponsors, in their sole discretion. To the extent that the provisions of the confidentiality agreements are inconsistent or conflict with the requirements of RFP Section 3.8.3, the more stringent confidentiality obligation shall govern.

### 3.8.3 Confidential Information

- (1) For the purpose of this RFP Process, “**Confidential Information**” means all material, data, information or any item in any form, whether oral or written, including in electronic or hard-copy format, supplied by, obtained from or otherwise provided by the Sponsors or the Government of Ontario in connection with the RFP Process, the RFP Documents or the Project, whether supplied, obtained from or provided before or after the RFP Process.
- (2) The Proponent agrees that all Confidential Information:
  - (a) shall remain the sole property of the Sponsors or the Government of Ontario, as applicable, and the Proponent shall treat it as confidential;
  - (b) shall not be used by the Proponent for any purpose other than developing and submitting a Proposal in response to this RFP Process or the performance of any subsequent agreement relating to the Project with the Signing Parties;
  - (c) shall not be disclosed by the Proponent to any person who is not involved in the Proponent’s preparation of its Proposal or the performance of any subsequent agreement relating to the Project with the Signing Parties, without prior written consent of the Sponsors or the Government of Ontario, as applicable;
  - (d) shall not be used in any way detrimental to the Sponsors or the Government of Ontario; and

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- (e) if requested by the Sponsors, all Confidential Information shall be returned by the Proponents to the Sponsors no later than ten days after that request.
- (3) Each Proponent shall be responsible for any breach of the provisions of this RFP Section 3.8.3 by any person to whom it discloses the Confidential Information including, for greater clarity, the Proponent's employees, representatives and Advisors and the Proponent Team Members and their employees, representatives and Advisors. Each Proponent shall indemnify each of the Sponsors and the Government of Ontario and each of their related entities and each of their respective directors, officers, consultants, employees, agents and representatives and save each of them fully harmless from and against any and all loss, cost, damage, expense, fine, suit, claim, penalty, demand, action, obligation and liability of any kind or nature (including, without limitation, professional fees on a full indemnity basis) suffered or incurred by any of them arising as a result of or in connection with any breach of any of the provisions of this RFP Section 3.8.3 by the Proponent or by any person to whom the Proponent has disclosed the Confidential Information. Each Proponent agrees that the Sponsors act as trustee for each of their related entities and the Government of Ontario and each of their respective directors, officers, consultants, employees, agents and representatives with respect to all rights contemplated hereunder arising in favour of a related entity or the Government of Ontario or any of their respective directors, officers, consultants, employees, agents or representatives and that the Sponsors have agreed to accept such trust and hold and enforce such rights on behalf of each related entity or the Government of Ontario and each of their respective directors, officers, consultants, employees, agents and representatives.
- (4) Each Proponent acknowledges and agrees that a breach of the provisions of this RFP Section 3.8.3 would cause the Sponsors, the Government of Ontario and their related entities to suffer loss that could not be adequately compensated by damages, and that the Sponsors, the Government of Ontario and any of their related entities may, in addition to any other remedy or relief, enforce any of the provisions of this RFP Section 3.8.3 upon application to a court of competent jurisdiction without proof of actual damage to the Sponsors, the Government of Ontario or any of their related entities.
- (5) Notwithstanding anything else to the contrary in this RFP, the provisions of this RFP Section 3.8.3 shall survive any cancellation of this RFP Process and the conclusion of the RFP Process and, for greater clarity, shall be legally binding on all Prequalified Parties, whether or not they submit a Proposal.
- (6) The confidentiality obligations of the Proponent shall not apply to any information which falls within the following exceptions:
- (a) information that is lawfully in the public domain at the time of first disclosure to the Proponent, or which, after disclosure to the Proponent, becomes part of the public domain other than by a breach of the Proponent's confidentiality obligations or by any act or fault of the Proponent;
  - (b) information which was in the Proponent's possession prior to its disclosure to the Proponent by the Sponsors, and provided that it was not acquired by the Proponent under an obligation of confidence; or

- (c) information which was lawfully obtained by the Proponent from a third party without restriction of disclosure, provided such third party was at the time of disclosure under no obligation of secrecy with respect to such information.

### 3.8.4 Copyright and Use of Information in Proposals

- (1) The Sponsors' rights, as set out in this RFP Section 3.8.4, to the Proposal and all Proposal Information submitted by the Proponent during the RFP Process shall be granted to the Sponsors as follows:
  - (a) if a Proposal Fee is offered in accordance with RFP Section 10.3.2:
    - (i) for unsuccessful Proponents, upon payment of the Proposal Fee; and
    - (ii) for the Preferred Proponent, upon Commercial Close;
  - (b) if the Project is cancelled and a Break Fee is offered in accordance with RFP Section 10.3.3, upon payment of the Break Fee; or
  - (c) if RFP Sections 3.8.4(1)(a) and 3.8.4(1)(b) do not apply, upon submission of the Proposal.
- (2) Proponents shall not use or incorporate into their Proposals any concepts, products or processes which are subject to copyright, patents, trademarks or other intellectual property rights of third parties unless Proponents have, or will procure through licencing without cost to the Sponsors, the right to use and employ such concepts, products and processes in and for the Project.
- (3) All requirements, designs, documents, plans and information supplied by the Sponsors to the Proponents in connection with this RFP are and shall remain the property of the Sponsors. Upon request of the Sponsors, all such designs, documents, plans and information (and any copies thereof in any format or medium created by or on behalf of the Proponent) must be returned to the Sponsors.
- (4) The Proponent shall grant to each of, the Sponsors and Her Majesty the Queen in Right of Ontario a non-exclusive, perpetual, irrevocable, world-wide, fully paid and royalty free licence (fully assignable without the consent of the Proponent and with the right to sub-licence without the consent of the Proponent) to use the Proposal Information (the "**Proposal Information Licence**"). Without limiting the foregoing, the Proposal Information Licence shall include the right to modify the Proposal Information, and, where applicable, to use it, or any modified form of it, anywhere in the world. Under no circumstances shall the Proponent, except Project Co (as defined in the Project Agreement) in relation to this Project, be liable to the Sponsors, Her Majesty the Queen in Right of Ontario or to any other person or entity for any damages, losses, costs, expenses, claims or actions whatsoever arising directly or indirectly from the use of the Proposal Information pursuant to the Proposal Information Licence.
- (5) For the purpose of this RFP Section 3.8.4, "**Proposal Information**" includes:
  - (a) all information contained in a Proposal or which is disclosed by or through a Proponent to the Sponsors during the evaluation of Proposals or during the process of executing any Project Agreement; and



- (b) any and all ideas, concepts, products, alternatives, processes, recommendations and suggestions developed by or through a Proponent and revealed to or discovered by the Sponsors, including any and all those which may be connected in any way to the preparation, submission, review or negotiation of any Proposal or the Project Agreement.
- (6) Proponents shall ensure that all intellectual property rights associated with any and all of the Proposal Information (including copyright and moral rights but excluding patent rights) provide for and give Infrastructure Ontario, the Client and Her Majesty the Queen in Right of Ontario the rights set out in this RFP Section 3.8.4. It is expressly understood and agreed that any actual or purported restriction in the future on the ability of Infrastructure Ontario, the Client or Her Majesty the Queen in Right of Ontario to use any of the Proposal Information, or anything else obtained by or through Proponents, shall be absolutely null and void and unenforceable as against Infrastructure Ontario, the Client, Her Majesty the Queen in Right of Ontario and each of their respective Advisors, and that the provisions of this RFP Section 3.8.4 shall take precedence and govern.

### **3.8.5 Open Data Directive**

- (1) Proponents acknowledge that the RFP Documents and a part or parts of any Proposal are subject to the Open Data Directive and that the Ontario ministries and agencies are required to disclose or publish certain data in accordance with the Open Data Directive.

## **3.9 Conflict of Interest and Ineligible Persons**

### **3.9.1 Conflict of Interest**

- (1) Proponents and Proponent Team Members and each of their Advisors, shall disclose, in their Proposal Submission Forms and the Proponent Team Member Declaration (in respect of Proponent Team Members), all perceived, potential and actual Conflicts of Interest. For clarity, Proponents have an ongoing obligation to comply with this RFP Section 3.9.1.
- (2) If a Proponent, a Proponent Team Member or any of their respective Advisors, prior to or following submission of its Proposal, discovers any perceived, potential or actual Conflicts of Interest, the Proponent shall promptly disclose the perceived, potential or actual Conflict of Interest to the Sponsors in a written statement to the Contact Person.
- (3) At the request of the Sponsors, the Proponent shall provide the Sponsors with the Proponent's proposed means to mitigate and minimize to the greatest extent practicable any perceived, potential or actual Conflict of Interest. The Proponent shall submit any additional information to the Sponsors that the Sponsors consider necessary to properly assess the perceived, potential or actual Conflict of Interest.
- (4) The Sponsors may, in their sole discretion, exclude any Proponent Team Member or Proponent Advisor on the grounds of Conflict of Interest.
- (5) Without limiting the generality of RFP Sections 3.9.1(4) or 3.9.1(6), the Sponsors may, in their sole discretion, require the Proponent, Proponent Team Member or a Proponent's Advisor to substitute a new person or entity for the person or entity giving rise to the Conflict of Interest.

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- (6) The Sponsors may, in their sole discretion, waive any and all perceived, potential or actual Conflicts of Interest of Proponents or Proponent Team Members, or any of their respective Advisors. A waiver may be upon such terms and conditions as the Sponsors, in their sole discretion, require to satisfy themselves that the Conflict of Interest has been appropriately managed, mitigated and minimized, including requiring the Proponent to put into place such policies, procedures, measures and other safeguards as may be required by and be acceptable to the Sponsors, in their sole discretion, to manage, mitigate and minimize the impact of such Conflict of Interest.
- (7) For the purposes of this RFP Process “**Conflict of Interest**” includes any situation or circumstance where a Proponent, any Proponent Team Member, any Proponent Advisor or any of the employees of a Proponent, Proponent Team Member or Proponent Advisor engaged in the development or oversight of development of the Proponent’s Proposal (including for such employees in their personal capacities):
- (a) has commitments, relationships or financial interests or involvement in any litigation or proceeding that:
    - (i) could or could be seen to exercise an improper influence over the objective, unbiased and impartial exercise of the independent judgment by any personnel of the Sponsors or their Advisors; or
    - (ii) could or could be seen to compromise, impair or be incompatible with the effective performance of a Proponent’s obligations under the Project Agreement if that Proponent was determined to be the Preferred Proponent under the RFP Process;
  - (b) has contractual or other obligations to Infrastructure Ontario or the Client that could or could be seen to have been compromised or otherwise impaired as a result of its participation in the RFP Process or the Project; or
  - (c) has knowledge of confidential information (other than Confidential Information) that,
    - (i) has been made available to the Proponent, any Proponent Team Member or any Proponent Advisor by the Client, Infrastructure Ontario, MTO or any Municipality;
    - (ii) is of strategic and/or material relevance to the RFP Process or to the Project; and
    - (iii) is not available to other Proponents and that could or could be seen to give the Proponent an unfair competitive advantage.
- (8) The final determination of whether a perceived, potential or actual Conflict of Interest exists shall be made by the Sponsors in their sole discretion.

### 3.9.2 Ineligible Persons

- (1) As a result of their involvement in the Project, the persons named as “**Ineligible Persons**” in the RFP Data Sheet, together with any persons who formerly worked on behalf of either of the Sponsors and in the course of such work had knowledge of confidential information of strategic

and/or material relevance to the RFP Process or to the Project that is not available to other Proponents and that could or could be seen to give the Proponent an unfair advantage (collectively, “**Ineligible Persons**”), their employees, and any of their subcontractors, advisors, consultants or representatives engaged in respect of this Project and, subject to RFP Sections 3.9.2(3) and 3.9.2(4) any person controlled by, that controls or that is under common control with the Ineligible Persons (each an “**Ineligible Person’s Affiliate**”) are not eligible to participate as a Proponent Team Member, Advisor to the Proponent, Financial Services Provider or Advisor to a Financial Services Provider.

- (2) The Sponsors may amend the Ineligible Persons list in the RFP Data Sheet from time to time during the RFP Process.
- (3) An Ineligible Person’s Affiliate may be eligible to participate as a Proponent Team Member, Advisor to the Proponent, Financial Services Provider or Advisor to a Financial Services Provider only after it has obtained a written consent from the Sponsors permitting it to participate as a Proponent Team Member, Advisor to the Proponent, Financial Services Provider or Advisor to a Financial Services Provider. To obtain consent for an Ineligible Person’s Affiliate to participate as a Proponent Team Member, Advisor to the Proponent, Financial Services Provider or Advisor to a Financial Services Provider, the Proponent must submit a request for consent to the Contact Person that includes the following information:
  - (a) the full legal name of the Ineligible Person’s Affiliate that the Proponent wishes to include on its team or as a Proponent Team Member, Advisor to the Proponent, Financial Services Provider or Advisor to a Financial Services Provider;
  - (b) information regarding the Ineligible Person’s Affiliate’s relationship to the Ineligible Person listed in the RFP Data Sheet; and
  - (c) a description of the policies and procedures that will be put in place to manage, mitigate or minimize the impact of any perceived, potential or actual Conflict of Interest with respect to the Ineligible Person’s Affiliate.
- (4) Upon the Contact Person’s receipt of a Proponent’s properly completed request for consent in accordance with RFP Section 3.9.2(3), the Sponsors shall, in their sole discretion, make a determination as to whether they consider there to be a real, perceived or potential or actual Conflict of Interest and whether the impact of such real, perceived or potential Conflict of Interest can be appropriately managed, mitigated or minimized. The Proponent shall be notified of the Sponsors’ decision by means of a consent letter setting out the nature of the consent and the management, mitigation or minimization measures required as a condition of consent. If the Ineligible Person’s Affiliate is considered to have a Conflict of Interest, the impact of which cannot be properly managed, mitigated or minimized, the Sponsors shall add the Ineligible Person’s Affiliate to the Ineligible Persons list by Addendum.

### 3.9.3 Conflict of Interest Screening List

- (1) Proponents shall deliver to the Contact Person, no later than the deadline set out in the Timetable, the list of Identified Proponent Parties and other significant individuals having involvement in the preparation and/or oversight of the preparation of the Proposal in the form prescribed by Schedule 5 of this RFP, which list shall be used by the Sponsors in their assessment of the presence of an actual, potential or perceived Conflict of Interest involving any Proponent, Identified Proponent

Party or any employee or advisor of the Sponsors in respect of the Project. Each Proponent shall also include, as part of its Proposal, an updated version of the list described in this RFP Section 3.9.3(1).

### **3.10 Proponent Costs**

- (1) The Proponent and the Proponent Team Members shall bear all costs and expenses incurred by them relating to any aspect of their participation in this RFP Process, including all costs and expenses related to the Proponent's involvement in:
  - (a) the preparation, presentation and submission of their Proposals;
  - (b) attendance at any Proponents Meeting, Commercially Confidential Meeting or any other meeting with the Sponsors;
  - (c) due diligence and information gathering processes;
  - (d) Scheduled Visits or Additional Visits;
  - (e) preparation of responses to questions or requests for information from the Sponsors;
  - (f) preparation of the Proponent's own RFIs during the clarification process; and
  - (g) negotiations.
- (2) Except as explicitly provided in RFP Sections 10.3.2, 10.3.3 and 10.4(3), if applicable, the Sponsors are not liable to pay any costs or expenses of any Proponent or to reimburse or compensate a Proponent under any circumstances, regardless of the outcome of the RFP Process.

### **3.11 Insurance and Workers Compensation**

#### **3.11.1 Insurance Required during the RFP Process**

- (1) During the RFP Process, the Proponent is required to obtain, and to cause all Proponent Team Members and other persons listed in this RFP Section 3.11.1(1) to obtain, and at all times keep and maintain in force the insurance as set out in RFP Sections 3.11.1(1)(a) and 3.11.1(1)(b), whenever the Proponent, a Proponent Team Member, or any of their respective directors, officers, employees, consultants, Advisors, agents or representatives are present at the Metrolinx Lands or at any facilities or premises of the Sponsors for any purpose whatsoever:
  - (a) Commercial/Comprehensive General Liability insurance, having an inclusive limit of not less than \$5,000,000 for each occurrence or accident and general aggregate, and covering all sums which the Proponent, a Proponent Team Member or any other persons listed above may become legally obligated to pay for damages as a result of bodily injury (including death at any time resulting there from) sustained by any person or persons or because of damage to, destruction of, or loss of use of property caused by an occurrence or accident arising out of any operations or activities carried out in connection with this RFP or RFP Process. The policy or policies shall include as insureds or additional insureds each of Her Majesty the Queen in right of Ontario, MOI, Infrastructure Ontario and the Client (and each of their respective directors, officers, employees, legislators,

members, officials, consultants and agents), and an endorsement specifying that the policy shall be primary and without right of contribution from any insurance otherwise maintained by Infrastructure Ontario, Her Majesty the Queen in right of Ontario, MOI, and the Client; and

- (b) Motor Vehicle Liability insurance, in the amount of \$2,000,000 per accident, for vehicles used by Proponents or Proponent Team Members (or their respective directors, officers, employees, consultants, Advisors and agents) while on or at the Metrolinx Lands or on or at any facilities or premises of the Sponsors.
- (2) As a condition of allowing access to the Lands or to the facilities or premises of the Sponsors, the Sponsors may, in their sole discretion, require Proponents to provide evidence acceptable to the Sponsors that the insurance required by RFP Sections 3.11.1(1)(a) and 3.11.1(1)(b) is in place.
  - (3) If a Proponent proposes to perform any investigations at the Lands, the risk related to which may not be fully insured under the policies set out in RFP Sections 3.11.1(1)(a) and 3.11.1(1)(b), the Sponsors may, in their sole discretion, require the Proponent, at its own cost and expense, to obtain insurance additional to that specified in RFP Sections 3.11.1(1)(a) and 3.11.1(1)(b).
  - (4) All insurance policies required to be obtained by Proponents shall contain endorsements confirming that the policy will not be cancelled, adversely reduced, adversely materially altered, or adversely materially amended without the insurer giving at least 30 days' prior written notice to the Sponsors.

### **3.11.2 Workplace Safety during the RFP Process**

- (1) As a condition of allowing access to the Lands or any facilities or premises of the Sponsors each of the Sponsors may, in its sole discretion, require Proponents to provide evidence acceptable to the Sponsors that the Proponent and its Proponent Team Members are registered with the Workplace Safety Insurance Board of Ontario, if such registration is required under Applicable Law, or, if such registration is not required under Applicable Law, to provide evidence acceptable to it that the Proponent and its Proponent Team Members have employer's liability insurance in amounts and on terms and conditions acceptable to it.

### **3.11.3 Infrastructure Ontario Construction Insurance Program**

- (1) Infrastructure Ontario may determine that certain construction insurance to be provided during the Works phase under the Project Agreement will be obtained under the Infrastructure Ontario Construction Insurance Program ("IOCIP"), as set out in the RFP Data Sheet. If a Project has been designated by Infrastructure Ontario to proceed under IOCIP, a "User Guide" will be posted as Background Information. The User Guide includes the form of confidentiality agreement that must be entered into between a Proponent and the IOCIP Broker of Record and the forms of applications to be completed by a Proponent and submitted to the IOCIP Broker of Record for the Works phase construction insurance.

### **3.12 Interview as part of the evaluation and scoring of the Technical Submission**

- (1) The Sponsors may, in their sole discretion, conduct interviews with Proponents as part of the evaluation process set forth in RFP Section 6.5.3, with the results of such interview being evaluated and scored in accordance with Parts 1 and 4 of Schedule 3 to this RFP.

- (2) Whether or not the Sponsors intend to hold interviews contemplated by this Section 3.12 will be set out in the RFP Data Sheet. If the Sponsors intend to hold interviews contemplated by this Section 3.12, the date and time of such interviews, and manner in which such interviews will be conducted, will be set out in the RFP Data Sheet.

### 3.13 Collaborative and Behavioural Assessment

- (1) As part of the evaluation process set forth in Section 6.5.4, the Sponsors may undertake one behavioural assessment (the “**Collaborative and Behavioural Assessment**”) to assess each Proponent’s understanding to working collaboratively and related behaviours to demonstrate such understanding. The results of the Collaborative and Behavioural Assessment will be evaluated and scored in accordance with Part 4 of Schedule 3 to this RFP.
- (2) The Collaborative and Behavioural Assessment will comprise of an interactive, collaborative and behavioural assessment workshop. If the Sponsors intend to hold the Collaborative and Behavioural Assessment, the date and time of such Collaborative and Behavioural Assessment will be set out in the RFP Data Sheet.
- (3) The Collaborative and Behavioural Assessment will be independently facilitated and managed by a collaborative and behavioural consultant. The Fairness Monitor may attend the workshop and interview comprising the Collaborative and Behavioural Assessment.

## 4 PROPOSAL FORM AND CONTENT REQUIREMENTS AND SURETY CONSENT

### 4.1 Format and Content of the Proposal

- (1) Proponents shall submit Proposals organized in accordance with and in the format set out in Schedules 3 to 6 to this RFP.
- (2) Proponents shall submit Proposals in two parts as follows:
- (a) Part A – Technical Submission consisting of:
- (i) Proposal Submission Form (Technical), a Proponent Team Member Declaration (Schedule 6 to this RFP) for each Proponent Team Member and a Certificate of Officer (Schedule 7 to this RFP) for each Proponent Team Member and the Surety’s Consent; and
  - (ii) the Technical Submission Information,  
(the “**Technical Submission**”); and
- (b) Part B – Financial Submission consisting of:
- (i) Proposal Submission Form (Financial);
  - (ii) Guaranteed Price Form (Schedule 8 to this RFP); and
  - (iii) Financial Submission Information,

(the “**Financial Submission**”).

- (3) Proponents shall submit each of Parts A, B and C of their Proposals in accordance with the requirements and instructions set out in the RFP Documents.

## 4.2 Surety’s Consent

### 4.2.1 Surety’s Consent

- (1) Each Proponent must submit a surety’s consent as set out in Schedule 9B (a “**Surety’s Consent**”) in order to secure the issuance of a performance bond and a labour and material payment bond for the Project as required by the Project Agreement. Proponents are advised that, in submitting the Surety’s Consent, the Proponent may submit either,
- (a) a Surety’s Consent duly completed by a Surety substantially in the same form and content as set out in RFP Schedule 9B, including the form of performance bond and labour and material payment bond attached; or
  - (b) a Surety’s Consent duly completed by a Surety substantially in the form set out in RFP Schedule 9B including attached forms of a performance bond and a labour and material payment bond which, having regard to the intended purpose of the Project Agreement, the Proponent can demonstrate will result in value for money to the Sponsors.
- (2) If the Proponent submits a Surety’s Consent pursuant to RFP Section 4.2.1(1)(b) the Sponsors may, in their sole discretion, accept or reject the form of Surety’s Consent including the proposed form of performance and labour and material payment bonds attached to the Surety’s Consent submitted by the Proponent (the “**Bonding Submission**”).
- (3) If the Sponsors reject a Proponent’s Bonding Submission the Sponsors may, in their sole discretion, either reject the Proponent’s Proposal in its entirety or advise the Proponent as to any changes that the Sponsors may require to the Bonding Submission and negotiate the form of Surety’s Consent (a “**Revised Bonding Submission**”) to meet those requirements, including the resubmission of:
- (a) the proposed form of performance and labour and material payment bonds attached to the Surety’s Consent;
  - (b) any ancillary amendments to the Project Agreement that may be required; and
  - (c) any change that may be required in the Guaranteed Price contained in the Proponent’s Proposal resulting from the changes to the Bonding Submission.
- (4) If the Sponsors and the Proponent agree to a Revised Bonding Submission, the Sponsors may require the Proponent to submit the agreed form of Revised Bonding Submission to the Sponsors prior to Preferred Proponent notification. The Sponsors shall retain the right to accept, at any stage of the negotiations, the Proponent’s initial form of Surety’s Consent, including the proposed form of performance and labour and material payment bonds, submitted in the Proponent’s Proposal.

- (5) In negotiating the Revised Bonding Submission, the parties shall act reasonably in good faith and if, notwithstanding such good faith efforts, the Proponent and the Sponsors fail to arrive at an agreed form of Revised Bonding Submission and the Sponsors do not elect to accept the Proponent's initial form of Surety's Consent, including the proposed form of performance and labour and material payment bonds submitted in the Proponent's Proposal, then the Sponsors may reject the Proponent's Proposal.

## **5 SUBMISSION, WITHDRAWAL, MODIFICATION OF THE PROPOSAL AND LENDER REQUIREMENTS**

### **5.1 Submission of Proposal**

- (1) Each Proponent shall submit its Technical Submission on or before the Technical Submission Deadline and its Financial Submission on or before the Financial Submission Deadline. For the purposes of the RFP Process, the determination of whether the Technical Submission or the Financial Submission has been submitted on or before the Technical Submission Deadline or Financial Submission Deadline, as applicable, shall be based on the electronic time and date stamp the Proponent receives from the Electronic Submission and Evaluation System identified in the RFP Data Sheet. Technical Submissions or Financial Submissions received after the Technical Submission Deadline or Financial Submission Deadline, as applicable, in each case as documented by the electronic time and date stamp, shall be returned unopened to the sender.
- (2) Proponents shall submit their Technical Submissions and their Financial Submissions using only the method set out in the RFP Data Sheet. It is the sole responsibility of the Proponent to ensure that each of the Technical Submission and the Financial Submission is received by Infrastructure Ontario prior to the Technical Submission Deadline and the Financial Submission Deadline, as applicable, and to ensure each receives an electronic time and date stamp receipt from the Electronic Submission and Evaluation System confirming its timely delivery. The Sponsors will not accept a Technical Submission or a Financial Submission delivered by electronic mail.
- (3) Proponents shall provide electronic copies of their Technical Submissions and Financial Submissions in the formats specified in Part 4 of Schedule 3 to this RFP.
- (4) If there is any difference whatsoever between the electronic copies of the Proposal in PDF format and native file format submitted through the Electronic Submission and Evaluation System, the copy of the Proposal in the PDF format submitted through the Electronic Submission and Evaluation System shall govern.

### **5.2 Withdrawal of Proposals**

- (1) A Proponent may withdraw its Technical Submission using the Electronic Submission and Evaluation System before the Technical Submission Deadline.
- (2) A Proponent may withdraw its Financial Submission using the Electronic Submission and Evaluation System before the Financial Submission Deadline provided that the Proponent resubmits a revised Financial Submission prior to the Financial Submission Deadline.



### 5.3 Amendment of Proposal

- (1) Except as provided in RFP Section 5.5, Proponents may amend their Technical Submissions and Financial Submissions after submission but only if the withdrawn and amended Technical Submission is resubmitted before the Technical Submission Deadline and the withdrawn and amended Financial Submission is resubmitted before the Financial Submission Deadline in accordance with the following:
  - (a) the Proponent shall withdraw its original Technical Submission or Financial Submission by using the Electronic Submission and Evaluation System before the Technical Submission Deadline or Financial Submission Deadline, as applicable; and
  - (b) the Proponent shall submit a revised replacement Technical Submission or Financial Submission in accordance with the RFP Documents and before the Technical Submission Deadline or Financial Submission Deadline, as applicable, in accordance with the requirements of RFP Section 5.1.

### 5.4 Proposal Irrevocability

- (1) Except as provided in RFP Sections 5.6(1) and 5.6(3) and subject to RFP Section 5.5 and the Proponent's right to withdraw a Technical Submission before the Technical Submission Deadline, the Proposals shall be irrevocable and shall remain in effect and open for acceptance for 165 days after the Financial Submission Deadline (the "**Proposal Validity Period**") or until Financial Close, whichever occurs first.

### 5.5 Credit Spreads and Lenders Commitment Letter

- (1)
  - (a) After the Financial Submission Deadline, the Indicative Credit Spread Benchmark(s) (if applicable) and, subject to RFP Section 5.5(2)(e), the election pursuant to RFP Section 5.5(1)(b) shall not change.
  - (b) On the Financial Submission Deadline, each Proponent shall identify in writing to the Sponsors by way of an election:
    - (i) which form(s) of lending facility and/or debt financing instruments and investment instrument(s), if any, in respect of which it shall participate in the First Credit Spread Lock-in Date (the "**Credit Spread Election Facilities**"); and
    - (ii) which form(s) of lending facility and/or debt financing instruments and investment instrument(s), if any, in respect of which it shall hold, subject to RFP Section 5.5(3.1), Credit Spread(s) from the Financial Submission Deadline to Financial Close (the "**Held Pricing Facilities**"),and such information shall be reflected in the Financial Model.
  - (c) In respect of the Credit Spread Election Facilities, a Proponent shall, no later than 10 Business Days prior to the Financial Submission Deadline and using the process set out in RFP Section 3.2.2, provide to the Sponsors for their review and acceptance, in their

sole discretion, a formula in writing describing how its Credit Spread(s) shall move upwards or downwards consistent with the movement in the Indicative Credit Spread Benchmark(s) and the Sponsors shall confirm in writing to such Proponent whether the Sponsors will accept such formula for the purposes of this RFP Section 5.5. The Sponsors shall confirm whether or not they accept the formula submitted by the Proponent no later than seven Business Days prior to the Financial Submission Deadline. Any formula that is accepted by the Sponsors may be used by the Proponent and the Proponent's Lenders to explain (A) why the movement, if any, in the Indicative Credit Spread Benchmark(s) is or is not sufficient to require a change to the Credit Spread(s), and (B) how the change, or lack thereof, to the Credit Spread(s) is consistent with the movement, if any, of the Indicative Credit Spread Benchmark(s). Where the formula is not accepted, the provisions of this RFP Section 5.5 shall apply as if any such formula had not been provided to the Sponsors by the Proponent.

- (2) Each Proponent that has provided notification pursuant to RFP Section 5.5(1)(b)(i) shall, prior to the identification of the Preferred Proponent under RFP Section 8.1 and no later than 12:00:00pm on the first credit spread lock-in date *established by the Sponsors* in accordance with this RFP (the "**First Credit Spread Lock-in Date**"), confirm or change in respect of the Credit Spread Election Facilities, the Credit Spread(s) set out in Part B of its Proposal in accordance with the following process:
- (a) the Sponsors shall provide at least seven days prior written notice to the Proponents of the Sponsors' establishment of the First Credit Spread Lock-in Date and provided the Sponsors may revoke their notice and issue a replacement notice in their sole discretion;
  - (b) the Proponent shall, no later than the First Credit Spread Lock-in Date, advise the Sponsors of its decision to either confirm or change its Credit Spread(s) in accordance with the following:
    - (i) if there has been upward or downward movement in the Indicative Credit Spread Benchmark(s) sufficient to require a change to its Credit Spread(s) on or before the First Credit Spread Lock-in Date, the Proponent shall change its Credit Spread(s) by submitting to the Sponsors:
      - (A) an updated Financial Model that has been,
        - (I) revised only to reflect the Proponent's changes to its Credit Spread(s); and
        - (II) re-optimized to reflect the revised Guaranteed Price resulting from the change to the Proponent's Credit Spread(s).
- For greater clarity, no changes shall be made to the Financial Model other than to change the Credit Spread(s) and any resulting changes from the re-optimization of the Financial Model to reflect the revised Credit Spread(s);
- (B) an amended Guaranteed Price Form revised only to reflect the Proponent's changes to its Credit Spread(s);

- (C) a written explanation and, where applicable, calculations from the Proponent demonstrating:
- (I) why the upward or downward movement in the Indicative Credit Spread Benchmark(s) from the Financial Submission Deadline to the First Credit Spread Lock-in Date is sufficient to require a change to the Credit Spread(s); and
  - (II) that the change to the Credit Spread(s) is consistent with the movement of the Indicative Credit Spread Benchmark(s) of the Proponent from the Financial Submission Deadline to the First Credit Spread Lock-in Date.

For greater clarity, the written explanation shall be supported by facts, justifications and analysis of relevant factors such as new issue spreads, credit default swap spreads, and/or other publicly verifiable spread indices as applicable. The Sponsors may reject the submission if the calculation related to the movement in the Indicative Credit Spread Benchmarks does not reflect, in the Sponsors' sole discretion, accurate market pricing levels for the relevant instruments included in the Indicative Credit Spread Benchmarks;

- (D) a written explanation and, where applicable, calculations prepared and executed by the Proponent's Lenders demonstrating:
- (I) why the upward or downward movement in the Indicative Credit Spread Benchmark(s) from the Financial Submission Deadline to the First Credit Spread Lock-in Date is sufficient to require a change to the Credit Spread(s); and
  - (II) that the change to the Credit Spread(s) is consistent with the movement of the Indicative Credit Spread Benchmark(s) of the Proponent from the Financial Submission Deadline to the First Credit Spread Lock-in Date.

For greater clarity, the written explanation shall be supported by facts, justifications and analysis of relevant factors such as new issue spreads, credit default swap spreads, and/or other publicly verifiable spread indices as applicable. The Sponsors may reject the submission if the calculation related to the movement in the Indicative Credit Spread Benchmarks does not reflect, in the Sponsors' sole discretion, accurate market pricing levels for the relevant instruments included in the Indicative Credit Spread Benchmarks; and

- (E) written confirmation that the Proponent has not changed any variables in the Financial Model or made any revisions to Part B of its Proposal, except for the Credit Spread(s) and any resulting changes from the re-optimization of the Financial Model to reflect the revised Credit Spread(s);

- (ii) if there has not been upward or downward movement in the Indicative Credit Spread Benchmark(s) sufficient to require a change to its Credit Spread(s), on or before the First Credit Spread Lock-in Date, the Proponent shall not change its Credit Spread(s) and shall submit to the Sponsors:
- (A) a written explanation and, where applicable, calculations from the Proponent demonstrating:
- (I) why the movement, if any, in the Indicative Credit Spread Benchmark(s) from the Financial Submission Deadline to the First Credit Spread Lock-in Date is not sufficient to require a change to the Credit Spread(s); and
- (II) that maintaining the Credit Spread(s) as submitted on the Financial Submission Deadline is consistent with the movement, if any, in the Indicative Credit Spread Benchmark(s) of the Proponent from the Financial Submission Deadline to the First Credit Spread Lock-in Date.

For greater clarity, the written explanation shall be supported by facts, justifications and analysis of relevant factors such as new issue spreads, credit default swap spreads, and/or other publicly verifiable spread indices as applicable. The Sponsors may reject the submission if the calculation related to the movement in the Indicative Credit Spread Benchmarks does not reflect, in the Sponsors' sole discretion, accurate market pricing levels for the relevant instruments included in the Indicative Credit Spread Benchmarks; and

- (B) a written explanation and, where applicable, calculations prepared and executed by the Proponent's Lenders demonstrating:
- (I) why the movement, if any, in the Indicative Credit Spread Benchmark(s) from the Financial Submission Deadline to the First Credit Spread Lock-in Date is not sufficient to require a change to the Credit Spread(s); and
- (II) that maintaining the Credit Spread(s) as submitted on the Financial Submission Deadline is consistent with the movement, if any, in the Indicative Credit Spread Benchmark(s) of the Proponent from the Financial Submission Deadline to the First Credit Spread Lock-in Date.

For greater clarity, the written explanation shall be supported by facts, justifications and analysis of relevant factors such as new issue spreads, credit default swap spreads, and/or other publicly verifiable spread indices, as applicable. The Sponsors may reject the submission if the calculation related to the movement in the Indicative Credit Spread Benchmarks does not reflect, in the Sponsors' sole discretion, accurate market pricing levels for the relevant instruments included in the Indicative Credit Spread Benchmarks;

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- (iii) as of the First Credit Spread Lock-in Date, but subject to RFP Sections 5.5(3) and 5.6(2), the revised or unchanged Credit Spread(s), as applicable, and, if applicable, any re-optimization of its Financial Model and any revisions to Part B of its Proposal shall apply until the expiry of the Proposal Validity Period; and
- (c) if a Proponent fails to confirm or submit a change to the Credit Spread(s) in accordance with RFP Section 5.5(2) on or before the First Credit Spread Lock-in Date, the Sponsors may:
- (i) deem that the Proponent has amended its Credit Spread(s) to be consistent with the movement of the Indicative Credit Spread Benchmark(s) of the Proponent from the Financial Submission Deadline to the First Credit Spread Lock-in Date and require the Proponent to submit the information set out in RFP Section 5.5(2)(b)(i), failing which the Sponsors may deem the Proposal materially non-compliant; and/or
  - (ii) deem that the Proponent has made no changes to its Credit Spread(s) subsequent to the Financial Submission Deadline and require the Proponent to submit the information set out in RFP Section 5.5(2)(b)(ii), failing which the Sponsors may deem the Proposal materially non-compliant; and/or
  - (iii) deem the Proposal materially non-compliant;
- (d) if, in the sole discretion of the Sponsors, the Proponent's amendment or confirmation of the Credit Spread(s) under RFP Section 5.5(2) is not consistent with the Indicative Credit Spread Benchmark(s), the Sponsors may:
- (i) require the Proponent to re-submit pursuant to RFP Section 5.5(2)(b); and/or
  - (ii) consider this inconsistency in the evaluation and scoring of the Proponent's Proposal; and/or
  - (iii) decline to select the Proponent as the Preferred Proponent;
- (e) on the First Credit Spread Lock-in Date, each Proponent that has confirmed or changed its Credit Spread(s) in respect of the Credit Spread Election Facilities in accordance with RFP Section 5.5(2) shall identify in writing to the Sponsors by way of an election that, if selected as the Preferred Proponent:
- (i) which, if any, Credit Spread Election Facilities it shall participate in respect of the Final Credit Spread Lock-in Date (the "**Final Credit Spread Election Facilities**"); and
  - (ii) which, if any, Credit Spread Election Facilities it shall hold Credit Spread(s) for from the First Credit Spread Lock-in Date to Financial Close.
- (3) If the Preferred Proponent has provided notification pursuant to RFP Section 5.5(2)(e)(i), the Preferred Proponent shall, prior to Commercial Close and no later than the date *established by the Sponsors* as the final credit spread lock-in date in accordance with this RFP (the "**Final Credit Spread Lock-in Date**"), further confirm or change, in respect of the Final Credit Spread Election

Facilities, the Credit Spread(s) in Part B of its Proposal and as submitted pursuant to RFP Section 5.5(2) in accordance with the following process:

- (a) the Sponsors shall provide at least one Business Day prior written notice to the Preferred Proponent of the Sponsors' establishment of the Final Credit Spread Lock-in Date and provided the Sponsors may revoke their notice and issue a replacement notice in their sole discretion;
- (b) the Preferred Proponent shall, no later than the Final Credit Spread Lock-in Date, advise the Sponsors of its decision to either confirm or change its Credit Spread(s) in accordance with the following:
  - (i) if there has been upward or downward movement in the Indicative Credit Spread Benchmark(s) sufficient to require a change to its Credit Spread(s) on or before the Final Credit Spread Lock-in Date, the Preferred Proponent shall change its Credit Spread(s) by submitting to the Sponsors:
    - (A) an updated Financial Model that has been,
      - (I) revised only to reflect the Preferred Proponent's changes to its Credit Spread(s); and
      - (II) re-optimized to reflect the revised Guaranteed Price resulting from the change to the Proponent's Credit Spread(s).

For greater clarity, no changes shall be made to the Financial Model other than to change the Credit Spread(s) and any resulting changes from the re-optimization of the Financial Model to reflect the revised Credit Spread(s);

- (B) an amended Guaranteed Price Form revised only to reflect the Preferred Proponent's changes to its Credit Spread(s);
- (C) a written explanation and, where applicable, calculations from the Preferred Proponent demonstrating:
  - (I) why the upward or downward movement in the Indicative Credit Spread Benchmark(s) from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date is sufficient to require a change to the Credit Spread(s); and
  - (II) that the change to the Credit Spread(s) is consistent with the movement of the Indicative Credit Spread Benchmark(s) of the Preferred Proponent from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date.

For greater clarity, the written explanation shall be supported by facts, justifications and analysis of relevant factors such as new issue spreads, credit default swap spreads, and/or other publicly verifiable spread indices, as applicable. The Sponsors may reject the submission if the calculation related to the movement in the Indicative Credit Spread

Benchmarks does not reflect, in the Sponsors' sole discretion, accurate market pricing levels for the relevant instruments included in the Indicative Credit Spread Benchmarks;

- (D) a written explanation and, where applicable, calculations prepared and executed by the Preferred Proponent's Lenders demonstrating:
  - (I) why the upward or downward movement in the Indicative Credit Spread Benchmark(s) from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date is sufficient to require a change to the Credit Spread(s); and
  - (II) that the change to the Credit Spread(s) is consistent with the movement of the Indicative Credit Spread Benchmark(s) of the Preferred Proponent from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date.

For greater clarity, the written explanation shall be supported by facts, justifications and analysis of relevant factors such as new issue spreads, credit default swap spreads, and/or other publicly verifiable spread indices, as applicable; and

- (E) written confirmation that the Preferred Proponent has not changed any variables in the Financial Model or made any revisions to Part B of its Proposal, except for the Credit Spread(s) and any resulting changes from the re-optimization of the Financial Model to reflect the revised Credit Spread(s);
- (ii) if there has not been upward or downward movement in the Indicative Credit Spread Benchmark(s) sufficient to require a change to its Credit Spread(s), on or before the Final Credit Spread Lock-in Date, the Preferred Proponent shall not change its Credit Spread(s) and shall submit to the Sponsors:
  - (A) a written explanation and, where applicable, calculations from the Preferred Proponent demonstrating:
    - (I) why the movement, if any, in the Indicative Credit Spread Benchmark(s) from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date is not sufficient to require a change to the Credit Spread(s); and
    - (II) that maintaining the Credit Spread(s) as submitted on the First Credit Spread Lock-in Date is consistent with the movement, if any, in the Indicative Credit Spread Benchmark(s) of the Preferred Proponent from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date.

For greater clarity, the written explanation shall be supported by facts, justifications and analysis of relevant factors such as new issue spreads, credit default swap spreads, and/or other publicly verifiable spread

indices, as applicable. The Sponsors may reject the submission if the calculation related to the movement in the Indicative Credit Spread Benchmarks does not reflect, in the Sponsors' sole discretion, accurate market pricing levels for the relevant instruments included in the Indicative Credit Spread Benchmarks; and

- (B) a written explanation and, where applicable, calculations prepared and executed by the Preferred Proponent's Lenders demonstrating:
  - (I) why the movement, if any, in the Indicative Credit Spread Benchmark(s) from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date is not sufficient to require a change to the Credit Spread(s); and
  - (II) that maintaining the Credit Spread(s) as submitted on the First Credit Spread Lock-in Date is consistent with the movement, if any, in the Indicative Credit Spread Benchmark(s) of the Preferred Proponent from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date.

For greater clarity, the written explanation shall be supported by facts, justifications and analysis of relevant factors such as new issue spreads, credit default swap spreads, and/or other publicly verifiable spread indices, as applicable. The Sponsors may reject the submission if the calculation related to the movement in the Indicative Credit Spread Benchmarks does not reflect, in the Sponsors' sole discretion, accurate market pricing levels for the relevant instruments included in the Indicative Credit Spread Benchmarks; and

- (iii) as of the Final Credit Spread Lock-in Date, but subject to RFP Section 5.6(2), the revised or unchanged Credit Spread(s), as applicable, and, if applicable, any re-optimization of its Financial Model and any revisions to Part B of its Proposal provided by the Preferred Proponent shall apply until Financial Close; and
- (c) if the Preferred Proponent fails to confirm or submit a change to the Credit Spread(s) in accordance with RFP Section 5.5(3) on or before the Final Credit Spread Lock-in Date, the Sponsors may:
  - (i) deem that the Preferred Proponent has amended its Credit Spread(s):
    - (A) consistent with the movement of the Indicative Credit Spread Benchmark(s) of the Preferred Proponent from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date; and/or
    - (B) in the case of bonds, to reflect the Clearing Spread set out in RFP Section 5.5(4),

and require the Proponent to submit the information set out in RFP Section 5.5(3)(b)(i) and/or RFP Section 5.5(4); and/or



- (ii) deem that the Preferred Proponent has made no changes to its Credit Spread(s) subsequent to the First Credit Spread Lock-in Date and require the Preferred Proponent to submit the explanations set out in RFP Section 5.5(3)(b)(ii).

(3.1) Each Proponent that has provided notification under RFP Section 5.5(1)(b)(ii) or RFP Section 5.5(1)(b)(i) that it intends to provide, respectively, Held Pricing Facilities or Credit Spread Election Facilities may, on the First Credit Spread Lock-in Date only, as applicable (i) reduce the Credit Spread(s) set out in the Proponent's Financial Submission relating to the Held Pricing Facilities for debt instruments (or any of them), (ii) increase the Credit Spreads set out in the Proponent's Financial Submission relating to Held Pricing Facilities for investment instruments (or any of them), and (iii) re-designate the Credit Spread Election Facilities (or any of them) as Held Pricing Facilities conditional upon the re-designation resulting in a reduction of the Credit Spread(s) applicable thereto from those set out in the Proponent's Financial Submission, and, in each case, shall submit to the Sponsors on the First Credit Spread Lock-in Date:

- (a) the decreased (or increased, as applicable) Credit Spread(s) for each of the affected Held Pricing Facilities or Credit Spread Election Facilities and an unconditional confirmation that the decreased (or increased, as applicable) Credit Spread(s) will remain in effect for the balance of the Proposal Validity Period with respect to the affected Held Pricing Facilities or Credit Spread Election Facilities;
- (b) an updated Financial Model that has been,
  - (i) revised only to reflect the Proponent's decreases (or increases, as applicable) to its Credit Spread(s); and
  - (ii) optimized in accordance with the procedure outlined in Part 2 of Schedule 3 to this RFP.

For greater clarity, no changes shall be made to the Financial Model other than to decrease (or increase, as applicable) the Credit Spread(s) and any resulting changes from the re-optimization of the Financial Model to reflect the decreased Credit Spread(s);

- (c) an amended Guaranteed Price Form revised only to reflect the Proponent's decrease(s) (or increase(s), as applicable) to its Credit Spread(s); and
- (d) written confirmation that the Proponent has not changed any variables in the Financial Model or made any revisions to the Financial Submission except in respect of the Credit Spread(s) in accordance with this RFP Section 5.5 and any resulting changes from the re-optimization of the Financial Model to reflect the decreased (or increased, as applicable) Credit Spread(s).

(3.2) The Sponsors will evaluate the reasonableness of the Credit Spread(s) for the Credit Spread Election Facilities submitted by the Proponent and as priced in the Proponent's Financial Submission. If the Sponsors, acting in their sole discretion, do not find such Credit Spread(s) to be reasonable, the Sponsors may,

- (a) either at the First Credit Spread Lock-in Date or at the Final Credit Spread Lock-in Date, as the case may be, deem that the Proponent has amended such Credit Spread(s) to be consistent with the movement of the Indicative Credit Spread Benchmark(s) of the

Proponent from the Financial Submission Deadline to the First Credit Spread Lock-in Date and/or from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date; provided that if the Sponsors exercise their rights under this RFP Section 5.5(3.2)(a), any deemed amendments to the Credit Spread(s) shall be equal to the change in the Indicative Credit Spread Benchmark(s) over the applicable period of time; or

- (b) no later than the identification of Preferred Proponent, deem the Proposal materially non-compliant.
- (4) The Preferred Proponent and Lenders (including but not limited to underwriters, mandated lead arrangers and arrangers) acknowledge and agree that if, on the Final Credit Spread Lock-in Date:
- (a) the Clearing Spread for the bonds payable by the Preferred Proponent is less than the Credit Spread derived using Indicative Credit Spread Benchmark(s), the full benefit of such lower Clearing Spread will be passed through to Infrastructure Ontario. This Clearing Spread will be reflected in the reduction of the Cost of the Financing payable by Infrastructure Ontario as set out in the Financial Model submitted by the Preferred Proponent prior to Financial Close using the optimization process described in Section 6.0 of Part B of Part 2 of Schedule 3 to this RFP; or
  - (b) the Clearing Spread for the bonds payable by the Preferred Proponent is higher than the Credit Spread derived using the Indicative Credit Spread Benchmark(s), then the Lenders will be required to provide to Infrastructure Ontario an explanation for such variance between the Clearing Spread and the Credit Spread derived using the Indicative Credit Spread Benchmark(s) described herein in this RFP Section 5.5, supported by facts, justifications and analysis of relevant factors. Only if such explanation is accepted by Infrastructure Ontario, acting in their sole discretion, then such higher Credit Spread will be reflected in the Cost of the Financing payable by Infrastructure Ontario as set out in the Financial Model submitted by the Preferred Proponent prior to Financial Close using the optimization process described in Section 6.0 of Part B of Part 2 of Schedule 3 to this RFP. If such explanation is not accepted by Infrastructure Ontario, acting in its sole discretion, Infrastructure Ontario may exercise its rights set out in RFP Section 5.5(6) without limiting any other rights under this RFP. If, pursuant to RFP Section 5.5(3.2), the Sponsors have concluded, based on similarly rated transactions or similarly rated comparables, that the Credit Spreads are unreasonable, then the Sponsors shall reject any explanation or justification provided by the Lender or Preferred Proponent for the upward deviance between the Credit Spread derived using the Indicative Credit Spread Benchmark process and the Clearing Spread in connection with the Final Credit Spread Lock-in Date; and
  - (c) to provide complete transparency, between the time of selection of the Preferred Proponent and targeted Financial Close, the Preferred Proponent and the Lenders will provide periodic updates to the satisfaction of Infrastructure Ontario in respect of (i) the expected Clearing Spread for the bonds using the Indicative Credit Spread Benchmark(s) process pursuant to this RFP and (ii) any variances between the expected Clearing Spread for the bonds and the Credit Spread derived using the Indicative Credit Spread Benchmark(s) process pursuant to this RFP.
- (5) In a written notice given to the Preferred Proponent the Sponsors shall prescribe the date (provided the Sponsors may give a further notice of a revised date in their sole discretion) on

which the Preferred Proponent shall submit to the Sponsors a letter, the form and substance of which shall be satisfactory to the Sponsors on the letterhead of its Lenders and executed by the Lenders (the “**Lenders Commitment Letter**”) addressed to the Preferred Proponent confirming:

- (a) the Lenders funding commitment to provide the financing described in the Financial Submission including as revised under RFP Sections 5.5(2), 5.5(3), 5.5(3.1) or 5.5(4), which, subject to Section 5.5(5)(b), may be subject to such reasonable and customary conditions of the Lenders as agreed to by the Sponsors, acting reasonably;
- (b) that the funding commitment does not contain any material adverse change clause, market flex clause, or any other similar condition which explicitly or implicitly makes the funding commitment by the Lenders conditional on the absence of a material adverse change in the market, or if such conditions were originally applicable that the Lenders have now waived such conditions; and
- (c) that the Lenders accept the Project Agreement without any material change.

Prior to the issuance of the Lenders Commitment Letter, and no later than either the Final Credit Spread Lock-in Date, if applicable, or five Business Days prior to the due date of the Lenders Commitment Letter as prescribed by the Sponsors pursuant to this RFP Section 5.5(5), the Preferred Proponent shall submit a draft thereof (the “**Draft Lenders Commitment Letter**”) to the Sponsors for review and comment by the Sponsors.

- (6) If (i) in respect of the Final Credit Spread Election Facilities, the amendment or confirmation of the Credit Spread(s) under RFP Section 5.5(3) are not consistent with the Indicative Credit Spread Benchmark(s) of the Preferred Proponent, in the sole discretion of the Sponsors, or (ii) in respect of the Final Credit Spread Election Facilities, the written explanations justifying the amendment or confirmation of the Credit Spread(s) under RFP Section 5.5(3) are not, in the sole discretion of the Sponsors, acceptable to the Sponsors, or (iii) any other of the requirements respecting the amendment or confirmation of the Credit Spread(s) under RFP Section 5.5(3) have not, in the sole discretion of the Sponsors, been satisfied or complied with, or (iv) the Preferred Proponent’s Lenders have not provided a Lenders Commitment Letter which, in the Sponsors’ sole discretion, satisfies the requirements of RFP Section 5.5(5), then:
  - (a) the Sponsors shall, no later than seven Business Days after the Final Credit Spread Lock-in Date or the date of receipt by the Sponsors of the Lenders Commitment Letter, give written notice to the Preferred Proponent setting out the manner in which any of the foregoing requirements of RFP Sections 5.5(3), 5.5(4) or 5.5(5) have not been satisfied or complied with (the “**Rectification Notice**”). The Preferred Proponent shall have seven Business Days following the date of the Rectification Notice to rectify the failure to satisfy the requirements as set out in the Rectification Notice (for greater certainty, including the resubmission of an updated Financial Model that provides for revised Credit Spread(s) that are consistent with the changes to the Indicative Credit Spread Benchmark(s) of the Preferred Proponent or the resubmission of the Lenders Commitment Letter) by submitting to the Sponsors a response to the Rectification Notice (the “**Rectification Notice Response**”).
  - (b) If the Sponsors, in their sole discretion: (A) are not satisfied with the Rectification Notice Response or with the Lenders Commitment Letter; and/or (B) determine that the Guaranteed Price of the Preferred Proponent’s Financial Submission as revised by RFP

Section 5.5(3) exceeds the budget for the Project; and/or (C) determine that the Guaranteed Price of the Preferred Proponent's Financial Submissions as revised by RFP Section 5.5(3) changes the overall rank of the Preferred Proponent relative to the other Proponents, the Sponsors may, in their sole discretion and without limitation to any other right under this RFP:

- (i) request the Second Negotiations Proponent (as referred to in RFP Section 8.1(1)(b)) to confirm or change its Credit Spread(s) in accordance with RFP Section 5.5(3), and at the same time request the Preferred Proponent to again confirm or change its Credit Spread(s) in accordance with RFP Section 5.5(3), and based on the results thereof, re-run the evaluation process to determine which of the Preferred Proponent or the Second Negotiations Proponent is then the highest ranked Proponent. If the Second Negotiations Proponent is then the highest ranked Proponent then the Second Negotiations Proponent shall then become the Preferred Proponent in place of the first selected Preferred Proponent for all purposes of this RFP;
- (ii) commence negotiations with the Second Negotiations Proponent in accordance with RFP Section 8 including requesting the Second Negotiations Proponent to confirm or change its Credit Spread(s) in accordance with RFP Section 5.5(3). If the Second Negotiations Proponent is then the highest ranked Proponent then the Second Negotiations Proponent shall then become the Preferred Proponent in place of the first selected Preferred Proponent for all purposes of this RFP;
- (iii) direct the Preferred Proponent to terminate its relationship with its Lenders, and the Sponsors shall conduct, in conjunction with the Preferred Proponent, a competition amongst prospective lenders to become Lenders to the Preferred Proponent following which the Preferred Proponent shall resubmit Part B of its Proposal to incorporate the financial terms and conditions of the Lenders that are successful in the competition. Based thereon, the Sponsors may, in their sole discretion, continue with the Preferred Proponent in accordance with the provisions of this RFP;
- (iv) commence separate and distinct but contemporaneous negotiations with the Second Negotiations Proponent and the Preferred Proponent. If the Second Negotiations Proponent is then the highest ranked Proponent then the Second Negotiations Proponent shall then become the Preferred Proponent in place of the first selected Preferred Proponent for all purposes of this RFP; or
- (v) request the Second Negotiations Proponent and the Preferred Proponent to resubmit their respective Proposals for evaluation under and in accordance with this RFP, and for such purpose shall establish a new Technical Submission Deadline and Financial Submission Deadline.

The Sponsors may, in their sole discretion and for greater clarity, elect to change which of the RFP Section 5.5(6)(b) processes to employ at any time during the application of RFP Section 5.5(6)(b). In the event that the Sponsors have determined to proceed under any of RFP Sections 5.5(6)(b)(i), 5.5(6)(b)(ii), or 5.5(6)(b)(iv), then the provisions of RFP Sections 8.1(2), 8.1(3) and 8.1(4) shall apply to such processes. Without limitation to the foregoing, and in their sole

discretion, the Sponsors may, if they are not satisfied with the Rectification Notice Response or the Lenders Commitment Letter, at any time notify the Preferred Proponent in a written notice (the “**Termination Notice**”) that the Preferred Proponent is disqualified and is no longer entitled to participate in the RFP Process. In such latter circumstance, the Sponsors may consider the performance of the Preferred Proponent and the Proponent Team Members of the Preferred Proponent and the fact of the giving of the Termination Notice to the Preferred Proponent in any future requests for qualifications issued by the Sponsors.

- (c) The Sponsors may, in their sole discretion, exercise any of their rights under RFP Sections 5.5(6)(b)(i) to 5.5(6)(b)(v) in the event that the Sponsors determine, in their sole discretion, that the Lenders have made any change to the Draft Lenders Commitment Letter or the Lenders Commitment Letter.
  - (d) In the sole discretion of the Sponsors, the Letter of Credit provided by the Preferred Proponent in accordance with RFP Section 9.1(2) may be returned to the Preferred Proponent within three days following delivery by the Sponsors of the Termination Notice and/or such Preferred Proponent may be paid the amount, if any, of the Proposal Fee or the Break Fee under RFP Sections 10.3.2 and 10.3.3. The return of the Letter of Credit and/or the payment of the Proposal Fee or the Break Fee to such Preferred Proponent shall represent full and final satisfaction of any obligation or liability of the Sponsors and the Government of Ontario to the Preferred Proponent and the Proponent Team Members of the Preferred Proponent in connection with this RFP, and the Sponsors’ decision to return the Letter of Credit and/or pay the Proposal Fee and the Break Fee shall be contingent on the receipt of a waiver, in form and substance satisfactory to the Sponsors, from such Preferred Proponent and the Proponent Team Members of the Preferred Proponent to that effect.
- (7) The Sponsors reserve the right to request and/or approve a change in the financing plan or debt strategy of the Preferred Proponent (for example, fixed or variable rate, the use of synthetics, bank debt or capital market debt) following identification of the Preferred Proponent under RFP Section 8.1 and prior to Financial Close.

## **5.6 Extension of Proposal Validity Period**

- (1) If the Sponsors wish to extend the Proposal Validity Period, the Sponsors shall submit a request to extend to those Proponents whose Proposals, in the Sponsors’ sole discretion, are still under consideration in the RFP Process. For the purpose of greater clarity, the Sponsors may issue a request to extend the Proposal Validity Period after the Negotiations Proponents or the Preferred Proponent have already been identified. A Proponent may, in its discretion, refuse to extend the Proposal Validity Period in accordance with the following:
  - (a) notwithstanding a Proponent’s refusal to extend the Proposal Validity Period, that Proponent’s Proposal shall continue to be valid in accordance with the original Proposal Validity Period; and
  - (b) if the Sponsors determine that they will be unable to determine the Preferred Proponent or reach Commercial Close prior to the expiration of the original Proposal Validity Period, the Sponsors may discontinue the evaluation or consideration of a Proponent or

may discontinue negotiations with a Negotiations Proponent or finalization of a Project Agreement with a Preferred Proponent if that Proponent has refused the Sponsors' request to extend the Proposal Validity Period and may continue the RFP Process with only those Proponents that have agreed to an extension of the Proposal Validity Period.

- (2) In respect of the Preferred Proponent, the Sponsors shall be considered to have accepted the Preferred Proponent's Proposal, including its Financial Submission and its revised Credit Spread(s) pursuant to RFP Section 5.5 prior to the expiration of the Proposal Validity Period if the Signing Parties and the Preferred Proponent reach Commercial Close prior to the expiration of the Proposal Validity Period (or the extended Proposal Validity Period, if applicable). For greater clarity, the Preferred Proponent shall maintain its prices as set out in its Guaranteed Price Form (as submitted on the Financial Submission Deadline or, if applicable, as amended pursuant to RFP Section 5.5 or during any negotiations process pursuant to RFP Section 5.5(6) or RFP Section 8.1) from Commercial Close until Financial Close, subject only to the adjustments on Financial Close in accordance with Section 3.1(b) of the Project Agreement.
- (3) Notwithstanding RFP Section 5.6(1), if, during the course of negotiations between a Negotiations Proponent and the Sponsors, the Negotiations Proponent resubmits prices to the Sponsors or agrees to revised terms and conditions of the Project Agreement or the Negotiations Proponent's Proposal prior to the expiration of the Proposal Validity Period, that Negotiations Proponent is deemed to have agreed to an extension of the Proposal Validity Period for the Negotiations Proponent's amended Proposal for a period of 95 days after the date of the Proponent's submission to the Sponsors of the revised prices or revised terms and conditions, as applicable. For clarity, notwithstanding the submission by a Negotiations Proponent or Preferred Proponent of an amended Proposal in accordance with this RFP Section 5.6(3), the Proponent's original Proposal as amended by the application or by RFP Section 5.5, as applicable, continues to exist in accordance with the original Proposal Validity Period.
- (4) Notwithstanding RFP Section 5.5, RFP Section 5.6(1), RFP Section 5.6(2) or RFP Section 5.6(3), the adjustments on Financial Close that are set out in Part 2 of Schedule 3 to this RFP shall remain applicable.

## **5.7 Lender Requirements**

- (1) At any time in the RFP Process, Proponents shall not enter into exclusivity arrangements with any Lenders, including prospective Lenders. The Proponent or the Proponent's financial advisor will be required to confirm in its letter to be delivered under Part 2 of Schedule 3 of this RFP that the Lenders have not entered into any exclusivity arrangement with the Proponent with respect to the Project. Notwithstanding any other provision of this RFP, but subject to the following proviso, the Lenders may act in the capacity of Lenders for more than one Proponent under this RFP Process provided the Lenders have agreed with each Proponent:
  - (a) to establish industry standard confidentiality and conflict of interest screens to ensure that each Proponent is represented by a discrete team of Lender personnel;
  - (b) to prohibit any communication regarding this RFP Process between members of different teams of Lender personnel;
  - (c) to physically separate all documentation under the control of each team of Lender personnel;

- (d) to keep all computer based information and data discrete and control access to prohibit persons other than on a team of Lender personnel to have access to that Proponent team's information; and
  - (e) that any breaches of such confidentiality requirements are appropriately sanctioned including possible dismissal.
- (2) Lenders participating in a Proposal (“**Participating Lenders**”) shall not be Affiliates of any of the Proponent Team Members participating in that Proposal (“**Participating Proponent Team Members**”) (other than any other Participating Lender or a financial advisor wholly owned by a Participating Lender) and shall act at all times at arm's length to every other Participating Proponent Team Member (other than any other Participating Lender or a financial advisor wholly owned by a Participating Lender).

## 6 EVALUATION, CLARIFICATION AND VERIFICATION OF PROPOSALS

### 6.1 Evaluation Committee and Advisors

- (1) The Sponsors will establish an evaluation committee (the “**Evaluation Committee**”) for the purpose of evaluating Proposals in accordance with the RFP Documents. The Sponsors, in their sole discretion, will determine the size, structure and composition of the Evaluation Committee and any sub-committees of the Evaluation Committee. The Evaluation Committee may be assisted by and receive advice from any of the Sponsors' Advisors, and any other employees or representatives of the Sponsors in any manner determined necessary or desirable by the Sponsors.
- (2) If a member of the Evaluation Committee or, if applicable, an evaluation sub-committee becomes unable to continue serving on the Evaluation Committee or evaluation sub-committee before the completion of a step in the evaluation process, the evaluation comments and scores of that individual, in respect of the uncompleted steps in the evaluation process only, shall be ignored. For clarity, if an Evaluation Committee or sub-committee member becomes unable to continue serving on the Evaluation Committee or a sub-committee after the full completion of a step in the evaluation process, the results of the completed steps of the evaluation process are unaffected and remain valid. Whether or not an Evaluation Committee or sub-committee member, in these circumstances, is replaced is in the sole discretion of the Sponsors.

### 6.2 Sponsors' Clarification and Verification of Proposals

- (1) The Sponsors may:
- (a) require the Proponent to clarify or verify the contents of its Proposal or any statement made by the Proponent;
  - (b) require the Proponent to submit supplementary documentation clarifying or verifying any matters contained in its Proposal; and
  - (c) seek a Proponent's acknowledgement of the Sponsors' interpretation of the Proposal or any part of the Proposal.

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- (2) The Sponsors are not obliged to seek clarification or verification of any aspect of a Proposal or any statement by a Proponent, including an ambiguity in a Proposal or in a statement made by a Proponent.
  - (3) Any written information received by the Sponsors from a Proponent pursuant to a request for clarification or verification from the Sponsors as part of the RFP Process may, in the Sponsors' sole discretion, be considered as an integral part of the applicable Proposal.

### 6.3 Determination of Compliance

- (1) For purposes of this RFP, a Proposal is “**non-compliant**” and does not “**comply**” or achieve “**compliance**” with the requirements of the RFP Documents if that Proposal contains a “**Material Deviation**”. A Material Deviation is any failure in a Proposal to conform with any requirement of the RFP Documents that, in the sole discretion of the Sponsors:
  - (a) impedes, in any material way, the ability of the Sponsors to evaluate the Proposal;
  - (b) constitutes an attempt by the Proponent to revise the Sponsors' or the Proponent's rights or obligations under the RFP Documents or affects the Sponsors' ability to enforce the Proponent's obligations pursuant to the RFP Documents in a way not permitted by this RFP; or
  - (c) constitutes an attempt by the Proponent to revise the Sponsors' or the Proponent's rights or obligations under the Project Agreement.
- (2) A requirement in either this RFP or in the Schedules to this RFP that a Proponent “must” or “shall” do anything is not intended to supersede the concepts of “comply”, “compliance” or “Material Deviation” or any other portion of this RFP Section 6.3.
- (3) Each Proponent acknowledges and agrees that the Sponsors' evaluation of compliance with the RFP Documents is not an evaluation of absolute compliance and that the Sponsors may waive,
  - (a) any deviation that is not a Material Deviation at any time; and
  - (b) any Material Deviation in accordance with RFP Section 10.2(3).
- (4) The Sponsors may identify a Material Deviation in a Proposal at any time during the RFP Process (after the Technical Submission Deadline) and, for clarity, at any step during the evaluation process set out in RFP Section 6.5.
- (5) Subject to RFP Section 6.3(3)(b), if the Sponsors determine that a Proposal is non-compliant in accordance with RFP Section 6.3, the Sponsors may, in their sole discretion and without liability, cost or penalty, declare that the Proposal shall not be given any further consideration and take such action as permitted under RFP Section 7.1.2. If a declaration by the Sponsors that a Proposal is non-compliant occurs after the scoring of that Proposal has commenced, any scores given to that Proposal shall be declared null and void.



## 6.4 Non-Compliance Distinguished from Poor Quality

- (1) A Proposal that contains a poor quality response and/or a failure to conform to a requirement of the RFP Documents shall not be deemed to be non-compliant and such poor quality response and/or failure to conform shall not be deemed to be a Material Deviation unless, and only unless, such poor quality response and/or failure to conform to the requirement of the RFP Documents, in the sole discretion of the Sponsors, meets the definition of a Material Deviation as set out in RFP Section 6.3(1).
- (2) A design compliance/conformance or technical compliance conformance review is only a tool to assist in the evaluation and scoring of Technical Submissions. Notwithstanding the similarity of terminology, the determination of whether a Proposal, in its entirety, is compliant or non-compliant with the requirements of the RFP Documents is not the same as the concept of “design compliance”, “design conformance and/or non-conformance”, “technical compliance”, or “technical conformance and/or non-conformance” or any other assessment of quality made during the evaluation and scoring of a Proposal.
- (3) The quality of a Proposal, an assessment of which is made during the evaluation and scoring of that Proposal and which is separate and distinct from the assessment of the compliance of a Proposal, may be subject to one or more minimum scoring thresholds in accordance with Part 4 to Schedule 3 to this RFP.
- (4) A Proposal that does not contain any Material Deviations shall not be automatically presumed to pass any applicable minimum scoring threshold as set out in Part 4 to Schedule 3 to this RFP. Any assessment of “design compliance”, “design conformance and/or non-conformance”, “technical compliance”, or “technical conformance and/or non-conformance” or any other assessment of quality of a Proposal shall not result in any presumed score for that Proposal.
- (5) The submission of a compliant Proposal that contains a poor quality response and/or any failure by a Proponent to conform with any requirement of the RFP Documents which is not a Material Deviation does not derogate from the obligations of the Preferred Proponent pursuant to RFP Section 9.2, or of Project Co under the Project Agreement to bring all aspects of a Proponent’s proposed design, construction or financing into conformance with the requirements of the Project Agreement, pursuant to its terms.

## 6.5 Steps in the Evaluation Process

### 6.5.1 Step 1 – Compliance of Technical Submissions

- (1) In Step 1 of the evaluation process, the Sponsors will open each Technical Submission and will review the contents of the Technical Submission to assess whether it is in compliance with the terms and conditions of the RFP Documents.
- (2) If the Sponsors identify a Material Deviation in a Technical Submission, then, subject to RFP Section 6.3(3)(b), the Sponsors may determine that the Proposal to which the Technical Submission relates is non-compliant in accordance with RFP Section 6.3 and take such action as described in RFP Section 6.3(5).
- (3) In the event that the Sponsors declare a Proposal to be non-compliant and declare that it shall not be further considered before the opening of the Financial Submission, the Financial Submission

of that Proponent will remain unopened and will not be evaluated. Unopened Financial Submissions will be returned to Proponents at the conclusion of the RFP Process.

#### **6.5.2 Step 2 – Review of the Proposal Submission Form (Technical)**

- (1) In Step 2 of the evaluation process, the Sponsors shall review the Proposal Submission Form (Technical) to:
  - (a) ensure that there have been no changes to the Proponent or Proponent Team Members from their Prequalification Submissions, except for changes that have been approved by the Sponsors in accordance with RFP Section 3.6; and
  - (b) assess the Conflict of Interest and Confidential Information sections of the Proposal Submission Form (Technical).

#### **6.5.3 Step 3 – Review, Scoring and Interview in respect of the Technical Submissions**

- (1) In Step 3 of the evaluation process, subject to 6.5.3(4), the Technical Submissions will be evaluated and scored in accordance with Parts 1 and 4 of Schedule 3 to this RFP.
- (2) If a Proponent fails to achieve any of the minimum scores as set out in the applicable provisions of Part B - Proposal Evaluation of Part 4 of Schedule 3 to this RFP, then, as part of Step 3 of the evaluation process and pursuant to and in accordance with such provisions, the Sponsors may, in their sole discretion, determine whether that Proponent's Proposal will continue to be considered in the RFP Process.
- (3) In the event that a Proponent's Technical Submission fails to achieve any of the minimum scores as set out in the applicable provisions of Part B – Proposal Evaluation of Part 4 of Schedule 3 to this RFP and the Sponsors do not exercise their discretionary rights as set out in RFP Section 6.5.3(2), the Proponent's Proposal will not continue to Step 5 of the evaluation process. Additionally, the Financial Submission of that Proponent will remain unopened and will not be evaluated. Unopened Financial Submissions will be returned to Proponents at the conclusion of the RFP Process.
- (4) If the Sponsors are to conduct interviews with Proponents pursuant to Section 3.12 as part of the evaluation process of this Section 6.5.3, the results of such interviews with the Proponent will be evaluated and scored in accordance with Parts 1 and 4 of Schedule 3 to this RFP, and the evaluation and scoring of the Proponent's Technical Submission will be subject to the evaluation and scoring attributable to the results of such interviews.
- (5) If a Proponent fails to attend the interviews contemplated pursuant to Section 3.12, then, as part of Step 3 of the evaluation process and pursuant to and in accordance with such provisions, the Sponsors may, in their sole discretion, determine whether that Proponent's Proposal will continue to be considered in the RFP Process, and in any event, such failure to attend may have an adverse impact on the score assigned to such Proponent's Technical Submission.

#### **6.5.4 Step 4 – Scoring of the Collaborative and Behavioural Assessment**

- (1) In Step 4 of the evaluation process, the Sponsors will undertake the Collaborative and Behavioural Assessment, and the Proponent's attendance at, participation in, and performance during the

Collaborative and Behavioural Assessment will be evaluated and scored in accordance with Part 4 of Schedule 3 to this RFP.

- (2) The Collaborative and Behavioural Assessment will take place at any time after the completion of Step 2 of the evaluation process and prior to the beginning of Step 5 of the evaluation process. During this time period, the Collaborative and Behavioural Assessment may take place concurrently with, before or after Step 3 of the evaluation process.
- (3) If a Proponent fails to attend the Collaborative and Behavioural Assessment, then, as part of Step 4 of the evaluation process and pursuant to and in accordance with such provisions, the Sponsors may, in their sole discretion, determine whether that Proponent's Proposal will continue to be considered in the RFP Process, and in any event, such failure to attend may have an adverse impact on the score assigned to such Proponents Technical Submission.

#### **6.5.5 Step 5 – Review of the Proposal Submission Form (Financial)**

- (1) In Step 5 of the evaluation process, the Sponsors shall review the Proposal Submission Form (Financial) to:
  - (a) ensure that there have been no changes to the representations and warranties made by the Proponent in its Proposal Submission Form (Financial);
  - (b) ensure that there have been no changes to the Proponent or Proponent Team Members from their Prequalification Submissions following the Technical Submission Deadline, except for changes that have been approved by the Sponsors in accordance with RFP Section 3.6; and
  - (c) assess the Conflict of Interest and Confidential Information sections of the Proposal Submission Form (Financial).

#### **6.5.6 Step 6 – Compliance of Financial Submissions**

- (1) In Step 6 of the evaluation process, the Sponsors will open each Financial Submission and will review the contents of the Financial Submission to assess whether it is in compliance with the terms and conditions of the RFP Documents.
- (2) If the Sponsors identify a Material Deviation in a Financial Submission then, subject to RFP Section 6.3(3)(b), the Sponsors may determine that the Proposal to which the Financial Submission relates is non-compliant in accordance with RFP Section 6.3 and take such action as described in RFP Section 6.3(5).

#### **6.5.7 Step 7 – Review and Scoring of the Financial Submissions**

- (1) In Step 7 of the evaluation process, the Financial Submissions as revised by RFP Section 5.5(2), as applicable, will be evaluated and scored in accordance with Parts 2 and 4 of Schedule 3 to this RFP.
- (2) If a Proponent fails to achieve any of the minimum scores or fails to have in place the approval(s) required for its Proposal to have committed financing as set out in the applicable provisions of Part B – Proposal Evaluation of Part 4 of Schedule 3 to this RFP, then, as part of Step 7 of the

evaluation process and pursuant to and in accordance with such provisions, the Sponsors may, in their sole discretion, determine whether that Proponent's Proposal will continue to be considered in the RFP Process.

- (3) In the event that a Proponent's Financial Submission fails to achieve any of the minimum scores as set out in the applicable provisions of Part B (Proposal Evaluation) of Part 4 of Schedule 3 to this RFP and the Sponsors do not exercise their discretionary rights as set out in RFP Section 6.5.7(2), the Proponent's Proposal will not continue to Step 8 of the evaluation process.

#### **6.5.8 Step 8 – Establishing a Final Proposal Score**

- (1) For the purpose of the evaluation process, the weightings and scoring set out in Part B (Proposal Evaluation) of Part 4 of Schedule 3 to this RFP will apply.
- (2) In Step 8 of the evaluation process, upon receipt by, and acceptance of, the Evaluation Committee of the results of the evaluation process and finalization of the scores of all Proponents' Proposals, the score for each Proposal will be tallied and finalized.
- (3) The score established based on this RFP Section 6.5.8 shall be the "**Final Proposal Score**".

#### **6.5.9 Step 9 – Ranking the Proponents**

- (1) In Step 9 of the evaluation process, the Evaluation Committee shall rank only those Proponents that have met all requirements in Steps 1 through 9 of the evaluation process and shall base the ranking on the Final Proposal Score determined in Step 8.
- (2) In the event of a tie in the Final Proposal Score between two Proponents the Sponsors may, in their sole discretion, give the higher ranking to the Proponent proposing the lower Guaranteed Price for Evaluation in its Proposal.

### **7 GENERAL EVALUATION AND DISQUALIFICATION PROVISIONS**

#### **7.1.1 Sponsors' Discretion in Determining Compliance, Scoring and Ranking**

- (1) The Sponsors shall, in their sole discretion, determine:
  - (a) the membership of the Evaluation Committee and any sub-committees of the Evaluation Committee;
  - (b) whether a Proposal is compliant with the RFP Documents;
  - (c) whether a failure to comply constitutes a Material Deviation;
  - (d) whether Key Individuals who were not named in a Prequalification Submission are acceptable to the Sponsors;
  - (e) the Final Proposal Score of a Proposal;
  - (f) the rankings of the Proposals; and
  - (g) whether a Proposal or a Proponent,

- (i) is disqualified; or
  - (ii) will cease to be considered in the evaluation process.
- (2) The Sponsors' discretion in determining compliance, scores, ranking and disqualification of the Proponents and their Proposals is not limited or restricted in any way by the fact that a prequalification process preceded this RFP Process.
- (3) The Sponsors have the right, at any time and in their sole discretion, to consider in the evaluation of the Proposals or in the exercise of any of the Sponsors' rights under this RFP:
  - (a) any instances of poor performance by a Proponent or a Proponent Team Member that the Sponsors have experienced; and/or
  - (b) any publicly available information about a Proponent or a Proponent Team Member that is, in the Sponsors' sole discretion, credible information.
- (4) Pursuant to the page limit restrictions applicable to any portion of a Proposal as described in this RFP, the Sponsors shall, without discretion, neither review nor score any pages of a Proposal that exceed the maximum number of pages specified for the applicable portion of the Proposal.

#### **7.1.2 Disqualification**

- (1) The Sponsors may, in their sole discretion, disqualify a Proponent, a Proponent Team Member or a Proposal or reverse their decision to make an award (even if the award has already been made to a Preferred Proponent under this RFP) at any time prior to Commercial Close with respect to the Preferred Proponent and at any time prior to Financial Close with respect to the remaining Proponents, if,
  - (a) the Proposal is determined to be non-compliant pursuant to RFP Section 6.3;
  - (b) the Proponent fails to cooperate in any attempt by the Sponsors to verify any information provided by the Proponent in its Proposal or interview;
  - (c) the Proponent contravenes RFP Section 3.3.2 or RFP Section 3.3.3;
  - (d) the Proponent fails to comply with Applicable Law;
  - (e) the Proponent, any Proponent Team Member, their identified subcontractors, or any of their directors, officers, employees or Affiliates have engaged in a Prohibited Act;
  - (f) the Proponent, any Proponent Team Member, their identified subcontractors, or any of their directors, officers, employees or Affiliates are a Restricted Person;
  - (g) the Proposal, including any officer's certificate or any form attached to the Proposal, contains false or misleading information or a misrepresentation;
  - (h) the Proponent or any Proponent Team Member fails to disclose any information (including in any officer's certificate or any other form attached to the Proposal in

connection with this RFP) that would materially adversely affect the Sponsors' evaluation of the Proposal;

- (i) the Proposal, in the opinion of the Sponsors, reveals a material Conflict of Interest as described in RFP Section 3.9 and the Proponent,
  - (i) does not receive a waiver from the Sponsors in accordance with RFP Section 3.9.1(6) or does not receive a consent in accordance with RFP Section 3.9.2(4), as applicable; or
  - (ii) fails to substitute the person or entity giving rise to the Conflict of Interest in accordance with RFP Section 3.9.1(5);
- (j) in the 36 months prior to the Financial Submission Deadline, the Sponsors became aware that the Proponent or any Proponent Team Member failed to disclose an actual Conflict of Interest in any past or current procurement issued by either Sponsor, unless the Proponent has demonstrated to the satisfaction of the Sponsors that the Proponent has implemented measures to prevent future false or omitted disclosure of actual Conflicts of Interest;
- (k) in the opinion of the Sponsors, acting reasonably, the Proponent or a Proponent Team Member or any of their respective Advisors, employees or representatives directly or indirectly colluded with one or more other Proponents or its Proponent Team Members or any of their respective Advisors, employees or representatives in the preparation or submission of a Proponent's Proposal or otherwise contravened RFP Section 3.3.4;
- (l) the Proponent has committed a material breach of any existing agreement between the Proponent and a Sponsor;
- (m) the Proponent or any Proponent Team Member has been convicted of an offence in connection with, or any services rendered to the Sponsors or any Ministry, agency, Board or Commission of the Government of Ontario;
- (n) there are any convictions related to inappropriate bidding practices or unethical behaviour by a Proponent or a Proponent Team Member or any of their Affiliates in relation to a public or broader public sector tender or procurement in any Canadian jurisdiction; or
- (o) the Proponent, or any Proponent Team Member, has an economic or other interest or relationship that:
  - (i) is, or could reasonably be perceived to be, contrary to the objectives of the Project; or
  - (ii) could potentially compromise the Sponsors' reputation or integrity or the Sponsors' procurement process, so as to affect public confidence in that process,

whether or not such interest creates a Conflict of Interest.

## 8 COMPETITION, NEGOTIATIONS AND THE IDENTIFICATION OF A PREFERRED PROPONENT

### 8.1 Evaluation Results and the Identification of a Preferred Proponent or Negotiations Proponents

- (1) Based on the Final Proposal Scores, the Sponsors may, in their sole discretion, at any time prior to the expiration of the Proposal Validity Period:
  - (a) identify the highest ranked Proponent as the Preferred Proponent and either negotiate with such Proponent or accept such Proponent's Proposal as submitted;
  - (b) identify the two highest ranking Proponents as the first negotiations proponent (the "**First Negotiations Proponent**") (highest ranked) and the second negotiations proponent (the "**Second Negotiations Proponent**") (second highest ranked) (collectively, the "**Negotiations Proponents**") and enter into negotiations with the First Negotiations Proponent and, failing successful negotiations, enter into negotiations with the Second Negotiations Proponent and identify the Proponent with whom the Sponsors conclude successful negotiations as the Preferred Proponent; or
  - (c) enter into separate and distinct but contemporaneous negotiations with the First Negotiations Proponents and Second Negotiations Proponents and identify a Preferred Proponent as a result of those negotiations.
- (2) The Sponsors may use the negotiations process to negotiate any aspect of a Negotiations Proponent's Proposal or the Project Agreement, or both, including, for greater clarity, any amendments to the Project Agreement that are reasonably required to:
  - (a) accommodate a Negotiations Proponents' financing arrangements;
  - (b) revise the scope of the Project in the event that all Proposal prices have exceeded the Sponsors' Project budget;
  - (c) ensure that a Negotiations Proponent's Proposed Works Schedule meets the applicable requirements set out in Schedule 12 – Works Schedule Requirements of the Project Agreement in order to satisfy the Sponsors that the Negotiations Proponent will be able to meet the requirement set out in RFP Section 9.2(1)(d), if the Negotiations Proponent is identified as the Preferred Proponent; and/or
  - (d) satisfy the Sponsors with respect to the current status of a Negotiations Proponents' health and safety certifications, provided in accordance with Section 1.4 of Part 1 of Schedule 3 to this RFP.
- (3) Except as provided in RFP Section 5.6(3), notwithstanding any negotiations between the Sponsors and a Negotiations Proponent, the Proposals of all Proponents shall remain valid and irrevocable until the expiration of the Proposal Validity Period or until Financial Close, in accordance with RFP Section 5.4(1).
- (4) If, in accordance with RFP Section 8.1(1)(b) or RFP Section 8.1(1)(c) the Proponent and the Sponsors negotiate revisions to the Project Agreement, the Sponsors and the Preferred Proponent

shall develop a revised Project Agreement and, for the purposes of RFP Section 9, the revised Project Agreement shall be the “**Project Agreement**”.

- (5) The Sponsors may, in their sole discretion and for greater clarity, elect to change the selection of which of the RFP Section 8.1(1) negotiations processes to employ at any time during the application of RFP Section 8.

## 8.2 Early Contractor Activities

- (1) Following Financial Close, rapid progress on the Project is of paramount importance to the Sponsors. To that end, the First Negotiations Proponent, or Second Negotiations Proponent in the event that the Sponsors enter into negotiations with the Second Negotiations Proponent pursuant to Section 8.1(1) of this RFP, (the “**Relevant Negotiations Proponent**”), are permitted to undertake and perform certain activities forming part of the Works, more particularly described in Appendix “A” - Early Contractor Activities to this RFP (the “**Early Contractor Activities**”) at its own cost and expense (subject to Section 8.2.2(2)), between the date upon which the Relevant Negotiations Proponent is so identified by the Sponsors, and Financial Close (the “**Pre-Closing Period**”). For greater certainty:
  - (a) the Early Contractor Activities constitute part of the Works;
  - (b) the Relevant Negotiations Proponent includes the Preferred Proponent; and
  - (c) while the Relevant Negotiations Proponent is strongly encouraged to undertake the Early Contractor Activities during the Pre-Closing Period, the decision of whether or not to undertake the Early Contractor Activities during the Pre-Closing Period shall be at the sole option or election of the Relevant Negotiations Proponent.

### 8.2.2 Early Contractor Costs

- (1) The Relevant Negotiations Proponent shall:
  - (a) subject to Section 8.2.2(2), be solely responsible for all costs and expenses (including any financing costs) incurred by the Relevant Negotiations Proponent in performing the Early Contractor Activities (the “**Early Contractor Costs**”);
  - (b) ensure that the Financial Model reflects the costs and expenses of performing the Early Contractor Activities, whether performed during the Pre-Closing Period or following Financial Close. For clarity, the amount of all Early Contractor Costs incurred by the Relevant Negotiations Proponent shall form part of the Guaranteed Price; and
  - (c) provide such evidence to the Sponsors as the Sponsors may reasonably require in order to substantiate any of the Early Contractor Costs incurred by the Relevant Negotiations Proponent in performing the Early Contractor Activities.
- (2) In the event that the Sponsors elect to discontinue or cancel the RFP Process pursuant to Section 10.1(1)(g) or 10.1(1)(i) of the RFP, as applicable, the Sponsors shall reimburse the Relevant Negotiations Proponent for all Early Contractor Costs properly incurred in performing the Early Contractor Activities and paid by the Relevant Negotiations Proponent within 45 Business Days of the date of such election by the Sponsors.



### 8.2.3 Performance of the Early Contractor Activities

- (1) The Relevant Negotiations Proponent shall only be permitted to access, occupy or otherwise make use of the Early Works Lands for the purposes of performing the Early Contractor Activities once it has entered into the Early Works Agreement with Contracting Authority, the form of which is attached as Appendix B – Form of Early Works Agreement to this RFP.
- (2) The Relevant Negotiations Proponent shall not have access to any portion of the Lands which are not the Early Works Lands during the Pre-Closing Period.
- (3) Where the Relevant Negotiations Proponent elects not to undertake the Early Contractor Activities within the Pre-Closing Period, such election shall not constitute a breach or violation of any requirement of the RFP and the negotiating position of the Relevant Negotiations Proponent shall not be in any way prejudiced by such decision, however the scope of work comprising the Early Contractor Activities shall be completed by Project Co as part of the Works pursuant to the terms of the Project Agreement following Financial Close.

## 9 PREFERRED PROPONENT

### 9.1 Identification of the Preferred Proponent and the Letter of Credit

- (1) Subject to RFP Sections 10.1 and 10.2, the Sponsors intend to identify a Preferred Proponent in accordance with RFP Section 8.1(1) or RFP Section 5.5(6).
- (2) No later than three Business Days after a Proponent's receipt of a notice from the Contact Person that the Proponent is the Preferred Proponent, the Preferred Proponent shall provide an irrevocable standby letter of credit (the "**Letter of Credit**") in the amount specified in the RFP Data Sheet and in the form attached as Schedule 9A to this RFP to secure the Preferred Proponent's obligations in accordance with RFP Section 9.1(5) and, prior to Commercial Close, shall secure Project Co's (as defined in the Project Agreement) obligations in accordance with Section 2.3(c) of the Project Agreement. The Preferred Proponent may, with the prior written consent of the Sponsors, which consent may be withheld in the sole discretion of the Sponsors, provide multiple irrevocable standby letters of credit from Proponent Team Members as approved and confirmed by the Sponsors (each a "**Letter of Credit Provider**") totalling the amount specified in the RFP Data Sheet and in the form attached as Schedule 9A to this RFP,
  - (a) to secure the Preferred Proponent's obligations in accordance with RFP Section 9.1(5); and
  - (b) upon Commercial Close, to secure Project Co's (as defined in the Project Agreement) obligations in accordance with Section 2.3(c) of the Project Agreement.
- (3) If the Preferred Proponent does not provide the Letter(s) of Credit to the Sponsors as required by this RFP Section 9.1 the Sponsors may, in their sole discretion, by written notice to the Preferred Proponent, cease all discussions with the Preferred Proponent, terminate any obligations of the Sponsors to the Preferred Proponent under any agreement or understanding relating to the Project and, for greater certainty, the Preferred Proponent will not be entitled to or receive any payment or compensation of any kind relating to the Project.

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- (4) Subject to the Sponsors' right to retain and apply the Letter(s) of Credit as liquidated damages as provided in this RFP or in the Project Agreement, the Letter(s) of Credit shall be returned to the Preferred Proponent as follows:
- (a) if the Sponsors give notice to the Preferred Proponent that they are cancelling or discontinuing the RFP Process, no later than 10 days after receipt by the Sponsors of a written demand for the Letter(s) of Credit by the Preferred Proponent; or
  - (b) if Commercial Close has been achieved, the return of the Letter(s) of Credit will be governed in accordance with the terms of the Project Agreement.
- (5) The Sponsors shall be entitled to draw on the Letter(s) of Credit and retain and apply the proceeds thereof as liquidated damages if,
- (a) there is a breach of the Preferred Proponent obligations set out in RFP Section 9.2 by the Preferred Proponent;
  - (b) a Termination Notice has been given to the Preferred Proponent under RFP Section 5.5(6)(b);
  - (c) Commercial Close has not occurred (for reasons other than the failure of the Signing Parties to execute the Project Agreement in accordance with its terms),
    - (i) on or before the Commercial Close Target Date; or
    - (ii) if the Commercial Close Target Date has passed and the Sponsors have given their consent, on or before the expiration of the Proposal Validity Period (or the extended Proposal Validity Period, if applicable);
  - (d) the Preferred Proponent has notified the Sponsors in writing that it wishes to cease all discussions with the Sponsors relating to the Project; or
  - (e) if Commercial Close has been achieved, the entitlement to draw on the Letter(s) of Credit will be governed in accordance with the terms of the Project Agreement.
- (6) The Sponsors shall not be required to give any prior written notice to the Preferred Proponent of their intention to draw on the Letter(s) of Credit. If the Preferred Proponent notifies the Contact Person in writing that the Preferred Proponent disputes the Sponsors' right to draw on the Letter(s) of Credit and to retain the proceeds as liquidated damages, then the Sponsors shall nonetheless be entitled to draw on the Letter(s) of Credit, but will remain liable to repay all or a portion of the amount drawn, together with interest charges at the rate prescribed on that amount, until such dispute has been finally resolved. If the Preferred Proponent fails to renew or extend the Letter(s) of Credit at least 30 days prior to its expiry date, the Sponsors may, at any time without notice to the Preferred Proponent, draw on the Letter(s) of Credit and hold the proceeds thereof in the same manner and for the same purposes as the Letter(s) of Credit.
- (7) If the Preferred Proponent delivers multiple Letters of Credit from multiple Letter of Credit Providers in accordance with RFP Section 9.1(2), the Preferred Proponent acknowledges and agrees that:

- (a) the Sponsors may draw upon any Letter of Credit provided by any Letter of Credit Provider in any specified ratable amount;
- (b) the Sponsors may draw on any Letter of Credit provided by any Letter of Credit Provider in a disproportionate amount to such Letter of Credit Provider's contribution to security;
- (c) the Sponsors may draw upon any Letter of Credit provided by any Letter of Credit Provider even in the event that such Letter of Credit Provider is no longer a Proponent Team Member; and
- (d) the provision of multiple letters of credit shall not in any way prejudice or adversely affect the rights of the Sponsors to draw on any Letter of Credit in accordance with this RFP, including in the event that the Sponsors are entitled to draw on the Letter(s) of Credit in accordance with RFP Section 9.1(5) and such circumstance is not the result of any act or omission of the Letter of Credit Provider whose Letter of Credit is drawn upon.

## 9.2 Preferred Proponent Obligations

- (1) The Preferred Proponent shall,
  - (a) achieve Commercial Close,
    - (i) prior to the Commercial Close Target Date; or
    - (ii) if the Commercial Close Target Date has passed unless the Sponsors have given their consent, prior to the expiration of the Proposal Validity Period (or the extended Proposal Validity Period, if applicable),  
  
based on the Project Agreement in substantially the same form and content as finalized prior to the Technical Submission Deadline or on the Project Agreement as revised and agreed to by the Proponent and the Sponsors;
  - (b) execute the Project Agreement, subject only to revision in respect of the following:
    - (i) minor changes, additions and modifications necessary to create a legally complete and binding agreement;
    - (ii) changes, additions and modifications to those provisions which require,
      - (A) the insertion or addition of information relating to the Preferred Proponent's corporate and funding structure which are not inconsistent with the principles set out in the Project Agreement;
      - (B) the insertion or addition of information or the modification of provisions of the Project Agreement required in order to reflect accurately the nature of the Preferred Proponent's relationships with its principal subcontractors; or
      - (C) the revision of provisions in the Project Agreement to more accurately reflect the result of negotiations in accordance with RFP Section 8.1;

- (iii) changes, additions and modifications required in order to complete (based on the Proposal) any provision of the Project Agreement (where contemplated in or required under the terms of the RFP Documents) or to complete any Schedules to the Project Agreement; and
- (iv) changes, additions and modifications to those parts of the Project Agreement which are indicated in the Project Agreement as being subject to completion or finalization,

provided, that, in each case the changes, additions or modifications identified in RFP Section 9.2(1)(b) are consistent with the principles set out in the Project Agreement, are otherwise acceptable to the Sponsors, acting reasonably, and are consistent with RFP Section 9.2(4);

- (c) maintain its prices in accordance with the terms and conditions of this RFP, subject only to (i) revisions to the Credit Spread(s), if any, in accordance with, as applicable, RFP Section 5.5(3) or 5.5(3.1); and (ii) revisions to the price explicitly agreed to by the Sponsors;
  - (d) no later than five days following receipt of notice from the Sponsors that it is the Preferred Proponent, submit the Interim Works Schedule to the Sponsors for review in accordance with the requirements of Schedule 12 – Works Schedule Requirements of the Project Agreement; and
  - (e) at least two Business Days before Commercial Close, execute an escrow closing procedure agreement with Contracting Authority and the other parties thereto substantially in the form set out in Schedule 10 – Form of Escrow Closing Procedure Agreement to this RFP. The Preferred Proponent shall be responsible for causing all parties to such agreement other than Contracting Authority and the Escrow Agent (as defined in Schedule 10 – Form of Escrow Closing Procedure Agreement to this RFP) to enter into such agreement.
- (2) The Preferred Proponent shall not later than five days after receipt of notice from the Sponsors that it is the Preferred Proponent, deliver to the Contact Person a timetable setting out its schedule for achieving the following Financial Close milestone dates:
- (a) commencement and completion of financing documentation;
  - (b) receipt of final ratings from rating agencies (if applicable); and
  - (c) final pricing of the financing,

for review and approval by the Sponsors, acting reasonably (the “**Financing Timetable**”). The Sponsors may elect, in their sole discretion, to extend one or more of the dates identified in the Financing Timetable.

- (3) The Preferred Proponent shall provide access and shall promptly make available to the Sponsors and their Advisors, agents and representatives such documentation, financial and technical information as may be reasonably requested by the Sponsors from time to time in connection with the Sponsors’ due diligence investigations including, without limitation, copies of any written representation, statements, assurances, commitments or agreements which the Preferred

Proponent, any Team Member of the Preferred Proponent or any of their respective Advisors have received from any municipality, governmental authority or utility relating to the Project. The Preferred Proponent shall provide to the Sponsors, in a timely fashion, final draft versions of all documents required to be delivered by the Preferred Proponent in accordance with the Project Agreement, together with such other documentation as the Sponsors may reasonably request from time to time.

- (4) The Preferred Proponent acknowledges and agrees that, except for those parts of its Proposal which are, in the sole discretion of the Sponsors, incorporated by explicit reference into the Project Agreement by the Project Co Proposal Extracts, on Financial Close, the RFP Documents and the Proposal will be superseded entirely by the executed Project Agreement.

### **9.3 The Sponsors Authorization and Approvals**

- (1) The Preferred Proponent acknowledges and agrees that the entering into of the Project Agreement by the Signing Party or Signing Parties is conditional on and subject to the Signing Party or Signing Parties obtaining any necessary authorizations and approvals required in connection with the Project, including, for certainty, the approval of any relevant government authority.

## **10 GENERAL LEGAL MATTERS AND RIGHT TO ACCEPT OR REJECT**

### **10.1 General Rights of the Sponsors**

- (1) The Sponsors may, in their sole discretion:
  - (a) reject any or all of the Proposals;
  - (b) reject the Key Individuals proposed in a Proposal and, if not satisfactorily substituted, reject the Proposal;
  - (c) reject the financing plan contained in a Proposal and thereby reject the Proposal;
  - (d) request a replacement financing plan if the financing plan contained in the Proposal is, in the opinion of the Sponsors, uncompetitive or incomplete, or both;
  - (e) accept any Proposal;
  - (f) if only one Proposal is received, elect to accept or reject it or enter into negotiations with the Proponent;
  - (g) elect to discontinue the RFP Process at any time before the end of the RFP Process, including after the identification of a Preferred Proponent but before Commercial Close;
  - (h) alter the Timetable, the RFP Process or any other aspect of this RFP, which, for greater certainty, includes the right to schedule Financial Close on the day after Commercial Close; and
  - (i) cancel this RFP Process and subsequently advertise or call for new submissions for the same or different subject matter of these RFP Documents with the same or different participants.

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- (2) Each Proponent Team Member of any Proponent is required to provide a certificate of an officer from such Proponent Team Member in the form attached as Schedule 7 – Certificate of Officer to this RFP. Without limitation to any other rights of the Sponsors hereunder, in order to ensure the integrity, openness and transparency of the RFP Process, the Sponsors may, in their sole discretion, require at any time, including any time after a Proponent has submitted its Proposal, that any Proponent Team Member of any Proponent provide or resubmit a certificate of an officer from such Proponent Team Member in the form attached as Schedule 7 – Certificate of Officer to this RFP.
- (3) Without limitation to any other rights of the Sponsors hereunder, in order to ensure the integrity, openness and transparency of the RFP Process, the Sponsors may, in their sole discretion:
- (a) impose at any time on all Proponents and any Proponent Team Members additional conditions, requirements or measures with respect to bidding practices or ethical behaviour of the Proponents and Proponent Team Members; and
  - (b) require that any or all Proponents and/or any Proponent Team Member at any time during the RFP Process provide the Sponsors with copies of its internal policies, processes and controls establishing ethical standards for its bidding practices and evidence of compliance by the Proponent and all Proponent Team Members with such policies, processes and controls.
- (4) If a financial institution put forward as a Proponent Team Member and acting in a financial advisory capacity is not an Affiliate of any of the Proponent Team Members of the Proponent (“**Exempt Financial Institution**”), then RFP Sections 10.1(2) and 10.1(3) shall not apply to any such Exempt Financial Institution.
- (5) Further to RFP Sections 10.1(2) and 10.1(3), and in the event that any Proponent and/or Proponent Team Member:
- (a) fails to comply with any requirement prescribed by the Sponsors pursuant to RFP Section 10.1(2) or 10.1(3); or
  - (b) complies with Sponsors’ requirement as prescribed in accordance with RFP Section 10.1(2) or 10.1(3), but the Sponsors determine that any Proponent and/or Proponent Team Member has or may have engaged in inappropriate bidding practices or unethical behaviour,
- the Sponsors shall have the right, at any time and in their sole discretion to reject and not consider a Proposal from a Proponent, to require the Proponent to remove and/or replace any Proponent Team Member pursuant to RFP Section 3.6, or to otherwise elect not to proceed further in the procurement process with such Proponent.

## 10.2 Special Circumstances

- (1) If the Sponsors determine that all of the Proposals submitted are non-compliant in accordance with RFP Section 6.3, the Sponsors may, in their sole discretion:
- (a) take any action in accordance with RFP Section 10.1;

- (b) carry out a process whereby all Proponents are directed to correct the Material Deviations in their Proposals for re-submission, without a change in their Guaranteed Prices or Adjusted Guaranteed Prices (as set out in the Guaranteed Price Form) or their Proposed Works Schedules; or
  - (c) enter into negotiations with any one of the Proponents to attempt to finalize an agreement.
- (2) If the Sponsors receive,
- (a) one Proposal and that Proposal is compliant; or
  - (b) more than one Proposal, but only one compliant Proposal,  
the Sponsors may, in their sole discretion:
  - (c) take any action in accordance with RFP Section 10.1(1); or
  - (d) cancel this RFP and subsequently enter into negotiations with the Proponent that submitted a compliant Proposal.
- (3) The Sponsors may, in their sole discretion, waive a Material Deviation in a Proposal and, therefore, waive a material failure to comply with the requirements of the RFP Documents. The Sponsors may, in their sole discretion, decline to disqualify a non-compliant Proposal.
- (4) If at any time prior to the Technical Submission Deadline, a Proponent is disqualified or withdraws from the RFP Process, the Sponsors may, in their discretion, invite a Reserve Prequalified Party to participate in the RFP Process. Prior to and as a condition of becoming a Prequalified Party and a Proponent under this RFP, such Reserve Prequalified Party shall be required to satisfy the requirements of RFQ Section 5.2(2) of the RFQ. Upon the satisfaction of such conditions, such Reserve Prequalified Party shall become a Prequalified Party and a Proponent under this RFP.

### **10.3 Sponsors' Liability for Proponent's Costs**

#### **10.3.1 General**

- (1) Except as provided in RFP Sections 10.3.2 and 10.3.3, neither the Sponsors nor the Government of Ontario shall be liable for any expense, cost, loss or damage incurred or suffered by any Proponent, any Proponent Team Member, any Proponent Advisor or any person connected with any one of them, as a result of any action taken by the Sponsors in accordance with RFP Sections 10.1 or 10.2.

#### **10.3.2 Proposal Fee**

- (1) If the Sponsors specify in the RFP Data Sheet that they offer a Proposal Fee for this Project, such Proposal Fee plus any applicable HST shall be paid by the Sponsors to each Proponent other than the Proponent that achieves Commercial Close under the Project Agreement to this RFP, subject to the following conditions:

- (a) a Proponent must submit a full and proper Proposal for that Proponent to be eligible for the Proposal Fee, provided that the Sponsors shall determine whether a Proposal is full and proper based on factors that include whether the Proposal is compliant with this RFP (as determined in accordance with RFP Section 6.3) and whether the Proposal received a Final Proposal Score with respect to its Technical Submission of at least 50%;
- (b) a Proponent must not withdraw from this RFP Process after the Technical Submission Deadline in contravention of this RFP;
- (c) if Infrastructure Ontario draws upon a Proponent's Letter of Credit in accordance with this RFP or the Proponent's Standby Letter of Credit in accordance with the Project Agreement, then such Proponent will not be eligible for the Proposal Fee; and
- (d) Financial Close must be achieved with a Proponent under the Project Agreement to this RFP, provided that in the event that Financial Close is not achieved with a Proponent under the Project Agreement because Infrastructure Ontario, as a result of a Severe Market Disruption,
  - (i) exercises its rights under Section 2.4(b) of the Project Agreement (the "**Severe Market Disruption Event Date**"), and
  - (ii) concludes and reaches Financial Close under a new project agreement respecting the Project within 6 months after the Severe Market Disruption Event Date,then this condition 10.3.2(1)(d) shall be satisfied.

For greater certainty, a Proponent shall not be eligible to receive both a Proposal Fee and the compensation contemplated under Section 2.4(c) of the Project Agreement.

- (2) The amount of the Proposal Fee that will be paid by the Sponsors to each eligible Proponent in accordance with RFP Section 10.3.2(1) is set out in the RFP Data Sheet. Any additional requirements for Proponents to take into consideration in relation to the Proposal Fee are set out in the RFP Data Sheet.
- (3) Payment of a Proposal Fee shall represent full and final satisfaction of any obligation or liability of the Sponsors and the Government of Ontario to the Proponent and Proponent Team Members in connection with this RFP, and the Sponsors' obligation to pay the Proposal Fee shall be contingent on the receipt of a waiver, in form and substance satisfactory to the Sponsors, from the Proponent and Proponent Team Members to that effect.

### 10.3.3 Break Fee

- (1) Subject to the Sponsors having obtained all necessary approvals, including approval from the Minister of Finance, if the Sponsors offer a Break Fee for this Project as set out in the RFP Data Sheet, any such Break Fee shall be paid in accordance with the following:
  - (a) if the Project is cancelled prior to submission of Proposals:
    - (i) only a Proponent who has demonstrated, to the Sponsors' satisfaction, active participation in the RFP Process will be eligible to receive a Break Fee; and



- (ii) the Sponsors may require a Proponent to substantiate its active participation in the RFP Process in order to receive a Break Fee; and
- (b) if the Project is cancelled after submission of Proposals or a Break Fee is payable for any other reason, a Break Fee will be paid to a Proponent that has submitted a full and proper Proposal.

The Sponsors shall determine whether a Proposal is full and proper based on factors that include whether the Proposal is compliant with this RFP (as determined in accordance with RFP Section 6.3) and whether the Proposal received a Final Proposal Score of at least 50%.

- (2) The amount of the Break Fee payable to each eligible Proponent will depend on the point in the RFP Process that cancellation occurs, in accordance with the principles set out in the RFP Data Sheet. The base amount of the Break Fee (the “**Base Break Fee**”) is set out in the RFP Data Sheet.
- (3) Payment of a Break Fee shall represent full and final satisfaction of any obligation or liability of the Sponsors and the Government of Ontario to the Proponent and Proponent Team Members in connection with this RFP, and the Sponsors’ obligation to pay the Break Fee shall be contingent on the receipt of a waiver, in form and substance satisfactory to the Sponsors, from the Proponent and Proponent Team Members to that effect.
- (4) If the Project is cancelled or a Break Fee is payable for any other reason, a Proponent shall only be eligible to receive a Break Fee and the Proponent will not be eligible to receive a Proposal Fee as well. For greater certainty, a Proponent shall not be eligible to receive both a Break Fee and a Proposal Fee relating to the Proponent’s participation in the RFP Process for this Project.

#### **10.4 Applicable Law, Attornment and Limit on Liability**

- (1) This RFP shall be governed and construed in accordance with Applicable Law as defined in the Project Agreement.
- (2) The Proponent agrees that,
  - (a) any action or proceeding relating to this RFP Process shall be brought in any court of competent jurisdiction in the Province of Ontario and for that purpose the Proponent irrevocably and unconditionally attorns and submits to the jurisdiction of that Ontario court;
  - (b) it irrevocably waives any right to and shall not oppose any Ontario action or proceeding relating to this RFP Process on any jurisdictional basis, including forum non conveniens; and
  - (c) it shall not oppose the enforcement against it, in any other jurisdiction, of any judgement or order duly obtained from an Ontario court as contemplated by this RFP Section 10.4.
- (3) Except as provided in RFP Sections 10.3.2 and 10.3.3, the Proponent agrees that if the Sponsors or the Sponsors’ Advisors commit a material breach of their obligations under or in connection with this RFP (that is, a material breach of the bidding contract or “Contract A”), the Sponsors’ liability to the Proponent and the aggregate amount of damages recoverable against the Sponsors

for any matter relating to or arising from that material breach, whether based upon an action or claim in contract, warranty, equity, negligence, intended conduct or otherwise, including any action or claim arising from the acts or omissions, negligent or otherwise, of the Sponsors, shall be the lesser of,

- (a) the Proposal preparation costs that the Proponent seeking damages from the Sponsors can demonstrate; and
- (b) \$500,000 or the Break Fee, if applicable, or the Proposal Fee, if applicable, whichever is greater.

## **10.5 Licences, Permits, etc.**

- (1) If a Proponent is required by Applicable Law to hold or obtain a licence, permit, consent or authorization to carry on an activity contemplated in its Proposal or in the Project Agreement, neither acceptance of the Proposal nor execution of the Project Agreement by the Sponsors shall be considered to be approval by the Sponsors of carrying on such activity without the requisite licence, permit, consent or authorization.

## **10.6 Power of Legislative Assembly**

- (1) Proponents are advised that no provision of the RFP Documents (including a provision stating the intention of the Sponsors) is intended to operate, nor shall any such provision have the effect of operating, in any way, so as to interfere with or otherwise fetter the discretion of the Legislative Assembly of Ontario in the exercise of its legislative powers.

## **11 NOTIFICATION AND DEBRIEFING**

- (1) Any time after the Preferred Proponent has been identified, the Sponsors will formally notify all Proponents who were not successful in the RFP Process that they have not been selected. Notwithstanding such notification, the Proponents' Proposals shall be irrevocable until the expiration of the Proposal Validity Period (or extended Proposal Validity Period, if applicable) or Financial Close, in accordance with RFP Section 5.4.
- (2) Any time after Financial Close, the Sponsors, and a member or members of the Evaluation Committee will meet with any unsuccessful Proponents, at the request of the unsuccessful Proponent, to provide a de-briefing.

## **12 DEFINITIONS**

### **12.1 General**

- (1) Unless otherwise defined in this RFP Section 12, capitalized terms and expressions used in this RFP have the meaning given to them in the Project Agreement. In this RFP, the singular shall include the plural and the plural shall include the singular, except where the context otherwise requires.
- (2) Any reference in this RFP to a submission deadline means the noted time to the second, even where seconds are not explicitly noted. For greater certainty, a submission deadline is as of the zero count in seconds of the noted time.

- (3) All references in this RFP to the Sponsors' or Infrastructure Ontario's "discretion" or "sole discretion" means in the sole and absolute discretion of the party exercising the discretion.
- (4) All references in this RFP to "day" or "days" means calendar days, unless otherwise stated.

## 12.2 RFP Definitions

Whenever used in the RFP:

- (1) "Acquiree" is defined in RFP Section 3.6(9);
- (2) "Acquirer" is defined in RFP Section 3.6(9);
- (3) "Ad Hoc Meetings" is defined in Schedule 2 – Proponent Consultation Process to this RFP;
- (4) "Addendum" means a written addendum to the RFP Documents issued by the Sponsors as set out in RFP Section 3.7;
- (5) "Additional Visits" is defined in RFP Section 3.5.2(2);
- (6) "Adjusted Guaranteed Price for Evaluation" has the meaning given in Part 2 of Schedule 3 to this RFP;
- (7) "Advisor" means any person or firm retained to provide professional advice to any one of the Sponsors, a Proponent, a Proponent Team Member or a Financial Services Provider, as applicable;
- (8) "Affiliate" means an "affiliate" as that term is used in the *Business Corporations Act* (Ontario) and any successor legislation thereto;
- (9) "Background Information" means various types of information provided by the Sponsors and is defined in RFP Section 2.4(1)(b);
- (10) "Base Break Fee" is defined in RFP Section 10.3.3(2);
- (11) "Benchmark Rate(s)" is defined in Part B of Part 2 of Schedule 3 to this RFP;
- (12) "Benchmarking Date" is defined in Part B of Part 2 of Schedule 3 to this RFP;
- (13) "Bonding Submission" is defined in RFP Section 4.2.1(2);
- (14) "Break Fee" means an amount to compensate a Proponent for some of the costs the Proponent had incurred in developing and submitting a Proposal in the event that the RFP Process is cancelled, as determined by the Sponsors in accordance with RFP Section 10.3.3;
- (15) "Business Day" means any day other than a Saturday, a Sunday, a statutory holiday in the province of Ontario or any day on which banks are not open for business in the city of Toronto, Ontario;

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- (16) “Clearing Spread” means the financing premiums/spread in excess of the Benchmark Rate used to calculate the price at which the end investors purchase bonds, as accepted by Infrastructure Ontario;
- (17) “Client” means the client or clients listed in the RFP Data Sheet in respect of RFP Section 1.1(1);
- (18) “Collaborative and Behavioural Assessment” is defined in RFP Section 3.13(1).
- (19) “Commercial Close” means the date the Project Agreement is signed by the Preferred Proponent and the Signing Parties;
- (20) “Commercial Close Target Date” means the date set out as the Commercial Close Target Date in the Timetable;
- (21) “Commercially Confidential Meetings” is defined in RFP Section 3.4.2(1);
- (22) “Commercially Confidential RFIs” is defined in RFP Section 3.2.2(1)(a)(ii);
- (23) “Confidential Information” is defined in RFP Section 3.8.3(1);
- (24) “Conflict of Interest” is defined in RFP Section 3.9.1(7);
- (25) “Consultation Session” is defined in Schedule 2 – Proponent Consultation Process to this RFP;
- (26) “Contact Person” is defined in RFP Section 3.2.1;
- (27) “Contract A” is defined in RFP Section 1.1(3);
- (28) “Credit Spread Election Facilities” is defined in RFP Section 5.5(1)(b)(i);
- (29) “Credit Spread(s)” means the financing premiums/spreads in excess of the Benchmark Rate as calculated/illustrated in the Financial Model in accordance with Table A in Section 3.0 of Part B of Part 2 of Schedule 3 to this RFP. For greater certainty, Credit Spread(s) do not include any hedge premiums, swap counterparty spreads or any other applicable fees;
- (30) “Data Room” is defined in RFP Section 2.4(1);
- (31) “DBF” is defined in Schedule 1 to this RFP;
- (32) “Design Presentation Meetings” is defined in Schedule 2 - Proponent Consultation Process to this RFP;
- (33) “Design Submission” means the component of the Proposal submitted in response to the requirements set out in Section 2.0 of Part B of Part 1 of Schedule 3 to this RFP;
- (34) “Draft Lenders Commitment Letter” is defined in RFP Section 5.5(5);
- (35) “Early Contractor Activities” is defined in RFP Section 8.2(1).
- (36) “Early Contractor Costs” is defined in RFP Section 8.2(1).

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- (37) “Early Works Agreement” means the early works agreement in respect of the Early Contractor Activities, entered into between Contracting Authority, the Relevant Negotiations Proponent and the Construction Contractor, the form of which has been made available to the Proponents by the Sponsors;
- (38) “Early Works Lands” has the meaning given in the Early Works Agreement;
- (39) “Electronic Submission and Evaluation System” means the electronic tendering software named AWARD® by Commerce Decisions®;
- (40) “Evaluation Committee” is defined in RFP Section 6.1(1);
- (41) “Exempt Financial Institution” is defined in RFP Section 10.1(4);
- (42) “Fairness Monitor” is defined in the RFP Data Sheet;
- (43) “Final Credit Spread Election Facilities” is defined in RFP Section 5.5(2)(e);
- (44) “Final Credit Spread Lock-in Date” is defined in RFP Section 5.5(3);
- (45) “Final Proposal Score” is defined in RFP Section 6.5.8(3);
- (46) “Financial Close” has the meaning given in the Project Agreement;
- (47) “Financial Model” means the computer model a Proponent has used and which is proposed to become the Financial Model under the Project Agreement in the format specified in Part 2 of Schedule 3 to this RFP;
- (48) “Financial Services Provider” means any Lender and any other provider of financial services or products;
- (49) “Financial Submission” has the meaning given in RFP Section 4.1(2)(b);
- (50) “Financial Submission Deadline” has the meaning given in RFP Section 3.1(1);
- (51) “Financial Submission Information” means the component of the Proposal submitted in response to the requirements set out in Part 2 of Schedule 3 to this RFP;
- (52) “Financing Timetable” is defined in RFP Section 9.2(2);
- (53) “FIPPA” is defined in RFP Section 3.8.1(1)(a);
- (54) “First Credit Spread Lock-in Date” is defined in RFP Section 5.5(2);
- (55) “First Negotiations Proponent” is defined in RFP Section 8.1(1)(b);
- (56) “General RFIs” is defined in RFP Section 3.2.2(1)(a)(i);
- (57) “Government of Ontario” means Her Majesty the Queen in Right of the Province of Ontario and any and all ministries, agencies, boards, commissions and/or corporations thereof;

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- (58) “Guaranteed Price Form” means the guaranteed price form submitted by a Proponent as part of its Proposal in the form attached as Schedule 8 – Guaranteed Price Form to this RFP;
- (59) “Held Pricing Facilities” is defined in RFP Section 5.5(1)(b)(ii);
- (60) “Identified Proponent Parties” is defined in RFP Section 3.6(1);
- (61) “includes” and “including” means “includes without limitation” and “including without limitation” respectively;
- (62) “Indicative Credit Spread Benchmark(s)” are described in Section 2.5 of Part D of Part 2 of Schedule 3 to this RFP;
- (63) “Ineligible Person’s Affiliate” is defined in RFP Section 3.9.2(1);
- (64) “Ineligible Persons” is defined in RFP Section 3.9.2(1);
- (65) “Infrastructure Ontario” is defined in RFP Section 1.1(1);
- (66) “Investment Canada Act” means the *Investment Canada Act*, R.S.C. 1985, c. 28 (1<sup>st</sup> Supp.), and regulations enacted thereunder, all as amended from time to time;
- (67) “IO” is defined in RFP Section 1.1(1);
- (68) “IOCIP” is defined in RFP Section 3.11.3(1);
- (69) “IOCIP Broker of Record” means Aon Reed Stenhouse Inc.;
- (70) “Key Individual” means those individuals identified in the Proponent’s Prequalification Submission as key individuals;
- (71) “Lenders” means the lenders who will provide debt financing for the sole purpose of the Project and are identified in any term sheet, Lending Agreement or Lenders Commitment Letter provided as part of the Financial Submission in accordance with Sections 1.1 and 1.2 of Part D of Part 2 of Schedule 3 to this RFP;
- (72) “Lenders Commitment Letter” is defined in RFP Section 5.5(5);
- (73) “Letter of Credit” is defined in RFP Section 9.1(2);
- (74) “Letter of Credit Provider” is defined in RFP Section 9.1(2);
- (75) “Material Deviation” is defined in RFP Section 6.3(1);
- (76) “MFIPPA” is defined in RFP Section 3.8.1(1)(b);
- (77) “Minimum Third Party Financing Threshold” is defined in Section 3.2(d) of Part 4 of Schedule 3 to this RFP;
- (78) “MOI” is defined in RFP Section 1.1(5);

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- (79) “MTO” or “Ministry of Transportation” means the Her Majesty the Queen in right of Ontario as represented by the Minister of Transportation, and includes any successors thereto or persons exercising delegate power and such Minister’s authority;
- (80) “Negotiations Proponents” is defined in RFP Section 8.1(1)(b);
- (81) “NPV” means net present value;
- (82) “OILC” is defined in RFP Section 1.1(1);
- (83) “Participating Lender” is defined in RFP Section 5.7(2);
- (84) “Participating Proponent Team Member” is defined in RFP Section 5.7(2);
- (85) “Pre-Closing Period” is defined in RFP Section 8.2(1);
- (86) “Preferred Proponent” is defined in RFP Section 1.1(2);
- (87) “Prequalification Stage” is defined in RFP Section 1.3(1)(a);
- (88) “Prequalification Submission” is defined in RFP Section 1.2(1);
- (89) “Prequalified Parties” is defined in RFP Section 1.2(1);
- (90) “Prohibited Act” means:
- (a) offering, giving or agreeing to give to the Sponsors or any public body (or anyone employed by or acting on their behalf), or to any family member of such person, any gift or consideration of any kind as an inducement or reward:
    - (i) for doing or not doing, or for having done or not having done, any act in relation to a Proponent becoming a Negotiations Proponent or the Preferred Proponent; or
    - (ii) for showing or not showing favour or disfavour to any person in relation to a Proponent’s Proposal;provided that this definition shall not apply to a Proponent or Proponent Team Member (or anyone employed by or acting on their behalf) providing consideration to the Sponsors or any public body in the ordinary course;
  - (b) entering into any other agreement with the Sponsors or any public body in connection with the Project if a commission or a fee has been paid or has been agreed to be paid by a Proponent or any Proponent Team Members, Key Individuals or any of their Affiliates, or on its behalf or to its knowledge, to the Sponsors or any public body (or anyone employed by or acting on their behalf), or to any family member of such person, unless, before the relevant agreement is entered into, particulars of any such commission or fee have been disclosed in writing to the Sponsors, provided that this definition shall not apply to a fee or commission paid by the Proponent or any Proponent Team Member or any of their Affiliates (or anyone employed by or acting on their behalf) to the Sponsors

or any public body pursuant to an agreement where such fee or commission is paid in the ordinary course without contravening the intent of this section;

- (c) breaching or committing any offence under Applicable Law in respect of corrupt or fraudulent acts in relation to this RFP Process; or
  - (d) defrauding or attempting to defraud or conspiring to defraud the Sponsors or any other public body;
- (91) “Project” is defined in RFP Section 1.1(6);
- (92) “Project Agreement” are those documents listed as the “Project Agreement” in the RFP Data Sheet;
- (93) “Project Agreement CCMs” is defined in Schedule 2 – Proponent Consultation Process to this RFP;
- (94) “Project Co” is the Preferred Proponent that has executed the Project Agreement with the Signing Party or Parties;
- (95) “Proponent” is defined in RFP Section 1.1(2);
- (96) “Proponent Consultation Process” is defined in Schedule 2 – Proponent Consultation Process to this RFP;
- (97) “Proponent Representative” is defined in RFP Section 1.2(2);
- (98) “Proponent Team Members” means all members of the Proponent team that were identified in the RFQ process and were prequalified as a Proponent team to submit a Proposal in this RFP Process;
- (99) “Proponents Meeting” is defined in RFP Section 3.4.1(1);
- (100) “Proposal” is defined in RFP Section 1.1(2);
- (101) “Proposal Fee” means an amount to compensate a Proponent for some of the costs the Proponent had incurred in developing and submitting a Proposal, as determined by the Sponsors in accordance with RFP Section 10.3.2;
- (102) “Proposal Information” is defined in RFP Section 3.8.4(5);
- (103) “Proposal Information Licence” is defined in RFP Section 3.8.4(4);
- (104) “Proposal Submission Form (Financial)” means the submission form submitted by a Proponent as part of its Proposal in the form attached as Part B – Proposal Submission Form (Financial) of Schedule 4 – Proposal Submission Forms to this RFP;
- (105) “Proposal Submission Form (Technical)” means the submission form submitted by a Proponent as part of its Proposal in the form attached as Part A – Proposal Submission Form (Technical) of Schedule 4 – Proposal Submission Forms to this RFP;



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- (106) “Proposal Submission Forms” means, collectively the Proposal Submission Form (Financial) and the Proposal Submission Form (Technical);
- (107) “Proposal Validity Period” is defined in RFP Section 5.4(1);
- (108) “Proposed Change in Identified Proponent Party” is defined in RFP Section 3.6(3);
- (109) “Proposed Works Schedule” is defined in Part 1 of Schedule 3 to this RFP;
- (110) “Rectification Notice” is defined in RFP Section 5.5(6)(a);
- (111) “Rectification Notice Response” is defined in RFP Section 5.5(6)(a);
- (112) “Relevant Negotiations Proponent” is defined in RFP Section 8.2(1).
- (113) “Reserve Prequalified Party” has the meaning provided in the RFQ;
- (114) “Restricted Person” means any person who, or any member of a group of persons acting together, any one of which:
- (a) has, directly or indirectly, its principal or controlling office in a country that is subject to any economic or political sanctions imposed by Canada or Ontario;
  - (b) has as its primary business the illegal manufacture, sale, distribution or promotion of narcotics substances or arms, or is or has been involved in terrorism;
  - (c) (i) is subject to a final order (including being subject to conditions or undertakings prescribed by the order) issued under Part IV.1 of the *Investment Canada Act* (Investments Injurious to National Security) that would prevent such person from undertaking the Project in whole or in part in a manner which the Sponsors consider unacceptable in their sole discretion or (ii) is currently, or could become, subject to a review of an investment by a non-Canadian under Part IV.1 of the *Investment Canada Act* (Investments Injurious to National Security) that could result in an order described in (i) being issued (as determined by the Sponsors in their sole discretion);
  - (d) in the case of an individual, he or she (or in the case of a legal entity, any members of its board of directors or its senior executive managers) has been sentenced to imprisonment or otherwise given a custodial sentence, other than a suspended sentence, for any criminal offence or for any offence under any Provincial statute, other than offences under the *Highway Traffic Act* (Ontario) or corresponding legislation in any other jurisdiction, or under any municipal laws, less than five years prior to the date at which the consideration of whether such individual is a “Restricted Person” is made hereunder;
  - (e) has as its primary business the acquisition of distressed assets or investments in companies or organizations which are or are believed to be insolvent or in a financial standstill situation or potentially insolvent;
  - (f) is subject to a material claim of the Sponsors or the Province under any proceedings (including regulatory proceedings) which have been concluded or are pending at the time at which the consideration of whether such person is a “Restricted Person” is made

hereunder, and which (in respect of any such pending claim, if it were to be successful) would, in the Sponsors' view, in either case, be reasonably likely to materially affect the ability of the Proponent to perform its obligations under the Project Agreement, if it were to become the successful Proponent under the RFP Process; or

- (g) has a material interest in the production of tobacco products;
- (115) "Revised Bonding Submission" is defined in RFP Section 4.2.1(3);
- (116) "RFI" is defined in RFP Section 3.2.2(1);
- (117) "RFP" is defined in RFP Section 1.1(1);
- (118) "RFP Data Sheet" means Schedule 1 to this RFP;
- (119) "RFP Documents" is defined in RFP Section 2.1;
- (120) "RFP Process" is defined in RFP Section 1.1(3);
- (121) "RFQ" is defined in RFP Section 1.2(1);
- (122) "Scheduled Visits" is defined in RFP Section 3.5.1(1);
- (123) "Second Negotiations Proponent" is defined in RFP Section 8.1(1)(b);
- (124) "Severe Market Disruption Event Date" is defined in RFP Section 10.3.2(1)(d)(i);
- (125) "Signing Parties" is defined in RFP Section 1.1(7);
- (126) "Sponsors" is defined in RFP Section 1.1(1) and means Infrastructure Ontario and the Client;
- (127) "Sponsors' Executive Ad Hoc Meeting" is defined in Schedule 2 – Proponent Consultation Process to this RFP;
- (128) "Submission Requirements" means all of the submission requirements set out in this RFP;
- (129) "Surety's Consent" is defined in RFP Section 4.2.1(1);
- (130) "Technical Submission" is defined in RFP Section 4.1(2)(a);
- (131) "Technical Submission Deadline" has the meaning given in RFP Section 3.1(1);
- (132) "Technical Submission Information" means the information contained in the Proponent's Technical Submission;
- (133) "Termination Notice" is defined in RFP Section 5.5(6)(b);
- (134) "Timetable" is defined in RFP Section 3.1(1); and
- (135) "Topic Meetings" is defined in Schedule 2 – Proponent Consultation Process to this RFP.



**APPENDIX A - EARLY CONTRACTOR ACTIVITIES**

The following Works shall constitute the Early Contractor Activities:

- (a) preparation, advancement, and submission of Works Submittals as contemplated under Schedule 10 – Review Procedure to the Project Agreement, including in particular those Works Submittals directly relevant to the critical path. The Relevant Negotiations Proponent and the Sponsors acknowledge and agree that they will apply the review procedure applicable to all Works Submittals pursuant to Sections 3, 4, 5, and 6 of Schedule 10 - Review Procedure to the Project Agreement to all Works Submittals submitted by the Relevant Negotiations Proponent to the Sponsors as part of the Early Contractor Activities, and provided that resolution of any Disputes in connection with such Works Submittals shall be deferred until after Financial Close has been achieved;
- (b) undertaking Design Review Meetings with the Sponsors, to the extent necessary to advance the design, as contemplated pursuant to, and in accordance with the requirements set out in, Section 11.3 of the Project Agreement;
- (c) performing any Utility Work, which can be undertaken pursuant to the terms of the Early Works Agreement and without direct access to any other portion of the Lands;
- (d) engaging with Utility Companies for the purposes of negotiating and entering into any Utility Agreement;
- (e) undertaking any activities in furtherance of obtaining and/or maintaining any Permits, Licenses, Approvals and Agreements which are designated the responsibility of Project Co pursuant to Appendix 1 – Permits, Licenses, Approvals and Agreements to Schedule 1 - Definitions and Interpretation to the Project Agreement;
- (f) undertaking negotiations to enter into any agreements with third party suppliers or subcontractors who may require extended lead-time to provide the goods or services necessary for completion of the Works;
- (g) mobilization activities, including:
  - (i) setting up any necessary trailers or other temporary structures on the as permitted pursuant to the Early Works Agreement;
  - (ii) mobilize necessary staff and equipment as permitted pursuant to the terms of the Early Works Agreement;
  - (iii) any necessary site preparation activities, including any required grading, clearing, demolition and removal of existing buildings or other structures (if applicable), and other similar activities, in each case as permitted pursuant to the terms of the Early Works Agreement;
- (h) construction and commissioning of the Site office, as permitted pursuant to the terms of the Early Works Agreement, and as described in Schedule 15 – Output Specifications to the Project Agreement;

- (i) any site investigation activities as may be necessary and as may be permitted pursuant to the terms of the Early Works Agreement; and
- (j) engaging with City of Toronto to the extent required in order to advance the Relevant Negotiation Proponent's design and obtaining all necessary Permits, Licenses, Approvals and Agreements.

**APPENDIX B – FORM OF EARLY WORKS AGREEMENT**

**EARLY WORKS AGREEMENT**

**THIS AGREEMENT** is made as of the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

**BETWEEN:**

**ONTARIO INFRASTRUCTURE AND LANDS CORPORATION**, a Crown agent, continued under the Ontario Infrastructure and Lands Corporation Act, 2011

**AND:**

**METROLINX**, a non-share capital corporation continued under the Metrolinx Act, 2006, S.O. 2006, c. 16 and a Crown agency within the meaning of the Crown Agency Act, R.S.O. 1990, c. 48, as amended in accordance with section 3 of the Metrolinx Act, 2006 (Ontario)

(collectively, “**Contracting Authority**”)

**AND:**

[•]

(the “**Relevant Negotiations Proponent**”)

**[Note to Proponents: Contracting Authority may require the Proponent and one or more Proponent Team Members or equity providers to execute this Agreement.]**

**AND:**

[•], a corporation incorporated under the laws of [Ontario]

(the “**Construction Contractor**”)

**[Note to Proponents: Construction Contractor may be a corporation, a limited partnership or a general partnership, in each case formed under the laws of any Canadian jurisdiction and otherwise acceptable to Contracting Authority]**

**RECITALS:**

- A. Pursuant to RFP Reference Number 20-002 issued August 20, 2020 (the “**RFP**”) by Contracting Authority, the Relevant Negotiations Proponent was selected as the Relevant Negotiations Proponent (as defined in the RFP) to enter into a project agreement with Contracting Authority, substantially in the form of the draft project agreement identified as version [•] and dated [•] (the “**Referenced Project Agreement**”) for the design, construction and financing of the Advance Tunnel for Scarborough Subway Extension (the “**Project**”).

- B. Pursuant to the RFP, the Relevant Negotiations Proponent may elect to undertake and perform certain activities forming part of Works prior to Financial Close at its own cost and risk.
- C. The Relevant Negotiations Proponent has elected to undertake and perform certain activities forming part of the Works prior to Financial Close as described herein, and has agreed to do pursuant to and in accordance with the terms and provisions of this Early Works Agreement.

**NOW THEREFORE** in consideration of the mutual promises and agreements of the Parties herein expressed and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties covenant and agree as follows:

## 1. Definitions

Unless otherwise specified or the context otherwise requires, capitalized but otherwise undefined terms in this Agreement will have the respective meanings given to such terms in the Project Agreement:

- (a) “**Applicable Law**” has the meaning given in the Referenced Project Agreement.
- (b) “**Business Day**” has the meaning given in the Referenced Project Agreement.
- (c) “**Commercial Close**” means the date of execution of the Referenced Project Agreement.
- (d) “**Completed Value(s)**” has the meaning given in Section 10(a)(i).
- (e) “**Construction Contractor**” means [●].
- (f) “**Contract Price**” means \$[●].
- (g) “**Contracting Authority Representative**” means [●] or such other person designated by Contracting Authority and notified in writing to the Relevant Negotiations Proponent.
- (h) “**Direct Losses**” has the meaning given in the Referenced Project Agreement.
- (i) “**Documents**” means all drawings (including as built drawings), plans, specifications, manuals, records, calculations and all other documents and all revisions and additions to the same, and the designs contained in them, prepared or to be prepared by or on behalf of the Relevant Negotiations Proponent in respect of the Early Works.
- (j) “**Early Works**” has the meaning given in Section 3.
- (k) “**Early Works Lands**” means those Lands described in rows 83, 84 and 85 of Part B of Schedule 20 – Lands to the Referenced Project Agreement.
- (l) “**Early Works Schedule**” has the meaning given in Section 3(a)(ii).
- (m) “**Element**” means one of the elements of the Early Works, as described in Appendix C to this Early Works Agreement.

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- (n) “**Existing Infrastructure**” has the meaning given in the Referenced Project Agreement.
  - (o) “**Financial Close**” has the meaning given in the Referenced Project Agreement.
  - (p) “**Financial Close Target Date**” means [●], as such date may be extended by agreement of the Parties or otherwise in accordance with the provisions of the Referenced Project Agreement.
  - (q) “**Governmental Authority**” has the meaning given in the Referenced Project Agreement.
  - (r) “**Indirect Losses**” has the meaning given in the Referenced Project Agreement.
  - (s) “**Insolvency Event**” has the meaning given in Section 9(d).
  - (t) “**Lands**” has the meaning given in the Referenced Project Agreement.
  - (u) “**Minor Deficiencies**” has the meaning given in the Referenced Project Agreement, *mutatis mutandis*.
  - (v) “**Party**” means Contracting Authority, the Construction Contractor or the Relevant Negotiations Proponent, and “**Parties**” means the Contracting Authority, the Construction Contractor, and the Relevant Negotiations Proponent.
  - (w) “**Payment Compensation Amount**” has the meaning given in the Project Agreement.
  - (x) “**Referenced Project Agreement**” has the meaning given in Recital A.
  - (y) “**Relevant Negotiations Proponent**” means [●].
  - (z) “**Relevant Negotiations Proponent’s Claim**” has the meaning given in Section 11(b).
  - (aa) “**Province Person**” has the meaning given in the Referenced Project Agreement.
  - (bb) “**Site**” has the meaning given in the Referenced Project Agreement.
  - (cc) “**Variation**” has the meaning given in the Referenced Project Agreement.
  - (dd) “**Works**” has the meaning given in the Referenced Project Agreement.

## 2. Interpretation

- (a) In the event that anything set out herein is inconsistent with Section 8.2 of the RFP, this Early Works Agreement shall prevail. Subject to the foregoing sentence, this Early Works Agreement shall be interpreted according to the following provisions, unless the context requires a different meaning:
  - (i) The headings in this Early Works Agreement are for convenience of reference only, shall not constitute a part of this Early Works Agreement, and shall not be taken into



consideration in the interpretation of, or affect the meaning of, this Early Works Agreement.

- (ii) Unless the context otherwise requires, references to specific Sections, Paragraphs, Subparagraphs, and other divisions are references to such Sections, Paragraphs, Subparagraphs, or divisions of this Early Works Agreement and the terms “Section” and “Clause” are used interchangeably and are synonymous.
- (iii) Words importing persons or parties are to be broadly interpreted and include an individual, corporation, firm, partnership, joint venture, trust, unincorporated organization, Governmental Authority, unincorporated body of persons or association and any other entity having legal capacity, and the heirs, beneficiaries, executors, administrators or other legal representatives of a person in such capacity.
- (iv) Unless the context otherwise requires, wherever used herein the plural includes the singular, the singular includes the plural, and each of the masculine, feminine and neuter genders include all other genders.
- (v) References to any standard, principle, agreement or document include (subject to all relevant approvals and any other provisions of this Early Works Agreement concerning amendments) a reference to that standard, principle, agreement or document as amended, supplemented, restated, substituted, replaced, novated or assigned.
- (vi) The words in this Early Works Agreement shall bear their natural meaning.
- (vii) References containing terms such as:
  - A. “hereof”, “herein”, “hereto”, “hereinafter”, and other terms of like import are not limited in applicability to the specific provision within which such references are set forth but instead refer to this Early Works Agreement taken as a whole; and
  - B. “includes” and “including”, whether or not used with the words “without limitation” or “but not limited to”, shall not be deemed limited by the specific enumeration of items but shall, in all cases, be deemed to be without limitation and construed and interpreted to mean “includes without limitation” and “including without limitation”.
- (viii) In construing this Early Works Agreement, the rule known as the *ejusdem generis rule* shall not apply nor shall any similar rule or approach to the construction of this Early Works Agreement and, accordingly, general words introduced or followed by the word “other” or “including” or “in particular” shall not be given a restrictive meaning because they are followed or preceded (as the case may be) by particular examples intended to fall within the meaning of the general words.

- (ix) Where this Early Works Agreement states that an obligation shall be performed “no later than” or “within” or “by” a stipulated date or event which is a prescribed number of days after a stipulated date or event, the latest time for performance shall be 5:00 p.m. on the last day for performance of the obligation concerned, or, if that day is not a Business Day, 5:00 p.m. on the next Business Day.
- (x) Where this Early Works Agreement states that an obligation shall be performed “on” a stipulated date, the latest time for performance shall be 5:00 p.m. on that day, or, if that day is not a Business Day, 5:00 p.m. on the next Business Day.
- (xi) Any reference to time of day or date means the local time or date in Toronto, Ontario.
- (xii) Unless otherwise indicated, time periods will be strictly construed.
- (xiii) Whenever the terms “will” or “shall” are used in this Early Works Agreement they shall be construed and interpreted as synonymous and to read “shall”.
- (xiv) Unless otherwise notified in writing, the Relevant Negotiations Proponent shall be entitled to treat any act of the Contracting Authority Representative which is authorized by this Early Works Agreement as being authorized by Contracting Authority, and the Relevant Negotiations Proponent shall not be required to determine whether authority has in fact been given.

### 3. Performance of the Early Works

- (a) Contracting Authority hereby retains the Relevant Negotiations Proponent to perform the work described in Appendix A – Description of Early Works to this Early Works Agreement, as the same may be modified from time to time pursuant to this Agreement (the “**Early Works**”), and the Relevant Negotiations Proponent agrees to and shall perform the Early Works in accordance with:
  - (i) the relevant requirements of the Referenced Project Agreement in respect of the Works as they pertain to the Early Works, including for clarity, but not limited to, Section 11.11 of the Referenced Project Agreement, and all applicable provisions of Schedule 15 – Output Specifications to the Referenced Project Agreement, each of which, solely for the purposes of this Early Works Agreement and the Early Works, will apply *mutatis mutandis* as if the Relevant Negotiations Proponent is Project Co under the Referenced Project Agreement and will be interpreted to be in full force and effect without conditions precedent as of the date of this Early Works Agreement; and
  - (ii) the Interim Schedule submitted by the Relevant Negotiations Proponent pursuant to the requirements of Part 1 – Technical Submission Requirements of Schedule 3 of the RFP, a copy of which is out in Appendix B – Early Works Schedule to this Early Works Agreement, as the same may be varied from time to time with the agreement of Contracting Authority and the Relevant Negotiations Proponent, each acting reasonably (the “**Early Works Schedule**”).

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- (b) The Relevant Negotiations Proponent represents and warrants that the Early Works Schedule accurately sets out the periods during which the Early Works are anticipated to be performed as at the date hereof.
  - (c) Without prejudice to anything else contained herein or set out in the Referenced Project Agreement requiring the Relevant Negotiations Proponent to comply with Applicable Law, the Relevant Negotiations Proponent shall at all times comply with the provisions of the *Construction Act* (Ontario) in performing its obligations hereunder.

#### **4. Access to Site**

- (a) Contracting Authority hereby grants to the Relevant Negotiations Proponent such access to the Early Works Lands as the Relevant Negotiations may reasonably require to carry out the Early Works in accordance with this Early Works Agreement. The access granted shall be subject to the requirements and restrictions pertaining to the Site and/or Lands set out in the Referenced Project Agreement and the Relevant Negotiations Proponent shall not use the Early Works Lands, or any other portion of the Site and/or Lands for any purpose other than the Early Works without the prior written approval of Contracting Authority.
- (b) For clarity, the Relevant Negotiations Proponent shall not be permitted to access any portion of the Lands or the Site, other than the Early Works Lands, during the term of this Early Works Agreement.

#### **5. Financial Close**

- (a) If and when Financial Close is achieved, the Referenced Project Agreement shall supersede and replace this Early Works Agreement. Without prejudice to the generality of the foregoing, any part of the Early Works performed by the Relevant Negotiations Proponent under and in accordance with this Early Works Agreement shall be treated as having been performed under and in accordance with the Referenced Project Agreement, and Contracting Authority's payment obligations related to that part of the Early Works will be those under the Referenced Project Agreement and not under this Early Works Agreement.

#### **6. No Liability to Contracting Authority**

- (a) Save as to any payments which may become due pursuant to and in accordance with Section 10 or Section 14, Contracting Authority shall have no liability to the Relevant Negotiations Proponent or the Construction Contractor whatsoever, whensoever and howsoever arising out of or in connection with the Early Works and/or the conditions of this Early Works Agreement.
- (b) No approval, instruction or comment by Contracting Authority or by Contracting Authority Representative in connection with the Early Works shall discharge, release or diminish any obligation and/or liability of the Relevant Negotiations Proponent or the Construction Contractor under this Early Works Agreement or give rise to any liability to the Relevant Negotiations Proponent or the Construction Contractor on the part of Contracting Authority.

**7. Relevant Negotiations Proponent to Perform at Own Cost**

- (a) Without prejudice to the generality of Section 6, the Relevant Negotiations Proponent shall perform the Early Works entirely at its own cost (save as to any payments which may become due pursuant to and in accordance with Section 10 or Section 14) and risk, and any consequences of such performance (or any failure in or of such performance) for the manner and timing of the performance of the Early Works shall be entirely at the cost and risk of the Relevant Negotiations Proponent.
- (b) For the avoidance of doubt, the Relevant Negotiations Proponent shall be responsible for any and all costs it incurs as a result of funding the Early Works, which costs, for clarity, shall have formed part of the Relevant Negotiations Proponent's overall bid costs as referenced in Section 3.10 of the RFP.

**8. Insurance**

- (a) The Relevant Negotiations Proponent has taken out the insurance policies described in Appendix D in the amounts and on the terms stated in Appendix D and has delivered to Contracting Authority the certificates of insurance pertaining to said insurance policies prior to the execution of this Early Works Agreement. The Relevant Negotiations Proponent shall maintain said insurance policies in good standing throughout the term of this Early Works Agreement.

**9. Termination of Early Works Agreement**

- (a) Contracting Authority reserves the right (at any time and for any reason) to terminate this Early Works Agreement forthwith by service of written notice to this effect upon the Relevant Negotiations Proponent.
- (b) In the event that:
  - (i) Financial Close has not been achieved by the Financial Close Target Date; or
  - (ii) Contracting Authority Representative notifies the Relevant Negotiations Proponent, in writing, that Contracting Authority reasonably considers that Financial Close will not be achieved by the Financial Close Target Date,

Contracting Authority may at any time terminate this Early Works Agreement by written notice to the Relevant Negotiations Proponent having immediate effect.

- (c) In the event that the Relevant Negotiations Proponent:
  - (i) is in material breach of its obligations, duties or responsibilities under this Early Works Agreement; or

- (ii) wholly abandons the Early Works for a period which exceeds 3 Business Days from receipt by the Relevant Negotiations Proponent of a written request from Contracting Authority to return to the Site,

Contracting Authority Representative shall give to the Relevant Negotiations Proponent a written notice specifying the breach. If the Relevant Negotiations Proponent does not rectify the specified breach within 30 days of receipt of such notice then Contracting Authority Representative may serve a further written notice on the Relevant Negotiations Proponent terminating this Early Works Agreement with immediate effect.

- (d) In the event that the Relevant Negotiations Proponent or the Construction Contractor:
  - (i) makes a composition or arrangement with or for the benefit of its creditors (including a voluntary arrangement);
  - (ii) has a receiver, administrator, administrative receiver, provisional liquidator or other encumbrancer appointed (and not being the subject of challenge by the Relevant Negotiations Proponent or the Construction Contractor, as the case may be) over the whole or any material part of its assets; or
  - (iii) has a petition presented (and not being the subject of challenge by the Relevant Negotiations Proponent or the Construction Contractor, as the case may be) or a resolution passed or an order made for the administration or the winding-up, bankruptcy or dissolution of the Relevant Negotiations Proponent,

(each, an “**Insolvency Event**”) Contracting Authority may, at any time, terminate this Early Works Agreement by written notice to the Relevant Negotiations Proponent or the Construction Contractor, as the case may be, having immediate effect.

## 10. Compensation on Termination

- (a) In the event that this Early Works Agreement is terminated under Section 9(b), Contracting Authority shall, subject to Section 10(d), pay to the Relevant Negotiations Proponent the aggregate of:
  - (i) the amount(s) set out in Appendix C to this Early Works Agreement, as adjusted by any agreed Variations to the Early Works (the “**Completed Value**”), in respect of the Elements which have been completed prior to the date of termination less the reasonably estimated cost of rectifying any Minor Deficiencies identified in respect of such Elements, which have not been completed as at the date of termination of this Early Works Agreement;
  - (ii) in respect of those Elements which have not been completed at the date of termination of this Early Works Agreement, the value of work undertaken as at the date of termination in respect of such Elements provided that such value shall not exceed the relevant Completed Value(s);

- (iii) such of the sub-contractor or order cancellation charges set out in Appendix C to this Early Works Agreement as have been incurred by the Relevant Negotiations Proponent as a result of such termination; and
- (iv) the cost of materials and goods reasonably and properly ordered for the Early Works for which the Relevant Negotiations Proponent has paid or for which the Relevant Negotiations Proponent is legally bound to pay (provided that on such payment in full by Contracting Authority such goods and materials shall become the property of Contracting Authority),

provided that there shall be no double counting between Sections 10(a)(i) to (iv).

- (b) In the event that this Early Works Agreement is terminated under Section 9(a), Contracting Authority shall, subject to Section 10(d), pay to the Relevant Negotiations Proponent the aggregate of:

- (i) the amounts referred to in Section 10(a);
- (ii) any demobilization costs reasonably and properly incurred by the Relevant Negotiations Proponent, up to a maximum of \$25,000;
- (iii) any Direct Losses; and
- (iv) any loss of profit, up to a maximum of \$50,000,

provided there shall be no double counting between Sections 10(b)(i) to (iv).

- (c) In the event that this Early Works Agreement is terminated under Sections 9(c) or 9(d), Contracting Authority shall, subject to Section 10(d), pay to the Relevant Negotiations Proponent the aggregate of the amounts referred to in Section 10(a) less the aggregate of:

the amount of any costs reasonably and properly incurred (or to be incurred) by

- (i) Contracting Authority in completing the Early Works; and
- (ii) any Direct Losses caused to Contracting Authority as a result of the termination,

provided that in the event that such calculation results in a negative amount, the Relevant Negotiations Proponent shall pay such amount to Contracting Authority.

- (d) Contracting Authority's maximum financial commitment under this Early Works Agreement and its total aggregate liability to make payment under Sections 10(a), 10(b) and 10(c), as the case may be, shall be limited in all circumstances to the Contract Price, as adjusted by the value of any agreed Variations to the Early Works, and Contracting Authority shall have no liability to make any payment to the Relevant Negotiations Proponent in excess of the Contract Price, regardless of how any further sums are calculated or constituted.

**11. Payment of Termination Amount**

- (a) Either party may set off against any amount due from such party any amount due from the other party under or for breach of the terms of this Early Works Agreement.
- (b) Within 15 Business Days of the date of termination of the performance of the Early Works, the Relevant Negotiations Proponent shall provide to Contracting Authority Representative full details of the amounts which it believes to be due to the Relevant Negotiations Proponent pursuant to Section 10 and the basis for their calculation, together with such supporting documentation as may be necessary to verify such amounts (the “**Relevant Negotiations Proponent’s Claim**”).
- (c) Within 5 Business Days of receipt of such the Relevant Negotiations Proponent’s Claim, Contracting Authority Representative may request that the Relevant Negotiations Proponent provide such further details and supporting documentation as it may reasonably require to verify the amount due to the Relevant Negotiations Proponent pursuant to Section 10.
- (d) The amounts due to the Relevant Negotiations Proponent pursuant to Section 10, and the basis for their calculation, shall be notified to the Relevant Negotiations Proponent by Contracting Authority Representative within 5 Business Days of receipt of such further details and supporting documentation or (if no such details have been requested by Contracting Authority Representative) within 5 Business Days of receipt of the Relevant Negotiations Proponent’s Claim, and the Relevant Negotiations Proponent shall then submit to Contracting Authority Representative a full invoice for such amounts.
- (e) Within 30 days following receipt of such invoice, Contracting Authority will, pay such amounts to the Relevant Negotiations Proponent or, in the event that the Relevant Negotiations Proponent suffers an Insolvency Event, directly to the Construction Contractor.
- (f) In the event that, notwithstanding the termination of this Early Works Agreement, Financial Close is subsequently achieved, Contracting Authority’s liability to make payment pursuant to Section 10 shall cease, and the Relevant Negotiations Proponent shall repay any amounts paid by Contracting Authority pursuant to this Early Works Agreement to Contracting Authority within 60 days of Financial Close. Relevant Negotiations Proponent shall indemnify Contracting Authority for damages suffered or incurred on account of any payment not duly made by Relevant Negotiations Proponent pursuant to the terms of the Referenced Project Agreement on the due date, by payment of an amount equal to the Payment Compensation Amount calculated from day to day at a rate per annum from the day after the date on which payment was due, up to and including the date of payment.

**12. Post-Termination Transition**

- (a) Upon termination of the Early Works pursuant to Section 9, the Relevant Negotiations Proponent shall forthwith cease the performance of the Early Works in a proper and orderly manner and:

- (i) within 5 Business Days, the Relevant Negotiations Proponent shall vacate the Lands and the Site and remove therefrom in a proper and orderly manner all waste materials and site accommodation, plant and machinery used in or arising out of the Early Works, and shall leave the Site in a clean, tidy and safe condition;
- (ii) ownership of all completed permanent work and goods and materials comprised in the Early Works shall pass to Contracting Authority; and
- (iii) the Relevant Negotiations Proponent shall deliver to Contracting Authority Representative such of the Documents as are then in the possession of the Relevant Negotiations Proponent.

### **13. Relevant Negotiations Proponent and Construction Contractor Indemnity**

- (a) The Relevant Negotiations Proponent and the Construction Contractor agree, jointly and severally, to indemnify Contracting Authority and the Province Persons and each of their respective directors, officers, employees, agents and representatives against all losses, damages, costs, claims, expenses or liabilities incurred in respect of any death or personal injury or damage to real or personal property (including the Lands, Site, the Early Works and the Existing Infrastructure) (save for any Indirect Losses incurred by Contracting Authority) arising out of or in connection with or by reason of the execution of the Early Works pursuant to this Early Works Agreement, save to the extent caused by any breach of this Early Works Agreement by Contracting Authority, or by any deliberate or negligent act or omission of Contracting Authority or any Province Person.

### **14. Ministry Indemnity**

- (a) Contracting Authority agrees to indemnify the Relevant Negotiations Proponent and the Construction Contractor against all losses, damages, costs, claims, expenses or liabilities incurred in respect of any death or personal injury or damage to real or personal property (save for any Indirect Losses incurred by the Relevant Negotiations Proponent and the Construction Contractor) arising out of or in connection with or by reason of a breach of this Early Works Agreement by Contracting Authority, save to the extent caused by any breach of this Early Works Agreement or the performance of the Early Works by the Relevant Negotiations Proponent or the Construction Contractor or their respective directors, officers, employees, agents, subcontractors and representatives, or by any deliberate or negligent act or omission of the Relevant Negotiations Proponent or the Construction Contractor.

### **15. Notices**

- (a) All notices, requests, demands, instructions, certificates, consents and other communications (each being a “**Notice**”) required or permitted under this Early Works Agreement shall be in writing (whether or not “written notice” or “notice in writing” is specifically required by the applicable provision of this Early Works Agreement) and served by sending the same by registered mail or by hand or transmitted by electronic transmission to the address or electronic mail address as follows:



If to the Relevant Negotiations Proponent: [●]

E-mail: [●]

Fax: [●]

Attn.: [●]

If to the Construction Contractor: [●]

E-mail: [●]

Fax: [●]

Attn.: [●]

If to Contracting Authority: Ontario Infrastructure and Lands Corporation  
1 Dundas Street West, 20th Floor  
Toronto, Ontario  
M5G 1Z3  
Attn.: [●]  
Email: notices@infrastructureontario.ca

With a copy to: [●]

[Address]

Attn: [●]

Email: [●]

## 16. Electronic Transmission

- (a) Where any Notice is provided or submitted to a Party via electronic transmission, an original of the Notice sent via electronic transmission shall promptly be sent by regular mail or registered mail. For greater certainty, a Notice given via electronic transmission shall not be invalid by reason only of a Party's failure to comply with this Section 16.

## 17. Change of Address

- (a) Either Party to this Early Works Agreement may, from time to time, change any of its contact information set forth in Section 15 by prior Notice to the other Party, and such change shall be effective on the Business Day that next follows the recipient Party's receipt of such Notice unless a later effective date is given in such Notice.

## 18. Deemed Receipt of Notices

- (a) Subject to Sections 18(b) and 18(c):
- (i) a Notice given by registered mail shall be deemed to have been received on the third Business Day after mailing;

- (ii) a Notice given by hand delivery shall be deemed to have been received on the day it is delivered; and
  - (iii) a Notice given by electronic transmission shall be deemed to have been received on the day it is transmitted by electronic transmission.
- (b) If the Party giving the Notice knows or ought reasonably to know of difficulties with the postal system which might affect negatively the delivery of mail, any such Notice shall not be mailed but shall be made or given by personal delivery or by electronic transmission in accordance with Section 17.
  - (c) If any Notice delivered by hand or transmitted by electronic transmission is so delivered or transmitted, as the case may be, either on a day that is not a Business Day or on a Business Day after 4:00 p.m. (recipient's local time), then such Notice shall be deemed to have been received by such recipient on the next Business Day.

## **19. Amendments**

- (a) This Early Works Agreement may not be varied, amended or supplemented except by an agreement in writing signed by duly authorized representatives of the Parties and stating on its face that it is intended to be an amendment, restatement or other modification, as the case may be, to this Early Works Agreement.

## **20. Waiver**

- (a) No waiver made or given by a Party under or in connection with this Early Works Agreement shall be binding or effective unless the waiver is in writing, signed by an authorized representative of the Party giving such waiver, and delivered by such Party to the other Parties. No waiver made with respect to any right, power or remedy in one instance will be deemed to be a waiver with respect to any other instance involving the exercise of such right, power, or remedy or with respect to any other right, power, or remedy.
- (b) Failure by any Party to exercise any of its rights, powers or remedies hereunder or its delay to do so shall not constitute a waiver of those rights, powers or remedies. The single or partial exercise of a right, power or remedy shall not prevent its subsequent exercise or the exercise of any other right, power or remedy.

## **21. Relationship Between the Parties**

- (a) The Parties are independent contractors. This Early Works Agreement is not intended to and does not create or establish between the Parties any relationship as partners, joint venturers, employer and employee, master and servant, or principal and agent.

**22. Joint and Several Liability**

- (a) Each of [●] and [●] covenant and agree that they shall be jointly and severally liable for and in respect of their obligations pursuant to this Agreement. *[Note to Proponents: Contracting Authority may require the Proponent and one or more Proponent Team Members or equity providers to execute this Agreement.]*

**23. Entire Agreement**

- (a) Except where provided otherwise in this Early Works Agreement, this Early Works Agreement and the Referenced Project Agreement constitute the entire agreement between the Parties in connection with the subject matter of this Early Works Agreement and supersede all prior representations, communications, negotiations and understandings, whether oral, written, express or implied, concerning the subject matter of this Early Works Agreement.
- (b) Contracting Authority is not obligated in any way by the terms of this Early Works Agreement to proceed to Commercial Close or Financial Close or to proceed with the procurement of the Project.

**24. Severability**

- (a) Each provision of this Early Works Agreement shall be valid and enforceable to the fullest extent permitted by law. If any provision of this Early Works Agreement is declared invalid, unenforceable or illegal by the courts of a competent jurisdiction, such provision may be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Early Works Agreement. If any such provision of this Early Works Agreement is invalid, unenforceable or illegal, the Parties shall, acting in good faith, promptly negotiate new provisions to eliminate such invalidity, unenforceability or illegality and to restore this Early Works Agreement as near as possible to its original intent and effect.

**25. No Assignment**

- (a) Neither the Relevant Negotiations Proponent nor the Construction Contractor shall assign or transfer all or any part of its rights obligations under this Early Works Agreement without the prior consent of Contracting Authority. Contracting Authority may assign or otherwise dispose of the benefit of the whole or part of this Early Works Agreement to any person to whom Contracting Authority may assign or otherwise dispose of its interest in the Referenced Project Agreement pursuant to Section 59.2 of the Referenced Project Agreement.

**26. Confidentiality**

- (a) The Relevant Negotiations Proponent shall comply with all the obligations incumbent upon Project Co under Section 42 of the Referenced Project Agreement, the provisions of which are incorporated into this Early Works Agreement, *mutatis mutandis*.

**27. Remedies Cumulative**

- (a) The rights and remedies under this Early Works Agreement are cumulative and are in addition to and not in substitution for any other rights and remedies available at law or in equity or otherwise. No single or partial exercise by a Party of any right or remedy precludes or otherwise affects the exercise of any other right or remedy to which that Party may be entitled.

**28. Enurement**

- (a) This Early Works Agreement shall enure to the benefit of, and be binding on, each of the Parties and their respective successors and permitted transferees and assigns.

**29. Governing Law and Jurisdiction**

- (a) This Early Works Agreement shall be governed by and construed in accordance with the laws of Ontario and the laws of Canada applicable therein and shall be treated in all respects as an Ontario contract, without regard to conflict of laws principles.
- (b) The Parties agree that the courts of the Province of Ontario and all courts competent to hear appeals therefrom shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Early Works Agreement and hereby irrevocably attorn to the exclusive jurisdiction of such courts.

**30. Further Assurance**

- (a) Each Party shall do all things, from time to time, and execute all further documents necessary to give full effect to this Early Works Agreement.

**31. Language of Agreement**

- (a) Each Party acknowledges having requested and being satisfied that this Early Works Agreement and related documents be drawn in English. Chacune des parties reconnait avoir demande que ces documents soient rediges en anglais et s'en declare satisfaite.

**32. Proof of Authority**

- (a) Contracting Authority reserves the right to require any person executing this Early Works Agreement on behalf of the Relevant Negotiations Proponent or the Construction Contractor to provide proof, in a form acceptable to Contracting Authority, that such person has the requisite authority to execute this Early Works Agreement on behalf of and to bind the Relevant Negotiations Proponent or the Construction Contractor, respectively.

**33. Counterparts**

- (a) This Early Works Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the Parties shall constitute a

full, original and binding agreement for all purposes. Counterparts may be executed either in original or electronically transmitted form provided that any Party providing its signature in electronically transmitted form shall promptly forward to such Party an original signed copy of this Early Works Agreement which was so electronically transmitted.

IN WITNESS WHEREOF the Parties have executed this Early Works Agreement as of the date first above written.

**ONTARIO INFRASTRUCTURE AND  
LANDS CORPORATION**, a Crown agent,  
continued under the *Ontario Infrastructure and  
Lands Corporation Act, 2011*

By:

Name:  
Title:

By:

Name:  
Title:

I/We have authority to bind the corporation.

**METROLINX**

By:

Name:  
Title:

By:

Name:  
Title:

I/We have authority to bind the corporation.

**[RELEVANT NEGOTIATIONS  
PROPONENT]**

By:

Name:

Title:

By:

Name:

Title:

**[CONSTRUCTION CONTRACTOR]**, a  
corporation incorporated under the laws of [●]  
(the “**Construction Contractor**”)

By:

Name:

Title:

By:

Name:

Title:

I/We have authority to bind the corporation.

## SCHEDULE A

### DESCRIPTION OF EARLY WORKS

- (1) The following Works shall constitute the Early Works:
- (a) preparation, advancement, and submission of Works Submittals as contemplated under Schedule 10 – Review Procedure to the Referenced Project Agreement, including in particular those Works Submittals directly relevant to the critical path. The Relevant Negotiations Proponent and the Sponsors acknowledge and agree that they will apply the review procedure applicable to all Works Submittals pursuant to Sections 3, 4, 5, and 6 of Schedule 10 - Review Procedure to the Referenced Project Agreement to all Works Submittals submitted by the Relevant Negotiations Proponent to the Sponsors as part of the Early Works, and provided that resolution of any Disputes in connection with such Works Submittals shall be deferred until after Financial Close has been achieved;
  - (b) undertaking Design Review Meetings with the Sponsors, to the extent necessary to advance the design, as contemplated pursuant to, and in accordance with the requirements set out in, Section 11.3 of the Referenced Project Agreement;
  - (c) performing any Utility Work, which can be undertaken on the Early Works Lands and without direct access to any other portion of the Lands;
  - (d) engaging with Utility Companies for the purposes of negotiating and entering into any Utility Agreement;
  - (e) undertaking any activities in furtherance of obtaining and/or maintaining any Permits, Licenses, Approvals and Agreements which are designated the responsibility of Project Co pursuant to Appendix 1 – Permits, Licenses, Approvals and Agreements to Schedule 1 - Definitions and Interpretation to the Referenced Project Agreement;
  - (f) undertaking negotiations to enter into any agreements with third party suppliers or subcontractors who may require extended lead-time to provide the goods or services necessary for completion of the Works;
  - (g) mobilization activities, including:
    - (i) setting up any necessary trailers or other temporary structures on the Early Works Lands;
    - (ii) mobilize necessary staff and equipment to and on the Early Works Lands;
    - (iii) any necessary site preparation activities, including any required grading, clearing, demolition and removal of existing buildings or other structures (if applicable), and other similar activities, in each case on and not beyond the Early Works Lands;
  - (h) construction and commissioning of the Site office on the Early Works Lands, as described in Section [●] of Schedule 15 – Output Specifications to the Referenced Project Agreement;



- (i) any site investigation activities as may be necessary on Early Works Lands; and
- (j) engaging with City of Toronto to the extent required in order to advance the Relevant Negotiation Proponent's design and obtaining all necessary Permits, Licenses, Approvals and Agreements.

**SCHEDULE B**

**EARLY WORKS SCHEDULE**

*[Note to Proponents: To be developed based on the Relevant Negotiations Proponent's RFP Submission.]*

**SCHEDULE C**

**SCHEDULE OF COMPLETED VALUE(S)**

*[Note to Proponents: To be developed based on the Relevant Negotiations Proponent's RFP Submission.]*

**SCHEDULE D**

**INSURANCES**

*[Note to Proponents: Insurance requirements will be provided by Addendum.]*

**SCHEDULE A TO APPENDIX D EARLY WORKS AGREEMENT INSURANCE  
REQUIREMENTS**

**Insurances to be provided, or caused to be provided, by the Relevant Negotiations Proponent:**

*[Note to Proponents: Insurance requirements will be provided by Addendum.]*