

## LENDER'S DIRECT AGREEMENT

THIS LENDER'S DIRECT AGREEMENT is made as of the 4<sup>th</sup> day of October, 2007

**BETWEEN:**

**BLUEWATER HEALTH**, a non-share capital corporation incorporated under the laws of the Province of Ontario

("Hospital")

**AND:**

**PACIFIC & WESTERN BANK OF CANADA**, a Canadian chartered bank in its capacity as Lender

**AND:**

[REDACTED] **ELLISDON HEALTHCARE INC.**, [REDACTED]

("Project Co")

**AND:**

**ELLISDON CORPORATION**, a corporation incorporated under the laws of Ontario

("Contractor")

**WHEREAS:**

- A. Hospital, Project Co and Contractor have entered into a project agreement dated as of August 29, 2007 (the "**Project Agreement**").
- B. Project Co has entered into the Construction Contract in the capacity of "Owner" with Contractor with respect to the Project.
- C. Project Co has under the Limited Assignment of Construction Contract assigned its rights and obligations as "Owner" under the Construction Contract to Hospital, save and except in respect to the obligation to pay any of the Base Progress Payments (the "**Retained Payment Obligation**").
- D. Under the Limited Assignment of Construction Contract, Hospital has acknowledged the right of Lender as against Contractor to enforce or to terminate the Construction Contract under PART 7 – DEFAULT NOTICE (the "**Enforcement Rights**").
- E. Under the Lending Agreements, the Financing is to be provided to Project Co by Lender to finance the payment of the Base Progress Payments to Contractor under the

Construction Contract, conditional, among other things, on Project Co executing and delivering the Lending Agreements.

- F. Lender has agreed to enter into this Lender's Direct Agreement with Hospital, Project Co and Contractor in relation to the Lending Agreements, the exercise of its rights under the Lending Agreements and the remedying of breaches by Project Co under the Project Agreement and by Contractor under the Construction Contract.
- G. Contractor, Project Co and Lender recognize and understand that Hospital is a public hospital under the *Public Hospitals Act* (Ontario) and is therefore subject to a highly regulated legal and operational environment.
- H. Hospital has been authorized to execute this Lender's Direct Agreement by the MOHLTC (it being acknowledged by the parties to this Lender's Direct Agreement that such authorization in no way obligates the Government of Ontario or the Province under this Lender's Direct Agreement or otherwise in respect of the Project).

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

#### **ARTICLE 1 - DEFINITIONS AND INTERPRETATION**

- 1.1** In this Lender's Direct Agreement, all capitalized terms not otherwise defined in this Lender's Direct Agreement shall have the meanings ascribed to them in the Project Agreement and unless the context otherwise requires:
- (a) **"Appointed Representative"** means any of the following to the extent so identified in an Appointed Representative Notice:
    - (i) Lender or any Affiliate of either of them;
    - (ii) a receiver or manager or any permutation thereof of Project Co appointed under the Lending Agreements;
    - (iii) a Person directly or indirectly owned or controlled by Lender; or
    - (iv) any other Person approved by Hospital (such approval not to be unreasonably withheld or delayed).
  - (b) **"Appointed Representative Notice"** has the meaning given to it in Section 7.2.
  - (c) **"Article"** and **"Section"** mean and refer to the specified article and section or subsection of this Lender's Direct Agreement.
  - (d) **"Base Progress Payments"** has the meaning given to it in the Construction Contract.

- (e) **“Compensation Payment”** has the meaning given to it in the Limited Assignment of Construction Contract.
- (f) **“Construction Contract”** means the Guaranteed Price Contract entered into between Project Co in the capacity of "Owner" and Contractor with respect to the Project as assigned to Hospital in accordance with the Limited Assignment of Construction Contract.
- (g) **“Construction Contract Assignment”** means an assignment of the Construction Contract by an Appointed Representative to a Replacement Contractor as contemplated in Section 7.3.
- (h) **“Construction Default Notice”** has the meaning given to it in Section 6.1.
- (i) **“Construction Event of Default”** means the occurrence of an event under the Construction Contract that upon the expiry of any cure periods provided for therein would entitle Hospital to terminate the Construction Contract.
- (j) **“Construction Insurance”** means the insurance contemplated under GC 11.1 - INSURANCE of the Construction Contract.
- (k) **“Construction Security”** means the performance bond and labour and material payment bond and the Subguard Policy as contemplated in GC 11.2 – BONDS AND SUBGUARD POLICY of the Construction Contract.
- (l) **“Enforcement Action”** means any acceleration of amounts due and owing under any of the Lending Agreements and/or any enforcement proceeding or enforcement action commenced or taken under any of the Lending Agreements.
- (m) **“Enforcement Event”** means an event of default under the Lending Agreements or any other event which permits an Enforcement Action.
- (n) **“Enforcement Rights”** has the meaning given to it in the Limited Assignment of Construction Contract.
- (o) **“Final Reimbursement Payment Date”** has the meaning given to it in the Construction Contract.
- (p) **“Hospital Final Reimbursement Payment”** has the meaning given to it in the Limited Assignment of Construction Contract.
- (q) **“Insurance Trust Agreement”** means the agreement dated as of the date hereof between Hospital, Lender, Project Co, Contractor and a trustee acceptable to the Parties and the Lender governing the receipt and distribution of insurance proceeds as therein set forth.
- (r) **“Interim Reimbursement Payment Amount”** has the meaning given to it in the Construction Contract.

- (s) “**Interim Reimbursement Payment Date**” has the meaning given to it in Construction Contract.
- (t) “**Legislative Holdback**” means the holdback to be maintained under the Construction Contract pursuant to Part IV of the *Construction Lien Act* (Ontario).
- (u) “**Lender**” means Pacific & Western Bank of Canada in its capacity as administrative agent for and on behalf of the lenders from time to time party to the Lending Agreements.
- (v) “**Lender Decision Period**” has the meaning given to it in Section 7.1.
- (w) “**Lender’s Consultant**” has the meaning given to it in the Construction Contract.
- (x) “**Lender’s Direct Agreement**” means this lender’s direct agreement.
- (y) “**Lending Agreements**” means any or all of the agreements or instruments to be entered into by Project Co or any of its Affiliates relating to the financing of the Project by the Lender and includes but is not limited to: [REDACTED]
- (z) “**Lien**” means the lien provided for under Section 14(1) of the *Construction Lien Act* (Ontario).
- (aa) “**Limited Assignment of Construction Contract**” means the Limited Assignment of Construction Contract between Project Co, Hospital and Contractor made as of even date herewith.
- (bb) “**Longstop Date**” has the meaning given to it in the Construction Contract.
- (cc) “**Notice Period**” means the period starting on the date of delivery of a Construction Default Notice and ending one hundred and twenty (120) days later.
- (dd) “**Party**” means any of Hospital, Project Co, Contractor or Lender, and “**Parties**” means all of Hospital, Project Co, Contractor and Lender, but, for greater certainty, such definitions do not include Infrastructure Ontario or Her Majesty the Queen in Right of Ontario, as represented by either the Minister of Health and Long-Term Care or the Minister of Public Infrastructure Renewal.
- (ee) “**Replacement Construction Contract**” has the meaning given to it in Section 7.3.
- (ff) “**Replacement Contractor**” means a replacement contractor under a Construction Contract Assignment or a Replacement Construction Contract entered into pursuant to Section 7.3 who must either be a contractor that is a Pre-Qualified Proponent under the Request for Qualifications (RFQ No. OIPC-06-00-M003) or that is acceptable to Hospital, Infrastructure Ontario and MOHLTC, acting reasonably.

- (gg) **“Response Period”** has the meaning given to it in Section 4.1(c).
- (hh) **“Step-In Date”** means the date on which Hospital receives a Step-In Notice from Lender.
- (ii) **“Step-In Notice”** means the notice given by Lender to Hospital pursuant to Section 7.1 stating that Lender is exercising its step-in rights under Article 7 of this Lender’s Direct Agreement.
- (jj) **“Step-In Period”** means the period from the Step-In Date up to and including the Step-Out Date.
- (kk) **“Step-Out Date”** means the earlier to occur of (i) the expiry of the periods provided for in Sections 6.3(a) or 6.3(b), as the case may be and (ii) the date on which Hospital receives a Step-Out Notice.
- (ll) **“Step-Out Notice”** has the meaning given to it in Section 8.1.
- (mm) **“Substantial Performance Date”** has the meaning given to it in the Construction Contract.
- (nn) **“Substantial Performance of the Work”** has the meaning given to it in the Construction Contract.

## 1.2 Interpretation

The provisions of Section 1.3(a) and (e) - (w), inclusive, of the Project Agreement are hereby incorporated in their entirety and all references in same to “Project Agreement” shall be read as “Lender’s Direct Agreement”.

## ARTICLE 2 - CONFLICT IN DOCUMENTS

- 2.1** In the event of ambiguities, conflicts or inconsistencies between or among this Lender’s Direct Agreement, the Project Agreement, the Construction Contract and the Limited Assignment of Construction Contract, this Lender’s Direct Agreement shall prevail. Notwithstanding the foregoing, if there is any right or remedy in favour of Hospital set out in this Lender’s Direct Agreement or any part thereof which is not set out or provided for in the Construction Contract, such additional right or remedy shall not constitute an ambiguity, conflict or inconsistency. No review by Hospital of the Lending Agreements shall constitute an acceptance in or acquiescence to any of the Lending Agreements or any term or condition thereof by Hospital and this Lender’s Direct Agreement, the Project Agreement and the Construction Contract shall not be subject to any of the terms and conditions of the Lending Agreements.

### **ARTICLE 3 - TERM**

- 3.1** This Lender's Direct Agreement shall terminate automatically on the date on which all obligations that may be or become owing by Project Co to Lender under the Lending Agreements have been satisfied in full.
- 3.2** Promptly, and in no event more than thirty (30) days following its occurrence, Lender shall provide notice to Hospital of the date referred to in Section 3.1.
- 3.3** Hospital hereby provides to Lender and Project Co and agrees to provide to Replacement Contractor a non-exclusive license to have access to and to use the Place of the Work on the same terms and conditions as set out in GC 3.17.1 of the Construction Contract.

### **ARTICLE 4 - AGREEMENTS AND SECURITY**

- 4.1** (a) Project Co and Lender shall not amend or modify any Lending Agreements other than as expressly provided for under the terms of those agreements and so long as such amendment (i) is consistent in all material respects with the Financial Model included as a Schedule to the Project Agreement, and (ii) does not increase (A) the costs of prepayment that were contained in the financing term sheet in the RFP Submission or (B) the calculation of any Debt Amount (as such term is defined in Schedule B to the Limited Assignment of Construction Contract), and shall provide prompt notice to Hospital of any amendments or modifications accompanied by a copy thereof.
- (b) Contractor, Project Co and Hospital shall not amend or modify any Implementing Agreements without the prior written consent of Lender, not to be unreasonably withheld or delayed, which consent shall not be withheld if the relevant amendment or modification does not (i) adversely affect the ability of Lender to exercise its rights under the Lending Agreements, (ii) adversely affect the security of the Lending Agreements, or (iii) increase the liability of Lender, Contractor or Project Co under the relevant agreement. Lender shall respond to any request for consent under this Section 4.2 within fifteen (15) days of receipt thereof, failing which Lender shall be deemed to have consented to the relevant amendment or modification.
- (c) Contractor, Project Co and Hospital acknowledge and agree that they will not, without the consent of the Lender (which consent shall not be unreasonably withheld), proceed to execute or implement any Change Order and Hospital acknowledges and agrees that it will not issue any Change Directive, which, in either case, is in respect to a discretionary expansion of the construction scope of the Work initiated by Hospital and would (i) materially alter the scope of the Work, or (ii) materially impact the financing of the Project or otherwise materially and adversely alter the risk profile of the Project; provided the Parties further acknowledge and agree that where such a Change Order or Change Directive, (iii) costs less than [REDACTED], or (iv) when aggregated with all other such Change Orders and Change Directives previously implemented, costs

less than [REDACTED], such Change Order or Change Directive shall be deemed not to materially alter the Scope of the Work or impact the financing of the Project or otherwise materially and adversely alter the risk profile of the Project. When the Lender's approval in respect of a Change Order or Change Directive in accordance with this Section 4.1 is required, the Lender will respond to a written request within ten (10) Business Days (the "**Response Period**") of receiving such request for its approval. If the Lender intends not to approve the Change Order or the Change Directive, the Lender will notify the Hospital within the Response Period and will set out its concerns in such notification. If the Lender's concerns can be addressed on a basis acceptable to the Hospital and the Lender, then the Hospital may proceed with such Change Order or Change Directive and will concurrently implement or cause to be implemented such agreed-upon solution, including as appropriate by way of an amendment to the Change Order or Change Directive or by a related Change Order or Change Directive.

- 4.2 Project Co and Contractor acknowledge and consent to the arrangements set out in this Lender's Direct Agreement, and agree not to do or omit to do anything that may prevent any other Party from enforcing its rights under this Lender's Direct Agreement.
- 4.3 Lender acknowledges having received a copy of each of the Implementing Agreements.
- 4.4 Hospital acknowledges having received a copy of each of the Lending Agreements and consents to the granting of security by Project Co over the Implementing Agreements contained in the Lending Agreements.
- 4.5 Contractor, Project Co and Lender acknowledge that none of Contractor, Project Co, or Lender shall, under the Project Agreement or any of the Implementing Agreements acquire any interest in the Project Lands or the Project (other than the licence to access the Project Lands or the Project provided in Section 3.3 or GC 3.17.1 of the Construction Contract) notwithstanding any provision therein to the contrary and that Hospital shall at all times retain the fee simple interest in and freehold title to the Project Lands and the Project to be constructed on the Project Lands under the Construction Contract. The Contracting Parties shall have access to the Project Lands and the Project under and subject to the limited license created in the Construction Contract.
- 4.6 Without limitation of any of their respective rights and remedies under the Project Agreement and the Implementing Agreements, Contractor, Project Co and Lender acknowledge that Hospital is a public hospital under the *Public Hospitals Act* (Ontario) and nothing in this Lender's Direct Agreement or any of the Implementing Agreements including the Construction Contract shall limit or shall be construed as limiting any authority and responsibility of Hospital under the *Public Hospitals Act* (Ontario) or, subject to Article A – 11.8 of the Construction Contract, any directions to Hospital or to the Board of Directors of Hospital made by a Governmental Authority under Applicable Law or from being in compliance with all Applicable Law.
- 4.7 The Parties agree that they will enter into the Insurance Trust Agreement contemporaneously with the execution of this Agreement.

**ARTICLE 5 - ENFORCEMENT OF SECURITY BY LENDER;  
LEGISLATIVE HOLDBACK**

- 5.1 Lender shall concurrently with notice to Project Co, notify Hospital of any Enforcement Event, any notice of default delivered pursuant to the Lending Agreements, any Enforcement Action, any notice from Lender to Project Co to accelerate the maturity of any amounts owing by Project Co to Lender under the Lending Agreements or any notice from Lender to Project Co to demand repayment thereof.
- 5.2 Lender shall appoint Lender's Consultant who shall be responsible, *inter alia*, to advise Lender with respect to the amount of any Legislative Holdback in respect to all Base Progress Payments.
- 5.3 Hospital may conduct a subsearch of the Project Lands at any time and from time to time and notify Lender, Project Co and Contractor if any Lien has been registered against the Project Lands arising from the performance of the Work and if such a Lien has been registered Contractor shall immediately take such steps, at its sole cost and expense, as are required to have the Lien vacated, except where such lien has arisen from work performed by the Owner's own forces and/or other contractors prior to any assignment of same to the Contractor in accordance with the Construction Contract, in which case the Owner shall be responsible for any such lien. Lender acknowledges and agrees with Hospital that Lender shall not be entitled to rely on Hospital to conduct a subsearch or on any subsearch result of Hospital and that the result of any such subsearch provided by Hospital is, subject to the obligations of Contractor, Project Co and Lender hereunder, for information only.
- 5.4 Lender agrees to conduct a subsearch of the Project Lands prior to the advance of any Financing and if a Lien has been registered against the Project Lands arising from the performance of the Work, Lender shall direct Project Co to proceed to immediately take such steps, at its sole cost and expense, as are required to have the Lien vacated or to make alternative arrangements to bond or otherwise secure the amount of the Lien and costs associated therewith satisfactory to the Lender, acting reasonably, and doing so shall be a condition precedent to the making of any advance of the Financing, except where such lien has arisen from work performed by the Owner's own forces and/or other contractors prior to any assignment of same to the Contractor in accordance with the Construction Contract, in which case the Owner shall be responsible for any such lien.

**ARTICLE 6 - CONSTRUCTION EVENT OF DEFAULT**

- 6.1 Subject only to the rights expressly afforded to Lender in this Article 6, Hospital shall serve notice to Lender, with a copy to Project Co, of a Construction Event of Default (the "**Construction Default Notice**") contemporaneously with any notice delivered by Hospital to Contractor under the Construction Contract.
- 6.2 At any time other than during the Step-In Period (with the restriction on termination during the Step-In Period set out in Section 6.3), Hospital shall not exercise any right it

may have to terminate the Construction Contract or exercise any other rights or remedies for a Construction Event of Default unless:

- (a) Hospital delivers to Lender a Construction Default Notice setting out the nature of the alleged default in reasonable detail; and
- (b) the Notice Period has expired and Lender has not delivered a Step-In Notice.

**6.3** During the Step-In Period, Hospital shall not exercise any right it may have to terminate the Construction Contract or, except to the extent required to protect legal rights or comply with Applicable Law, exercise any other rights or remedies for a Construction Event of Default:

- (a) if, in the case of a Construction Event of Default which is capable of being cured, the Construction Event of Default has been cured by or on behalf of Appointed Representative within thirty (30) days of the time periods set forth in the Construction Contract or the Appointed Representative is diligently proceeding to cure the breach in accordance with GC 7.1 of the Construction Contract within the time periods set forth in the Construction Contract including for greater certainty prior to the Longstop Date; or
- (b) if, in the case of a Construction Event of Default which is either (i) not capable of being cured (which, by way of example, would include an event described in GC 7.1.1 of the Construction Contract) or (ii) can only be cured in the determination of Lender (acting reasonably) by assigning the Construction Contract to a Replacement Contractor or entering into a Replacement Construction Contract as provided under Section 7.3, a Construction Contract Assignment with a Replacement Contractor has been entered into in accordance with Section 7.3 within one hundred and twenty (120) days of the delivery of the Construction Default Notice. Hospital and Appointed Representative may agree to extend such time period where the Lender or Appointed Representative is proceeding diligently. In the case of either a Construction Contract Assignment or a Replacement Construction Contract having been entered into the Work thereunder is to be completed on or before the date falling one hundred and eighty (180) days after the Longstop Date.

**6.4** The Lender shall not take any action that would compromise the enforceability of the Construction Insurance or the Construction Security.

#### **ARTICLE 7 - LENDER'S STEP-IN RIGHTS**

**7.1** Subject to Section 7.2 and without prejudice to Lender's rights to enforce the Lending Agreements against Project Co and Contractor, Lender may give Hospital a Step-In Notice at any time:

- (a) during which a Construction Event of Default is subsisting (whether or not a Construction Default Notice has been served);

- (b) during the Notice Period; or
- (c) during which an Enforcement Event is subsisting,

(which periods are jointly referred to herein as “**Lender Decision Period**”).

**7.2** At the time Lender delivers a Step-In Notice, Lender shall deliver written notice (an “**Appointed Representative Notice**”) to Hospital of the identity of its proposed Appointed Representative.

**7.3** Upon issuance of a Step-In Notice, Appointed Representative shall perform, or cause to be performed, all of Project Co’s rights and obligations to enforce the covenants and obligations of Contractor under the Construction Contract pursuant to the Enforcement Rights and cause Contractor to remedy the Construction Event of Default and shall have the right, if it is entitled to terminate the Construction Contract under the Enforcement Rights, and if it is permitted to do so under the Lending Agreements: (a) to access the Construction Security and, subject to the prior approval of Hospital, acting reasonably, and subject to the terms and conditions of the Construction Security, assign Contractor’s interest in the Construction Contract and the other Implementing Agreements to a Replacement Contractor (the “**Construction Contract Assignment**”) subject to the agreement by the Replacement Contractor to assume the terms and conditions of the Construction Contract; or (b) subject to the prior approval of Hospital, acting reasonably, to terminate the Construction Contract pursuant to the Enforcement Rights and enter into a replacement construction contract with a Replacement Contractor (the “**Replacement Construction Contract**”) on terms substantially similar to the Construction Contract provided in either case the Replacement Contractor covenants in the Construction Contract Assignment or the Replacement Construction Contract, as applicable, to remedy any curable breach of Contractor under the Construction Contract whether in respect to payment or performance and whether arising prior to or during the Step-In Period and to vacate any Liens from the Project Lands arising from the performance of the Work in all cases whether arising prior to or during the Step-In Period. Further, the Replacement Contractor must provide replacement or otherwise ensure continued maintenance of the Construction Insurance and the Construction Security under the Construction Contract in the event of a Construction Contract Assignment or under the Replacement Construction Contract in the event a Replacement Construction Contract is entered into. Upon any Construction Contract Assignment, the Construction Contract shall be deemed to be terminated on the date of such Construction Contract Assignment with respect to the Contractor and the provisions of Section 4.6 of Schedule B to the Limited Assignment of Construction Contract shall be deemed to apply as if compensation had been paid by Hospital pursuant to Section 2.1 of Schedule B to the Limited Assignment of Construction Contract, and the Replacement Contractor shall have no liability for the obligations of the Contractor arising prior to the date of such Construction Contract Assignment, provided the foregoing shall not limit the rights of Hospital to subsequently deduct from payments owing by Hospital under the Construction Contract those amounts which it would otherwise be entitled to deduct under the Construction Contract.

For greater certainty, to the extent required in connection with the exercise by Lender and/or the Appointed Representative of the rights and remedies set forth in this Section 7.3, the Hospital covenants and agrees with Lender that it shall, upon written request of Lender and as Lender may direct, in respect of each subcontract which is the subject of any Assignable Subcontract Agreement (in the agreed form) entered into in the Hospital's favour in accordance with GC 13.5 of the Construction Contract (an "ASA"), issue (i) an Assignment Notice (in accordance with and as defined in Section 2(d) of the ASA) to the subcontractor party thereto indicating therein as Assignee (as defined in the said Section 2(d)), Lender, the Appointed Representative or as Lender or the Appointed Representative may otherwise direct, or (ii) a Direct Assignment Notice (in accordance with and as defined in Section 2(f) of the ASA) to the subcontractor party thereto indicating therein as GC Assignee (as defined in Section 2(e) of the ASA) any Replacement Contractor.

- 7.4** At the time of a Construction Contract Assignment or the entering into of a Replacement Construction Contract under Section 7.3, unless Lender transfers the shares of Project Co to the Replacement Contractor pursuant to its rights under the Lending Agreements, the Replacement Contractor shall be required to form a substitute Project Co (the "**Substitute Project Co**"). If a Substitute Project Co is formed, then Lender shall assign the interests of Project Co under the Lending Agreements and the Implementing Agreements to Substitute Project Co or make such other arrangements under which Substitute Project Co stands in the place of Project Co under the Lending Agreements and the Implementing Agreements.
- 7.5** During the Step-In Period, Hospital shall deal with Appointed Representative instead of Project Co in connection with all matters related to the Construction Contract. Project Co agrees to be bound by all such dealings between Hospital and Appointed Representative to the same extent as if they had been between Hospital and Project Co.
- 7.6** For greater certainty, Lender acknowledges and agrees that its rights as Obligee under the performance bond (being a component of the Construction Security) shall be limited to the enforcement (for the purpose of completing or arranging for the completion of the unperformed obligations of the Contractor under the Construction Contract) of the obligations of the Surety as more particularly described in the performance bond and are subject to the Lender's obligation as an Obligee to pay the balance of the Contract price ("Obligee", "Surety", "Principal" and "balance of the Contract price" having the meanings given to them under the performance bond). If the Lender receives any benefit from the Surety under the performance bond or from the insurer under the Subguard Policy (being a component of the Construction Security) that is not applied to the Work and fails to complete or cause to have completed the obligations of the Contractor under the Construction Contract the Lender shall pay to the Hospital an amount equal to the lesser of (a) the amount of the benefit obtained by the Lender from the Surety or from the insurer under the Subguard Policy and not applied to the Work and (b) the Hospital's costs of obtaining the completion of the unperformed obligations of the Contractor under the Construction Contract:

## ARTICLE 8 - STEP-OUT RIGHTS

- 8.1** Appointed Representative may, at any time during the Step-In Period, deliver written notice (a “**Step-Out Notice**”) to Hospital to terminate the Step-In Period on the Step-Out Date.
- 8.2** On termination of the Step-In Period, where the Construction Contract has been assigned to the Replacement Contractor or a Replacement Construction Contract has been entered into as contemplated in Section 7.3, Hospital and Appointed Representative shall be released of any obligations to the other arising during the Step-In Period.
- 8.3** On termination of the Step-In Period, if the Construction Contract has not been assigned to a Replacement Contractor or a Replacement Construction Contract has not been entered into and any outstanding Construction Event of Default has not been cured, then Hospital shall confirm that, as consideration for the rights and benefits assigned to Hospital pursuant to paragraph (c) below, it shall pay to Project Co or as Project Co may direct an amount (the “**Step-Out Amount**”) equal to the amount that would have been paid by Hospital upon termination of the Construction Contract pursuant to the provisions of Section 2.1 of Schedule B to the Limited Assignment of Construction Contract (and calculated and payable in accordance therewith) and thereupon:
- (a) any rights and obligations between Appointed Representative on the one hand and Hospital on the other hand, arising during the Step-In Period, shall be mutually released, save and except for any claims based on gross negligence and wilful misconduct;
  - (b) subject to payment of the Step-Out Amount by Hospital, Hospital shall have no further obligation to Appointed Representative or Project Co to pay the Interim Reimbursement Payment Amount or, the Hospital Final Reimbursement Payment to Lender, Appointed Representative or Project Co on the achievement of Substantial Performance of the Work;
  - (c) Lender shall permit Hospital (and assign to Hospital as required) to thereupon have the full benefit and entitlement to the Enforcement Rights, the Construction Security and the Assignable Subcontract Agreements without regard to any interest therein of Lender or Project Co and Lender agrees that Hospital may thereafter proceed to enforce all of its rights under the Enforcement Rights, the Construction Security and/or the Assignable Subcontract Agreements without regard to any rights in favour of Lender or Project Co and the Lender shall notify the sureties under the Construction Security that the Hospital is entitled to the exclusive exercise of all rights and to take all benefits as obligee and/or loss payee thereunder; and
  - (d) the provisions of Section 4.6(a) of Schedule B to the Limited Assignment of Construction Contract shall, subject to payment of the Step-Out Amount by Hospital, be deemed to apply as between Project Co and Hospital, *mutatis mutandis*, and the Retained Payment Obligations (as defined the Limited

Assignment of Construction Contract) shall devolve to and thereafter be assumed by Hospital.

If an Enforcement Event has not been cured on termination of the Step-In Period as aforesaid, then the Hospital may confirm that, as consideration for the rights and benefits assigned to Hospital pursuant to paragraph (c) above, it shall pay to Project Co or as Project Co may direct the Step-Out Amount and the provisions of paragraphs (a), (b), (c) and (d) above shall thereupon apply.

For greater certainty, nothing in this Section 8.3 shall affect the rights and obligations of Contractor under the Construction Contract or the rights of the sureties under the Construction Security.

- 8.4** There will not be more than one Step-In Period following the issuance by Hospital of any one Construction Default Notice.
- 8.5** Hospital acknowledges and agrees that if Hospital proceeds to exercise its rights as Obligee under the performance bond (being a component of the Construction Security), unless Hospital has arranged for a replacement Financing through the Replacement Contractor and/or Project Co or a Substitute Project Co then Hospital shall be obligated to make the Base Progress Payments and to pay the applicable Value Added Taxes subject to and in accordance with the requirements of the Construction Contract and such payments shall be deemed to be Additional Owner Payments.
- 8.6** Hospital hereby undertakes that it will not exercise any rights it may have under or arising out of any of the Assignable Subcontract Agreements except following any assignment to Hospital pursuant to Section 8.3(c).

#### **ARTICLE 9 - PAYMENT DIRECTION OF HOSPITAL PAYMENTS**

- 9.1** Hospital acknowledges the assignment by Project Co of the Interim Reimbursement Payment Amount, the Hospital Final Reimbursement Payment and any Compensation Payment to Lender under the security granted to Lender by Project Co under the Lending Agreements. Project Co hereby irrevocably directs Hospital to pay the Interim Reimbursement Payment Amount, the Hospital Final Reimbursement Payment and any Compensation Payment which becomes payable to Project Co in accordance with the Limited Assignment of Construction Contract to Lender or as Lender may direct. Hospital acknowledges such direction and agrees to pay the Interim Reimbursement Payment Amount, the Hospital Final Reimbursement Payment and any Compensation Payment to Lender or as Lender may direct in accordance with such direction. Project Co acknowledges and agrees that payment by the Hospital of the Interim Reimbursement Payment Amount, the Hospital Final Reimbursement Payment and any Compensation Payment in accordance with this Section 9.1 to Lender or as Lender may direct constitutes payment by the Hospital to Project Co in satisfaction of the Hospital's obligation to make the Interim Reimbursement Payment Amount and the Hospital Final Reimbursement Payment.

## ARTICLE 10 - ASSIGNMENT

- 10.1** Hospital may assign or otherwise dispose of the benefit of the whole (but not part) of its interest in this Lender's Direct Agreement to any Person to whom Hospital assigns or otherwise disposes of its interest in the Project Agreement and the other Implementing Agreements pursuant to Section 6.2 of the Project Agreement, and shall provide written notice to Project Co and Lender of such assignment or disposition. Such assignee shall assume the obligations and acquire the rights of Hospital under this Lender's Direct Agreement. Upon any such assignment or disposition, Hospital shall be released of all its obligations hereunder to the extent such obligations are assumed by the assignee. Project Co and Lender shall, at Hospital's cost and expense, do all things and execute all further documents as may be necessary in connection therewith.
- 10.2** Lender may only assign or otherwise dispose of any interest in this Lender's Direct Agreement as permitted by the Lending Agreements, and with the prior written consent of Hospital, such consent not to be unreasonably withheld or delayed. Lender shall cause the assignee to enter into an assumption agreement of this Lender's Direct Agreement in form and substance reasonably satisfactory to Hospital with Project Co, Contractor and Hospital. Project Co, Contractor and Hospital shall, at Lender's cost and expense, do all things and execute all further documents as may be necessary in connection therewith.

## ARTICLE 11 - NOTICES

### 11.1 Notices to Parties

All notices, requests, demands, instructions, certificates, consents and other communications (each being a "**Notice**") required or permitted under this Lender's Direct Agreement shall be served by sending the same by facsimile or by hand, as follows:

If to Hospital:	89 Norman Street Sarnia, Ontario, N7T 6S3
	Fax No.: [REDACTED] Attn.: [REDACTED]
with a copy to Infrastructure Ontario:	777 Bay Street, 9 <sup>th</sup> Floor Toronto, Ontario, M5G 2C8
	Fax No.: [REDACTED] Attn.: [REDACTED]
with a copy to Infrastructure Ontario's Project Coordinator at:	777 Bay Street, 9 <sup>th</sup> Floor Toronto, Ontario, M5G 2C8
	Fax No.: [REDACTED] Attn.: [REDACTED]

If to Lender: 2002 -140 Fullerton Street  
London, Ontario N6A 5P2

Fax No.: [REDACTED]  
Attn.: [REDACTED]

If to Project Co: c/o Fengate Capital Management (Bluewater) Inc.  
Suite 1502, 5000 Yonge Street  
Toronto, Ontario M2N 7E9

Fax No.: [REDACTED]  
Attn.: [REDACTED]

If to Contractor: 89 Queensway Avenue West, Suite 800  
Mississauga, Ontario L5B 2V2

Fax No.: [REDACTED]  
Attn.: [REDACTED]

## **11.2 Facsimile**

Where any Notice is provided or submitted to a Party via facsimile, an original of the Notice sent via facsimile shall promptly be sent by regular mail. For greater certainty, a notice given via facsimile shall not be invalid by reason only of a Party's failure to comply with this Section 11.2.

## **11.3 Change of Address**

Any Party to this Lender's Direct Agreement may, from time to time, change any of its contact information set forth in Section 11.1 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.

## **11.4 Deemed Receipt of Notices**

Subject to Section 11.4(a), a Notice given by hand delivery shall be deemed to have been received on the day it is delivered. Subject to Sections 11.4(a) and 11.4(b), a Notice given by facsimile shall be deemed to have been received on the day it is transmitted by facsimile.

- (a) If any Notice delivered by hand or transmitted by facsimile 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 5:00 p.m. (recipient's local time), then such Notice shall be deemed to have been received by such recipient on the next Business Day.
- (b) A Notice given by facsimile shall be deemed to have been received by the recipient on the day it is transmitted only if a facsimile transmission report

(maintained by the sender) indicates that the transmission of such Notice was successful.

## **ARTICLE 12 - GENERAL**

### **12.1 Amendments**

This Lender's Direct Agreement may not be amended, restated, supplemented or otherwise modified 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, supplement or other modification, as the case may be, to this Lender's Direct Agreement.

### **12.2 Waiver**

- (a) No waiver made or given by a Party under or in connection with this Lender's Direct 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 Party. No waiver made with respect to any such right, power or remedy, in one instance will be deemed to be a waiver with respect to any other instance involving the exercise of the right, power, or remedy or with respect to any other such 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.

### **12.3 Relationship Between Parties**

The Parties are independent contractors. This Lender's Direct Agreement is not intended to and does not create or establish between the Parties or between the Province, including Infrastructure Ontario or Contracting Parties any relationship as partners, joint venturers, employer and employee, master and servant, or of principal and agent, and does not create or establish any relationship whatsoever between Hospital, the Province, including Infrastructure Ontario, and any Affiliate, representative or employee of Contracting Parties or Lender.

### **12.4 Entire Agreement**

Except where provided otherwise in this Lender's Direct Agreement, this Lender's Direct Agreement constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings, whether oral, written, express or implied, concerning the subject matter of this Lender's Direct Agreement.

## **12.5 No Reliance**

Each of the Parties acknowledges that:

- (a) it has not entered into this Lender's Direct Agreement on the basis of and does not rely, and has not relied, upon any statement or representation, whether negligent or innocent, or warranty or other provision, whether oral, written, express or implied, made or agreed to by any Person, whether a Party to this Lender's Direct Agreement or not, except those expressly made, given or repeated in this Lender's Direct Agreement and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be those expressly provided for in this Lender's Direct Agreement; and
- (b) this Section 12.5 shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Lender's Direct Agreement which was induced by fraud, for which the remedies available shall be all those available under the law governing this Lender's Direct Agreement.

## **12.6 Severability**

If any provision of this Lender's Direct 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 Lender's Direct Agreement. If any such provision of this Lender's Direct 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 Lender's Direct Agreement as near as possible to its original intent and effect.

## **12.7 Enurement**

This Lender's Direct Agreement shall enure to the benefit of, and be binding on, each of the Parties and their respective successors and permitted transferees and assigns.

## **12.8 Governing Law and Jurisdiction**

- (a) This Lender's Direct Agreement shall be governed by and construed in accordance with the laws of the Province 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 hereby irrevocably attorn to the exclusive jurisdiction of the courts of the Province of Ontario and all courts competent to hear appeals therefrom.

## **12.9 Cumulative Remedies**

Except as otherwise set forth in this Lender's Direct Agreement, the rights, powers and remedies of each Party set forth in this Lender's Direct Agreement are cumulative and are

in addition to and without prejudice to any other right, power or remedy that may be available to such Party under this Lender's Direct Agreement.

#### **12.10 Further Assurance**

Each Party shall do all things, from time to time, and execute all further instruments, agreements and documents necessary to give full effect to this Lender's Direct Agreement.

#### **12.11 Costs**

Each Party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution and delivery of this Lender's Direct Agreement.

#### **12.12 Counterparts**

This Lender's Direct 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, faxed or other electronic form provided that any Party providing its signature in faxed or other electronic form shall promptly forward to such Party an original signed copy of this Lender's Direct Agreement which was so transmitted.

#### **12.13 Language of Agreement**

Each Party acknowledges having requested and being satisfied that this Lender's Direct Agreement and related documents be drawn in English. *Chacune des parties reconnaît avoir demandé que ce document et ses annexes soient rédigés en anglaise et s'en declare satisfaite.*

#### **12.14 Confidentiality**

Lender shall comply with the obligations on the part of the Contracting Parties contained in Article 5 of the Project Agreement and this obligation shall survive the termination of this Lender's Direct Agreement.

**IN WITNESS WHEREOF** the Parties have executed this Lender's Direct Agreement as of the date first above written.

**BLUEWATER HEALTH**

Per: \_\_\_\_\_  
Name: [REDACTED]  
Title: [REDACTED]

Per: \_\_\_\_\_  
Name: [REDACTED]  
Title: [REDACTED]

I/We have authority to bind the corporation.

**PACIFIC & WESTERN BANK OF CANADA**

Per: \_\_\_\_\_  
Name: [REDACTED]  
Title: [REDACTED]

Per: \_\_\_\_\_  
Name: [REDACTED]  
Title: [REDACTED]

I/We have authority to bind the corporation.

**[REDACTED] ELLISDON HEALTHCARE INC.**

Per: \_\_\_\_\_  
Name: [REDACTED]  
Title: [REDACTED]

Per: \_\_\_\_\_  
Name: [REDACTED]  
Title: [REDACTED]

I/We have authority to bind the corporation.

**ELLISDON CORPORATION**

Per: \_\_\_\_\_  
Name: [REDACTED]  
Title: [REDACTED]

Per: \_\_\_\_\_  
Name: [REDACTED]  
Title: [REDACTED]

I/We have authority to bind the corporation.

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