

**DEVELOPMENT PHASE AGREEMENT**

**BETWEEN**

**ONTARIO INFRASTRUCTURE AND LANDS CORPORATION**

**AND**

**TRILLIUM HEALTH PARTNERS**

**AND**

**ED PCL TRILLIUM DEV CO LIMITED PARTNERSHIP**

## TABLE OF CONTENTS

	Page
<b>1. DEFINITIONS .....</b>	<b>2</b>
<b>2. INTERPRETATION .....</b>	<b>2</b>
2.1 General .....	2
2.2 Schedules and Appendices to this Agreement .....	4
2.3 Relationship to Draft Project Agreement .....	5
2.4 Priority, Conflicts and Identification of Ambiguities, Conflicts, Inconsistencies and Errors .....	6
2.5 Dev Co Proposal Extracts .....	8
<b>3. JOINT AND SEVERAL LIABILITY AND NO IO CONTINGENT LIABILITIES.....</b>	<b>8</b>
3.1 Joint and Several Liability of DPA Contracting Authority.....	8
3.2 No Contingent Liabilities of Infrastructure Ontario .....	8
<b>4. PURPOSE AND INTENT OF DEVELOPMENT PHASE AGREEMENT.....</b>	<b>8</b>
4.1 Purpose of this Agreement and Notice to Proceed to Commercial Close.....	8
4.2 No Renegotiation of Final Draft Project Agreement Provisions .....	10
4.3 Non-Exclusive Agreement.....	10
4.4 No Fettering DPA Contracting Authority or Government Entity Functions .....	11
<b>5. COLLABORATION AND COOPERATION .....</b>	<b>11</b>
5.1 Parties to Collaborate and Cooperate.....	11
<b>6. TRANSPARENCY AND PRICING EFFICIENCY.....</b>	<b>12</b>
6.1 Dev Co Transparency .....	12
6.2 Project Affordability Constraints .....	12
6.3 Estimate Information .....	12
6.4 Dev Co Public Tender of Costed Element.....	13
6.5 Non-Conformance of Cost and Pricing Information Included in Costed Elements.....	13
<b>7. DEVELOPMENT PHASE AGREEMENT TERM.....</b>	<b>14</b>
7.1 Commencement on Effective Date and Expiry and Termination .....	14
<b>8. REPRESENTATIONS AND WARRANTIES .....</b>	<b>14</b>
8.1 Dev Co Representations and Warranties .....	14
8.2 DPA Contracting Authority Representations and Warranties .....	16
<b>9. APPOINTMENT OF REPRESENTATIVES .....</b>	<b>19</b>

9.1	DPA Contracting Authority Representative .....	19
9.2	DPA Dev Co Representative .....	19
9.3	Communications to Representatives.....	20
<b>10.</b>	<b>DEV CO DPA WORKS OBLIGATIONS .....</b>	<b>20</b>
10.1	Performance of DPA Works .....	20
10.2	General DPA Works Requirements .....	21
10.3	DPA Works Schedules and DPA Works Schedules Requirements .....	22
10.4	Anti-Racism and Anti-Discrimination Processes, Policies and Procedures and Indigenous Engagement .....	22
10.5	Project Governance, Meetings and Progress Reporting.....	22
10.6	DPA Key Individuals.....	22
10.7	Dev Co Subcontracting .....	23
10.8	Access to Lands and Site .....	30
10.9	Additional Project Due Diligence.....	30
10.10	Business Opportunities .....	32
10.11	RFP Completion Documents .....	32
10.12	Enabling Works .....	32
10.13	MOH Approvals Support and Submissions.....	36
10.14	Online Collaborative Project Management.....	37
10.15	High Fidelity Room Mock-Ups and Mock-Up Space .....	37
10.16	Development and Finalization of Technical Specifications.....	39
<b>11.</b>	<b>BACKGROUND INFORMATION .....</b>	<b>40</b>
11.1	Review of DPA Background Information .....	40
11.2	No Warranty for Background Information .....	41
11.3	No Claims or Liability in Respect of Background Information.....	41
11.4	Exceptions.....	42
11.5	Additional Background Information.....	42
<b>12.</b>	<b>DPA VARIATION PROCEDURE.....</b>	<b>42</b>
12.1	DPA Variation Procedure .....	42
12.2	DPA Variation for DPA Contracting Authority Delay .....	44
<b>13.</b>	<b>TOTAL DPA AND DESIGN WORKS FIXED PRICE AND PAYMENT .....</b>	<b>45</b>
13.1	Total DPA and Design Works Fixed Price .....	45
13.2	Payment to Dev Co and Project Co of the Total DPA and Design Works Fixed Price....	46
13.3	Other Payment Obligations.....	47
13.4	Cash Allowance Items and Cash Allowance Amounts.....	47
13.5	Set-Off .....	50
13.6	Effect of Payment .....	50
13.7	No Other Entitlement.....	50
<b>14.</b>	<b>LIENS ARISING FROM THE DPA WORKS .....</b>	<b>50</b>

14.1	No Liens.....	50
<b>15.</b>	<b>FORCE MAJEURE EVENTS.....</b>	<b>51</b>
15.1	Force Majeure.....	51
15.2	Impacts of COVID-19 on DPA Works.....	52
<b>16.</b>	<b>INSURANCE AND PERFORMANCE SECURITY .....</b>	<b>53</b>
16.1	Insurance.....	53
16.2	Performance Guarantee of DPA Works Guarantor.....	53
16.3	DPA Closing Letter of Credit .....	53
16.4	No Required Bonds.....	56
<b>17.</b>	<b>CONFLICT OF INTEREST.....</b>	<b>56</b>
17.1	No Conflict of Interest .....	56
<b>18.</b>	<b>DEFAULT .....</b>	<b>57</b>
18.1	Dev Co Event of Default.....	57
18.2	DPA Contracting Authority Event of Default .....	60
<b>19.</b>	<b>NON-EVENT OF DEFAULT TERMINATION .....</b>	<b>61</b>
19.1	Termination for Convenience .....	61
19.2	Termination for Force Majeure Event .....	61
19.3	Automatic Termination and Expiry on Commercial Close.....	62
19.4	No Other Rights to Terminate.....	62
<b>20.</b>	<b>EFFECTS OF TERMINATION .....</b>	<b>62</b>
20.1	Dev Co's Obligations on Termination .....	62
20.2	Payment Obligations on Termination .....	63
20.3	Other Termination Rights and Obligations of the Parties.....	63
20.4	Survival.....	64
<b>21.</b>	<b>SUSPENSION OF DPA WORKS .....</b>	<b>64</b>
21.1	Suspension of DPA Works by DPA Contracting Authority .....	64
<b>22.</b>	<b>INDEMNITIES AND CONDUCT OF CLAIMS.....</b>	<b>65</b>
22.1	Dev Co Indemnities to DPA Contracting Authority.....	65
22.2	Dev Co Indemnity for Dev Co Event of Default Termination .....	66
22.3	Hospital Indemnities to Dev Co.....	66
22.4	Conduct of Claims .....	67
<b>23.</b>	<b>LIMITS OF LIABILITY .....</b>	<b>67</b>

23.1	No Liability for Indirect Losses or in Tort.....	67
23.2	Maximum Liability .....	68
<b>24.</b>	<b>DPA DISPUTE RESOLUTION PROCEDURE .....</b>	<b>69</b>
24.1	General.....	69
24.2	Amicable Negotiations and Arbitration .....	69
24.3	Litigation.....	71
24.4	Adjudication.....	71
24.5	Continued Performance During DPA Disputes .....	72
<b>25.</b>	<b>RECORDS, INFORMATION AND AUDIT .....</b>	<b>72</b>
25.1	Records Provisions, Information and General Audit Rights.....	72
<b>26.</b>	<b>CONFIDENTIALITY, PERSONAL INFORMATION AND COMMUNICATIONS .....</b>	<b>73</b>
26.1	Confidentiality and Personal Information.....	73
26.2	Promotion Restrictions .....	73
26.3	DPA Communications Plan .....	73
<b>27.</b>	<b>TITLE .....</b>	<b>74</b>
27.1	Title.....	74
<b>28.</b>	<b>INTELLECTUAL PROPERTY .....</b>	<b>74</b>
28.1	Representation and Warranty.....	74
28.2	Delivery of DPA Data and DPA Intellectual Property Rights.....	75
28.3	Licence of Project Data and DPA Intellectual Property Rights.....	75
28.4	DPA Jointly Developed Materials .....	76
28.5	Maintenance of Data.....	76
28.6	Claims .....	77
28.7	Contracting Authority Trade-Marks .....	77
28.8	Government Use of Documents.....	77
28.9	Restrictions .....	77
<b>29.</b>	<b>ASSIGNMENT AND CHANGE IN CONTROL.....</b>	<b>78</b>
29.1	Assignment .....	78
29.2	Change in Control.....	78
<b>30.</b>	<b>NOTICES .....</b>	<b>78</b>
30.1	Notices to Parties .....	78
30.2	Notices to Representatives.....	79
30.3	Electronic Submission .....	79
30.4	Change of Address.....	79
30.5	Deemed Receipt of Notices .....	79
30.6	Service on DPA Contracting Authority .....	80

<b>31.</b>	<b>AMENDMENTS .....</b>	<b>80</b>
<b>32.</b>	<b>WAIVER.....</b>	<b>80</b>
<b>33.</b>	<b>RELATIONSHIP BETWEEN THE PARTIES.....</b>	<b>81</b>
<b>34.</b>	<b>GENERAL DUTY TO MITIGATE.....</b>	<b>81</b>
<b>35.</b>	<b>ACTUAL KNOWLEDGE.....</b>	<b>81</b>
<b>36.</b>	<b>ENTIRE AGREEMENT .....</b>	<b>82</b>
<b>37.</b>	<b>NO RELIANCE .....</b>	<b>82</b>
<b>38.</b>	<b>SEVERABILITY .....</b>	<b>82</b>
<b>39.</b>	<b>ENUREMENT .....</b>	<b>82</b>
<b>40.</b>	<b>GOVERNING LAW AND JURISDICTION .....</b>	<b>82</b>
<b>41.</b>	<b>REMEDIES CUMULATIVE .....</b>	<b>83</b>
<b>42.</b>	<b>FURTHER ASSURANCES .....</b>	<b>83</b>
<b>43.</b>	<b>COSTS .....</b>	<b>83</b>
<b>44.</b>	<b>LANGUAGE OF THIS AGREEMENT .....</b>	<b>83</b>
<b>45.</b>	<b>PROOF OF AUTHORITY .....</b>	<b>83</b>
<b>46.</b>	<b>COUNTERPARTS .....</b>	<b>83</b>
<b>47.</b>	<b>GOVERNMENT ENTITIES AS THIRD PARTY BENEFICIARIES.....</b>	<b>84</b>
<b>48.</b>	<b>COPYRIGHT NOTICE .....</b>	<b>84</b>

**Schedule No. Description**

Schedule 1 – DPA Definitions

Schedule 2 – DPA Scope of Work

Schedule 3 – DPA Submissions and Project Development Process

Schedule 4 – DPA Works PA Requirements

Schedule 5 – DPA Key Individuals

Schedule 6 – DPA Variation Procedure

Schedule 7 – DPA Works Schedules Requirements

Schedule 8 – DPA Payment

Schedule 9 – DPA Insurance

Schedule 10 – DPA Dev Co Proposal Extracts

Schedule 11 – DPA Draft Project Agreement

Schedule 12 – [Intentionally Deleted]

Schedule 13 – Initial DPA Subcontracts

Schedule 14 – Form of Assignment of DPA Subcontract  
Schedule 15 – Form of Performance Guarantee of DPA Works Guarantor  
Schedule 16 – DPA Term Governance, Meetings and Progress Reporting  
Schedule 17 – Negotiable Draft Project Agreement Provisions  
Schedule 18 – Form of Enabling Works Contract  
Schedule 19 – Enabling Works Requirements

**DEVELOPMENT PHASE AGREEMENT**

**THIS AGREEMENT** is made and effective as of the 10<sup>th</sup> day of March, 2023 (the “**Effective Date**”)

**BETWEEN:**

**ONTARIO INFRASTRUCTURE AND LANDS CORPORATION**, a Crown agent, continued and amalgamated under the *Ontario Infrastructure and Lands Corporation Act, 2011*, S.O. 2011, c. 9, Schedule 32, as amended (“**Infrastructure Ontario**” or “**IO**”)

**AND:**

**TRILLIUM HEALTH PARTNERS**, a non-share capital corporation incorporated under the laws of Ontario (the “**Hospital**”)

**AND:**

**ED PCL TRILLIUM DEV CO LIMITED PARTNERSHIP, [REDACTED]** (“**Dev Co**”)

**RECITALS:**

- A. The Hospital, with the assistance of Infrastructure Ontario, (collectively, “**DPA Contracting Authority**”) wishes to develop a new hospital facility in Mississauga, Ontario;
- B. DPA Contracting Authority and Dev Co have agreed to enter into this Agreement, which sets out the terms and conditions pursuant to which Dev Co will perform the DPA Works, including the performance of the Development Phase PA Works, the development and submission to DPA Contracting Authority of the DPA Project Deliverables, and the performance of the Enabling Works;
- C. One of the DPA Project Deliverables Dev Co is required to develop and submit pursuant to this Agreement is a Project Proposal for Project Co to design, construct, finance and maintain the Facility (the “**Project**”) under a Final Project Agreement with the Hospital;
- D. Dev Co’s performance of the DPA Works will allow DPA Contracting Authority to assess and determine if DPA Contracting Authority, in its sole discretion, will elect for the Hospital to proceed to enter into a Final Project Agreement with Project Co following, amongst other things, the negotiation and finalization by DPA Contracting Authority and Dev Co of the form of the Draft Project Agreement, DPA Contracting Authority’s review of, comment on and any subsequent negotiation of Dev Co’s Project Proposal, the Parties’ successful completion of the Financing Process, and DPA Contracting Authority’s issuance of a Notice to Proceed to Commercial Close, subject to and in accordance with the terms and conditions of this Agreement;
- E. In the event that the Hospital and Project Co enter into a Final Project Agreement, this Agreement will automatically expire and terminate and the Development Phase PA Works will, as set out in



the Final Project Agreement, be deemed to have been completed as part of the Works under the Final Project Agreement;

- F. In the event that this Agreement is terminated in accordance with its terms other than as a result of its expiry and termination upon the Hospital and Project Co entering into a Final Project Agreement or a DPA Contracting Authority Event of Default, then DPA Contracting Authority may exercise its rights under the Assignment of Project Documents and any Assignment of DPA Subcontracts, including to cause the completion of the Development Phase PA Works pursuant to the DPA Subcontracts in order to permit the Hospital to develop a new public hospital facility similar to the Facility by way of a development model that may be similar to or different from the development model contemplated by the Draft Project Agreement and by persons that exclude Dev Co and some or all of the Dev Co Parties; and
- G. With a view to ensuring that both Parties are able to properly and effectively discharge their respective duties, functions and responsibilities under this Agreement and Applicable Law, and as further described in DPA Section 5.1, it is the intent that DPA Contracting Authority and Dev Co work collaboratively, responsibly and cooperatively throughout the DPA Term.

**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**

- (a) Unless otherwise specified or the context otherwise requires, capitalized but otherwise undefined terms in this Agreement have the respective meanings given to them in Schedule 1 – DPA Definitions.

## **2. INTERPRETATION**

### **2.1 General**

- (a) This Agreement shall be interpreted according to the following provisions, unless the context requires a different meaning:
- (i) The headings in this Agreement are for convenience of reference only, shall not constitute a part of this Agreement, and shall not be taken into consideration in the interpretation of, or affect the meaning of, this Agreement.
  - (ii) Unless the context otherwise requires, references to specific sections, paragraphs, subparagraphs, parts and other divisions are references to such sections, paragraphs, subparagraphs, parts or divisions of this Agreement and the terms “Section” and “Clause” are used interchangeably and are synonymous. References to “DPA Section” are to a Section of this main body of this Agreement and references to “Section” in a schedule, appendix or other attachment hereto or thereto are to a “Section” of such schedule, appendix or other attachment hereto or thereto.
  - (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 Agreement concerning amendments) a reference to that standard, principle, agreement or document as amended, supplemented, restated, substituted, replaced, novated or assigned.
- (vi) Unless otherwise provided in this Agreement, all accounting and financial terms used in this Agreement shall be interpreted and applied in accordance with Canadian GAAP.
- (vii) References to any Applicable Law, including any statutes or other Applicable Law specifically referred to herein, whether or not amendments or successors to such Applicable Law are referred to herein, are to be construed as references to that Applicable Law as from time to time amended or to any Applicable Law covering the same or similar subject matter from time to time replacing, extending, consolidating or amending the same.
- (viii) References to a statute shall include all regulations, by-laws, ordinances and orders made under or pursuant to the statute.
- (ix) The words in this Agreement shall bear their natural meaning.
- (x) 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 Agreement taken as a whole;
  - 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”; and
  - C. a Party’s “sole discretion” means in the sole and absolute discretion of the Party exercising the discretion.
- (xi) In construing this Agreement, the rule known as the *ejusdem generis rule* shall not apply nor shall any similar rule or approach to the construction of this 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.

- (xii) Where this 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.
- (xiii) Where this 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.
- (xiv) Any reference to time of day or date means the local time or date in Toronto, Ontario.
- (xv) Unless otherwise indicated, time periods will be strictly construed.
- (xvi) Whenever the terms “will” or “shall” are used in this Agreement they shall be construed and interpreted as synonymous and to read “shall”.
- (xvii) Any direct or indirect reference in this Agreement to “the completion of the design of the Facility and all Design Data” in accordance with this Agreement or the DPA Subcontracts shall be interpreted to mean the point at which a comment of “No Comment” or “Minor Non-Conformance” with no additional comment of “Re-Submit” has been assigned to each and all of the Schematic Design Submittals, Design Development Submittals, Construction Document Submittals and other Design Data and items required to be submitted by Dev Co for design review under this Agreement or the DPA Subcontracts in order to complete the full design of the Facility and all Design Data, in accordance with the Draft PA Review Procedure or the equivalent provisions of the DPA Subcontracts, and no such reference shall be interpreted to limit any liability of Dev Co under this Agreement or of a DPA Subcontractor under any DPA Subcontract (including with respect to the remedying of any defects in the design of the Facility or the Design Data).
- (xviii) Save where expressly stated otherwise, references to amounts or sums expressed to be “indexed” or “index linked” are references to amounts or sums which require adjustment to reflect the effects of inflation. Such adjustment shall be calculated in accordance with the following formula:

$$\text{Adjusted amount or sum} = \text{Amount or sum} \times \frac{\text{CPI}_n}{\text{CPI}_o}$$

## **2.2 Schedules and Appendices to this Agreement**

- (a) Except as set out in DPA Section 2.3, this Agreement is comprised of this executed agreement and the following schedules, including appendices, all of which are hereby incorporated by reference into and form part of this Agreement:

### **Schedule No. Description**

Schedule 1 – DPA Definitions

Schedule 2 – DPA Scope of Work

Schedule 3 – DPA Submissions and Project Development Process

Schedule 4 – DPA Works PA Requirements

Schedule 5 – DPA Key Individuals  
Schedule 6 – DPA Variation Procedure  
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Schedule 14 – Form of Assignment of DPA Subcontract  
Schedule 15 – Form of Performance Guarantee of DPA Works Guarantor  
Schedule 16 – DPA Term Governance, Meetings and Progress Reporting  
Schedule 17 – Negotiable Draft Project Agreement Provisions  
Schedule 18 – Form of Enabling Works Contract  
Schedule 19 – Enabling Works Requirements

- (b) The recitals to this Agreement form part of this Agreement, provided that they are intended to be read as subordinate to the other provisions of this Agreement.
- (c) Subject to DPA Section 2.2(a), all terms defined in this Agreement shall have the same meanings in its schedules and appendices unless otherwise defined in such schedules or appendices.
- (d) The documents comprising this Agreement are complementary and what is called for by any one of them shall be interpreted as if called for by all, except in the event of ambiguities, conflicts or inconsistencies, in which case DPA Section 2.4 shall apply.

### **2.3 Relationship to Draft Project Agreement**

- (a) Except where the context otherwise requires, the Parties agree that each reference expressly set out in this Agreement (other than in Schedule 11 – Draft Project Agreement) to a specific section, paragraph, subparagraph, part or other division of the Draft Project Agreement (including in the DPA Works PA Requirements) that is expressly intended to bind the Parties under this Agreement is, to the extent applicable, incorporated into this Agreement by such reference as if such section, paragraph, subparagraph, part or other division of the Draft Project Agreement was expressly set out in this Agreement and shall be applicable *mutatis mutandis*, including as though, if and to the extent set out in such reference:
  - (i) the Draft Project Agreement was this Agreement;
  - (ii) Commercial Close, Financial Close or the date of the Project Agreement under the Draft Project Agreement, as the context requires, was the Effective Date under this Agreement;
  - (iii) Contracting Authority under the Draft Project Agreement was DPA Contracting Authority under this Agreement;
  - (iv) the Contracting Authority Representative under the Draft Project Agreement was the DPA Contracting Authority Representative under this Agreement;
  - (v) Project Co under the Draft Project Agreement was Dev Co under this Agreement;

- (vi) the applicable part of the Works or the other Project Operations under the Draft Project Agreement, as the context requires, was the applicable part of the DPA Works under this Agreement;
- (vii) the Project Works Schedules under the Draft Project Agreement was the DPA Works Schedules under this Agreement;
- (viii) the Project Co Proposal Extracts under the Draft Project Agreement was the DPA Dev Co Proposal Extracts under this Agreement;
- (ix) the Dispute Resolution Procedure under the Draft Project Agreement was the DPA Dispute Resolution Procedure under this Agreement; and
- (x) any Variation under the Draft Project Agreement was a DPA Variation under this Agreement,

and where the term *mutatis mutandis* is used in this Agreement, in reference to provisions of the Draft Project Agreement being applicable in this Agreement, the provisions of this DPA Section 2.3(a) shall apply.

- (b) Notwithstanding anything to the contrary in this Agreement and subject to the express terms of Schedule 4 – DPA Works PA Requirements, except as expressly set out in this Agreement, no provision of the Draft Project Agreement is incorporated into this Agreement and no such provision shall have any legal force or effect whatsoever, and the Draft Project Agreement may be revised or amended in accordance with the provisions of this Agreement, including DPA Section 4.2.

## **2.4 Priority, Conflicts and Identification of Ambiguities, Conflicts, Inconsistencies and Errors**

- (a) In the event of ambiguities, conflicts or inconsistencies between or among any of the provisions of this Agreement, the provisions shall govern in the following order of precedence with each taking precedence over those listed subsequently:
  - (i) the provisions of amendments in writing to this Agreement and DPA Variation Confirmations signed by the Parties shall govern and take precedence only over those specific provisions of this Agreement expressly amended thereby;
  - (ii) any provision establishing a higher standard of safety, reliability, durability, performance or service shall take precedence over a provision establishing a lower standard of safety, reliability, durability, performance or service;
  - (iii) the body of this Agreement;
  - (iv) Schedule 1 – DPA Definitions;
  - (v) Schedule 8 – DPA Payment;
  - (vi) Schedule 2 – DPA Scope of Work;
  - (vii) Schedule 4 – DPA Works PA Requirements;

- (viii) Schedule 9 – DPA Insurance;
  - (ix) Schedule 6 – DPA Variation Procedure;
  - (x) Schedule 3 – DPA Submissions and Project Development Process;
  - (xi) Schedule 18 – Form of Enabling Works Contract;
  - (xii) Schedule 19 – Enabling Works Requirements;
  - (xiii) Schedule 17 – Negotiable Draft Project Agreement Provisions;
  - (xiv) the other Schedules in the order in which they are listed in DPA Section 2.2(a) other than Schedule 11 – DPA Draft Project Agreement; and
  - (xv) Schedule 10 – DPA Dev Co Proposal Extracts.
- (b) Subject to DPA Section 2.4(a), if the ambiguity, conflict or inconsistency is between a provision of general application and a provision that applies only to a specific part of the DPA Works, the provision that applies to the specific part of the DPA Works shall govern for that specific part of the DPA Works.
- (c) During the DPA Term, Dev Co shall promptly advise DPA Contracting Authority in writing of:
- (i) any ambiguity, conflict, inconsistency between or among any of the provisions of this Agreement;
  - (ii) any error, found or noted in this Agreement or in any of the portions of the Draft Project Agreement that are not included by reference in this Agreement pursuant to DPA Section 2.3;
  - (iii) supplementary details, instructions or directions that do not correspond with those contained in this Agreement; and
  - (iv) any other omission in or other fault with this Agreement or in any of the portions of the Draft Project Agreement that are not included by reference in this Agreement pursuant to DPA Section 2.3 that become evident to Dev Co and should be corrected respectively in order for:
    - A. Dev Co to properly perform the DPA Works in accordance with this Agreement, including in accordance with Applicable Law; and
    - B. Project Co to properly perform the Project Operations under the Final Project Agreement in the event that the Final Project Agreement were to be entered into by the Hospital and Project Co in accordance with this Agreement.
- (d) If any ambiguity, conflict or inconsistency between or among any of the provisions of this Agreement is not readily resolved by the foregoing provisions of this DPA Section 2.4, then the DPA Contracting Authority Representative shall, as soon as practicable in the circumstances, make a determination and give notice of such determination, in writing, to Dev Co.

- (e) DPA Contracting Authority and Dev Co shall comply with the determination of the DPA Contracting Authority Representative pursuant to DPA Section 2.4(d) unless DPA Contracting Authority or Dev Co disputes the decision of the DPA Contracting Authority Representative in which event such DPA Dispute may be referred for resolution in accordance with the DPA Dispute Resolution Procedure.

## **2.5 Dev Co Proposal Extracts**

- (a) The Parties shall comply with Schedule 10 – DPA Dev Co Proposal Extracts.
- (b) Except for the Dev Co Proposal Extracts, on the Effective Date, the Request for Proposals and Dev Co's proposal pursuant to the Request for Proposals shall be superseded entirely by this Agreement and rendered null and void, and shall not be relied upon or used by Dev Co, DPA Contracting Authority or anyone else (including anyone pursuant to the DPA Dispute Resolution Procedure or any court) in any way to interpret or qualify the scope of the DPA Works, any obligations or liabilities of Dev Co, or anything else contained in this Agreement.

## **3. JOINT AND SEVERAL LIABILITY AND NO IO CONTINGENT LIABILITIES**

### **3.1 Joint and Several Liability of DPA Contracting Authority**

- (a) DPA Contracting Authority shall be liable, on a joint and several basis, for all of the obligations of DPA Contracting Authority under this Agreement, provided that:
  - (i) where it is expressly set out that the Hospital is liable for an obligation, representation or warranty under this Agreement, Infrastructure Ontario shall not be liable for any such obligation, representation or warranty; and
  - (ii) where it is expressly set out that Infrastructure Ontario is liable for an obligation, representation or warranty under this Agreement, the Hospital shall not be liable for any such obligation, representation or warranty.

### **3.2 No Contingent Liabilities of Infrastructure Ontario**

- (a) Notwithstanding anything else in this Agreement, any express or implied reference to Infrastructure Ontario providing an indemnity or any other form of indebtedness or contingent liability that would directly or indirectly increase the indebtedness or contingent liabilities of the Province or Infrastructure Ontario, whether at the time of execution of this Agreement or at any time during the DPA Term, shall be void and of no legal effect with respect to Infrastructure Ontario but, for greater certainty, not to the Hospital if such reference is to DPA Contracting Authority.
- (b) Dev Co's sole recourse to Infrastructure Ontario with respect to the subject matter of this Agreement shall be to Infrastructure Ontario in its capacity as agent for the Province.

## **4. PURPOSE AND INTENT OF DEVELOPMENT PHASE AGREEMENT**

### **4.1 Purpose of this Agreement and Notice to Proceed to Commercial Close**

- (a) The Parties acknowledge and agree that the purpose of this Agreement is:



- (i) for DPA Contracting Authority and Dev Co to collaboratively plan and for (A) Dev Co to perform the DPA Works, subject to and in accordance with this Agreement; and (B) Dev Co to cause the performance of the Enabling Works, subject to and in accordance with this Agreement and the Enabling Works Contract; and
- (ii) to allow DPA Contracting Authority to assess and determine, in its sole discretion, if the Hospital will elect to proceed to enter into the Final Project Agreement with Project Co, including after:
  - A. the Draft Project Agreement Negotiations Process pursuant to Schedule 3 – DPA Submissions and Project Development Process is undertaken and completed;
  - B. the Project Proposal submitted by Dev Co pursuant to Schedule 3 – DPA Submissions and Project Development Process has been reviewed and commented on by DPA Contracting Authority;
  - C. any Project Proposal Negotiations pursuant to Schedule 3 – DPA Submissions and Project Development Process are undertaken and completed;
  - D. the Financing Process pursuant to Schedule 3 – DPA Submissions and Project Development Process is undertaken and completed; and
  - E. DPA Contracting Authority has taken into account and considered any other factors identified by DPA Contracting Authority or any of its stakeholders (including the MOH), in its sole discretion, including any relevant affordability constraints of the Hospital or the Province and the performance of Dev Co and the Dev Co Parties under this Agreement.
- (b) In the event that DPA Contracting Authority makes an election for the Hospital to proceed to enter into a Final Project Agreement with Project Co following the completion of the process set out in DPA Section 4.1(a), then DPA Contracting Authority shall, before the expiry of the Project Proposal Validity Period, deliver a written notice to Dev Co directing Dev Co to proceed to achieve Commercial Close in accordance with the provisions of Schedule 3 – DPA Submissions and Project Development Process (a “**Notice to Proceed to Commercial Close**”).
- (c) Notwithstanding anything to the contrary in this Agreement, Dev Co acknowledges, confirms and agrees that:
  - (i) DPA Contracting Authority shall be under no obligation whatsoever, and shall not be liable under this Agreement or otherwise pursuant to any Applicable Law, to Dev Co or to any Dev Co Party to deliver any Notice to Proceed to Commercial Close to Dev Co;
  - (ii) nothing in this Agreement shall limit, prejudice or fetter DPA Contracting Authority’s right to terminate this Agreement pursuant to DPA Section 19.1, including after DPA Contracting Authority delivers a Notice to Proceed to Commercial Close to Dev Co; and
  - (iii) DPA Contracting Authority shall not be liable for any losses, damages or claims suffered by Dev Co or any Dev Co Party arising from or connected with the termination of this Agreement for any reason whatsoever, including following DPA Contracting Authority’s



review of and comment on the Project Proposal, except as expressly set out in DPA Section 20.

#### **4.2 No Renegotiation of Final Draft Project Agreement Provisions**

- (a) Each Party acknowledges and confirms that it is satisfied with the form of the Draft Project Agreement other than (only) with respect to the specific provisions (or parts thereof) or specific subject matters in the Draft Project Agreement that are expressly identified in Schedule 17 – Negotiable Draft Project Agreement Provisions as being subject to completion or revision and negotiation by the Parties prior to the Final Checkpoint and the Project Proposal Submission Deadline (the “**Negotiable Draft Project Agreement Provisions**”), and agrees that it shall not seek to amend, revise or renegotiate the provisions of the Draft Project Agreement during the DPA Term, save and except as follows:
- (i) in accordance with DPA Section 12;
  - (ii) in accordance with Schedule 3 – DPA Submissions and Project Development Process; or
  - (iii) as otherwise agreed by the Parties in writing.
- (b) Notwithstanding DPA Section 4.2(a), in the event that, before the Final Checkpoint, Dev Co is of the reasonable opinion that revisions to any of the provisions of the Draft Project Agreement that are not (i) Negotiable Draft Project Agreement Provisions and (ii) incorporated into this Agreement by reference, may be beneficial to DPA Contracting Authority, then Dev Co may propose such revisions to DPA Contracting Authority, which may be negotiated, accepted or rejected (in whole or in part) by DPA Contracting Authority in its sole discretion. Dev Co acknowledges that DPA Contracting Authority is under no obligation whatsoever to negotiate or accept such proposed revisions.

#### **4.3 Non-Exclusive Agreement**

- (a) Without limiting or prejudice to the provisions of DPA Section 12 and Schedule 6 – DPA Variation Procedure, Dev Co acknowledges and accepts that:
- (i) it is providing the DPA Works to DPA Contracting Authority on a non-exclusive basis, and that DPA Contracting Authority reserves the right to contract with other third parties for the same or similar works and services as those provided by Dev Co under this Agreement and reserves the right to obtain or perform the same or similar works and services internally; and
  - (ii) DPA Contracting Authority may, at any time and in its sole discretion, elect to deliver any part of the Project set out in the Draft Project Agreement by works or services provided either directly by any entity comprising DPA Contracting Authority or by way of separate arrangements with third parties.
- (b) The Parties agree that, without limiting or prejudice to the provisions of DPA Section 12 or Schedule 6 – DPA Variation Procedure, if DPA Contracting Authority exercises any of its rights set out in DPA Section 4.3(a) without first making any necessary adjustments to the DPA Scope of Work by way of a DPA Variation to (i) reduce the DPA Scope of Work to reflect the performance

of such works or services by such third parties or by such entity comprising DPA Contracting Authority instead of Dev Co or (ii) otherwise address any and all interfaces between the DPA Scope of Work and such works or services, then (A) Dev Co shall not be responsible for such works or services; and (B), if any such works or services materially adversely interferes with the performance of the DPA Works or requires the performance by Dev Co or any Dev Co Party of any material additional works or services that would not otherwise be required of Dev Co or the Dev Co Parties under this Agreement, then, subject to and in accordance with Schedule 6 – DPA Variation Procedure, Dev Co shall be entitled to a DPA Variation in respect, and to the extent, of such material adverse interference or material additional works or services by Dev Co or the Dev Co Parties. For greater certainty, this DPA Section 4.3(b) shall not be applicable in the event, and to the extent, that DPA Contracting Authority exercises its rights pursuant to DPA Section 18.1(d)(i).

**4.4 No Fettering DPA Contracting Authority or Government Entity Functions**

- (a) Nothing in this Agreement shall in any way fetter the right, authority and discretion of DPA Contracting Authority or any Government Entity in fulfilling its statutory or other functions under Applicable Law, and Dev Co understands and agrees that nothing in this Agreement shall preclude Infrastructure Ontario's board of directors or the Hospital's board of directors from performing, discharging or exercising its duties, responsibilities and powers under Applicable Law.

**5. COLLABORATION AND COOPERATION**

**5.1 Parties to Collaborate and Cooperate**

- (a) The Parties agree to:
- (i) at all times act cooperatively, reasonably and in good faith in the performance of their respective obligations and the exercise of their respective rights under this Agreement;
  - (ii) at all times act in accordance with the following principles, whereby the Parties shall:
    - A. establish and maintain a collaborative culture and act, at all times, in a manner that is consistent with a "best for project" approach;
    - B. follow "safety first and always" principles;
    - C. seek to create exceptional value for DPA Contracting Authority and the Project and mutual benefits for the Parties; and
    - D. establish and maintain a value for money approach to the Project,

provided that the foregoing shall not limit any right of a Party where in this Agreement it is set out that a Party may exercise any of its rights in its sole discretion.

- (b) Unless it is specifically provided that a consent, approval or satisfaction is in the sole discretion of DPA Contracting Authority or the DPA Contracting Authority Representative, no consent, approval or satisfaction of DPA Contracting Authority or the DPA Contracting Authority Representative shall be unreasonably withheld or delayed.

- (c) Unless it is specifically provided that a consent, approval or satisfaction is in the sole discretion of Dev Co or the DPA Dev Co Representative, no consent, approval or satisfaction of Dev Co or the DPA Dev Co Representative shall be unreasonably withheld or delayed.
- (d) Notwithstanding anything to the contrary in this Agreement, no Party shall be under any obligation to perform or shall be liable for any of the other Party's obligations under this Agreement or to amend this Agreement to assist the other Party in performing its obligations under this Agreement.

## **6. TRANSPARENCY AND PRICING EFFICIENCY**

### **6.1 Dev Co Transparency**

- (a) For the purposes of achieving value for money and transparency with respect to the Project, Dev Co agrees that it will:
  - (i) honestly and openly answer any questions DPA Contracting Authority, or its advisors, may ask in connection with the DPA Works, including in connection with the DPA Project Deliverables; and
  - (ii) promptly at the request of DPA Contracting Authority, provide information and documentation relating to, and all reasonable requested assistance to allow DPA Contracting Authority to understand, the DPA Project Deliverables in general, the contingencies and pricing included or to be included within the Costed Elements, the process used by Dev Co to solicit pricing for each scope of work, the range of prices received by Dev Co for each scope or work, and Dev Co's and the Dev Co Parties' ability to complete the Financing Process and their costs related thereto.
- (b) DPA Contracting Authority acknowledges that nothing in DPA Section 6.1(a) applies to information or documentation that may be subject to legal professional privilege or are confidential lawyer-client communications.

### **6.2 Project Affordability Constraints**

- (a) DPA Contracting Authority may, in its sole discretion, elect to disclose to Dev Co in writing any affordability constraints in respect of the cost of the Project identified by DPA Contracting Authority. If DPA Contracting Authority elects to make such disclosure to Dev Co, then such disclosure shall be on a strictly confidential basis and shall be Background Information.

### **6.3 Estimate Information**

- (a) With respect to each element of a DPA Schedule 3 Submittal and the Project Proposal (each a "Costed Element"), DPA Contracting Authority may require Dev Co to deliver evidence to DPA Contracting Authority demonstrating to DPA Contracting Authority's reasonable satisfaction that Dev Co has used commercially reasonable efforts to obtain the best value for money in respect of all work, services, supplies, materials and equipment required by the Costed Element, including to minimize any and all price contingencies and by applying, using and comparing applicable industry benchmarks or benchmarking data for such purposes, and complying with all Good Industry Practice in relation to any procurement of any work, services, supplies, materials or equipment required by the Costed Element, to a standard no less than Dev Co would apply if all costs and

expenses (including contingencies) were to be incurred on its own account without recourse to DPA Contracting Authority. Also, to the extent any such procurement resulted in costs or expenses that are in excess of those costs or expenses established by industry benchmarks or benchmarking data, Dev Co shall provide DPA Contracting Authority sufficient information and analysis to demonstrate to DPA Contracting Authority's satisfaction, acting reasonably, that such excess costs or expenses are reasonable and justified in the context of the subject Costed Element. For greater certainty, DPA Contracting Authority acknowledges that Dev Co and the DPA Subcontractors may include price contingencies in the Costed Elements.

- (b) Dev Co shall deliver all evidence required by DPA Section 6.3(a) to DPA Contracting Authority within 10 Business Days (or such longer time period agreed by the Parties in writing) of a request from DPA Contracting Authority in accordance with DPA Section 6.3(a). In the event that DPA Contracting Authority does not agree that Dev Co has provided evidence demonstrating the matters set out in DPA Section 6.3(a), DPA Contracting Authority may require Dev Co to take additional measures to ensure that it complies with the requirements of DPA Section 6.3(a). DPA Contracting Authority shall not have any right to require Dev Co to modify its price as provided in the Project Proposal, or otherwise, as a result of any review undertaken pursuant to this DPA Section 6.3, provided however, that disclosure made in connection with this DPA Section 6.3 and any failure of Dev Co to comply with the provisions of this DPA Section 6.3 may otherwise be considered by DPA Contracting Authority, in the context of DPA Contracting Authority's review of any of the DPA Schedule 3 Submittals and the Project Proposal.

#### **6.4 Dev Co Public Tender of Costed Element**

- (a) At the request of DPA Contracting Authority, Dev Co shall, in good faith, issue and evaluate a competitive procurement for any Costed Element. In the event that DPA Contracting Authority requests that Dev Co issue and evaluate a competitive procurement for any Costed Element, Dev Co shall, subject to and in accordance with Schedule 6 – DPA Variation Procedure, be entitled to a DPA Variation in respect of the payment of its costs for carrying out such competitive procurement. Dev Co is not required by the terms of this Agreement, for the purposes of any DPA Schedule 3 Submittal, its Project Proposal or any performance under a Final Project Agreement, to accept any particular, or any response to any, competitive procurement required pursuant to this DPA Section 6.4(a).
- (b) In the event Dev Co incorporates a price which is higher than the amount of the lowest priced proposal for a Costed Element that has been the subject of a competitive procurement pursuant to DPA Section 6.4(a), or otherwise, into its pricing included in a DPA Schedule 3 Submittal or the Project Proposal, Dev Co shall include with such DPA Schedule 3 Submittal or the Project Proposal detailed reasons for its decision to carry such higher price for such Costed Element.
- (c) In accordance with DPA Section 4.3, Dev Co acknowledges that DPA Contracting Authority may, at any time, elect to run a competitive public procurement in respect of a Costed Element and may, in accordance with DPA Section 12, amend the DPA Scope of Work or the scope of the Draft Project Agreement accordingly.

#### **6.5 Non-Conformance of Cost and Pricing Information Included in Costed Elements**

- (a) For greater certainty, and without limiting any right of DPA Contracting Authority under this Agreement, except for pricing that is inconsistent with the provisions of DPA Section 13.2(c), DPA

Contracting Authority shall not issue a comment of “MAJOR NON-CONFORMANCE” or “CRITICAL NON-CONFORMANCE” pursuant to this Agreement to any cost estimate or any pricing element included in a Costed Element submitted by Dev Co to DPA Contracting Authority pursuant to this Agreement solely on the basis that such cost estimate or pricing element (i) exceeds any affordability threshold of DPA Contracting Authority, (ii) is not in conformance with market prices, (iii) is different from any costs estimates or pricing elements previously submitted by Dev Co under this Agreement or (iv) is in a quantum otherwise not acceptable to DPA Contracting Authority.

## **7. DEVELOPMENT PHASE AGREEMENT TERM**

### **7.1 Commencement on Effective Date and Expiry and Termination**

- (a) This Agreement commences on the Effective Date, and shall expire and terminate upon the earlier of (i) Commercial Close if and when the Hospital and Project Co enter into the Final Project Agreement; or (ii) the date this Agreement is otherwise terminated in accordance with its terms (the “**DPA Term**”).

## **8. REPRESENTATIONS AND WARRANTIES**

### **8.1 Dev Co Representations and Warranties**

- (a) Dev Co represents and warrants to DPA Contracting Authority that as of the Effective Date:
  - (i) Dev Co is a [REDACTED] and has all the requisite power and authority to own its properties and assets, to carry on its business as it is currently being conducted, and to enter into this Agreement and to perform its obligations under this Agreement;
  - (ii) [REDACTED];
  - (iii) [REDACTED];
  - (iv) [REDACTED];
  - (v) Dev Co and the Dev Co Parties, collectively, have extensive experience and are knowledgeable in the design and construction of hospital facilities and have the required ability, experience, skill and capacity to perform the DPA Works in a timely and professional manner as set out in this Agreement;
  - (vi) Dev Co has the requisite power, authority and capacity to execute, deliver and perform this Agreement, and to do all acts and things, and execute, deliver and perform all other agreements, instruments, undertakings and documents as are required by this Agreement to be done, executed, delivered or performed;
  - (vii) no steps or proceedings have been taken or are pending to supersede or amend the constating documents, articles or by-laws of Dev Co in a manner that would impair or limit its ability to perform the obligations of Dev Co under this Agreement;

- (viii) this Agreement has been duly authorized, executed, and delivered by Dev Co and constitutes a legal, valid, and binding obligation of Dev Co, enforceable against Dev Co in accordance with its terms, subject only to:
  - A. limitations with respect to the enforcement of remedies by bankruptcy, insolvency, moratorium, winding-up, arrangement, reorganization, fraudulent preference and conveyance and other laws of general application affecting the enforcement of creditors' rights generally; and
  - B. general equitable principles and the fact that the availability of equitable remedies is in the discretion of a court and that a court may stay proceedings or the execution of judgments;
- (ix) the execution, delivery, and performance by Dev Co of this Agreement does not and will not violate or conflict with, or constitute a default under:
  - A. its constating, formation or organizational documents, including any by laws;
  - B. any Applicable Law; or
  - C. any covenant, contract, agreement, or understanding to which it is a party or by which it or any of its properties or assets is bound or affected;
- (x) no Dev Co Event of Default has occurred and is continuing;
- (xi) there are no actions, suits, proceedings, or investigations pending or threatened against Dev Co or, to Dev Co's knowledge, any Dev Co Party at law or in equity before any Governmental Authority or arbitral body (whether or not covered by insurance) that individually or in the aggregate could result in any material adverse effect on the business, properties, or assets, or the condition, financial or otherwise, of Dev Co or any Dev Co Party or in any impairment of its ability to perform its obligations under this Agreement, and Dev Co has no knowledge of any violation or default with respect to any order, writ, injunction, or decree of any Governmental Authority or arbitral body that could result in any such material adverse effect or impairment;
- (xii) Dev Co has carefully reviewed the whole of this Agreement, and all other documents made available to Dev Co by or on behalf of DPA Contracting Authority, and, to Dev Co's knowledge, nothing contained herein or therein inhibits or prevents Dev Co from completing the DPA Works in accordance with this Agreement in a good manner so as to achieve and satisfy the requirements of this Agreement;
- (xiii) Dev Co is able to meet its obligations as they generally become due;
- (xiv) Dev Co is registered under Division V of Part IX of the *Excise Tax Act* (Canada) and its HST registration number is [REDACTED];
- (xv) Dev Co is not a Non-Resident;



- (xvi) no Restricted Person has Direct or Indirect Power or Control over any member of the Dev Co Group in relation to the decisions, management, actions or policies of Dev Co, or in relation to the Project;
- (xvii) to the knowledge of Dev Co, no Restricted Person has directly or indirectly an Economic Interest in Dev Co or the Project;
- (xviii) the Initial DPA Subcontracts identified in Schedule 13 – Initial DPA Subcontracts have been entered into and are in full force and effect, and Dev Co has provided a true and complete copy of each of them to DPA Contracting Authority;
- (xix) the DPA Subcontractors whose Initial DPA Subcontracts are the subject of the Assignment of Project Documents have acknowledged and consented to the Assignment of Project Documents in accordance with its terms;
- (xx) Dev Co has obtained priority for DPA Contracting Authority's security interest in the Assignment of Project Documents over all other security interests granted by Dev Co to any other person;
- (xxi) the Assignment of DPA Subcontract in respect of each applicable Initial DPA Subcontract is in full force and effect; and
- (xxii) Dev Co has not carried on any business activity of any kind except the performance of its obligations in connection with or under this Agreement.

## **8.2 DPA Contracting Authority Representations and Warranties**

- (a) The Hospital represents and warrants to Dev Co that as of the Effective Date:
  - (i) the Hospital is a non-share capital corporation incorporated and validly existing under the laws of the Province of Ontario, is in good standing with the Ministry of Government and Consumer Services of Ontario with respect to the filing of annual reports, and has all the requisite corporate power and authority to own its properties and assets, to carry on its business as it is currently being conducted, and to enter into this Agreement and to perform its obligations hereunder;
  - (ii) the Hospital has the requisite power, authority and capacity to execute, deliver and perform this Agreement, and to do all acts and things, and execute, deliver and perform all other agreements, instruments, undertakings and documents as are required by this Agreement to be done, executed, delivered or performed;
  - (iii) no steps or proceedings have been taken or are pending to supersede or amend its constating documents, letters patent or by-laws in a manner that would impair or limit its ability to perform its obligations under this Agreement;
  - (iv) this Agreement has been duly authorized, executed, and delivered by the Hospital and constitutes a legal, valid, and binding obligation of the Hospital, enforceable against the Hospital in accordance with its terms, subject only to:

- A. limitations with respect to the enforcement of remedies by bankruptcy, insolvency, moratorium, winding-up, arrangement, reorganization, fraudulent preference and conveyance and other laws of general application affecting the enforcement of creditors' rights generally; and
    - B. general equitable principles and the fact that the availability of equitable remedies is in the discretion of a court and that a court may stay proceedings or the execution of judgments;
  - (v) the execution, delivery, and performance by the Hospital of this Agreement does not and will not violate or conflict with, or constitute a default under:
    - A. its constating or organizational documents;
    - B. Applicable Law; or
    - C. any covenant, contract, agreement, or understanding to which it is a party or by which it or any of its properties or assets is bound or affected;
  - (vi) to the knowledge of the Hospital, there are no actions, suits, proceedings, or investigations pending or threatened (in writing) against the Hospital or, to the Hospital's knowledge, any DPA Contracting Authority Party at law or in equity before any Governmental Authority or arbitral body (whether or not covered by insurance) of which the Hospital has received written notice and that individually or in the aggregate could result in any material adverse effect on the business, properties, or assets, or the condition, financial or otherwise, of the Hospital or in any impairment of its ability to perform its obligations under this Agreement, and the Hospital has no knowledge of any violation or default with respect to any order, writ, injunction, or decree of any Governmental Authority or arbitral body that could result in any such material adverse effect or impairment; and
  - (vii) the Hospital is able to meet its obligations under this Agreement as they generally become due.
- (b) Infrastructure Ontario represents and warrants to Dev Co that as of the Effective Date:
- (i) Infrastructure Ontario is a non-share capital corporation continued and amalgamated under the *Ontario Infrastructure and Lands Corporation Act, 2011*, S.O. 2011, c.9, Schedule 32, as amended, and has all the requisite corporate power and authority to own its properties and assets, to carry on its business as it is currently being conducted, and to enter into this Agreement as agent for the Province;
  - (ii) subject to DPA Sections 8.2(b)(v)C), 8.2(b)(v)D), 8.2(b)(v)E) and 8.2(b)(v)F), Infrastructure Ontario is entering into this Agreement as agent for the Province and has the requisite power, authority and capacity to execute and deliver this Agreement and to bind the Province to this Agreement, and Dev Co is entitled to rely upon Infrastructure Ontario's authority to bind the Province in respect of all other agreements, instruments, undertakings and documents executed and delivered by Infrastructure Ontario as agent for the Province that are required by this Agreement to be executed and delivered by the Province;



- (iii) subject to DPA Sections 8.2(b)(v)C), 8.2(b)(v)D), 8.2(b)(v)E) and 8.2(b)(v)F), Infrastructure Ontario has the requisite power, authority and capacity to perform its obligations under this Agreement, and to do all acts and things, and execute, deliver and perform all other agreements, instruments, undertakings and documents as are required by this Agreement to be done, executed, delivered or performed;
- (iv) subject to DPA Sections 8.2(b)(v)C), 8.2(b)(v)D) and 8.2(b)(v)E), Infrastructure Ontario has obtained all necessary approvals to enter into this Agreement as agent for the Province;
- (v) this Agreement has been duly authorized, executed, and delivered by Infrastructure Ontario and constitutes a legal, valid, and binding obligation of Infrastructure Ontario, enforceable against Infrastructure Ontario in accordance with its terms, subject only to:
  - A. limitations with respect to the enforcement of remedies by bankruptcy, insolvency, moratorium, winding-up, arrangement, reorganization, fraudulent preference and conveyance and other laws of general application affecting the enforcement of creditors' rights generally;
  - B. general equitable principles and the fact that the availability of equitable remedies such as specific performance and injunction are not available against the Province and that a court may stay proceedings or the execution of judgments;
  - C. statutory limitations of general application respecting the enforceability of claims against the Province or its property;
  - D. section 11.3 of the *Financial Administration Act* (Ontario);
  - E. any terms and conditions set out in the approval that has been provided in connection with this Agreement for the purposes of section 28 of the *Financial Administration Act* (Ontario); and
  - F. the powers of the Minister of Finance to effect set offs against amounts owing by Ontario pursuant to section 43 of the *Financial Administration Act* (Ontario); and
- (vi) the execution, delivery, and performance by Infrastructure Ontario of this Agreement does not and will not violate or conflict with, or constitute a default under:
  - A. the *Ontario Infrastructure and Lands Corporation Act, 2011* (Ontario);
  - B. the *Executive Council Act* (Ontario);
  - C. any Applicable Law; or
  - D. any covenant, contract, agreement, or understanding relating to the Project to which it is a party or by which it or any of its properties or assets is bound or affected.

## **9. APPOINTMENT OF REPRESENTATIVES**

### **9.1 DPA Contracting Authority Representative**

- (a) Subject to the limitations set out in DPA Section 9.1(d), the DPA Contracting Authority Representative shall exercise the functions and powers identified in this Agreement as functions or powers to be performed by the DPA Contracting Authority Representative and such other functions and powers of DPA Contracting Authority under this Agreement as DPA Contracting Authority may notify Dev Co from time to time.
- (b) DPA Contracting Authority may, from time to time by written Notice to Dev Co, change the DPA Contracting Authority Representative. Such change shall have effect on the later of the date of delivery of such Notice and the date specified in such notice.
- (c) During any period when no DPA Contracting Authority Representative has been appointed, or when the DPA Contracting Authority Representative is unable, through illness, incapacity or any other reason whatsoever, to perform the DPA Contracting Authority Representative's functions under this Agreement, DPA Contracting Authority shall perform or may, by Notice to Dev Co, promptly appoint an alternative DPA Contracting Authority Representative to perform the functions which would otherwise be performed by the DPA Contracting Authority Representative. Upon receipt of such Notice, Dev Co and the DPA Dev Co Representative shall be entitled to treat any act of such alternative DPA Contracting Authority Representative which is permitted by this Agreement as being authorized by DPA Contracting Authority, and Dev Co and the DPA Dev Co Representative shall not be required to determine whether authority has in fact been given.
- (d) The DPA Contracting Authority Representative shall not, except as otherwise provided in this Agreement, be entitled to modify or waive any provision of this Agreement or to authorize a DPA Variation.
- (e) Subject to the limitations set out in DPA Sections 9.1(a) and 9.1(d), unless DPA Contracting Authority otherwise provides Notice to Dev Co, Dev Co and the DPA Dev Co Representative shall be entitled to treat any act of the DPA Contracting Authority Representative which is authorized by this Agreement as being authorized by DPA Contracting Authority, and Dev Co and the DPA Dev Co Representative shall not be required to determine whether authority has in fact been given.

### **9.2 DPA Dev Co Representative**

- (a) Subject to the limitations set out in DPA Section 9.2(d), the DPA Dev Co Representative shall have full authority to act on behalf of Dev Co for all purposes of this Agreement.
- (b) Dev Co may change the DPA Dev Co Representative with the prior written consent of DPA Contracting Authority.
- (c) During any period when the DPA Dev Co Representative is unable, through illness, incapacity or any other reason whatsoever, to perform the DPA Dev Co Representative's functions under this Agreement, Dev Co shall perform or may, by Notice to DPA Contracting Authority, promptly appoint an alternative DPA Dev Co Representative to perform the functions which would otherwise be performed by the DPA Dev Co Representative, provided that, Dev Co must seek DPA Contracting Authority's consent in accordance with DPA Section 9.2(b) if such alternative DPA

Dev Co Representative is in place for more than 20 Business Days. Upon receipt of such Notice, DPA Contracting Authority and the DPA Contracting Authority Representative shall be entitled to treat any act of such alternative DPA Dev Co Representative which is permitted by this Agreement as being authorized by Dev Co, and DPA Contracting Authority and the DPA Contracting Authority Representative shall not be required to determine whether authority has in fact been given.

- (d) The DPA Dev Co Representative shall not, except as otherwise provided in this Agreement, be entitled to modify or waive any provision of this Agreement.
- (e) Subject to the limitations set out in DPA Section 9.2(d), unless Dev Co otherwise provides Notice to DPA Contracting Authority, DPA Contracting Authority and the DPA Contracting Authority Representative shall be entitled to treat any act of the DPA Dev Co Representative which is authorized by this Agreement as being authorized by Dev Co, and DPA Contracting Authority and the DPA Contracting Authority Representative shall not be required to determine whether authority has in fact been given.

### **9.3 Communications to Representatives**

- (a) At the time that a Party appoints or changes the appointment of the DPA Contracting Authority Representative or the DPA Dev Co Representative, as applicable, that Party shall also provide the other Party with contact information for delivery of communications to such representative. Communications to such representative shall not constitute notices to the Party appointing such representative.

## **10. DEV CO DPA WORKS OBLIGATIONS**

### **10.1 Performance of DPA Works**

- (a) Dev Co shall, at its cost and expense, perform all work and provide all services necessary to complete the DPA Scope of Work in accordance with this Agreement (collectively, the “**DPA Works**”).
- (b) The Parties agree to comply with the provisions of Schedule 3 – DPA Submissions and Project Development Process, including with regards to:
  - (i) the performance of the activities to be carried out during the Initial Development Stage and Project Checkpoints processes;
  - (ii) Dev Co’s submission of the DPA Project Deliverables to DPA Contracting Authority for its review and comment; and
  - (iii) the process, terms and conditions in respect of the Parties negotiating, finalizing, executing and delivering a Final Project Agreement,

subject to and in accordance with the terms of this Agreement.

**10.2 General DPA Works Requirements**

- (a) Without limiting any other obligation of Dev Co in this Agreement, including the DPA Works PA Requirements:
  - (i) Dev Co shall perform and shall cause the performance of the DPA Works:
    - A. at all times, fully, diligently and in a professional and competent manner;
    - B. to be undertaken by persons qualified and skilled in their occupations and with the care and skill reasonably to be expected of persons providing a scope of works and services similar to each aspect of the DPA Works, and on a project of similar size, scope, complexity, quality and prestige to the Project; and
    - C. in accordance with Good Industry Practice and Applicable Law; and
  - (ii) Dev Co shall:
    - A. communicate, attend meetings and consult regularly with and provide progress reporting to DPA Contracting Authority during the performance of the DPA Works, including at the request of DPA Contracting Authority or as otherwise required by Dev Co to perform and complete the DPA Works;
    - B. inform itself of DPA Contracting Authority's requirements for the Project and the DPA Works, including by familiarising itself and keeping itself familiarised with the Background Information; and
    - C. carefully examine any Background Information from time to time provided by DPA Contracting Authority to the extent necessary to properly perform Dev Co's obligations under this Agreement and perform the DPA Works and in order to conform and comply with Good Industry Practice; and
  - (iii) if any of the DPA Works fail to satisfy the requirements of this Agreement, Dev Co shall promptly correct and rectify such failure at its own cost and expense following the earlier to occur of the date Dev Co becomes aware of such failure or of DPA Contracting Authority's provision of Notice to Dev Co outlining such failure.
- (b) Dev Co acknowledges and agrees that notwithstanding anything to the contrary in this Agreement, no consultation, cooperation, inspection, testing, approval, comment, audit, certification or acknowledgement by DPA Contracting Authority pursuant to this Agreement, and no consent furnished by DPA Contracting Authority pursuant to this Agreement, shall relieve Project Co under the Final Project Agreement from its exclusive responsibility for ensuring that the Works and the Facility comply with the requirements of the Final Project Agreement, or estop the Hospital from asserting any non-compliance with any such requirements under the Final Project Agreement.
- (c) For greater certainty, the Parties acknowledge and agree that:
  - (i) the Advance DPA Works forms part of the DPA Works; and

- (ii) the Advance DPA Works performed or completed by Dev Co and the Dev Co Parties prior to the Effective Date is subject to the provisions of this Agreement.

### **10.3 DPA Works Schedules and DPA Works Schedules Requirements**

- (a) Without limiting any other obligation of Dev Co in this Agreement, including the DPA Works PA Requirements, Dev Co shall perform the DPA Works in accordance with the DPA Works Schedules, and the requirements of Schedule 7 – DPA Works Schedules Requirements.
- (b) Dev Co shall, promptly and within 10 Business Days after becoming aware of a matter which is likely to delay the DPA Works, give Notice to DPA Contracting Authority describing the circumstances and extent or likely extent of the delay.
- (c) The DPA Works Schedules may be amended from time to time by Dev Co with the written approval of DPA Contracting Authority. Subject to the terms of Schedule 6 – DPA Variation Procedure, any DPA Contracting Authority approval of such changes to the DPA Works Schedule does not entitle Dev Co to a DPA Variation, an extension of time or any additional compensation (including to any adjustment to the Total DPA and Design Works Fixed Price).
- (d) Where Dev Co proposes any change to a DPA Works Schedule, Dev Co shall, no later than two Business Days following the written request of DPA Contracting Authority, deliver to DPA Contracting Authority a copy of the most current version of the requested DPA Works Schedule and/or any past version of the requested DPA Works Schedule in its native software format.

### **10.4 Anti-Racism and Anti-Discrimination Processes, Policies and Procedures and Indigenous Engagement**

- (a) Without limiting DPA Section 2.3, the Parties agree to comply with the provisions of Section 9.14 (Anti-Racism, Anti-Discrimination and Anti-Harassment Governance Requirements) of the Draft Project Agreement, which shall be applicable *mutatis mutandis*.
- (b) Dev Co shall implement and comply with the Indigenous Communities Engagement Plan.

### **10.5 Project Governance, Meetings and Progress Reporting**

- (a) The Parties shall comply with the provisions of Schedule 16 – DPA Term Governance, Meetings and Progress Reporting.

### **10.6 DPA Key Individuals**

- (a) The individuals who are critical to the performance of the DPA Works are identified in Schedule 5 – DPA Key Individuals (“**DPA Key Individuals**”). Dev Co shall use and shall cause the Dev Co Parties to use best efforts to ensure that all of the DPA Key Individuals remain involved in the DPA Works and, if applicable following Commercial Close in the Works under the Final Project Agreement, and in any event in the capacity set out in Schedule 5 – DPA Key Individuals.
- (b) Dev Co shall not, and shall cause the Dev Co Parties not to during the DPA Term, require or request any DPA Key Individual to be involved in any other project on behalf of Dev Co or any Dev Co Party if, in the opinion of DPA Contracting Authority acting reasonably, such involvement would have a material adverse effect on the DPA Works.

- (c) Dev Co shall cause all DPA Key Individuals to devote all such time to DPA Works as is reasonable, necessary and prudent.
- (d) If Dev Co considers it necessary to replace any DPA Key Individual, Dev Co shall promptly provide DPA Contracting Authority with relevant information on the proposed replacement and shall consult with DPA Contracting Authority before finalizing the appointment of such replacement. Dev Co shall not replace any DPA Key Individual without the prior written consent of DPA Contracting Authority, which consent shall not be withheld or delayed where the proposed replacement is suitably qualified and experienced.
- (e) If DPA Contracting Authority determines, acting reasonably, that it is in the best interests of DPA Contracting Authority or the Project that any DPA Key Individual be replaced, DPA Contracting Authority shall provide Notice to Dev Co (including a detailed explanation of the reasons for such determination), and, within 30 days after receipt by Dev Co of such Notice, Dev Co shall, subject to DPA Section 10.6(f), provide DPA Contracting Authority with relevant information on the proposed replacement and shall consult with DPA Contracting Authority before finalizing the appointment of such replacement. Dev Co shall not replace any DPA Key Individual in such a circumstance without the prior written consent of DPA Contracting Authority, which consent shall not be withheld or delayed where the proposed replacement is suitably qualified and experienced.
- (f) Dev Co shall, and shall cause each Dev Co Party to, use best efforts to ensure that any replacement of a DPA Key Individual pursuant to this DPA Section 10.6, possess similar or greater expertise, qualifications, experience, and ability than the DPA Key Individual named in this Agreement. Each such replacement shall be made at Dev Co's cost and expense.

#### **10.7 Dev Co Subcontracting**

- (a) Subject to DPA Section 10.12, all subcontracting of any tier of DPA Subcontractor by Dev Co or a DPA Subcontractor of the performance of the DPA Works during the DPA Term shall satisfy the requirements of this Agreement, including this DPA Section 10.7.
- (b) All Material DPA Subcontracts executed and delivered after the Effective Date shall be subject to the prior written approval of DPA Contracting Authority, acting reasonably. Subject to DPA Section 10.7(g), each such approval by DPA Contracting Authority may be subject to the execution and delivery of an Assignment of DPA Subcontract in the form set out in Schedule 14 – Form of Assignment of DPA Subcontract together with any revisions required by DPA Contracting Authority to permit such execution and delivery. Notwithstanding anything to the contrary in this Agreement or in any DPA Subcontract, no such approval by DPA Contracting Authority shall constitute or be deemed to constitute a waiver of any right of DPA Contracting Authority under this Agreement, a release by DPA Contracting Authority of Dev Co from any obligation or liability under this Agreement, or an amendment to this Agreement.
- (c) Without limiting any other provision of this Agreement, the DPA Subcontracts taken as a whole shall provide for the performance of all DPA Design Works and, subject to the applicable provisions of this Agreement, any other design work forming part of the Development Phase PA Works.
- (d) DPA Contracting Authority acknowledges and agrees that, without prejudice to any of its rights in this Agreement, DPA Contracting Authority has approved the Initial DPA Subcontracts, including



the DPA Subcontractors who are party to the Initial DPA Subcontracts. All Initial DPA Subcontracts are indicated in Schedule 13 – Initial DPA Subcontracts. Without limiting DPA Section 10.7(b), Dev Co agrees to update the list of Initial DPA Subcontractors and provide it to DPA Contracting Authority from time to time as additional DPA Subcontractors are engaged by Dev Co or any DPA Subcontractor, in accordance with this Agreement.

- (e) Dev Co agrees that it shall not, and it shall not permit any DPA Subcontractor to, seek to engage a DPA Subcontractor where such DPA Subcontractor or any of its Affiliates was listed as an “Ineligible Person” in the Request for Proposals, without the consent of DPA Contracting Authority, which may be withheld in DPA Contracting Authority’s sole discretion.
- (f) Without limiting any right of DPA Contracting Authority in this Agreement or the generality of any conditions of approval of a Material DPA Subcontract which DPA Contracting Authority may require before approving Dev Co’s or a DPA Subcontractor’s engagement of a DPA Subcontractor pursuant to DPA Section 10.7(b), each DPA Subcontract shall:
  - (i) with respect to;
    - A. each DPA Subcontract with the Construction Contractor and the Service Provider, adopt and drop-down all of the requirements of this Agreement to the extent applicable to the performance of those parts of the DPA Works to be performed by the DPA Subcontractor and all other relevant terms and conditions of this Agreement, including, for greater certainty, terms and conditions (I) related to payments, intellectual property, termination, Background Information, Liens, suspension of the DPA Works, confidentiality, DPA Key Individuals, insurance, DPA Variations and Force Majeure Events (II) necessary for Dev Co to comply with DPA Section 6.1; and (III) providing for the performance of the Development Phase PA Works in the event that DPA Contracting Authority exercises its rights under the Assignment of Project Documents, or if applicable, an Assignment of DPA Subcontract;
    - B. each Material DPA Subcontract other than as set out in DPA Section 10.7(f)(i)A, adopt or exceed the requirements of this Agreement to the extent applicable to the performance of those parts of the DPA Works to be performed by the DPA Subcontractor, and, at a minimum, adopt in all material respects or exceed the terms and conditions of this Agreement (I) related to payments, intellectual property, termination, Background Information, Liens, suspension of the DPA Works, confidentiality, DPA Key Individuals, insurance, DPA Variations and Force Majeure Events; (II) necessary for Dev Co to comply with DPA Section 6.1; and (III) providing for the performance of the Development Phase PA Works in the event that DPA Contracting Authority exercises its rights under the Assignment of Project Documents, or if applicable, an Assignment of DPA Subcontract; and
    - C. each of the DPA Subcontracts other than as described in DPA Sections 10.7(f)(i)A and 10.7(f)(i)B, adopt or exceed the requirements of this Agreement to the extent applicable to the performance of those parts of the DPA Works to be performed by the DPA Subcontractor, and, at a minimum, adopt in all material respects or exceed all of the terms and conditions of this Agreement (I) related to payments, intellectual property, termination, insurance, DPA Variations and Force Majeure

Events; (II) necessary for Dev Co to comply with DPA Section 6.1; and (III) providing for the performance of the Development Phase PA Works in the event that DPA Contracting Authority exercises its rights under the Assignment of Project Documents, or if applicable, an Assignment of DPA Subcontract;

- (ii) except as otherwise expressly permitted by DPA Section 20.2(a)(ii), not permit or require the payment of any break fee, penalty or payment of any additional costs or profits in the event this Agreement is terminated other than in accordance with DPA Section 19.3 if DPA Contracting Authority may, directly or indirectly, be required to pay all or any part of any such break fee, penalty or additional costs or profits (A) to Dev Co under this Agreement or (B), in the event that DPA Contracting Authority exercises its rights under the Assignment of Project Documents, or if applicable, an Assignment of DPA Subcontract, to a DPA Subcontractor pursuant to a DPA Subcontract. Dev Co acknowledges and shall cause the DPA Subcontractors to acknowledge in their DPA Subcontracts that, subject to DPA Section 20.2(a)(ii), DPA Contracting Authority shall not be required to, directly or indirectly, pay any such break fee, penalty or additional costs or profits under any circumstance under this Agreement or under any DPA Subcontract in the event that DPA Contracting Authority exercises its rights under the Assignment of Project Documents, or if applicable, an Assignment of DPA Subcontract;
- (iii) in the case of DPA Subcontracts entered into by Dev Co, be assignable to DPA Contracting Authority pursuant to the Assignment of Project Documents;
- (iv) if required by DPA Contracting Authority pursuant to DPA Section 10.7(b), be assignable to DPA Contracting Authority pursuant an Assignment of DPA Subcontract;
- (v) not include any provision that would have the effect of materially increasing any obligation or liability of DPA Contracting Authority, whether actual or potential, relative to DPA Contracting Authority's obligations or liabilities under this Agreement, were DPA Contracting Authority to exercise its rights under the Assignment of Project Documents or any Assignment of DPA Subcontract in respect of such DPA Subcontract;
- (vi) not include any provision that would have the effect of materially lessening or limiting any obligation or liability of the DPA Subcontractor under such DPA Subcontract or materially increasing any obligation or liability of DPA Contracting Authority under such DPA Subcontract, in each case, whether actual or potential and relative to such DPA Subcontractor's obligation to its counterparty under the relevant DPA Subcontract, were DPA Contracting Authority to exercise its rights under the Assignment of Project Documents or any Assignment of DPA Subcontract in respect of such DPA Subcontract;
- (vii) include in any DPA Subcontract that could be assigned to DPA Contracting Authority pursuant to the Assignment of Project Documents or which is subject to an Assignment of DPA Subcontract, the following provision:

*“Notwithstanding anything else in this agreement, any express or implied reference to Infrastructure Ontario (as an assignee to this agreement) providing an indemnity or any other form of indebtedness or contingent liability that would directly or indirectly increase the indebtedness or contingent liabilities of Infrastructure Ontario (as an assignee to this*



*agreement), whether at the time of execution of this agreement or at any time during the term, shall be void and of no legal effect.”;*

- (viii) not permit Dev Co or the DPA Subcontractor to amend, modify or depart from the terms of the agreement other than in accordance with the provisions of DPA Sections 10.7(p)(ii), 10.7(p)(iii) or 10.7(p)(iv);
  - (ix) not permit the DPA Subcontractor to terminate the DPA Subcontract or to suspend or to discontinue its performance thereunder for convenience, or for any default by Dev Co (or by DPA Contracting Authority as an assignee of such agreement), without first giving Dev Co and DPA Contracting Authority prior written notice, and without permitting Dev Co (or DPA Contracting Authority as an assignee of such agreement) the right to cure such default within a reasonable amount of time;
  - (x) in respect of each Material DPA Subcontract, include a provision that provides that, in the event that DPA Contracting Authority were to exercise its rights under the Assignment of Project Documents or any Assignment of DPA Subcontract in respect of such DPA Subcontract, any provisions of the DPA Subcontract that would or could be interpreted to require DPA Contracting Authority to pursue a claim (including any claim for payment, other compensation or schedule relief) against or resolve any other dispute with itself pursuant to this Agreement would no longer be of any force or effect as of the date DPA Contracting Authority exercises such rights, provided that such new provision may allow the DPA Subcontractor to pursue any such claim against or resolve any such dispute directly with DPA Contracting Authority in accordance with the applicable provisions of this Agreement; and
  - (xi) in respect of each Material DPA Subcontract, be on such additional terms and conditions as DPA Contracting Authority approves, acting reasonably.
- (g) If required by DPA Contracting Authority pursuant to DPA Section 10.7(b), Dev Co shall cause each DPA Subcontractor counterparty to a Material DPA Subcontract to enter into an Assignment of DPA Subcontract concurrently with it entering into the applicable DPA Subcontract, provided that no such DPA Subcontractor shall be obligated to enter into an Assignment of DPA Subcontract if the DPA Subcontract has been assigned to DPA Contracting Authority pursuant to the Assignment of Project Documents.
- (h) In addition to the provisions of DPA Section 10.7(f), unless otherwise agreed by DPA Contracting Authority in writing, Dev Co shall, and shall cause each DPA Subcontractor to, ensure that all DPA Subcontracts that are subject to the *Construction Act* contain provisions:
- (i) in each case, requiring Dev Co or the relevant DPA Subcontractor to make all payments within the timeframes set forth in the *Construction Act*, except for amounts withheld by reason of legitimate dispute which have been identified to the relevant DPA Subcontractor from whom payment has been withheld in accordance with the *Construction Act*;
  - (ii) which provide that each person making payments under the contract retain any required holdbacks in compliance with the *Construction Act*; and

- (iii) requiring each DPA Subcontractor to include a section to the same effect as this DPA Section 10.7(h) in any contract it enters into wholly or substantially for the purpose of performing or contributing to the performance of the whole or any part of the DPA Subcontract.
- (i) Dev Co shall not subcontract any interest in this Agreement, and shall not permit any DPA Subcontractor to subcontract any interest in any DPA Subcontract, to a Restricted Person, or any Affiliate thereof, or a person whose standing or activities are inconsistent with the Hospital's role as a hospital, or may compromise DPA Contracting Authority's reputation or integrity or the nature of the Province's health care system, so as to affect public confidence in that system.
- (j) Unless otherwise agreed by DPA Contracting Authority, Dev Co shall, and shall cause each DPA Subcontractor to, provide DPA Contracting Authority with the draft execution form of each DPA Subcontract that will be entered into following the Effective Date a minimum of 15 Business Days in advance of the proposed date of execution of the DPA Subcontract, and shall indicate at the time such draft execution form of DPA Subcontract is provided to DPA Contracting Authority, whether or not such draft execution form of DPA Subcontract requires DPA Contracting Authority's approval in accordance with DPA Section 10.7(b).
- (k) Dev Co agrees that it shall, and shall cause each DPA Subcontractor to, on the date any DPA Subcontract is entered into following the Effective Date:
  - (i) provide a true and complete copy of the DPA Subcontract to DPA Contracting Authority;
  - (ii) if the DPA Subcontract is the subject of the Assignment of Project Documents, provide, for DPA Contracting Authority's execution, an executed acknowledgement and consent agreement, in the form required by the Assignment of Project Documents; and
  - (iii) if the DPA Subcontract is the subject of an Assignment of DPA Subcontract, provide an executed copy of the Assignment of DPA Subcontract to DPA Contracting Authority for DPA Contracting Authority's execution.
- (l) With regards to each DPA Subcontract, Dev Co shall preserve and protect the rights of the Parties under this Agreement and ensure the work performed by the DPA Subcontractor meets the requirements of this Agreement.
- (m) Dev Co shall not be relieved of any liability or obligation under this Agreement by the engagement of any Dev Co Party, and Dev Co shall cause each Dev Co Party, to the extent such Dev Co Party performs or is specified hereunder to perform the DPA Works, to comply with the obligations of Dev Co hereunder in the same manner and to the same extent as Dev Co.
- (n) Dev Co shall comply with and cause each DPA Subcontractor to comply with each of its obligations under the applicable DPA Subcontract.
- (o) Dev Co shall (i) enforce and cause the enforcement of the obligations of each DPA Subcontractor counterparty to a Material DPA Subcontract under the applicable DPA Subcontract, including all entitlements, rights, remedies and relief in favour of Dev Co that relate to any obligations of Dev Co under this Agreement; and (ii) enforce and cause the enforcement of the obligations of each DPA Subcontractor under the applicable DPA Subcontract that are related to the terms of DPA

Section 10.7, including all entitlements, rights, remedies and relief in favour of Dev Co that relate to any obligations of Dev Co under this Agreement.

- (p) Dev Co shall not, except with the written consent of DPA Contracting Authority, acting reasonably and without any unreasonable delay:
- (i) terminate, or agree to or permit the termination of, all or any material part of any Material DPA Subcontract, which written consent of DPA Contracting Authority shall not be withheld if such termination will not:
    - A. materially and adversely affect the ability of Dev Co to perform its obligations under this Agreement; and
    - B. have the effect of increasing the liability of DPA Contracting Authority under this Agreement, whether actual or potential;
  - (ii) make, or agree to or permit the making of, any material amendment or modification to any Material DPA Subcontract, which written consent of DPA Contracting Authority shall not be withheld if such amendment or modification does not:
    - A. depart from any of the requirements related to the provisions of this DPA Section 10.7;
    - B. materially and adversely affect the ability of Dev Co to perform its obligations under this Agreement; and
    - C. have the effect of increasing the liability of DPA Contracting Authority under this Agreement, whether actual or potential,

provided that, notwithstanding the foregoing, no written consent of DPA Contracting Authority shall be required in the event that an amendment to a Material DPA Subcontract is the direct and reasonable consequence of a DPA Variation;
  - (iii) make, or agree to or permit the making of, any amendment or modification to any DPA Subcontract that is not a Material DPA Subcontract if such amendment or modification will:
    - A. depart in any material respects from any provision of a DPA Subcontract related to the requirements of this DPA Section 10.7;
    - B. materially and adversely affect the ability of Dev Co to perform its obligations under this Agreement; or
    - C. have the effect of increasing the liability of DPA Contracting Authority under this Agreement, whether actual or potential;
  - (iv) permit any departure by a DPA Subcontractor from any material provision of a Material DPA Subcontract or permit any departure by a DPA Subcontractor from any material provision of a DPA Subcontract that relate to the requirements of DPA Section 10.7;

- (v) permit the DPA Subcontractor to assign or transfer to any person any of the DPA Subcontractor's rights or obligations under any of the Material DPA Subcontracts; and
- (vi) permit the DPA Subcontractors to subcontract any of the works or services under the DPA Subcontract except to the extent provided for under the DPA Subcontract, and in all cases, in compliance with the terms of this Agreement, including DPA Section 10.7.
- (q) During the DPA Term, Dev Co shall:
  - (i) within 15 Business Days of receiving a written request from DPA Contracting Authority, cause the execution and delivery to DPA Contracting Authority of a statement or certificate stating (if such is the case, or stating the manner in which such may not be the case):
    - A. that any particular DPA Subcontract is unmodified and in full force and effect;
    - B. the date of commencement and expiry of the term of such DPA Subcontract and the dates to which all payments payable thereunder have been paid;
    - C. whether or not there is any existing default by a party to such DPA Subcontract, and, if so, specifying such default;
    - D. that there are no defences, counterclaims or rights of set-off in respect of the obligations thereunder of a party to such DPA Subcontract; and
    - E. such other matters as DPA Contracting Authority may reasonably request;
  - (ii) within two Business Days of receiving a notice of default from a DPA Subcontractor in respect of a DPA Subcontract, provide a copy of such notice of default to DPA Contracting Authority;
  - (iii) if it issues a notice of default to a DPA Subcontractor in respect of a DPA Subcontract, provide a copy of such notice of default to DPA Contracting Authority at the same time as such notice of default is issued to such DPA Subcontractor; and
  - (iv) promptly after it is executed and delivered or otherwise finally agreed to in writing, provide to DPA Contracting Authority a copy of any amendment, restatement supplement or other modification to any DPA Subcontract between Dev Co and any DPA Subcontractor or between any DPA Subcontractors.
- (r) When requested by DPA Contracting Authority, Dev Co shall promptly provide reasonable documentary evidence to DPA Contracting Authority of compliance with Dev Co's obligations set out in this DPA Section 10.7.
- (s) For clarity, DPA Contracting Authority's rights under any applicable DPA Subcontract only arise if, when and to the extent that DPA Contracting Authority exercises its rights pursuant to and in accordance with the Assignment of Project Documents or any Assignment of DPA Subcontract.

**10.8 Access to Lands and Site**

- (a) Dev Co and the Dev Co Parties shall not be permitted to use, access or conduct due diligence or other investigations at the Lands or the Site (including the Existing Facilities) for the purposes of the Project without the written consent of DPA Contracting Authority, which may be withheld, granted or granted with conditions by DPA Contracting Authority, acting reasonably and without any unreasonable delay.
- (b) Notwithstanding DPA Section 10.8(a), DPA Contracting Authority shall use reasonable commercial efforts to permit and facilitate any reasonable due diligence and other investigations at the Lands and the Site (including the Existing Facilities) that Dev Co or any Dev Co Party desires to perform for the purposes of the DPA Works, including for developing the Project Proposal.

**10.9 Additional Project Due Diligence**

- (a) Without limiting any of the provisions of DPA Sections 11.1(a), 11.2 and 11.3 whatsoever, in the event that a Party is of the opinion that additional investigations or other technical due diligence in respect of the Lands, including for clarity the Existing Facilities, may be beneficial for the purposes of the proper performance of the DPA Works (including to facilitate Dev Co's development of the Project Proposal) or the Project or to effectively or efficiently mitigate risks with respect to the DPA Works or the Project ("**Additional Project Due Diligence**"), then, following consultation with the other Party:
  - (i) Dev Co may, acting reasonably, request in writing that DPA Contracting Authority:
    - A. perform or direct Dev Co to perform such Additional Project Due Diligence at DPA Contracting Authority's cost and expense, in accordance with DPA Section 10.9(a)(ii); or
    - B. provide its written approval for Dev Co to perform such Additional Project Due Diligence, at Dev Co's cost and expense, which approval by DPA Contracting Authority may be provided or refused by DPA Contracting Authority in its sole discretion.
  - (ii) DPA Contracting Authority may:
    - A. at its own cost and expense, perform or cause the performance of Additional Project Due Diligence; or
    - B. by way of Notice to the DPA Dev Co Representative, direct Dev Co to perform such Additional Project Due Diligence, and, in such an event, the provisions of DPA Section 13.4 shall apply to the performance of such DPA Works.
- (b) In the event that DPA Contracting Authority receives any written request from Dev Co in respect of the performance of Additional Project Due Diligence in accordance with DPA Section 10.9(a)(i)A, then DPA Contracting Authority may, in its sole discretion:
  - (i) perform such Additional Project Due Diligence pursuant to DPA Section 10.9(a)(ii)A;

- (ii) direct Dev Co to perform any such Additional Project Due Diligence in accordance with DPA Section 10.9(a)(ii)B; or
- (iii) refuse to perform or direct Dev Co to perform such Additional Project Due Diligence for any reason whatsoever.

Any such refusal by DPA Contracting Authority shall not limit any right of Dev Co to subsequently request in writing that DPA Contracting Authority provide its written approval for Dev Co to perform such Additional Project Due Diligence in accordance with DPA Section 10.9(a)(i)B, provided that, for greater certainty, DPA Contracting Authority shall not have any obligation under this Agreement whatsoever to approve any such request.

- (c) Notwithstanding anything to the contrary in this DPA Section 10.9, Dev Co acknowledges and agrees that:
  - (i) DPA Contracting Authority may not, in certain circumstances, have a right to use, access or permit any Additional Project Due Diligence at the Lands, including at any lands comprising part of the Lands that are not owned by the Hospital or are subject to an Encumbrance, or at lands that are beyond the boundaries of the Lands;
  - (ii) DPA Contracting Authority shall, in its sole discretion, be entitled to limit any Additional Project Due Diligence, including any Additional Project Due Diligence which, as determined by DPA Contracting Authority in its sole discretion, could be detrimental to or interfere with the use or operation of any part of the Lands;
  - (iii) the performance of any Additional Project Due Diligence by Dev Co may, in DPA Contracting Authority's sole discretion, be subject to any instructions, conditions, rules and other requirements provided by DPA Contracting Authority to Dev Co from time to time (including in respect of security, safety, privacy and dates and hours of use and access), and Dev Co agrees to comply with all such instructions, conditions, rules and other requirements;
  - (iv) Dev Co and the Dev Co Parties shall only be permitted to use and access those specific areas of the Lands to which they have been granted use and access by DPA Contracting Authority for the purpose of performing any Additional Project Due Diligence in accordance with this Agreement; and
  - (v) the Existing Facilities are being used by the Hospital, including for public hospital purposes, and, DPA Contracting Authority, may, in its sole discretion, cancel or reschedule any such use and access, change such areas of use and access or modify any instructions, conditions, rules or other requirements provided by DPA Contracting Authority to Dev Co pursuant to DPA Section 10.9(c)(iii).
- (d) All reports produced by Dev Co or any Dev Co Party as a result of any Additional Project Due Diligence shall be addressed to DPA Contracting Authority in addition to Dev Co.



10.10 **Business Opportunities**

- (a) Without limiting DPA Section 2.3, the Parties agree to comply with the provisions of Section 4 (Business Opportunities) of the Draft Project Agreement, which shall be applicable *mutatis mutandis*.

10.11 **RFP Completion Documents**

- (a) Within 15 Business Days following the Effective Date, Dev Co shall deliver to DPA Contracting Authority two USB keys, each containing electronic copies of all of the documents described in Schedule 11 – Preferred Proponent Completion Documents of the Request for Proposals. One of the USB keys shall be delivered to Infrastructure Ontario at its address for Notices and one of the USB keys shall be delivered to the Hospital at its address for Notices.

10.12 **Enabling Works**

- (a) The Parties agree that, at the request of DPA Contracting Authority and in any event by no later than 15 Business Days following the Effective Date, the Parties shall meet to plan and coordinate the performance of the DPA Works described in this DPA Section 10.12 and the performance of the Enabling Works under the Enabling Works Contract.
- (b) The Parties acknowledge that, subject to the terms and conditions of this Agreement, it is intended that the Enabling Works are performed under the Enabling Works Contract such that they achieve “Substantial Completion of the Work” as defined in and under the Enabling Works Contract before Commercial Close or as soon as practicable after Commercial Close.
- (c) Following the completion of the meeting described in DPA Section 10.12(a), Dev Co shall, with the input of DPA Contracting Authority and by no later than a date agreed by the Parties develop and submit for DPA Contracting Authority’s review and approval:
- (i) an indicative estimate of the cost of the performance and completion of the Enabling Works under the Enabling Works Contract; and
  - (ii) a detailed plan for the performance of the DPA Works under this DPA Section 10.12 and the Enabling Works under the Enabling Works Contract (the “**Enabling Works Plan**”), including:
    - A. a list of all of the Enabling Works Subcontractors who may be procured and engaged by Dev Co pursuant to DPA Section 10.12(g); and
    - B. Dev Co’s plan to procure and engage such Enabling Works Subcontractors in accordance with DPA Section 10.12(g).
- (d) Dev Co shall, in accordance with the Enabling Works Plan and the DPA Works Schedules:
- (i) develop and provide all design and construction documentation and specifications necessary for the performance of the Enabling Works (including the Drawings and the Specifications and all amendments and revisions thereto, including in respect of any and all “Change Orders” and “Change Directives”, as defined in and as required under the Enabling Works Contract), which shall:

- A. comply with Schedule 19 – Enabling Works Requirements, other applicable requirements of this Agreement (including the Output Specifications), and any other reasonable requirements of DPA Contracting Authority;
  - B. take into account and reflect the DPA Background Information and all other Background Information; and
  - C. in each case, be subject to the approval of DPA Contracting Authority;
- (ii) provide to DPA Contracting Authority (A) costs estimates in respect of the performance of the Enabling Works under the Enabling Works Contract, to a level of detail required and in a form approved by DPA Contracting Authority; and (B) a proposed “Scheduled Substantial Completion Date” (as such term is defined in the Form of Enabling Works Contract), which shall be subject to the approval of DPA Contracting Authority and subsequently set out in the Enabling Works Contract;
- (iii) prior to the execution and delivery of the Enabling Works Contract, at the request of and subject to the prior approval of DPA Contracting Authority, (A) commence the obtainment of and, if practicable, obtain any permissions, consents, approvals, certificates, permits, licences, agreements and authorizations to be obtained by the Construction Manager under the Enabling Works Contract; and (B) provide assistance to the Hospital in commencing the obtainment of and, if practicable, obtaining any permissions, consents, approvals, certificates, permits, licences, agreements and authorizations to be obtained by the Owner, under the Enabling Works Contract or otherwise in connection with the Enabling Works; and
- (iv) without limiting the generality of the foregoing provisions of this DPA Section 10.12(d), at the request of DPA Contracting Authority from time to time, perform the services described in and assigned to Dev Co in Schedule A1 of Schedule 18 – Form of Enabling Works Contract and subsequently in Schedule A1 of the Enabling Works Contract, which services shall be DPA Works under this Agreement.
- (e) Dev Co shall, promptly following the request of DPA Contracting Authority, provide DPA Contracting Authority any additional assistance and information in respect of the Enabling Works reasonably requested by DPA Contracting Authority from time to time, including in order to obtain all approvals of the MOH as set out in DPA Section 10.13 and DPA Section 10.12(k).
- (f) The Parties agree that the provisions of DPA Section 10.7 shall not apply to the subcontracting of the Enabling Works described in this DPA Section 10.12.
- (g) Dev Co shall, promptly following the written request of DPA Contracting Authority, procure the Enabling Works Subcontracts in accordance with the following:
  - (i) unless otherwise approved by DPA Contracting Authority in writing, each Enabling Works Subcontract shall be competitively procured by Dev Co on a fixed price basis and in accordance with the Enabling Works Plan and any other reasonable requirements of DPA Contracting Authority;



- (ii) Dev Co shall deliver drafts and all final versions of all procurement documents to DPA Contracting Authority (including all requests for proposals, tenders, draft contracts and purchase orders, and evaluation handbooks) for its review and approval at least 15 Business Days before the scheduled commencement of any procurement of an Enabling Works Subcontract, and, unless otherwise agreed by DPA Contracting Authority, it shall be a term of each such procurement that the prices provided by each of the potential Enabling Works Subcontractors in its proposal be binding and irrevocable for a minimum period of three months (or, if that period is not practicable, for any other shorter minimum period approved in writing by the DPA Contracting Authority);
- (iii) Dev Co shall consult with, provide status updates to DPA Contracting Authority in respect of, and, on an open book basis, provide the results of, each procurement of an Enabling Works Subcontract, including all proposals received (including prices and terms) and the evaluation outcomes;
- (iv) Dev Co shall:
  - A. not and shall not permit any Dev Co Party to award any Enabling Works Subcontract;
  - B. not permit the Construction Manager to enter into any Enabling Works Subcontract; and
  - C. not self-perform and shall not permit the self-performance of any Enabling Works, without the written approval of DPA Contracting Authority; and
- (v) Dev Co shall not permit the Construction Manager or any Enabling Works Subcontractor to subcontract any interest in any Enabling Works Subcontract to (A) a person who was listed as an “Ineligible Person” in the Request for Proposals, a Restricted Person, or any Affiliate thereof; or (B) a person whose standing or activities are inconsistent with the Hospital’s role as a hospital, or may compromise DPA Contracting Authority’s reputation or integrity or the nature of the Province’s health care system, so as to affect public confidence in that system.
- (h) Subject to DPA Section 10.12(k), after the completion of the activities described in DPA Sections 10.12(d) (if and to the extent that such activities are to be performed before the execution and delivery of the Enabling Works Contract) and 10.12(g) and before the Construction Manager enters into any Enabling Works Subcontract:
  - (i) DPA Contracting Authority shall give Notice to the DPA Dev Co Representative that the Owner and the Construction Manager will enter into the Enabling Works Contract within 10 Business Days of the date of such Notice, and attach the final form of Enabling Works Contract to such Notice in accordance with the requirements of DPA Section 10.12(i);
  - (ii) DPA Contracting Authority shall, before the expiry of such 10 Business Day period, deliver a copy of the Enabling Works Contract signed by the Owner to be held in escrow subject only to the execution and delivery of the Enabling Works Contract by the Construction Manager; and

- (iii) Dev Co shall, within two Business Days of its receipt of the copy of the Enabling Works Contract signed by the Owner, cause the Construction Manager to (A) execute and deliver the Enabling Works Contract without conditions; and (B) deliver the executed surety bonds required by the Enabling Works Contract for final execution by the Owner.
- (i) Unless otherwise agreed by the Parties, the Owner and the Construction Manager shall enter into the Enabling Works Contract in the form described in Schedule 18 – Form of Enabling Works Contract:
  - (i) whereby:
    - A. the Construction Manager shall be paid an all-inclusive percentage fee of **[REDACTED]**% of the “Cost of the Work” under the Enabling Works Contract as set out in Article A-5.3 of the Form of Enabling Works Contract for the performance of the “Work” under the Enabling Works Contract;
    - B. the “CM Design Consultant” described in the Enabling Works Contract shall be one or more members of the Design Team identified by Dev Co and approved by DPA Contracting Authority (the “**CM Design Consultant**”); and
    - C. the Specifications and Drawings shall be the Specifications and Drawings approved by DPA Contracting Authority pursuant to DPA Section 10.12(d)(i); and
  - (ii) subject only to minor changes, additions and modifications, and additional scope documents necessary to create a legally complete and binding agreement.
- (j) Without limiting the generality of DPA Section 10.12(d)(iv), Dev Co shall cause the CM Design Consultant to perform the role and duties of the “CM Design Consultant” under the Enabling Works Contract in accordance with Good Industry Practice, and to the extent provided in the Enabling Works Contract or as otherwise required for the proper performance and completion of the Enabling Works. For clarity, such services by the CM Design Consultant shall be DPA Works under this Agreement.
- (k) Dev Co acknowledges and agrees that the entering into of the Enabling Works Contract by the Hospital is conditional on and subject to DPA Contracting Authority obtaining any necessary authorizations and approvals required in connection with the Enabling Works Contract, including all approvals required by the MOH.
- (l) Notwithstanding anything to the contrary in this Agreement:
  - (i) except as expressly set out in this Agreement or in any Final Project Agreement to the contrary, this Agreement and any Final Project Agreement shall not apply to the performance by the Owner and the Construction Manager of their respective obligations under the Enabling Works Contract;
  - (ii) Dev Co shall not be entitled to any payment, other compensation, extension to a DPA Works Schedule or other relief under this Agreement, and DPA Contracting Authority shall not be liable under this Agreement, for any failure by the Construction Manager to perform its obligations in accordance with the Enabling Works Contract or for any failure

of the CM Design Consultant to perform the services described in DPA Section 10.12(j);  
and

- (iii) without limiting or prejudice to DPA Section 18.1 or any other provision of this Agreement, Dev Co shall, at the request of DPA Contracting Authority, promptly take all steps necessary to, as applicable, cause the Construction Manager to cure any breaches by the Construction Manager of its obligations under the Enabling Works Contract and to cause the CM Design Consultant to cure any breaches by the CM Design Consultant of its obligations set out in DPA Section 10.12(j).
- (m) In the event that the Construction Manager terminates the Enabling Works Contract in accordance with its terms as a result of a default of the Owner, then, without limiting any right of a Party under this Agreement or of the Owner or the Construction Manager under the Enabling Works Contract, Dev Co shall, subject to and in accordance with Schedule 6 – DPA Variation Procedure, be entitled to a DPA Variation in respect of the addition of the scope of the Enabling Works into the DPA Scope of Work and the Works under any Final Project Agreement.
- (n) Dev Co acknowledges and agrees, and shall cause the Construction Manager and each Enabling Works Subcontractor to acknowledge and agree, that Infrastructure Ontario shall not have any liability or obligation under the Enabling Works Contract whatsoever, including in respect of the performance by the Owner of its obligations and the satisfaction by the Owner of its liabilities under the Enabling Works Contract.

#### **10.13 MOH Approvals Support and Submissions**

- (a) Dev Co shall assist and support DPA Contracting Authority in obtaining, and provide all submissions required by DPA Contracting Authority or the MOH to allow DPA Contracting Authority to obtain, all necessary approvals from the MOH in respect of the Project during the DPA Term, including:
  - (i) assisting and supporting (including providing documents in support of) and, if required, participating in, DPA Contracting Authority's meetings and presentations to the MOH;
  - (ii) providing support and submissions in respect of the Enabling Works and the "MOH stage 3B.2 Submission(s)" and the "MOH stage 4 Submission(s)" to be made by the Hospital to the MOH; and
  - (iii) providing any other submissions, support and documents required by DPA Contracting Authority or the MOH in respect of the Project from time to time(collectively, the "**MOH Hospital Submissions**").
- (b) Dev Co acknowledges that the MOH Hospital Submissions may include:
  - (i) if applicable, feedback on and submissions in respect of the affordability constraints in respect of the cost of the Project identified by DPA Contracting Authority pursuant to DPA Section 6.2;
  - (ii) Project cost estimates in respect of each level of design;

- (iii) Project risk submissions;
- (iv) design document submissions in respect of each level of design, including descriptions of any and all design assumptions made by Dev Co and the Dev Co Parties and other documents in support of the design document submissions;
- (v) feedback on or support for the Output Specifications, the Project's functional program and other technical aspects of the Project, including as may be or have been modified by any potential or actual DPA Variations or other changes to the scope of the Project;
- (vi) the identification of opportunities for the improvement and optimization of the Output Specifications, other provisions of the Draft Project Agreement, and other aspects of the Project; and
- (vii) submissions in support of any desired or required DPA Variations or other changes to the scope of the Project.

#### **10.14 Online Collaborative Project Management**

- (a) During the DPA Term, Dev Co shall obtain and use, and ensure that all of the Dev Co Parties use, an interactive on-line (web-based) project management software system for the Project ("**OCPM**"), which must:
  - (i) automate certain aspects of the processes identified in the Review Procedures, the Design Quality Plan, Schedule 6 – DPA Variation Procedure, the DPA Works Report and other processes identified by DPA Contracting Authority in its sole discretion; and
  - (ii) be useable by DPA Contracting Authority and the DPA Contracting Authority Parties for the purposes of the Project.
- (b) Dev Co shall propose the OCPM to DPA Contracting Authority before the Effective Date, which shall be approved by DPA Contracting Authority, acting reasonably, by no later than such date.
- (c) Dev Co agrees to obtain, at a minimum, 15 licences for DPA Contracting Authority and the DPA Contracting Authority Parties to use the OCPM for the purposes of the Project at no cost or expense to DPA Contracting Authority and the DPA Contracting Authority Parties.

#### **10.15 High Fidelity Room Mock-Ups and Mock-Up Space**

- (a) Dev Co acknowledges that:
  - (i) part of the DPA Design Works includes the development and maintenance in good working order of the high fidelity mock-ups of the rooms of the Facility described in the Draft PA Review Procedure (the "**High Fidelity Room Mock-Ups**"), which shall be designed, constructed, adjusted and maintained by Dev Co and reviewed by DPA Contracting Authority during the DPA Term in accordance with the Draft PA Review Procedure and the DPA Works Schedules;
  - (ii) without limiting Section 10.15(a), the construction of and subsequent adjustments to the High Fidelity Room Mock-Ups shall, in accordance with the applicable provisions of

Schedule 3 – DPA Submissions and Project Development Process, be completed before the Third Checkpoint and the Final Checkpoint respectively; and

- (iii) unless otherwise agreed by DPA Contracting Authority prior to the Final Checkpoint, the High Fidelity Room Mock-Ups shall be dismantled by Project Co following the DPA Term in accordance with any Final Project Agreement.
- (b) The Parties agree that the Hospital shall, at its cost and expense, enter into a lease or licence agreement with a landlord in respect of the facilities (the “**Mock-Up Space Facilities**”) within which the High Fidelity Room Mock-Ups are to be constructed and maintained by Dev Co and the Dev Co Parties during the DPA Term and as required by any Final Project Agreement during the Project Term (the “**Mock-Up Space Agreement**”).
- (c) The Hospital shall:
  - (i) use reasonable commercial efforts to provide a draft copy of the Mock-Up Space Agreement to Dev Co in advance of its execution and delivery;
  - (ii) provide a copy of the Mock-Up Space Agreement to Dev Co following its execution and delivery; and
  - (iii) without limiting any liability of Dev Co under this Agreement, make all rent, additional rent and other payments to the landlord required by the Mock-Up Space Agreement.
- (d) The Parties acknowledge that (i) the DPA Works in respect of one of the Cash Allowance Items are in respect of some (but not all) of the DPA Works related to the High Fidelity Room Mock-Ups; and (ii) the provisions of DPA Section 13.4 shall apply to the DPA Works in respect of such Cash Allowance Item.
- (e) With respect to the Mock-Up Space Agreement, Dev Co agrees that it shall and shall cause the Dev Co Parties to:
  - (i) comply with all obligations of the Hospital and its contractors and subcontractors under the Mock-Up Space Agreement in connection with the use of and access to the Mock-Up Space Facilities (on a non-exclusive basis) for the purposes of performing the DPA Works with respect to the High Fidelity Room Mock-Ups;
  - (ii) ensure that Dev Co and the Dev Co Parties do not cause the Hospital to contravene the Mock-Up Space Agreement;
  - (iii) cooperate and assist the Hospital in any dispute between the landlord and the Hospital relating to Dev Co’s or the Dev Co Parties’ use of and access to the Mock-Up Space Facilities, including attending at hearings, providing information, and doing such other things as the Hospital may reasonably require to resolve the dispute;
  - (iv) if required, obtain and maintain any additional insurance specified in the Mock-Up Space Agreement that is not otherwise required by this Agreement; and
  - (v) enter into and comply with any consent or other agreement reasonably required by the landlord in connection with the Mock-Up Space Agreement,

provided that, that, in the event the Mock-Up Space Agreement or any such other consent or agreement contains terms or conditions which will result in a material (A) change or other variation to the DPA Scope of Work and would not otherwise be required of Dev Co or the Dev Co Parties under this Agreement; or (B) delay to the performance of the DPA Works, then, subject to and in accordance with Schedule 6 – DPA Variation Procedure, Dev Co shall be entitled to a DPA Variation in respect of such material change, other variation or delay.

#### **10.16 Development and Finalization of Technical Specifications**

- (a) Dev Co shall, following consultation with DPA Contracting Authority and the Design Conformance Consultant, develop and submit to DPA Contracting Authority for DPA Contracting Authority's review and approval, progressive iterations of the Technical Specifications:
  - (i) in accordance with and subject to this DPA Section 10.16 and the applicable technical and other requirements of this Agreement; and
  - (ii) in coordination and alignment with the performance of the DPA Works in accordance with this Agreement, including the performance of the DPA Design Works and the development of the Design Data and the other DPA Submittals.
- (b) Without limiting the generality of DPA Section 10.16(a), Dev Co shall progressively develop and submit the Technical Specifications to DPA Contracting Authority, together with the associated DPA Works Submittals, as follows:
  - (i) during the 30% Design Development Stage, Dev Co shall prepare a table of contents for the Technical Specifications in the format and based on the document titled "PGMH-Tech Spec-3-Part\_Masterformat TOC", which forms part of the DPA Background Information;
  - (ii) during the 60% Design Development Stage, Dev Co shall develop an outline of the Technical Specifications to cover the broad scope description of all proposed products to be used in the construction of the Facility. DPA Contracting Authority may require that Dev Co submit to DPA Contracting Authority a competence analysis, in the format and based on the document titled "PGMH-Tech Spec A - Outline Spec" included within the DPA Background Information, (A) in respect of any element of the Technical Specifications, as deemed necessary by DPA Contracting Authority; and (B) for any product or system proposed by Dev Co that, in DPA Contracting Authority's reasonable opinion, deviates from Good Industry Practice; and
  - (iii) during the 90% Design Development Stage, Dev Co shall complete the development of the Technical Specifications, which shall be MasterFormat three-part specifications based on the structure of the precedent documents titled "PGMH-Tech Spec B - 07 26 16 - Below-Grade Vapour Barrier" and "PGMH-Tech Spec B - 07 42 63 - Ceramic Cladding System", each of which forms part of the DPA Background Information.
- (c) Dev Co shall, with each submission of the Technical Specifications documentation described in DPA Sections 10.16(b)(ii) and 10.16(b)(iii), submit a narrative describing any and all departures in such documentation from the standards identified in the Output Specifications and a rationale for each such departure.



- (d) During the development of the Technical Specifications and without creating any obligation or liability of DPA Contracting Authority, Dev Co shall promptly advise DPA Contracting Authority in writing if it is of the opinion that any alteration, addition or variation to this Agreement or the Draft Project Agreement ancillary and related to the development of the Technical Specifications or inclusion of the Technical Specifications in the Output Specifications in accordance with this DPA Section 10.16 would be necessary or beneficial to DPA Contracting Authority or the Project.
- (e) Without limiting any right of DPA Contracting Authority in this Agreement and subject to DPA Section 12.1(c), DPA Contracting Authority shall, as applicable:
  - (i) alter, add to or vary this Agreement by way of DPA Variations, subject to and in accordance with Schedule 6 – DPA Variations; and
  - (ii) revise the Draft Project Agreement pursuant to Section 4.1 of Schedule 3 – DPA Submissions and Project Development Process,to reflect the development and finalization of the Technical Specifications.
- (f) The Parties agree that, for the purposes of this Agreement, the Technical Specifications shall be completed and finalized by the Parties when:
  - (i) the final Technical Specifications have been approved by DPA Contracting Authority pursuant to DPA Section 10.16(a); and
  - (ii) such final Technical Specifications have been included in the Output Specifications and any other associated alteration, addition or variation to this Agreement and the Draft Project Agreement determined by DPA Contracting Authority to be necessary to properly include the Technical Specifications in the Output Specifications has been made pursuant to the process outlined in DPA Section 10.16(e),(collectively, “**Technical Specifications Completion**”).
- (g) The Parties acknowledge that Technical Specifications Completion shall occur prior to the Final Checkpoint.

## **11. BACKGROUND INFORMATION**

### **11.1 Review of DPA Background Information**

- (a) Without limiting any of Dev Co’s rights under DPA Section 11.4, Dev Co acknowledges and agrees that it has and shall be deemed to have:
  - (i) conducted its own review, due diligence and analysis of the DPA Background Information in accordance with Good Industry Practice;
  - (ii) satisfied itself as to the accuracy, completeness and fitness for purpose of any such DPA Background Information upon which it places reliance; and



- (iii) identified and raised, prior to the last date for the issuance of addenda under the Request for Proposals, any and all ambiguities or issues requiring clarification associated with the DPA Background Information.
- (b) Dev Co acknowledges and agrees that, with respect to any DPA Background Information provided to it or obtained by it following the Effective Date, it shall and shall be deemed to have:
  - (i) conducted its own review, due diligence and analysis of the DPA Background Information in accordance with Good Industry Practice as soon as practicable during the DPA Term and without any unreasonable delay;
  - (ii) during and as a result of such review, due diligence and analysis, satisfied itself as to the accuracy, completeness and fitness for purpose of any such DPA Background Information upon which it places reliance; and
  - (iii) identified and raised, prior to placing any reliance upon the DPA Background Information, any and all ambiguities or issues requiring clarification associated with the DPA Background Information.

#### **11.2 No Warranty for Background Information**

- (a) Except as expressly provided in DPA Section 11.4, none of DPA Contracting Authority, any DPA Contracting Authority Party or any Government Entity gives any warranty or undertaking of whatever nature in respect of the Background Information, and, specifically (but without limitation), none of DPA Contracting Authority, any DPA Contracting Authority Party or any Government Entity warrants that the Background Information represents all of the information in its possession or control (including during the conduct of the Request for Proposals and as of the Effective Date) relevant or material to or in connection with the Project or the obligations of Dev Co under this Agreement.

#### **11.3 No Claims or Liability in Respect of Background Information**

- (a) Except as expressly provided in DPA Section 11.4, none of DPA Contracting Authority, any DPA Contracting Authority Party or any Government Entity shall be liable to Dev Co or any Dev Co Party for, and Dev Co or any Dev Co Party shall not claim for, or seek to recover from DPA Contracting Authority, any DPA Contracting Authority Party or any Government Entity, any damages, losses, costs, liabilities or expenses which may arise (whether in contract, tort or otherwise, including any claim for extensions of time or for additional payments under this Agreement):
  - (i) from the adoption, use or application of the Background Information by, or on behalf of, Dev Co or any Dev Co Party;
  - (ii) as a result of any claim that the Background Information was incorrect, inaccurate, incomplete, insufficient or unfit for purpose;
  - (iii) as a result of any misunderstanding or misapprehension in respect of the use of the Background Information by Dev Co or any Dev Co Party; or

- (iv) from any failure (whether before, on, or after the Effective Date) by DPA Contracting Authority, any DPA Contracting Authority Party or Government Entity to:
  - A. disclose or make available to Dev Co or any Dev Co Party any information, documents or data; or
  - B. review or update the Background Information.

#### **11.4 Exceptions**

- (a) DPA Contracting Authority agrees that if, at the Effective Date, except as:
  - (i) described in any DPA Background Information;
  - (ii) as otherwise expressly disclosed by DPA Contracting Authority, any DPA Contracting Authority Party or any Government Entity; or
  - (iii) known by Dev Co or any Dev Co Party,any of the information in the Technical Reports is incorrect or there is relevant information in the possession or control of DPA Contracting Authority that would make any of the information in the Technical Reports incorrect, then, to the extent that such incorrect information materially adversely interferes with Dev Co's ability to perform the DPA Works or materially adversely affects Dev Co's cost of performing the DPA Works, such incorrect information shall, subject to and in accordance with DPA Schedule 6 – DPA Variation Procedure, result in a DPA Variation.
- (b) DPA Sections 11.2 and 11.3 are not intended to and shall not prohibit Dev Co from relying upon information that has been provided by a person who has given Dev Co an express written entitlement to rely on that information, provided however, except as set out in this DPA Section 11.4, Dev Co shall not be entitled to make any claim of any nature whatsoever against DPA Contracting Authority, any DPA Contracting Authority Party or any Government Entity on any grounds relating to the information provided by that person. For clarity, except as set out in DPA Sections 11.4, Dev Co's legal recourse with respect to the information provided by the person who provided the express written entitlement to rely on the information shall be against that person and not DPA Contracting Authority or any DPA Contracting Authority Party.

#### **11.5 Additional Background Information**

- (a) Any reports, documents and other information obtained by Dev Co pursuant to any Additional Project Due Diligence performed by DPA Contracting Authority or Dev Co pursuant to DPA Section 10.9 shall be deemed to be DPA Background Information hereunder provided to or obtained by Dev Co on the same basis as set out in DPA Sections 11.1 to 11.4.

### **12. DPA VARIATION PROCEDURE**

#### **12.1 DPA Variation Procedure**

- (a) Schedule 6 – DPA Variation Procedure shall apply in respect of DPA Variations.

- (b) Dev Co shall, subject to and in accordance with Schedule 6 – DPA Variation Procedure, be entitled to a DPA Variation if a written direction to Dev Co issued by Infrastructure Ontario’s board of directors, the Hospital’s board of directors or both of them results in a variation, addition, reduction, substitution, omission, modification, deletion, removal or other change to the whole or any part of the DPA Works.
- (c) Notwithstanding anything to the contrary in this Agreement, the Parties agree that during the DPA Term:
  - (i) subject to DPA Section 4.2, any alteration, addition or variation to any Attachment to Schedule 3 – DPA Submissions and Project Development Process shall be effected by way of a DPA Variation, subject to and in accordance with Schedule 6 – DPA Variation Procedure, provided that Dev Co shall only be entitled to any additional compensation and schedule relief under this Agreement if and to the extent that such DPA Variation directly results in a material increase in Dev Co’s costs or materially impacts the schedule to perform the DPA Works;
  - (ii) DPA Contracting Authority may revise and reissue in whole or in part the Draft Project Agreement pursuant to Schedule 3 – DPA Submissions and Project Development Process, and, except as set out in DPA Section 12.1(c)(iii), no such amendment, revision or reissuance to the Draft Project Agreement shall require (A) a DPA Variation; (B) an amendment to this Agreement; (C) DPA Contracting Authority to pay Dev Co any additional compensation under this Agreement; or (D) DPA Contracting Authority to provide any schedule or other relief to Dev Co under this Agreement, and this Agreement shall remain in full force and effect notwithstanding any such revision or reissuance;
  - (iii) any proposed alteration, addition or variation to any provision of the Draft Project Agreement that is expressly incorporated into this Agreement by reference that directly impacts or will impact (I) the performance of the DPA Works (including the DPA Works PA Requirements); (II) other obligations or liabilities of Dev Co under this Agreement; or (III) the performance of the Remaining PA Design Works under a Final Project Agreement, shall, subject to and in accordance with Schedule 6 – DPA Variation Procedure, require and be effected by a DPA Variation, provided that:
    - A. Dev Co shall not be entitled to any additional compensation or schedule relief in accordance with Schedule 6 – DPA Variation Procedure or otherwise under this Agreement if such proposed alteration, addition or variation to the Draft Project Agreement constitutes reasonable revisions arising out of the development and progression of the design for the Project in accordance with normal design development practices, including any such reasonable revisions made after DPA Contracting Authority’s review of and comment on the DPA Works Submittals under this Agreement at any previous stage of the design development process;
    - B. Dev Co shall not be entitled to any additional compensation or schedule relief in accordance with Schedule 6 – DPA Variation Procedure or otherwise under this Agreement if such proposed alteration, addition or variation to the Draft Project Agreement reflects elements of a DPA Submittal or is made to include or reflects elements of the Technical Specifications; and

- C. Dev Co shall otherwise only be entitled to additional compensation and schedule relief under this Agreement in respect of such proposed alteration, addition or variation to the Draft Project Agreement in accordance with Schedule 6 – DPA Variation Procedure if and to the extent that such DPA Variation directly results in a material increase in (1) Dev Co’s costs and materially impacts the schedule to perform the DPA Works or (2) the cost to Project Co of performing the Remaining PA Design Works under any Final Project Agreement (other than with respect to any Remaining PA Design Works Overhead and Profit); and
- (iv) subject to DPA Section 10.12(m), any DPA Variation which incorporates the Remaining DPA Design Works, or any part thereof, into the DPA Works or which removes any DPA Design Works from the DPA Works and adds such DPA Design Works to the Remaining PA Design Works shall not result in any adjustment to the Total DPA and Design Works Fixed Price.
- (d) Dev Co shall promptly advise DPA Contracting Authority as to any circumstances or events arising pursuant to this Agreement that, in its reasonable opinion, comprise or require a DPA Variation.
- (e) For greater certainty, Dev Co may and is encouraged to propose DPA Variations pursuant to Schedule 6 – DPA Variation Procedure for value engineering, cost reduction, schedule acceleration and efficiency enhancing purposes, provided that DPA Contracting Authority shall be under no obligation whatsoever to accept any such proposals.

#### 12.2 DPA Variation for DPA Contracting Authority Delay

- (a) Except to the extent caused or contributed to by Dev Co or a Dev Co Party:
  - (i) if DPA Contracting Authority materially delays Dev Co’s performance of the DPA Works as a result of any failure of DPA Contracting Authority to comply, or delay of DPA Contracting Authority in complying with, its obligations to comment on DPA Submittals in accordance with the provisions of the Review Procedures; or
  - (ii) without limiting the provisions of this DPA Section 12.2(a) but subject to Dev Co’s compliance with DPA Section 10.13, if Dev Co is materially delayed in the performance of the DPA Works as a result of any failure of DPA Contracting Authority to obtain, or delay of DPA Contracting Authority obtaining, any required approval from the MOH in accordance with the deadlines set out in the DPA Works Schedules,

then, subject to and in accordance with Schedule 6 – DPA Variation Procedure, Dev Co shall be entitled to a DPA Variation whereby Dev Co shall be provided with:

- A. an extension of time to the DPA Works Schedules to the extent of the necessary extension of the Critical Path as a result of such material delay (each a “**DPA Contracting Authority Delay Period**”); and
- B. additional payment from the Hospital to the extent necessary to compensate Dev Co for such material delay.

**13. TOTAL DPA AND DESIGN WORKS FIXED PRICE AND PAYMENT**

**13.1 Total DPA and Design Works Fixed Price**

- (a) Dev Co represents and warrants that the all-inclusive “**Total DPA and Design Works Fixed Price**”, exclusive of HST, for the performance of:
- (i) the DPA Works under this Agreement; and
  - (ii) without limiting or prejudice to any right of DPA Contracting Authority under this Agreement (including under DPA Section 4.1(a)(ii)), the Remaining PA Design Works under a Final Project Agreement,
- is, subject to DPA Section 13.1(d), an amount equal to \$[REDACTED].
- (b) The Parties agree that the Total DPA and Design Works Fixed Price will not be subject to adjustment despite changes in the DPA Works or to the Draft Project Agreement, except in accordance with DPA Section 12 and Schedule 6 – DPA Variation Procedure. The Parties further agree that the Total DPA and Design Works Fixed Price will only be adjusted where this Agreement specifically and expressly refers to an adjustment to the Total DPA and Design Works Fixed Price, and no claim for an adjustment to the Total DPA and Design Works Fixed Price on any legal or equitable basis outside of the specific and express rights to an adjustment of the Total DPA and Design Works Fixed Price set out in this Agreement will be allowed. In order to be effective, any permitted adjustment to the Total DPA and Design Works Fixed Price must be provided in a DPA Variation Confirmation in accordance with Schedule 6 – DPA Variation Procedure.
- (c) Dev Co acknowledges and agrees that, subject to DPA Section 13.1(d):
- (i) Dev Co has satisfied itself as to the correctness and sufficiency of the Total DPA and Design Works Fixed Price, and has based the Total DPA and Design Works Fixed Price on the data, interpretations, necessary information, examinations and satisfaction as to all relevant matters related to this Agreement (including the Draft Project Agreement);
  - (ii) the Total DPA and Design Works Fixed Price covers all of Dev Co’s obligations under this Agreement and all of Project Co’s obligations set out in the Draft Project Agreement with respect to the Remaining PA Design Works, and all things necessary for the proper performance and completion of the DPA Works under this Agreement and the Remaining PA Design Works under a Final Project Agreement, and the remedying of any defects;
  - (iii) the Total DPA and Design Works Fixed Price includes all premium time and overtime that may be required to perform the DPA Works in accordance with this Agreement and Good Industry Practice and the Remaining PA Design Works in accordance with any Final Project Agreement and Good Industry Practice; and
  - (iv) except as otherwise expressly provided in this Agreement or under any Final Project Agreement, there shall be no other amounts payable to Dev Co under this Agreement or to Project Co under any Final Project Agreement other than the Total DPA and Design Works Fixed Price, in respect of the DPA Works and the Remaining PA Design Works.

- (d) The Parties acknowledge and confirm that, notwithstanding anything to the contrary in this Agreement, the Total DPA and Design Works Fixed Price:
- (i) does not include any Remaining PA Design Works Overhead and Profit; and
  - (ii) only includes amounts associated with the performance of the DPA Works that are to be performed following Dev Co's submission of the Project Proposal pursuant to this Agreement that are necessary to achieve Commercial Close in accordance with this Agreement by no later than the date that is 90 days following the date of such submission. The Parties accordingly agree that:
    - A. Dev Co shall include in the Project Proposal an amount (the "**Closing Allowance**") that will be payable by the Hospital to Project Co under any Final Project Agreement that specifically relates to and is directly attributable to the aggregate of Dev Co's reasonable and direct incremental costs associated with the performance of the DPA Works following Dev Co's submission of the Project Proposal pursuant to this Agreement that are necessary to achieve Commercial Close by no later than the date of the expiry of the subsequent 55 day period occurring after the expiry of such 90 day period. For clarity, such subsequent 55 day period ends on the date of the expiry of the Project Proposal Validity Period; and
    - B. the Closing Allowance shall be without duplication of any amount included in the Total DPA and Design Works Fixed Price, and shall not include any amount that was otherwise required to be included in the Total DPA and Design Works Fixed Price in accordance with the Request for Proposals.

**13.2 Payment to Dev Co and Project Co of the Total DPA and Design Works Fixed Price**

- (a) Subject to the provisions of this Agreement (including DPA Sections 13.2(b) and 13.5) and in accordance with and subject to Applicable Law respecting holdbacks, the Hospital shall, on a monthly and earned value basis, pay Dev Co a portion of the Total DPA and Design Works Fixed Price attributable to the performance of the DPA Works plus applicable HST in accordance with Schedule 8 – DPA Payment.
- (b) Notwithstanding anything to the contrary in this Agreement, the Parties agree:
- (i) in the event that DPA Contracting Authority delivers a Notice to Proceed to Commercial Close to Dev Co pursuant to DPA Section 4.1(b), except as otherwise set out in DPA Section 13.2(d) and Section 1.9(a)(ii) of Schedule 6 – DPA Variation Procedure, the Hospital shall not be obligated to pay Dev Co, and neither Dev Co nor any Dev Co Party shall be entitled to be paid by the Hospital, any amount whatsoever pursuant to DPA Section 13.2(a) for or in respect of the performance of the DPA Works during the DPA Term performed after the Final EV Payment DPA Works;
  - (ii) Dev Co shall include an amount equal to (A) the Total DPA and Design Works Fixed Price minus (B) all amounts that were paid, are payable and are estimated to be payable by the Hospital to Dev Co pursuant to DPA Section 13.2(a) in respect of all DPA Works performed up to and including the Final EV Payment DPA Works and any Cash Allowance



Amounts that have not been paid, are not payable and are not estimated to be payable by the Hospital to Dev Co pursuant to DPA Section 13.4 (the “**Remaining Total DPA and Design Works Fixed Price**”) as part of the Project Proposal in accordance with the requirements of Appendix 3 – Project Proposal Content and Requirements of Schedule 3 – DPA Submissions and Project Development Process, which shall be adjusted during the Commercial Closing Stage in accordance with Section 6.3(c) of Schedule 3 – DPA Submissions and Project Development Process; and

- (iii) Dev Co shall not be permitted to include any additional amount in the Project Proposal whatsoever in respect of the performance of the DPA Works or the Remaining PA Design Works other than the Remaining Total DPA and Design Works Fixed Price and Remaining PA Design Works Overhead and Profit.
- (c) The Parties acknowledge that, in accordance with Appendix 3 – Project Proposal Content and Requirements of Schedule 3 – DPA Submissions and Project Development Process, the Remaining Total DPA and Design Works Fixed Price (as adjusted during the Commercial Closing Stage in accordance with Section 6.3(c) of Schedule 3 – DPA Submissions and Project Development Process) shall be included in the payments to be made by Contracting Authority to Project Co under, and shall be payable by Contracting Authority to Project Co pursuant to, any Final Project Agreement as consideration for Project Co’s performance of the Remaining PA Design Works.
- (d) In the event this Agreement is terminated by a Party in accordance with any of DPA Section 18.1, 18.2, 19.1 or 19.2 after the date Contracting Authority delivers a Notice to Proceed to Commercial Close to Dev Co pursuant to DPA Section 4.1(b), then, without limiting any other right, obligation or liability of a Party under this Agreement (including the rights of the Hospital pursuant to DPA Section 13.5), the Hospital shall be obligated to pay Dev Co a portion of the Total DPA and Design Works Fixed Price attributable to the performance of the DPA Works after the performance of the Final EV Payment DPA Works in accordance with DPA Section 13.2 and DPA Section 20.2.

### **13.3 Other Payment Obligations**

- (a) Without limiting or prejudice to DPA Section 13.2, the Parties shall comply with the provisions of Schedule 8 – DPA Payment.

### **13.4 Cash Allowance Items and Cash Allowance Amounts**

- (a) The Parties acknowledge and agree that:
  - (i) the Cash Allowance Amounts form part of the Total DPA and Design Works Fixed Price;
  - (ii) the DPA Works in respect of each Cash Allowance Amount are the works and services required to perform and complete the Cash Allowance Item;
  - (iii) unless otherwise directed by DPA Contracting Authority in writing, each Cash Allowance Amount is only for the corresponding Cash Allowance Item and not for other Cash Allowance Items;
  - (iv) unless otherwise agreed by DPA Contracting Authority in writing, the DPA Works associated with a Cash Allowance Item may only be performed by Dev Co and a Cash



Allowance Amount may only be expended by Dev Co and reimbursed by the Hospital if Dev Co satisfies the requirements of this DPA Section 13.4; and

- (v) if Dev Co commences the performance of the DPA Works associated with a Cash Allowance Item or makes any expenditure of a Cash Allowance Amount in respect of a Cash Allowance Item and Dev Co fails to comply with the requirements of this DPA Section 13.4 (including if Dev Co makes any such expenditure before receiving a Cash Allowance Disbursement Authorization or fails to comply with any Cash Allowance Disbursement Authorization), then, without limiting any other right of DPA Contracting Authority or obligation of Dev Co under this Agreement, such expenditure may (A) be the subject of a DPA Dispute under this Agreement; (B) form the basis of a notice of non-payment by the Hospital in accordance with the *Construction Act*; (C) not be reimbursed by the Hospital; and (D) be deducted from the Total DPA and Design Works Fixed Price by way of a DPA Variation.
- (b) Prior to Dev Co performing any DPA Works associated with a Cash Allowance Item:
  - (i) Dev Co shall, on its own volition or at the written request of DPA Contracting Authority, submit a written proposal to DPA Contracting Authority for DPA Contracting Authority's review (A) detailing its projected expenditures for the Cash Allowance Item, any relevant terms of the expenditures, the methods of accounting for such expenditures, and when Dev Co anticipates making such expenditures; and (B) that satisfies the requirements of DPA Section 13.4(g)(ii) (each is a "**Cash Allowance Expenditure Proposal**"); and
  - (ii) following the receipt of a Cash Allowance Expenditure Proposal, DPA Contracting Authority may, without unreasonable delay, require Dev Co to revise and resubmit the Cash Allowance Expenditure Proposal to reflect DPA Contracting Authority's requirements related to the expenditures for the Cash Allowance Item, including to obtain a more satisfactory proposal to DPA Contracting Authority that reflects any one or more of the following:
    - A. the renegotiation of any third party pricing or other terms;
    - B. two or more competitive quotes from third parties;
    - C. a quote from any particular third party identified by DPA Contracting Authority;
    - D. a different method of accounting for such expenditure; or
    - E. any other requirement of DPA Contracting Authority related to the expenditure,and Dev Co shall, as soon as practicable, comply with such requirements and subsequently revise and resubmit the Cash Allowance Expenditure Proposal to DPA Contracting Authority for DPA Contracting Authority's review and approval.
- (c) If DPA Contracting Authority approves of the Cash Allowance Expenditure Proposal, as may be revised and resubmitted pursuant to DPA Section 13.4(b)(ii), then DPA Contracting Authority shall provide a written authorization to Dev Co authorizing Dev Co to proceed with the DPA Works in respect of the Cash Allowance Item and the expenditures in respect of the Cash Allowance Item

set out in the Cash Allowance Expenditure Proposal (each a “**Cash Allowance Disbursement Authorization**”).

- (d) Dev Co shall carry out the DPA Works in respect of each Cash Allowance Item in accordance with the applicable Cash Allowance Disbursement Authorization provided by DPA Contracting Authority.
- (e) Any expenditure by Dev Co in respect of a Cash Allowance Item in excess of the pricing set out in a Cash Allowance Disbursement Authorization, must receive the prior approval in writing of DPA Contracting Authority.
- (f) Dev Co shall seek reimbursement for any expenditures reasonably and properly incurred by Dev Co in respect of a Cash Allowance Item plus any applicable HST pursuant to Schedule 8 – DPA Payment.
- (g) Dev Co acknowledges and agrees that:
  - (i) no Cash Allowance Amount is a cap or a maximum expenditure on the cost to Dev Co or a Dev Co Party in respect of the performance of the DPA Works in respect of the corresponding Cash Allowance Item, provided that Dev Co shall promptly advise DPA Contracting Authority if at any time it is of the reasonable opinion that any expenditure of the Cash Allowance Amount required to perform the DPA Works in respect of a Cash Allowance Item will or is reasonably likely to be in excess of the Cash Allowance Amount for such Cash Allowance Item;
  - (ii) Dev Co shall use commercially reasonable efforts to obtain fixed pricing for all expenditures for each Cash Allowance Item and to include such fixed pricing in its Cash Allowance Expenditure Proposal for such Cash Allowance Item;
  - (iii) the expenditure of the Cash Allowance Amount in respect of a Cash Allowance Item set out in a Cash Allowance Disbursement Authorization shall cover the total and all-inclusive cost to Dev Co of works and services and other authorized expenses incurred in performing the DPA Works in respect of the Cash Allowance Item, plus any applicable HST;
  - (iv) neither Dev Co, nor any Dev Co Party, shall be entitled to any mark-ups for profit, overhead or other costs associated with any of the Cash Allowance Items;
  - (v) all discounts, rebates, refunds, chargebacks, credits, price adjustments and other allowances available to Dev Co in connection with the Cash Allowance Items shall be attributed solely to and shall benefit the pricing of the Cash Allowance Items;
  - (vi) any of the Cash Allowance Amounts that are not expended in accordance with this Agreement shall reduce the Total DPA and Design Works Fixed Price payable to Dev Co under this Agreement by way of a DPA Variation, and Dev Co shall not be entitled to any payment under this Agreement on account of any such Cash Allowance Amounts; and
  - (vii) Dev Co shall include within the DPA Works Schedules a schedule when Dev Co anticipates making such expenditures and providing a Cash Allowance Expenditure

Proposal and when any associated Cash Allowance Disbursement Authorization will be required.

**13.5 Set-Off**

- (a) The Parties agree that their rights of set-off at law or in equity are limited to the right of:
  - (i) the Hospital to set off against any amounts otherwise due to Dev Co pursuant to the terms of this Agreement, any amounts (including any amounts payable in accordance with DPA Sections 18.1(f) and 22) that (A) are due to DPA Contracting Authority by Dev Co pursuant to the terms of this Agreement or (B) are being disputed in accordance with the DPA Dispute Resolution Procedure; and
  - (ii) Dev Co to set off against any amounts otherwise due to DPA Contracting Authority pursuant to the terms of this Agreement, any amounts (including, without limitation, any amounts payable in accordance with DPA Section 22) that (A) are due to Dev Co by the Hospital pursuant to the terms of this Agreement or (B) are being disputed in accordance with the DPA Dispute Resolution Procedure.
- (b) Where a set-off, deduction or withholding is being exercised against amounts payable under a Proper Invoice, the Hospital shall deliver a notice of non-payment in the prescribed form and manner no later than 14 days after receiving the Proper Invoice.

**13.6 Effect of Payment**

- (a) No payment under this Agreement shall be construed as an acceptance or approval of incomplete, defective or improper performance by Dev Co of any of its obligations under this Agreement, nor shall it operate to relieve Dev Co from the performance of any of its obligations under this Agreement which have not been performed.

**13.7 No Other Entitlement**

- (a) Dev Co shall not be entitled to any payments, compensation, rights, remedies, benefits or entitlements under or in connection with this Agreement, except as specifically and expressly set out in this Agreement.

**14. LIENS ARISING FROM THE DPA WORKS**

**14.1 No Liens**

- (a) Dev Co shall not suffer or permit any construction lien or other lien for work, labour, services or materials ordered or supplied or claimed to have been ordered or supplied by or on behalf of Dev Co arising from the DPA Works and Applicable Law (“**Lien**”) to be to be filed or registered against the Lands or any part thereof. Whenever any Lien is registered or shall attach or claims therefore shall be filed or if notice of any Lien is provided to the Hospital, Dev Co shall forthwith, and in any event no longer than 10 Business Days after Dev Co has notice and/or knowledge of such Lien, cause such Lien to be discharged or vacated from title to the Lands by payment or by giving security or in such other manner as is or may be required or permitted by Applicable Law or to cause such notice of Lien to be withdrawn by the Lien claimant.

- (b) Dev Co further agrees that whenever a certificate of action is registered relating to any Lien, Dev Co shall forthwith, and in any event no longer than 10 Business Days after Dev Co has notice and/or knowledge of the registration of such certificate of action have it vacated.
- (c) If Dev Co fails to so discharge or vacate any such Lien or certificate of action or to have such notice of Lien withdrawn by the Lien claimant, within such 10 Business Day period, the Hospital may (but shall not be obligated to) and without prejudice to any of its other rights or remedies under this Agreement or otherwise pursuant to Applicable Law, discharge or vacate the Lien or certificate of action or to have such notice of Lien withdrawn. Any amounts paid and any cost and expenses incurred in respect of the foregoing by or on behalf of the Hospital (including, without limitation, all legal fees on a full indemnity basis and disbursements) shall be paid by Dev Co to the Hospital upon demand.
- (d) This DPA Section 14.1 shall not apply to any Lien claimed by Dev Co as a result of any default of the Hospital to make any payments to Dev Co in accordance with this Agreement.

## **15. FORCE MAJEURE EVENTS**

### **15.1 Force Majeure**

- (a) For the purposes of this Agreement, “**Force Majeure Event**” means an event or circumstance arising after the Effective Date that is beyond the affected Party’s reasonable control, including fire, flood, earthquake, elements of nature or acts of God, epidemics, pandemics, acts of war, states of belligerency, acts of the public enemy, power or utility failures that extend beyond one day, orders issued by public authorities, labour disputes, strikes, lock-outs, abnormally adverse weather conditions, terrorism, riots, or civil disorders, save and except if and to the extent any such event or circumstance was caused by or contributed to by a breach of this Agreement by the affected Party or any act omission by or on behalf of the affected Party. This definition shall not include and the Party seeking relief shall not be entitled to relief on the grounds of a Force Majeure Event for any of the following:
  - (i) late or incomplete performance of an obligation of Dev Co under this Agreement, including as a result of late or incomplete performance of such obligation by a Dev Co Party under this Agreement, unless any such late or incomplete performance is itself caused by a Force Majeure Event;
  - (ii) late or incomplete performance by DPA Contracting Authority under this Agreement, unless such late or incomplete performance is itself caused by a Force Majeure Event;
  - (iii) economic hardship suffered by a Party or any Party’s inability to pay moneys under this Agreement;
  - (iv) the late payment of moneys due and payable under this Agreement;
  - (v) any infringement by a Party of any intellectual property right by a party; and
  - (vi) any event for which a reasonable business person applying due diligence in the same or similar circumstance under the same or similar obligations as those contained in this

Agreement would have put in place contingency plans to either materially mitigate or negate the effects of such event.

- (b) No Party shall be liable for any failure to perform or delay in the performance of any of its obligations under this Agreement if the Party affected by a Force Majeure Event submits satisfactory evidence to the other Party that such failure or delay was the result of a Force Majeure Event, and the DPA Works Schedules shall be revised in accordance with the provisions of Schedule 6 – DPA Variation Procedure, provided that, for greater certainty, Dev Co shall not be entitled to any additional payment in respect of any DPA Variation required in accordance with this DPA Section 15.1(b) and in no circumstance shall any extension of time be more than the necessary extension of the Critical Path as a result of such Force Majeure Event.
- (c) Without limiting DPA Section 15.1(b), DPA Contracting Authority shall not be required to provide to Dev Co, and Dev Co shall not be entitled to, any additional compensation pursuant to this Agreement as a result of or in connection with a Force Majeure Event.
- (d) Any Party affected by a Force Majeure Event shall:
  - (i) give Notice to the other Party within 5 Business Days of the date it becomes aware of the commencement of the Force Majeure Event. Such Notice shall give sufficient details to identify the particular event claimed to be a Force Majeure Event;
  - (ii) take commercially reasonable steps to mitigate the consequences of the Force Majeure Event upon the performance of its obligations under this Agreement;
  - (iii) resume performance of its obligations affected by the Force Majeure Event as soon as possible and use commercially reasonable efforts to remedy its failure to perform;
  - (iv) advise the other Party in writing on a weekly basis of its efforts to overcome and/or mitigate the Force Majeure Event; and
  - (v) give Notice to the other Party promptly when the Force Majeure Event has ceased, and when the performance of its affected obligations can be resumed.
- (e) To the extent that the Party claiming relief does not comply with its obligations under DPA Section 15.1(d), such failure shall be taken into account in determining such Party's entitlement to relief pursuant to DPA Section 15.1(b).

## **15.2 Impacts of COVID-19 on DPA Works**

- (a) Notwithstanding anything to the contrary in this Agreement:
  - (i) Dev Co acknowledges the impact of COVID-19 (including the impact of Applicable Law related to COVID-19) generally on the provision of design, construction, consulting and financial services in the Province of Ontario and on the specific DPA Works to be performed by Dev Co under this Agreement;
  - (ii) Dev Co confirms that it has taken into account all such impacts on the performance of the DPA Works, including in the Total DPA and Design Works Fixed Price and the DPA Works Schedules; and

- (iii) the Parties agree that, notwithstanding anything to the contrary in this Agreement, the effects of COVID-19 on Dev Co's performance of the DPA Works and its other obligations hereunder as of the Effective Date shall not constitute a Force Majeure Event, and that the provisions of DPA Section 15.1 shall not apply to the effects of COVID-19 on Dev Co's performance of the DPA Works and its other obligations hereunder after the Effective Date, except to the extent of a material change to the effects of COVID-19 on Dev Co's performance of the DPA Works and its other obligations under this Agreement which arise after the Effective Date.

## **16. INSURANCE AND PERFORMANCE SECURITY**

### **16.1 Insurance**

- (a) Dev Co shall and shall cause all relevant Dev Co Parties to obtain and maintain during the DPA Term the insurance set out in Schedule 9 – DPA Insurance.
- (b) Neither compliance nor failure to comply with the insurance provisions of this Agreement shall relieve Dev Co or DPA Contracting Authority of their respective liabilities and obligations under this Agreement.

### **16.2 Performance Guarantee of DPA Works Guarantor**

- (a) At all times during the DPA Term and, in respect of the provisions described in DPA Section 20.4 following the DPA Term, Dev Co shall ensure that a valid and binding Performance Guarantee of DPA Works Guarantor in favour of DPA Contracting Authority from the DPA Works Guarantor (or a party of comparable financial strength, capacity and stability, as determined by DPA Contracting Authority acting in its sole discretion) and in the form of guarantee attached as Schedule 15 – Form of Performance Guarantee of DPA Works Guarantor, is in place and enforceable by DPA Contracting Authority.
- (b) The Parties agree that any demands made and amounts paid by the DPA Works Guarantor to DPA Contracting Authority under the Performance Guarantee of DPA Works Guarantor is without prejudice to DPA Contracting Authority's right to make continuing claims against Dev Co under this Agreement in relation to matters for which the Performance Guarantee of DPA Works Guarantor is provided.

### **16.3 DPA Closing Letter of Credit**

- (a) On the date that is five Business Days following the date DPA Contracting Authority delivers a Notice to Proceed to Commercial Close to Dev Co pursuant to DPA Section 4.1(b), Dev Co shall deliver or cause one or more Dev Co Parties or members of the Dev Co Group (each a “**DPA Letter of Credit Client**”) to deliver to DPA Contracting Authority one or more unconditional and irrevocable letters of credit, which shall be:
  - (i) in the amount of \$[REDACTED];
  - (ii) from any one or more of the Schedule I Canadian chartered banks or any other financial institutions approved by DPA Contracting Authority, in each case, whose current long-term issuer rating is at least “A” by Standard & Poor's and “A2” by Moody's Investor



- Services or an equivalent rating by another party acceptable to DPA Contracting Authority, in its sole discretion;
- (iii) in favour and for the direct and exclusive benefit of DPA Contracting Authority;
  - (iv) in the form set out in Appendix 6 – Form of DPA Closing Letter of Credit to Schedule 3 – DPA Submissions and Project Development Process; and
  - (v) maintained, without reduction or step-down, by Dev Co until the Security Release Date, (the “**DPA Closing Letter of Credit**”).
- (b) DPA Contracting Authority shall be entitled to draw on the DPA Closing Letter of Credit in accordance with Section 6.2(b) of Schedule 3 – DPA Submissions and Project Development Process. On and following Commercial Close, the Hospital may draw on the DPA Closing Letter of Credit in accordance with Section 2.3(b) of the Final Project Agreement.
- (c) DPA Contracting Authority shall further be entitled to draw on the DPA Closing Letter of Credit if any one or more of the following occurs:
- (i) upon the failure of Dev Co to renew or to cause the renewal of the DPA Closing Letter of Credit in accordance with its terms and to provide or cause the provision of written proof of such renewal to DPA Contracting Authority, before the date that is 20 Business Days before the expiry date of the DPA Closing Letter of Credit;
  - (ii) upon the bankruptcy or insolvency of Dev Co or the applicable DPA Letter of Credit Client; and
  - (iii) upon the downgrading of any issuer of a DPA Closing Letter of Credit below any of the applicable thresholds set out in DPA Section 16.3(a)(ii) where the DPA Closing Letter of Credit has not been replaced by Dev Co or the applicable DPA Letter of Credit Client, as the case may be, with a replacement DPA Closing Letter of Credit in the form set out in Appendix 6 – Form of DPA Closing Letter of Credit to Schedule 3 – DPA Submissions and Project Development Process or such other form acceptable to DPA Contracting Authority, acting reasonably, and issued by one or more banks or other financial institutions that satisfy the requirements set out in DPA Section 16.3(a)(ii), within 20 Business Days following such downgrading,
- provided that DPA Contracting Authority shall give Dev Co at least two Business Days prior written notice before drawing on the DPA Closing Letter of Credit pursuant to this DPA Section 16.3(c).
- (d) In the event that the DPA Closing Letter of Credit is drawn upon in accordance with DPA Section 16.3(c), DPA Contracting Authority shall hold the cash proceeds thereof in a segregated bank account at a bank selected by DPA Contracting Authority that meets the thresholds described in DPA Section 16.3(a)(ii), and, until Dev Co delivers or causes the delivery of a new DPA Closing Letter of Credit to DPA Contracting Authority, such cash proceeds and interest earned on such cash proceeds shall thereupon stand in place of the DPA Closing Letter of Credit, with the provisions of this Agreement being interpreted such that all references to the DPA Closing Letter of Credit shall



- be deemed to be references to such cash proceeds and interest earned on such cash proceeds, applicable *mutatis mutandis*. All interest earned on such cash proceeds shall be for the benefit of Dev Co. DPA Contracting Authority shall be entitled to withdraw such cash proceeds and interest earned on such cash proceeds in the same manner that it is permitted to draw upon the DPA Closing Letter of Credit pursuant to this Agreement. Upon the replacement of the DPA Closing Letter of Credit by Dev Co or a DPA Letter of Credit Client, as the case may be, DPA Contracting Authority shall return all remaining cash proceeds and all interest earned on such cash proceeds from such segregated bank account to Dev Co or as Dev Co may direct within five Business Days.
- (e) DPA Contracting Authority may make multiple and partial draws on the DPA Closing Letter of Credit pursuant to DPA Section 16.3(b).
  - (f) Unless the DPA Closing Letter of Credit is fully drawn by DPA Contracting Authority in accordance with the provisions of this Agreement, DPA Contracting Authority shall release and deliver the DPA Closing Letter of Credit to Dev Co or the DPA Letter of Credit Clients, (i) if DPA Contracting Authority terminates this Agreement in accordance with DPA Section 19.1 prior to Commercial Close being achieved; or (ii) if the Hospital has entered into the Final Project Agreement with Project Co, on the date set out in Section 2.2(b) of the Final Project Agreement (the “**Security Release Date**”).
  - (g) If Dev Co delivers multiple letters of credit comprising the DPA Closing Letter of Credit from multiple DPA Letter of Credit Clients in accordance with DPA Section 16.3(a), Dev Co acknowledges and agrees that:
    - (i) DPA Contracting Authority may draw upon any such letter of credit provided by any DPA Letter of Credit Client in any specified ratable amount;
    - (ii) DPA Contracting Authority may draw on any such letter of credit provided by any DPA Letter of Credit Client in a disproportionate amount to such DPA Letter of Credit Client’s contribution to security;
    - (iii) DPA Contracting Authority may draw upon any such letter of credit provided by any DPA Letter of Credit Client even in the event that such DPA Letter of Credit Client is no longer a Dev Co Party; and
    - (iv) the provision of multiple letters of credit shall not in any way prejudice or adversely affect the rights of DPA Contracting Authority to draw on any such letter of credit in accordance with this Agreement, including in the event that DPA Contracting Authority is entitled to draw on the DPA Closing Letter of Credit in accordance with this Agreement and such circumstance is not the result of any act or omission of the particular DPA Letter of Credit Client whose letter of credit is drawn upon.
  - (h) In the event that the DPA Closing Letter of Credit is drawn upon in accordance with DPA Section 16.3(c), Dev Co shall pay to DPA Contracting Authority all of DPA Contracting Authority’s reasonable costs and expenses resulting from or arising in connection with such draw, and DPA Contracting Authority shall have the right to withhold such amounts from the amounts drawn in accordance with DPA Section 16.3(c) unless paid by Dev Co within five Business Days of a written request from DPA Contracting Authority to Dev Co.

**16.4 No Required Bonds**

- (a) The Parties agree that, except as otherwise required under the Enabling Works Contract, a DPA Variation or as a result of a judicial determination made under the *Construction Act*, neither Dev Co nor any DPA Subcontractor shall be required to furnish DPA Contracting Authority with a performance bond or a labour and material payment bond in connection with the DPA Works. In the event that, following the Effective Date, a final judicial determination is made under the *Construction Act* that a performance bond or a labour and material payment bond is required or both of them are required in connection with the DPA Works, then, subject to and in accordance with Schedule 6 – DPA Variation Procedure, Dev Co shall be entitled to a DPA Variation for the additional costs incurred as a result of Dev Co or any DPA Subcontractor obtaining such required bond or bonds.

**17. CONFLICT OF INTEREST**

**17.1 No Conflict of Interest**

- (a) Dev Co shall and shall cause the Dev Co Parties to:
- (i) avoid any Conflict of Interest in the performance of Dev Co's obligations under this Agreement;
  - (ii) promptly disclose in writing to DPA Contracting Authority without delay any actual, potential or perceived Conflict of Interest that arises during the performance of Dev Co's obligations under this Agreement; and
  - (iii) comply with any requirements prescribed by DPA Contracting Authority to resolve any actual, potential or perceived Conflict of Interest that arises during the performance of Dev Co's obligations under this Agreement.
- (b) At the request of DPA Contracting Authority, Dev Co shall provide DPA Contracting Authority with Dev Co's proposed means to mitigate and minimize to the greatest extent practicable any actual, potential or perceived Conflict of Interest.
- (c) Dev Co shall submit any additional information to DPA Contracting Authority that DPA Contracting Authority considers necessary to properly assess any actual, potential or perceived Conflict of Interest.
- (d) DPA Contracting Authority may, in its sole discretion, exclude any potential DPA Subcontractor on the grounds of an actual, potential or perceived Conflict of Interest.
- (e) DPA Contracting Authority may, in its sole discretion, waive in writing any actual, potential or perceived Conflict of Interest of Dev Co or a Dev Co Party. A waiver may be upon such terms and conditions as DPA Contracting Authority, in its sole discretion, requires to satisfy itself that the Conflict of Interest has been appropriately managed, mitigated and minimized, including requiring Dev Co to put into place such policies, procedures, measures and other safeguards as may be required by and be acceptable to DPA Contracting Authority, in its sole discretion, to manage, mitigate and minimize the impact of such actual, potential or perceived Conflict of Interest.

**18. DEFAULT**

**18.1 Dev Co Event of Default**

- (a) For the purposes of this Agreement, a “**Dev Co Event of Default**” means any one or more of the following events or circumstances:
- (i) Dev Co is adjudged bankrupt, makes a general assignment for the benefit of its creditors or a receiver is appointed on account of Dev Co’s insolvency;
  - (ii) Dev Co wholly suspends or abandons the DPA Works for a period which exceeds five Business Days, including as described in Section 6.2(b)(ii)C of Schedule 3 – DPA Submissions and Project Development Process but excluding any suspension undertaken in accordance with DPA Section 18.2(b)(i) or as directed by DPA Contracting Authority in accordance with DPA Section 21.1(a);
  - (iii) Dev Co fails to pay any sum or sums due to DPA Contracting Authority under this Agreement, which sum or sums are not being disputed in accordance with the DPA Dispute Resolution Procedure;
  - (iv) Dev Co fails to comply with DPA Section 14 (Liens Arising from the DPA Works) in respect of discharging or vacating any Lien or certificate of action or having any written notice of Lien withdrawn by the Lien claimant;
  - (v) Dev Co fails to comply with DPA Section 17.1 (No Conflict of Interest) in any material respects;
  - (vi) Dev Co fails to comply with DPA Section 26 (Confidentiality, Personal Information and Communications);
  - (vii) Dev Co fails to comply with DPA Section 29 (Assignment and Change in Control);
  - (viii) Dev Co or any Dev Co Party (or anyone employed by or acting on their behalf) commits a Prohibited Act;
  - (ix) Dev Co makes any representation or warranty in this Agreement that is false or misleading when made, and that has or could have at any time a material adverse effect on the performance of the DPA Works, on DPA Contracting Authority’s ability to exercise its rights under the Assignment of Project Documents or any Assignment of DPA Subcontracts, on the Project, or that may compromise DPA Contracting Authority’s reputation or integrity or the nature of the Province’s health care system, so as to affect public confidence in that system;
  - (x) Dev Co subcontracts the performance of the DPA Works without first obtaining the written approval of DPA Contracting Authority in accordance with DPA Section 10.7(b);
  - (xi) Dev Co fails to obtain any insurance required to be obtained by or on behalf of Dev Co pursuant to this Agreement or fails to deliver any performance security required to be delivered by or on behalf of Dev Co pursuant to this Agreement or any such insurance or any such performance security delivered by Dev Co or a Dev Co Party under this

Agreement being vitiated or otherwise ceasing to be in full force and effect or in material compliance with the requirements set out in this Agreement;

- (xii) Dev Co fails to comply with any determination, decision, order or award made against Dev Co in accordance with the DPA Dispute Resolution Procedure, or Dev Co fails to proceed in accordance with the written instruction of DPA Contracting Authority during the pendency of a DPA Dispute pursuant to DPA Section 24.5(b);
- (xiii) Dev Co fails to submit a Project Proposal by the Project Proposal Submission Deadline in accordance with Section 5.4 of Schedule 3 – DPA Submissions and Project Development Process or an updated Project Proposal by the applicable deadline in accordance with Section 8.1 of Appendix 5 – Financing Process of Schedule 3 – DPA Submissions and Project Development Process, or delivers a Project Proposal which receives a comment from DPA Contracting Authority of “MAJOR NON-CONFORMANCE” or “CRITICAL NON-CONFORMANCE” and all or any material part of such Project Proposal is not resubmitted by the applicable deadline described in Section 5.5 of Schedule 3 – DPA Submissions and Project Development Process;
- (xiv) prior to any Notice to Proceed to Commercial Close being delivered to Dev Co by DPA Contracting Authority pursuant to DPA Section 4.1(b), Dev Co withdraws or modifies the Project Proposal before the expiry of the Project Proposal Validity Period contrary to the provisions of Schedule 3 – DPA Submissions and Project Development Process, including Sections 5.4(c) and 5.7(c) of Schedule 3 – DPA Submissions and Project Development Process;
- (xv) Dev Co fails to deliver a DPA Closing Letter of Credit in accordance with DPA Section 16.3(h);
- (xvi) an event or circumstance described in Section 6.2(b) of Schedule 3 – DPA Submissions and Project Development Process occurs entitling DPA Contracting Authority to draw on the DPA Closing Letter of Credit and retain and apply the proceeds thereof as liquidated damages;
- (xvii) Dev Co fails to comply with the terms of the Committed Financing in any material respects;
- (xviii) any repudiation of the Performance Guarantee of DPA Works Guarantor;
- (xix) Dev Co commits a material breach of its obligations under this Agreement other than as set out above in this DPA Section 18.1(a);
- (xx) the Total DPA Liability of Dev Co to DPA Contracting Authority is equal to or exceeds the DPA Maximum Liability Amount;
- (xxi) the Construction Manager commits a material breach of its obligations under the Enabling Works Contract; and
- (xxii) Dev Co fails to cause the CM Design Consultant to perform its obligations set out in the Enabling Works Contract in any material respects

which event or circumstance arose, with respect to any provision of this DPA Section 18.1(a) other than DPA Section 18.1(a)(xxi), as a consequence of a breach by DPA Contracting Authority of its obligations under this Agreement, or, with respect to DPA Section 18.1(a)(xxi), as a consequence of a breach by the Owner of its obligations under the Enabling Works Contract; and

- (xxiii) the Owner terminates the Enabling Works Contract in accordance with its terms as a result of a default of the Construction Manager thereunder.
- (b) A Party shall, promptly upon becoming aware of the occurrence of a Dev Co Event of Default, give Notice to the other Party of the occurrence and details of the Dev Co Event of Default (a “**Notice of Dev Co Event of Default**”). In addition, a Party shall promptly give Notice to the other Party of any event or circumstance which is likely, with the passage of time, giving of Notice, determination of any condition, or otherwise, to constitute or give rise to a Dev Co Event of Default.
- (c) Upon the receipt by Dev Co or the receipt by DPA Contracting Authority of a Notice of Dev Co Event of Default provided pursuant to DPA Section 18.1(b), Dev Co shall promptly and within five days provide a written plan to remedy or to cause the remedy of such Dev Co Event of Default to DPA Contracting Authority and immediately commence and diligently continue to remedy or cause the remedy of the Dev Co Event of Default and to mitigate any adverse effects on DPA Contracting Authority. In the event that such Dev Co Event of Default is not a Dev Co Event of Default described in DPA Section 18.1(a)(i), DPA Section 18.1(a)(xvi), DPA Section 18.1(a)(xx) or DPA Section 18.1(a)(xxiii) and has not been remedied to the reasonable satisfaction of DPA Contracting Authority within 10 Business Days after such Notice of Dev Co Event of Default is received (or such longer period agreed by DPA Contracting Authority) (the “**Dev Co Event of Default Cure Period**”), then DPA Contracting Authority may terminate this Agreement in its entirety with immediate effect by giving Notice to Dev Co. In the event that such Dev Co Event of Default is a Dev Co Event of Default described in DPA Section 18.1(a)(i), DPA Section 18.1(a)(xvi), DPA Section 18.1(a)(xx) or DPA Section 18.1(a)(xxiii), then, notwithstanding the delivery of a remediation plan or any remedial actions undertaken by Dev Co, DPA Contracting Authority may terminate this Agreement in its entirety with immediate effect by giving Notice to Dev Co.
- (d) Without prejudice to any other rights of DPA Contracting Authority in this Agreement or pursuant to Applicable Law, including this DPA Section 18.1, if a Dev Co Event of Default occurs and is continuing, DPA Contracting Authority may at any time following the delivery of Notice to Dev Co and at Dev Co’s risk and expense:
- (i) take such steps as DPA Contracting Authority considers appropriate, either themselves or by engaging others (including a third party) to take such steps, to perform or obtain the performance of Dev Co’s obligations under this Agreement or to remedy such Dev Co Event of Default;
  - (ii) following the expiry of any Dev Co Event of Default Cure Period, require the termination and replacement of any DPA Subcontractor who caused or contributed to the Dev Co Event of Default; and/or
  - (iii) direct Dev Co to suspend the performance of all or a part of the DPA Works pursuant to DPA Section 21.1(a).

- (e) Upon the occurrence of a Dev Co Event of Default that Dev Co has remedied in accordance with this DPA Section 18.1, such occurrence of a Dev Co Event of Default shall thereafter cease to be a Dev Co Event of Default and DPA Contracting Authority shall not be entitled to terminate this Agreement for that occurrence of the Dev Co Event of Default.
- (f) Dev Co shall be responsible for and shall, following the delivery by DPA Contracting Authority of Notice requesting reimbursement, promptly reimburse DPA Contracting Authority for all reasonable costs (including all applicable Taxes and all legal or professional services, legal costs being on a full indemnity basis) properly incurred by DPA Contracting Authority in exercising its rights under this DPA Section 18.1, including any relevant increased administrative expenses. DPA Contracting Authority shall take commercially reasonable steps to mitigate such costs. Dev Co shall not be required to reimburse DPA Contracting Authority pursuant to this DPA Section 18.1(f) if and to the extent that the Hospital is reimbursed for the same costs under the Enabling Works Contract.

**18.2 DPA Contracting Authority Event of Default**

- (a) For the purposes of this Agreement, “**DPA Contracting Authority Event of Default**” means DPA Contracting Authority failing to pay any sum or sums due to Dev Co under this Agreement, which sum or sums are not the subject of a notice of non-payment from DPA Contracting Authority and are not being disputed in accordance with the DPA Dispute Resolution Procedure or have not been set off by DPA Contracting Authority pursuant to DPA Section 13.5, and which sum or sums, either singly or in aggregate, exceed(s) \$[REDACTED] (index linked), and such failure continues for 30 days from receipt by DPA Contracting Authority of a notice of outstanding payment from or on behalf of Dev Co and arose other than as a consequence of a breach by Dev Co of its obligations under this Agreement.
- (b) On the occurrence of a DPA Contracting Authority Event of Default and while the same is continuing, Dev Co may give notice to DPA Contracting Authority of the occurrence of such DPA Contracting Authority Event of Default, which notice will specify the details thereof, and, at Dev Co’s option and without prejudice to its other rights and remedies under this Agreement, may:
  - (i) suspend performance of the DPA Works until such time as DPA Contracting Authority has remedied such DPA Contracting Authority Event of Default; or
  - (ii) if such DPA Contracting Authority Event of Default has not been remedied within 30 days of receipt by DPA Contracting Authority of Notice of the occurrence of such DPA Contracting Authority Event of Default, terminate this Agreement in its entirety by Notice in writing having immediate effect.
- (c) The Hospital shall be responsible for and shall, following the delivery by Dev Co of Notice requesting reimbursement, promptly reimburse Dev Co for all reasonable costs (including all applicable Taxes and all legal or professional services, legal costs being on a full indemnity basis) properly incurred by Dev Co in exercising its rights under this DPA Section 18.2, including any relevant increased administrative expenses. Dev Co shall take commercially reasonable steps to mitigate such costs.



- (d) Dev Co shall have no right or entitlement to terminate this Agreement, nor to accept any repudiation of this Agreement, and shall not exercise, nor purport to exercise, any such right or entitlement except as expressly set forth in this Agreement.

## **19. NON-EVENT OF DEFAULT TERMINATION**

### **19.1 Termination for Convenience**

- (a) Notwithstanding anything to the contrary in this Agreement, DPA Contracting Authority shall, in its sole discretion, for any reason whatsoever and without cause, be entitled to terminate this Agreement at any time during the DPA Term upon giving a minimum 30 days prior Notice to Dev Co. Dev Co acknowledges that some of the circumstances that could give rise to such a termination of this Agreement include the following events or circumstances:
- (i) without limiting any right of DPA Contracting Authority in respect of any Dev Co Event of Default, DPA Contracting Authority not being satisfied, in its sole discretion, with the performance of the DPA Works or any one or more of the DPA Project Deliverables (including related to the anticipated cost of the Project or the Project Proposal);
  - (ii) DPA Contracting Authority electing not to give a Notice to Proceed to Commercial Close to Dev Co pursuant to DPA Section 4.1(b); and
  - (iii) DPA Contracting Authority failing to obtain any approvals desired by DPA Contracting Authority in respect of the Final Project Agreement or necessary for the Hospital to enter into the Final Project Agreement.
- (b) In the event of Notice being given by DPA Contracting Authority in accordance with this DPA Section 19.1, DPA Contracting Authority shall, at any time before the expiration of such Notice, be entitled to direct Dev Co to complete any unfinished specific DPA Works, refrain from commencing, or allowing any DPA Subcontractor to commence, the DPA Works or any part or parts of the DPA Works, where such DPA Works have not yet been commenced.
- (c) In the event this Agreement is terminated under this DPA Section 19.1, upon such termination, Dev Co shall be released from liability that may arise in relation to the use of the design produced as a result of the Development Phase PA Works by DPA Contracting Authority or by a third party from and after the date of termination of this Agreement, provided however that the foregoing release shall not apply to limit DPA Contracting Authority's rights in relation to applicable DPA Subcontractors if DPA Contracting Authority enforces its rights under the Assignment of Project Documents or any Assignment of DPA Subcontract.

### **19.2 Termination for Force Majeure Event**

- (a) If a Force Majeure Event occurs and the effects of the Force Majeure Event continue for 90 days from the date on which the affected Party gives Notice to the other Party pursuant to DPA Section 15.1(d)(i), either Party may, at any time thereafter, terminate this Agreement by Notice to the other Party having effect a minimum of 30 days following the date of such Notice, provided that the effects of the Force Majeure Event continue during such period and prevent either Party from performing all or substantially all of its obligations under this Agreement.



- (b) In the event this Agreement is terminated under this DPA Section 19.2, upon such termination, Dev Co shall be released from liability that may arise in relation to the use of the design produced as a result of the Development Phase PA Works by DPA Contracting Authority or by a third party from and after the date of termination of this Agreement, provided however that the foregoing release shall not apply to limit DPA Contracting Authority's rights in relation to applicable DPA Subcontractors if DPA Contracting Authority enforces its rights under the Assignment of Project Documents or any Assignment of DPA Subcontract.

**19.3 Automatic Termination and Expiry on Commercial Close**

- (a) The Parties acknowledge the provisions of Section 6.5 of Schedule 3 – DPA Submissions and Project Development Process in respect of DPA Contracting Authority and Project Co entering into a Final Project Agreement.
- (b) This Agreement shall expire and terminate automatically on Commercial Close.

**19.4 No Other Rights to Terminate**

- (a) Except as set out in DPA Sections 18.1(c) and 18.2(b)(ii) and this DPA Section 19, no Party shall have a right or entitlement to terminate this Agreement, nor to accept any repudiation of this Agreement, and shall not exercise, nor purport to exercise, any such right or entitlement.

**20. EFFECTS OF TERMINATION**

**20.1 Dev Co's Obligations on Termination**

- (a) In the event this Agreement is terminated other than as a result of its expiry pursuant to DPA Section 19.3(a), whether or not such termination is subject to a DPA Dispute, Dev Co shall, in addition to its other obligations under this Agreement and at Applicable Law:
  - (i) at the request of DPA Contracting Authority, provide DPA Contracting Authority with any completed or partially completed DPA Works other than the Project Proposal in the formats requested by DPA Contracting Authority, including all design and other technical drawings and data, reports, working drafts and all other information directly related to the DPA Works;
  - (ii) provide DPA Contracting Authority with a report detailing: (A) the current state of the provision of the DPA Works at the date of termination; and (B) any other information requested by DPA Contracting Authority pertaining to the provision of DPA Works and performance by Dev Co under this Agreement;
  - (iii) execute such documentation as may be required by DPA Contracting Authority to give effect to the termination of this Agreement;
  - (iv) cooperate with DPA Contracting Authority and any DPA Contracting Authority Parties, provide information to DPA Contracting Authority and any DPA Contracting Authority Parties, and comply with all reasonable instructions provided by DPA Contracting Authority or any DPA Contracting Authority Party to Dev Co (including instructions for Dev Co and the Dev Co Parties to complete any unfinished specific DPA Works) in order

to provide for an orderly, efficient and safe transition of Dev Co's role in any works and services with respect to the Project to DPA Contracting Authority and to permit the Hospital to develop a new public hospital facility similar to the Facility by way of a development model that may be different than the development model contemplated by the Draft Project Agreement and by persons that exclude Dev Co and some or all of the Dev Co Parties; and

- (v) without limiting any of the foregoing provisions of this DPA Section 20.1 or any other provision of this Agreement, the Assignment of Project Documents or any Assignment of DPA Subcontracts, comply with (A) any obligation of Project Co set out in any one or more of Sections 45.4 (Consequences of Termination), 45.5 (Ownership of Information) and 45.7 (Transitional Arrangements) of the Draft Project Agreement that DPA Contracting Authority, in its sole discretion, instructs Dev Co to comply with or be responsible for in writing, which provisions of the Draft Project Agreement shall be applicable *mutatis mutandis* as though such termination occurred prior to the Final Completion Date as defined in and under the Draft Project Agreement; and (B) all other reasonable instructions provided by DPA Contracting Authority to Dev Co related thereto. For clarity, DPA Contracting Authority may, in its sole discretion, exercise any of the rights of Contracting Authority set out such Sections of the Draft Project Agreement.

## **20.2 Payment Obligations on Termination**

- (a) Subject to DPA Section 13.5, on termination of this Agreement other than pursuant to DPA Section 19.3(a), the Hospital shall only be responsible for the payment to Dev Co of the following amounts:
  - (i) amounts payable under this Agreement in accordance with DPA Section 13.2 for the performance of the DPA Works for up to and including the effective date of the termination of this Agreement;
  - (ii) if the termination of this Agreement is pursuant to DPA Sections 18.2 or 19.1, an amount equal to Dev Co's Demobilization Costs;
  - (iii) any other amount expressly due and payable to Dev Co pursuant to DPA Sections 18.2(c) and 22.3; and
  - (iv) any other amounts expressly due and payable to Dev Co in accordance with the terms of this Agreement up to and including the effective date of the termination of this Agreement.

## **20.3 Other Termination Rights and Obligations of the Parties**

- (a) On completion of Dev Co's obligations pursuant to this DPA Section 20, this Agreement shall terminate and, except as provided in DPA Section 20.4, all rights and obligations of DPA Contracting Authority and Dev Co under this Agreement shall cease and be of no further force and effect.
- (b) Notwithstanding any breach of this Agreement by a Party, the other Party may elect to continue to treat this Agreement as being in full force and effect and to enforce its rights under this Agreement without prejudice to any other rights which such other Party may have in relation to such breach.

The failure of either Party to exercise any right under this Agreement, including any right to terminate this Agreement and any right to claim damages, shall not be deemed to be a waiver of such right for any continuing or subsequent breach.

- (c) Subject to any exercise by DPA Contracting Authority of its rights to perform, or to seek, pursuant to this Agreement, a third party to perform, the obligations of Dev Co, the Parties shall continue to perform their obligations under this Agreement, notwithstanding the giving of any notice of default or notice of termination, until the termination of this Agreement becomes effective.
- (d) Dev Co shall make provision in all DPA Subcontracts to which it is a party (including requiring the relevant Dev Co Parties to make such provision) to ensure that DPA Contracting Authority shall be in a position to exercise its rights, and Dev Co shall be in a position to perform its obligations, under this DPA Section 20.

#### **20.4 Survival**

- (a) The termination of this Agreement shall not relieve a Party of any liabilities of a Party to the other Party under this Agreement arising prior to the effective date of the termination of this Agreement or of any of a Party's obligations pursuant to this DPA Section 20.
- (b) Without limiting the generality of DPA Section 20.4(a), the termination of this Agreement shall be without prejudice to, and shall not affect:
  - (i) any representations, warranties and indemnities under this Agreement; and
  - (ii) DPA Sections 2, 3, 8, 11, 13.2, 13.4(g)(vi), 13.5 to 13.7, 14, 16.2, 16.3, 18.1(f), 18.2(c), 20, 22 to 32, 34, 37 to 42, 44, 47 and 48, any provisions of this Agreement related to the completion of the Financing Process following Commercial Close or the achievement of Financial Close (including as set out in Schedule 3 – DPA Submissions and Project Development Process) until the achievement of Financial Close, Schedule 1 – Definitions, Section 6.5 of Schedule 3 – DPA Submissions and Project Development Process, Schedule 8 – DPA Payment, and any other provisions of this Agreement which are expressed to survive termination or which are required to give effect to such provisions which survive termination or to such termination or the consequences of such termination, the Assignment of Project Documents, the Assignments of DPA Subcontracts and the Performance Guarantee of DPA Works Guarantor,

all of which shall survive the termination of this Agreement, including pursuant to DPA Section 19.3.

### **21. SUSPENSION OF DPA WORKS**

#### **21.1 Suspension of DPA Works by DPA Contracting Authority**

- (a) DPA Contracting Authority may, at any time, direct Dev Co in writing to suspend all or any part of the DPA Works for such period of time as DPA Contracting Authority may determine to be appropriate for the convenience of DPA Contracting Authority. This right of DPA Contracting Authority to suspend the DPA Works shall not give rise to any duty on the part of DPA Contracting Authority to exercise this right for the benefit of Dev Co or any Dev Co Party.

- (b) In the event that (i) DPA Contracting Authority provides any such direction to Dev Co; (ii) such direction and suspension does not arise as a result of any failure of Dev Co to perform its obligations in accordance with this Agreement (including as a result of a Dev Co Event of Default); and (iii) Dev Co incurs any material costs as a result of any delays to the performance of the DPA Works, then, subject to Schedule 6 – DPA Variation Procedure, such suspension shall result in a DPA Variation.

## **22. INDEMNITIES AND CONDUCT OF CLAIMS**

### **22.1 Dev Co Indemnities to DPA Contracting Authority**

- (a) Dev Co shall indemnify and save harmless DPA Contracting Authority and its directors, officers, employees, agents and representatives from and against any and all Direct Losses which may be suffered, sustained, incurred or brought against them as a result of, in respect of, or arising out of any one or more of the following:

- (i) any physical loss of or damage to all or any part of the Lands, the Site, the Existing Facilities or to any equipment, assets or other property related thereto or of any entity comprising DPA Contracting Authority;
- (ii) the death or personal injury of any person; and
- (iii) any physical loss of or damage to property or assets of any third party or any other loss or damage of any third party;

in each case, arising, directly or indirectly, out of, or in consequence of, or involving or relating to, the performance or any breach of this Agreement by Dev Co or any act or omission of Dev Co or any Dev Co Party, except to the extent caused, or contributed to, by the breach of this Agreement by DPA Contracting Authority; or any act or omission of DPA Contracting Authority or any DPA Contracting Authority Party.

- (b) Dev Co shall indemnify and save harmless DPA Contracting Authority and its directors, officers, employees, agents and representatives from and against any and all Direct Losses which may be suffered, sustained, incurred or brought against them as a result of, in respect of, or arising out of arising out of any one or more of:
- (i) any breach of a representation or warranty by Dev Co herein;
  - (ii) the enforcement by DPA Contracting Authority of any performance security for which Dev Co is responsible under this Agreement as a result of a Dev Co Event of Default; and
  - (iii) the exercise by DPA Contracting Authority of any rights under the Assignment of Project Documents or any Assignment of DPA Subcontract as a result of a Dev Co Event of Default.
- (c) Dev Co shall indemnify and save harmless DPA Contracting Authority, each DPA Contracting Authority Party and each of their respective directors, officers, employees, agents and representatives from and against any and all Direct Losses which may be suffered, sustained, incurred or brought against them as a result of, in respect of, arising out of, or involving or relating

to any one or more of the performance by Dev Co of this Agreement not in accordance with or in breach of the requirements of any Permits, Licences, Approvals and Agreements, Applicable Law or requirements of Governmental Authorities, or the failure of Dev Co to obtain all necessary Project Co Permits, Licences, Approvals and Agreements in accordance with this Agreement, except to the extent that such Direct Losses are caused, or contributed to, by the breach of this Agreement by DPA Contracting Authority or by any act or omission of DPA Contracting Authority or any DPA Contracting Authority Party.

- (d) Dev Co shall indemnify DPA Contracting Authority for damages suffered or incurred on account of (i) any payment not duly made by Dev Co pursuant to the terms of this Agreement on the due date; (ii) any overpayment to or underpayment by Dev Co; or (iii) an amount finally determined as payable by Dev Co to DPA Contracting Authority under the DPA Dispute Resolution Procedure, by payment of an amount equal to the Payment Compensation Amount calculated from the day after the date on which payment was due, the day on which overpayment was made by the Hospital, or from the date identified (if any) applicable to an amount determined as payable by Dev Co to DPA Contracting Authority under the DPA Dispute Resolution Procedure, up to and including the date of payment.

## **22.2 Dev Co Indemnity for Dev Co Event of Default Termination**

- (a) Without limiting or prejudice to any other right or remedy available to DPA Contracting Authority under this Agreement or pursuant to Applicable Law but without duplication of any costs that Dev Co is responsible for reimbursing DPA Contracting Authority pursuant to DPA Section 18.1(f), Dev Co shall indemnify and save harmless DPA Contracting Authority and its directors, officers, employees, agents and representatives from and against any and all Direct Losses which may be suffered, sustained, incurred or brought against them as a result of, in respect of, or arising out of any termination of this Agreement by DPA Contracting Authority pursuant to DPA Section 18.1(c), including any Direct Losses arising as a result of DPA Contracting Authority having to re-procure the Project.

## **22.3 Hospital Indemnities to Dev Co**

- (a) The Hospital shall indemnify and save harmless Dev Co and the Dev Co Parties and each of their respective directors, officers, employees, agents and representatives from and against any and all Direct Losses which may be suffered, sustained, incurred or brought against them as a result of, in respect of, or arising out of any one or more of the following:
  - (i) the death or personal injury of any person arising, directly or indirectly, out of, or in consequence of, or involving or relating to, the performance or breach of this Agreement by DPA Contracting Authority or any act or omission of DPA Contracting Authority or any DPA Contracting Authority Party, except to the extent caused, or contributed to, by the breach of this Agreement by Dev Co or by any act or omission of Dev Co or any Dev Co Party;
  - (ii) any physical loss of or damage to all or any part of any property or assets of Dev Co or any Dev Co Party, arising, directly or indirectly, out of, or in consequence of, or involving or relating to, breach of this Agreement by DPA Contracting Authority or any deliberate or negligent act or omission of DPA Contracting Authority or any DPA Contracting Authority

Party, except to the extent caused, or contributed to, by the breach of this Agreement by Dev Co or by any act or omission of Dev Co or any Dev Co Party; and

- (iii) any physical loss of or damage to property or assets of any third party, or any other loss or damage of any third party, arising, directly or indirectly, out of, or in consequence of, or involving or relating to, breach of this Agreement by DPA Contracting Authority or any deliberate or negligent act or omission of DPA Contracting Authority or any DPA Contracting Authority Party, except to the extent caused, or contributed to, by the breach of this Agreement by Dev Co or by any act or omission of Dev Co or any Dev Co Party,

provided that there shall be excluded from the indemnity given by the Hospital any liability for the occurrence of risks against which Dev Co is required to insure under this Agreement to the extent of the proceeds available or that should have been available but for a failure by Dev Co to comply with its obligations to properly insure under this Agreement.

- (b) The Hospital shall indemnify and save harmless Dev Co and its directors, officers, employees, agents and representatives from and against any and all Direct Losses which may be suffered, sustained, incurred or brought against them as a result of, in respect of, or arising out of any breach of a representation or warranty by the Hospital herein.
- (c) The Hospital shall indemnify Dev Co for damages suffered or incurred on account of (i) any payment not duly made by the Hospital pursuant to the terms of this Agreement on the due date; (ii) any overpayment to or underpayment by the Hospital; or (iii) an amount finally determined as payable by DPA Contracting Authority to Dev Co under the DPA Dispute Resolution Procedure, by payment of an amount equal to the Payment Compensation Amount calculated from the day after the date on which payment was due, the day on which overpayment was made by Dev Co, or from the date identified (if any) applicable to an amount determined as payable by DPA Contracting Authority to Dev Co under the DPA Dispute Resolution Procedure, up to and including the date of payment.

#### **22.4 Conduct of Claims**

- (a) Without limiting DPA Section 2.3, the Parties agree to comply with the provisions of Section 53.3 (Conduct of Claims) of the Draft Project Agreement, which shall be applicable *mutatis mutandis* and applied in respect of the provisions of DPA Sections 22.1 and 22.2.

### **23. LIMITS OF LIABILITY**

#### **23.1 No Liability for Indirect Losses or in Tort**

- (a) Without prejudice to the Parties' rights in respect of payments provided for in this Agreement, the indemnities under this Agreement shall not apply and there shall be no right to claim damages for breach of this Agreement, in tort or on any other basis whatsoever, to the extent that any loss claimed by either Party is an Indirect Loss.
- (b) Subject to the indemnities provided herein, DPA Contracting Authority and the DPA Contracting Authority Parties shall not be liable in tort to Dev Co or any Dev Co Party, and neither Dev Co nor any Dev Co Party shall be liable in tort to DPA Contracting Authority or any DPA Contracting



Authority Party in respect of any negligent act or omission of any such person relating to or in connection with this Agreement and no such person shall bring such a claim.

- (c) Notwithstanding any other provision of this Agreement, and except to the extent recovered under any of the insurances required pursuant to Schedule 9 – DPA Insurance, neither Party shall be entitled to recover compensation or make a claim under this Agreement, or any other agreement in relation to the Project, in respect of any loss that it has incurred (or any failure of the other Party) to the extent that the Party has already been compensated in respect of that loss or failure pursuant to this Agreement, or otherwise.

### **23.2 Maximum Liability**

- (a) Notwithstanding anything to the contrary in this Agreement other than, and subject to, Sections 23.2(b) and 23.2(c), the maximum aggregate liability of either Party to the other Party arising under or relating to this Agreement, including in respect of any delay by Dev Co in the performance of the DPA Works, any indemnity provided by either Party to the other Party under this Agreement, or as a consequence of any termination of this Agreement, (the “**Total DPA Liability**”) shall not exceed \$[REDACTED] (the “**DPA Maximum Liability Amount**”).
- (b) The DPA Maximum Liability Amount shall:
  - (i) be exclusive of any insurance or performance security (other than the Performance Guarantee of DPA Works Guarantor) proceeds received or which will be received pursuant to insurance policies or performance security maintained pursuant to this Agreement or which would have been received if Dev Co and the Dev Co Parties had obtained and maintained insurance in accordance with this Agreement;
  - (ii) not apply in cases of willful misconduct, deliberate acts of wrongdoing, fraud, gross negligence, material misrepresentation or for claims for death or personal injury;
  - (iii) in the case of Dev Co, shall not apply in respect of:
    - A. any claim by DPA Contracting Authority against Dev Co:
      - (I) pursuant to DPA Section 22.1(b)(ii) or DPA Section 22.1(b)(iii);
      - (II) in respect of any defects or deficiencies in the DPA Works Submittals submitted pursuant to this Agreement;
      - (III) related to any third party intellectual property rights misappropriation or infringement by Dev Co or a Dev Co Party; or
      - (IV) in respect of Dev Co abandoning the DPA Works;
    - B. any fines or penalties payable by Dev Co or a Dev Co Party resulting from a breach of Applicable Law by Dev Co or a Dev Co Party;
    - C. any breach by Dev Co of any of DPA Sections 8.1(a)(xvi), 8.1(a)(xvii), 10.7(i), 10.12(g)(v) or 29, as such provisions apply in relation to Restricted Persons;



- D. any costs or expenses incurred by DPA Contracting Authority in enforcing a claim under this Agreement, or in relation to recovering any insurance related to a failure by Dev Co to perform the DPA Works, save and except as otherwise set out in DPA Section 23.2(b)(iii)A(I); and
  - E. any liabilities arising under any Encumbrance (including any Lien) created or caused by Dev Co or any Dev Co Party in connection with the performance of the DPA Works.
- (c) Nothing in this DPA Section 23.2 shall restrict, limit, prejudice or in any other way impair the rights and/or remedies of the Parties under any other provision of this Agreement.

## 24. DPA DISPUTE RESOLUTION PROCEDURE

### 24.1 General

- (a) The Parties agree to follow and comply with the DPA Dispute resolution procedure set out in this DPA Section 24 (the “**DPA Dispute Resolution Procedure**”) to resolve any DPA Dispute between them that arises during or following the DPA Term.
- (b) The Parties shall use commercially reasonable efforts to resolve any DPA Disputes that could impact the development or submission of the Project Proposal prior to the Final Checkpoint.

### 24.2 Amicable Negotiations and Arbitration

- (a) The Parties agree that at all times each of them will make reasonable and *bona fide* efforts to resolve any DPA Dispute arising between them through amicable, full, frank, candid and without prejudice negotiations (i) between the Project teams of the Parties; and (ii) if and to the extent the Project teams cannot resolve the DPA Dispute, then between the Party Representatives.
- (b) If the Parties are unable to resolve the DPA Dispute pursuant to DPA Section 24.2(a), then either Party may, as soon as practicable, give the other Party Notice of such DPA Dispute (a “**Notice of DPA Dispute**”). Each Notice of DPA Dispute shall contain
  - (i) particulars of the matters in DPA Dispute sufficient to allow the Party who will receive the Notice of DPA Dispute to understand and meaningfully respond to the Notice of DPA Dispute;
  - (ii) describe any relief sought;
  - (iii) to the extent available at the time the Notice of DPA Dispute is delivered, attach all key documents relevant to the DPA Dispute on which the Party intends to rely for the purposes of resolving the DPA Dispute pursuant to this DPA Section 24.2 in the possession or control of such Party following reasonable due diligence; and
  - (iv) be signed by the Party Representative of the Party that is delivering the Notice of DPA Dispute.
- (c) The Parties agree that a Notice of DPA Dispute must be delivered as a precondition to the Parties proceeding with any further steps contemplated in this DPA Section 24.2.

- (d) After receipt of a Notice of DPA Dispute, the DPA Dispute shall be referred for resolution to one or more senior executives of each of the Parties who is in a position of authority above that of the Party Representative and has or has been delegated full authority to resolve the DPA Dispute subject only to approval of the Chief Executive Officer or board of directors or similar governing or regulatory body of the Party (as applicable), as determined by each such senior executive (the “**Senior Executive Representatives**”). The Senior Executive Representatives shall meet within 15 Business Days (or such longer period agreed by the Parties) of the receipt of the Notice of DPA Dispute at a mutually convenient location and make reasonable and *bona fide* efforts to resolve the DPA Dispute through amicable, full, frank, candid and without prejudice negotiations.
- (e) If the Senior Executive Representatives cannot resolve the DPA Dispute to the satisfaction of the Parties at the meeting described in DPA Section 24.2(d) or any subsequent meeting(s) scheduled and attended by the Senior Executive Representatives, any Party may require, by the delivery of Notice to the other Party (a “**Notice of Request to Arbitrate**”), that the resolution of the DPA Dispute be submitted to arbitration in accordance with the *Arbitration Act*. A Notice of Request to Arbitrate will not be effective unless it (i) is signed by the Party Representative of the Party who is delivering the Notice of Request to Arbitrate; (ii) indicates it is a Notice of Request to Arbitrate pursuant to this DPA Section 24.2(e); and (iii) expressly identifies the DPA Dispute to be arbitrated.
- (f) If a DPA Dispute is submitted to arbitration pursuant to DPA Section 24.2(e), the following terms and conditions apply:
- (i) the DPA Dispute referred to arbitration shall be resolved by a single arbitrator unless the Parties otherwise agree in writing;
  - (ii) the Parties shall jointly appoint the arbitrator, provided that if the Parties are unable to agree on the arbitrator within 15 Business Days after delivery of the Notice of Request to Arbitrate, either Party may apply to the Ontario Superior Court of Justice to appoint the arbitrator pursuant to the *Arbitration Act*;
  - (iii) the arbitrator must have qualifications and experience relevant to the issues in the DPA Dispute commensurate with the nature, complexity and value of the DPA Dispute to be arbitrated;
  - (iv) no one shall be nominated or appointed to act as an arbitrator who is or was within the past five years in any way interested, financially or otherwise, in the business affairs of DPA Contracting Authority, Dev Co, any Affiliate of Dev Co or any consultant, subconsultant or subcontractor of any of them who may be involved or implicated in the DPA Dispute;
  - (v) the arbitrator shall not alter, amend or otherwise change the terms and conditions of this Agreement.
  - (vi) unless otherwise agreed by the Parties, the seat and venue of the arbitration shall be Toronto, Ontario. The language of the arbitration shall be English;
  - (vii) the arbitrator shall render its award as soon as possible and no later than 60 days after the date of the closure of the hearing, or such other period of time as agreed to by the Parties in writing and accepted by the arbitrator;

- (viii) the costs of the arbitration are within the discretion of the arbitrator. In exercising discretion to award costs, the arbitrator will take into account the desire of the Parties that costs should generally be awarded to each Party in proportion to the relative success that each Party has in the arbitration; and
- (ix) the award of the arbitrator shall be final and binding upon the Parties and not subject to appeal.

#### **24.3 Litigation**

- (a) Except as set out in this DPA Section 24.3, the Parties shall not be permitted to resolve any DPA Dispute by litigation.
- (b) If necessary to prevent irreparable harm to a Party, nothing contained in this DPA Section 24.3 will prevent the Parties from seeking interim protection from the Ontario Superior Court of Justice, including seeking an interlocutory injunction.
- (c) Either Party may bring an application or motion directly to the Ontario Superior Court of Justice for a determination regarding appointment of the challenged or a proposed alternative arbitrator.
- (d) All litigation permitted pursuant this DPA Section 24.3 shall be resolved in the Ontario Superior Court of Justice. Both Parties irrevocably attorn to the exclusive jurisdiction of the courts of the Province of Ontario in respect of any DPA Disputes or matters which arise under this Agreement or in connection with the Project and which are to be resolved by litigation.

#### **24.4 Adjudication**

- (a) The Parties acknowledge and agree that, notwithstanding anything to the contrary in this DPA Section 24, to the extent that the *Construction Act* applies to this Agreement and the aspect of the performance of the DPA Works that is the subject of the DPA Dispute, either Party may submit a DPA Dispute for resolution by adjudication pursuant to and in accordance with the adjudication provisions of the *Construction Act*.
- (b) In the event that a DPA Dispute is submitted for resolution by adjudication pursuant to this DPA Section 24.4, the Parties agree that any Party that is dissatisfied with a determination of the adjudicator may, within 30 days of the release of the adjudicator's determination (or such longer period agreed by the Parties, acting reasonably), deliver a Notice of Request to Arbitrate the DPA Dispute pursuant to DPA Section 24.2(e). In such an event, the determination of the adjudicator shall be reviewed *de novo* by arbitration in accordance with DPA Section 24.2(f). If neither Party delivers a Notice of Request to Arbitrate the DPA Dispute pursuant to this DPA Section 24.4(b) before the expiry of such period, or if any arbitration that is commenced pursuant to DPA Section 24.2(f) is subsequently abandoned in writing by the Parties before an arbitral award is made pursuant to DPA Section 24.2(f), then the determination of the adjudicator shall be final and binding on the Parties and shall not be subject to appeal, arbitration, litigation or any other DPA Dispute resolution process in this Agreement, and the Parties expressly waive any and all such rights in respect of the DPA Dispute resolved by the adjudicator.

**24.5 Continued Performance During DPA Disputes**

- (a) Dev Co and DPA Contracting Authority shall diligently carry out their respective obligations under this Agreement during the pendency of any DPA Dispute. If during the pendency of any DPA Dispute it is considered necessary by either Party to proceed in respect of a matter that is in DPA Dispute, then subject to DPA Section 24.5(b), either Party may proceed without prejudice to either Party's rights under this Agreement in respect of the DPA Dispute.
- (b) While a DPA Dispute is pending, DPA Contracting Authority may give such written instructions as in DPA Contracting Authority's opinion are necessary in respect of the matter that is in DPA Dispute, including for Dev Co to proceed with the DPA Works which are the subject of the DPA Dispute in accordance with the position of DPA Contracting Authority, and Dev Co shall comply with such written instructions forthwith.
- (c) Dev Co acknowledges and agrees that (i) a pending DPA Dispute will not justify Dev Co's failure or refusal to comply with any written instructions given by DPA Contracting Authority pursuant to DPA Section 24.5(b); and (ii) Dev Co has no right to require a determination pursuant to this DPA Section 24 of whether or not DPA Contracting Authority is entitled to give such written instructions or whether or not Dev Co is required to comply with such written instructions, before complying with such written instructions. Only concurrently with or after complying with DPA Contracting Authority's written instructions shall Dev Co be entitled to refer any such DPA Dispute for resolution in accordance with this DPA Section 24.
- (d) Any claims for time and/or cost consequences of complying with DPA Section 24.5(b) shall be addressed as part of the resolution of the applicable DPA Dispute, provided that, in the event the matter in DPA Dispute is determined in favour of Dev Co, proceeding in accordance with DPA Contracting Authority's written instructions pursuant to DPA Section 24.5(b) shall, subject to and in accordance with Schedule 6 – DPA Variation Procedure, result in a DPA Variation.

**25. RECORDS, INFORMATION AND AUDIT**

**25.1 Records Provisions, Information and General Audit Rights**

- (a) Without limiting DPA Section 2.3, the Parties agree to comply with the provisions of Sections 31.15 (Audit of Performance of Project Operations), 34.1 (Records, Information and Audit) and 34.2 (Information and General Audit Rights) and Schedule 26 – Record Provisions of the Draft Project Agreement, which shall be applicable *mutatis mutandis*.
- (b) With respect to any DPA Subcontract which may be assignable to DPA Contracting Authority pursuant to the Assignment of Project Documents or pursuant to an Assignment of DPA Subcontracts, without limiting any obligation of Dev Co pursuant to DPA Section 25.1(a) or any other requirement of this Agreement, Dev Co shall prepare, retain and maintain at its own expense in accordance with the terms of Section 1 (General Requirements) of Schedule 26 – Record Provisions to the Draft Project Agreement and subject to Section 2.2 (Records To Be Kept) of Schedule 26 – Record Provisions to the Draft Project Agreement, which shall be applicable *mutatis mutandis*:
  - (i) each such DPA Subcontract; and

- (ii) all documents, records and drawings in any form, including any electronic or physical form, related to such DPA Subcontract, and including all work product, invoices and correspondence related to such DPA Subcontract.

## **26. CONFIDENTIALITY, PERSONAL INFORMATION AND COMMUNICATIONS**

### **26.1 Confidentiality and Personal Information**

- (a) Without limiting DPA Section 2.3, the Parties agree to comply with the provisions of Sections 49.1 to 49.7 (Confidentiality / Communications) and Section 50 (Personal Information) of the Draft Project Agreement, which shall be applicable *mutatis mutandis*. For clarity, a redacted version of this Agreement and the Total DPA and Design Works Fixed Price may be disclosed by DPA Contracting Authority subject to and in accordance with such provisions, and the reference to Section 45 (Effect of Termination) in Section 49.6(a)(viii) of the Draft Project Agreement shall be interpreted to be a reference to DPA Section 20.

### **26.2 Promotion Restrictions**

- (a) Notwithstanding anything to the contrary in DPA Section 26.1 and except as set out in the DPA Communications Plan:
  - (i) any publicity or publications related to this Agreement and the DPA Works shall be at the sole discretion of DPA Contracting Authority; and
  - (ii) DPA Contracting Authority may, in its sole discretion, acknowledge the DPA Works provided by Dev Co in any such publicity or publication.
- (b) Dev Co shall not:
  - (i) except as set out in the DPA Communications Plan or otherwise agreed by DPA Contracting Authority, make use of its association with DPA Contracting Authority; or
  - (ii) without the prior written consent of DPA Contracting Authority, which may be granted or refused in its sole discretion, make any claim, representation or warranty to any third party that it has been engaged to perform the Project Operations or has been awarded the Project under the Final Project Agreement (other than the Development Phase PA Works) unless and until after the execution and delivery of the Final Project Agreement and at such time subject to the terms and conditions of such agreement.

- (c) Without limiting the generality of this DPA Section 26.2, except as expressly set out in the DPA Communications Plan, Dev Co shall not at any time directly or indirectly communicate with the media in relation to this Agreement or the DPA Works unless it has first obtained the express written authorization to do so from DPA Contracting Authority, which may be provided or refused in DPA Contracting Authority's sole discretion.

### **26.3 DPA Communications Plan**

- (a) By no later than the date that is 20 Business Days following the Effective Date, Dev Co shall submit to DPA Contracting Authority a draft plan in respect of communications related to the Project, which shall be applicable:

- (i) during the DPA Term in connection with this Agreement, including with respect to the performance of the DPA Works; and
  - (ii) during the term of the Enabling Work Contract in connection with such contract, including with respect to the performance of the Enabling Works,

(the “**Draft DPA Communications Plan**”).
- (b) The Draft DPA Communications Plan shall:
  - (i) comply with the applicable requirements of this Agreement, including DPA Sections 26.1 and 26.2, and of the Form of Enabling Works Contract, including GC 2.6 – Confidentiality;
  - (ii) be consistent with the relevant portions of the “Overall Approach, Development Phase Partnering and Design Communications Plan” included in the Dev Co Proposal Extracts; and
  - (iii) notwithstanding DPA Section 26.3(b)(ii), be consistent with and based on the communications principles and relevant obligations of Contracting Authority and Project Co set out in Schedule 18 – Communications of the Draft Project Agreement.
- (c) Dev Co shall consult with DPA Contracting Authority before and during the development of the Draft DPA Communications Plan.
- (d) The Draft DPA Communications Plan shall be subject to the written approval of DPA Contracting Authority, acting reasonably. Upon DPA Contracting Authority’s written approval of the Draft DPA Communications Plan, such plan shall automatically and immediately become the “**DPA Communications Plan**” under this Agreement and, following its execution and delivery, under the Enabling Works Contract.
- (e) The Parties agree to implement and comply with the DPA Communications Plan to the extent it relates to this Agreement, including with respect to the performance of the DPA Works. Dev Co agrees to cause the Construction Manager to implement and comply with the DPA Communications Plan to the extent it relates to the Enabling Works Contract, including with respect to the performance of the Enabling Works.

## **27. TITLE**

### **27.1 Title**

- (a) Without limiting DPA Section 2.3, and if applicable, Section 44 (Title) of the Draft Project Agreement is applicable *mutatis mutandis*.

## **28. INTELLECTUAL PROPERTY**

### **28.1 Representation and Warranty**

- (a) Dev Co represents, warrants and covenants to DPA Contracting Authority and agrees that:



- (i) Dev Co is and shall be the sole and exclusive owner of the DPA Data and the DPA Intellectual Property Rights or has and shall have the right to provide the licences granted to DPA Contracting Authority in this Agreement;
- (ii) Dev Co has and shall have the right to execute, and shall ensure that the Dev Co Parties have the right to execute, all assignments of DPA Intellectual Property, DPA Data and DPA Jointly Developed Materials contemplated under this DPA Section 28; and
- (iii) the DPA Data and the DPA Intellectual Property Rights and their use by the DPA Contracting Authority Parties do not and shall not infringe, and are not and shall not be a misappropriation of, any third party DPA Intellectual Property Rights, and, as of the date of this Agreement, Dev Co has not received any alleged infringement or misappropriation notices from third parties regarding the DPA Data or the DPA Intellectual Property Rights.

**28.2 Delivery of DPA Data and DPA Intellectual Property Rights**

- (a) Without limiting any obligation of Dev Co to deliver documents or information under this Agreement, Dev Co shall make all DPA Data and DPA Intellectual Property Rights available to, and upon request shall deliver to, Contracting Authority free of charge all DPA Data, and shall obtain all necessary licences, permissions and consents to ensure that Dev Co shall make the DPA Data and DPA Intellectual Property Rights available to and deliver the DPA Data to DPA Contracting Authority on the aforesaid terms of this DPA Section 28.2, for any and all of the DPA Approved Purposes.

**28.3 Licence of Project Data and DPA Intellectual Property Rights**

- (a) Dev Co:
  - (i) hereby grants to DPA Contracting Authority an irrevocable, worldwide, royalty free, perpetual, non-exclusive and transferable licence, including the right to grant sub-licences, to use the DPA Data and the DPA Intellectual Property Rights for any and all of the DPA Approved Purposes; and
  - (ii) shall, at Dev Co's cost, where any DPA Intellectual Property Rights are or become vested in a third party, obtain the grant of an equivalent licence to that referred to in DPA Section 28.3(a)(i).
- (b) In this DPA Section 28.3(a) and DPA Section 28.5(a), "use" includes any and all acts of copying, modifying, adapting, translating, incorporating with other materials, creating derivative works and otherwise using the DPA Data and DPA Intellectual Property Rights.
- (c) DPA Contracting Authority's rights under this DPA Section 28.3 include, following any termination of this Agreement otherwise than pursuant to DPA Section 19.3, the right to provide the DPA Data to third parties and use the DPA Data in order to permit the Hospital to develop, operate and maintain a new public hospital facility similar to the Facility or any part or parts thereof by way of the same or a similar development model to the one contemplated by the Draft Project Agreement or a different development model and with the participation of persons that exclude Dev Co and some or all of the Dev Co Parties, including to enter into and carry out future agreements to enable such development, operation and maintenance with or without Dev Co and



some or all of the Dev Co Parties. Notwithstanding DPA Section 26, Dev Co shall not contest or object to any such disclosure or assert any confidentiality interest or other right to restrict, condition or limit any such disclosure or the use of such DPA Data by any such third parties for the DPA Approved Purposes.

#### 28.4 DPA Jointly Developed Materials

- (a) To the extent any data, documents, drawings, reports, plans, software, formulae, calculations or designs or any other materials are developed jointly by Dev Co and DPA Contracting Authority pursuant to this Agreement or in relation to the Facility or the Project (the “**DPA Jointly Developed Materials**”), then the Parties hereby acknowledge and agree that DPA Contracting Authority shall be the sole and exclusive owner of all right, title and interest in and to the DPA Jointly Developed Materials, any DPA Intellectual Property associated therewith and any and all improvements, modifications and enhancements thereto. Dev Co shall, at the request of DPA Contracting Authority, execute such further agreements and cause the Dev Co Parties to execute any and all assignments, waivers of moral rights and other documents as may be reasonably required to fulfill the intent of this provision.
- (b) DPA Contracting Authority hereby grants Dev Co a royalty free, non-exclusive and non-transferable licence, with a right to grant sub-licences to each DPA Subcontractor, to use the DPA Jointly Developed Materials during the DPA Term for the sole purposes of Dev Co or any DPA Subcontractor performing its obligations under this Agreement or its DPA Subcontract, as applicable.
- (c) Upon the termination of this Agreement, all rights and licences whatsoever granted to Dev Co in the DPA Jointly Developed Materials shall automatically terminate, and Dev Co shall return any and all DPA Jointly Developed Materials in the custody or possession of Dev Co to DPA Contracting Authority.

#### 28.5 Maintenance of Data

- (a) To the extent that any of the data, materials and documents referred to in this DPA Section 28 are generated by, or maintained on, a computer or similar system, Dev Co shall procure for the benefit of DPA Contracting Authority, either at no charge or at the lowest reasonable fee, the grant of a licence or sub-licence for any relevant software to enable DPA Contracting Authority or its nominee to access and otherwise use (as such term is defined in DPA Section 28.3(b)), subject to the payment by DPA Contracting Authority of any relevant fee, such data, materials and documents for the DPA Approved Purposes.
- (b) Without limiting the obligations of Dev Co under DPA Section 28.5(a), Dev Co shall ensure the back up and storage in safe custody of the data, materials and documents referred to in this DPA Section 28 in accordance with Good Industry Practice. Dev Co shall submit to the DPA Contracting Authority Representative Dev Co’s proposals for the back up and storage in safe custody of such data, materials and documents and DPA Contracting Authority shall be entitled to object if the same is not in accordance with Good Industry Practice. Dev Co shall comply, and shall cause all Dev Co Parties to comply, with all procedures to which the DPA Contracting Authority Representative has not objected. Dev Co may vary its procedures for such back up and storage subject to submitting its proposals for change to the DPA Contracting Authority Representative, who shall be entitled to object on the basis set out above.

**28.6 Claims**

- (a) Where a demand, claim, action or proceeding is made or brought against DPA Contracting Authority or a DPA Contracting Authority Party which arises out of the alleged infringement or misappropriation of any rights in or to any DPA Data or DPA Intellectual Property Rights or the use thereof by DPA Contracting Authority or any DPA Contracting Authority Party or because the use of any materials, Plant (as defined in the Draft Project Agreement), machinery or equipment in connection with the Project infringes any rights in or to any DPA Intellectual Property of a third party then, unless such infringement has arisen out of the use of any DPA Data or DPA Intellectual Property Rights by DPA Contracting Authority otherwise than in accordance with the terms of this Agreement, Dev Co shall indemnify, defend and hold harmless DPA Contracting Authority from and against all such demands, claims, actions and proceedings and DPA Section 22.4 shall apply.

**28.7 Contracting Authority Trade-Marks**

- (a) Dev Co shall not
- (i) use any DPA Contracting Authority Trade-Marks without obtaining a trade-mark licence on terms and conditions mutually satisfactory to DPA Contracting Authority and Dev Co, each acting reasonably; or
  - (ii) use the names or any identifying logos or otherwise of DPA Contracting Authority or the DPA Contracting Authority Representative in any advertising or permit them so to be used except with the prior written consent of DPA Contracting Authority.

**28.8 Government Use of Documents**

- (a) The Parties hereby disclaim any right, title or interest of any nature whatsoever they each may have in or to this Agreement that might prohibit or otherwise interfere with MOI's, IO's, MOH's or the Province's ability to use this Agreement in any manner desired by MOI, IO, MOH or the Province.
- (b) Each of the Parties hereby consents to the use by MOI, IO, MOH and/or the Province of this Agreement, and any portion thereof, subject to compliance with FIPPA and to the removal by DPA Contracting Authority (in consultation with Dev Co) of any information supplied in confidence to MOI, IO, MOH and/or the Province by either Party in circumstances where disclosure may be refused under section 17(1) of FIPPA.

**28.9 Restrictions**

- (a) Dev Co hereby covenants and agrees that it will not make any commercial use, including use in any request for proposals or similar procurement process, of the DPA Data, the DPA Intellectual Property Rights, the DPA Jointly Developed Materials, the DPA Intellectual Property of DPA Contracting Authority or the Confidential Information of DPA Contracting Authority, including the Output Specifications, or any other drawings, reports, documents, plans, formulae, calculations, manuals, or other data that was created specifically for the Project or was based upon the DPA Data, the DPA Intellectual Property Rights, the DPA Jointly Developed Materials, the DPA Intellectual Property of DPA Contracting Authority or the Confidential Information of DPA Contracting Authority, including the Output Specifications.

**29. ASSIGNMENT AND CHANGE IN CONTROL**

**29.1 Assignment**

- (a) Subject to DPA Section 29.1(b), Dev Co shall not assign or transfer all or any part of its rights or obligations under this Agreement without the prior consent of DPA Contracting Authority, which may be granted, withheld or granted on conditions, in DPA Contracting Authority's sole discretion.
- (b) On or any time after Commercial Close, Dev Co may assign all of its rights and obligations under this Agreement to Project Co or to the Construction Contractor with the prior consent of DPA Contracting Authority, acting reasonably.
- (c) Without limiting DPA Section 2.3, DPA Contracting Authority may assign or otherwise dispose of the benefit of the whole or part of this Agreement to any person to whom DPA Contracting Authority may assign or otherwise dispose of its interest in the Draft Project Agreement, subject to and in accordance with Section 56.2 (Contracting Authority Assignment) of the Draft Project Agreement, which is applicable *mutatis mutandis*.

**29.2 Change in Control**

- (a) Without limiting DPA Section 2.3, the Parties agree that Section 56.4 (Changes in Ownership and Control) and Section 56.5 (Contracting Authority Due Diligence) of the Draft Project Agreement is applicable to this Agreement, *mutatis mutandis*, provided that:
  - (i) the terms "Project Co Group" and "Control Party" in such Section shall be deemed to be references to "Dev Co Group" and "Dev Co Control Party" as defined in Schedule 1 – DPA Definitions;
  - (ii) Dev Co shall not have any obligations with respect to the identification or payment of any "Excess Equity Gain"; and
  - (iii) Section 56.6 (Gain Share) of the Draft Project Agreement shall be inapplicable.

**30. NOTICES**

**30.1 Notices to Parties**

- (a) All notices, requests, demands, instructions, certificates, consents and other communications (each being a "**Notice**") required or permitted under this Agreement shall be in writing (whether or not "written notice" or "notice in writing" is specifically required by the applicable provision of this Agreement) and served by sending the same by registered mail, by hand (in each case with a copy by electronic submission to the DPA Contracting Authority Representative and the DPA Dev Co Representative), or by electronic submission as follows:

If to Dev Co:

**ED PCL Trillium Dev Co Limited Partnership  
[REDACTED]**

If to DPA Contracting Authority:

**Trillium Health Partners  
[REDACTED]**

and to:

**Infrastructure Ontario  
[REDACTED]**

### **30.2 Notices to Representatives**

- (a) In addition to the Notice requirements set out in this DPA Section 30.1, where any Notice is to be provided or submitted to the DPA Contracting Authority Representative or the DPA Dev Co Representative it shall be provided or submitted by sending the same by registered mail, by hand (in each case with a copy by electronic submission to the DPA Contracting Authority Representative), or by electronic submission as follows with regards to the initial DPA Dev Co Representative and the initial DPA Contracting Authority Representative:

If to DPA Dev Co Representative:

**ED PCL Trillium Dev Co Limited Partnership  
[REDACTED]**

If to the DPA Contracting Authority Representative:

**Infrastructure Ontario  
[REDACTED]**

with a copy to:

**Trillium Health Partners  
[REDACTED]**

### **30.3 Electronic Submission**

- (a) Where any Notice is provided or submitted to a Party via electronic submission, an original of the Notice sent via electronic submission shall promptly be sent by regular mail or registered mail. For greater certainty, a Notice given via electronic submission shall not be invalid by reason only of a Party's failure to comply with this DPA Section 30.3.

### **30.4 Change of Address**

- (a) Either Party to this Agreement may, from time to time, change any of its contact information set forth in DPA Sections 30.1 or 30.2 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.

### **30.5 Deemed Receipt of Notices**

- (a) Subject to DPA Sections 30.5(b) 30.5(c) and 30.5(d):

- (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 submission shall be deemed to have been received on the day it is transmitted by electronic submission.
- (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 submission in accordance with this DPA Section 30.
- (c) If any Notice delivered by hand or transmitted by electronic submission 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.
- (d) A Notice given by electronic submission shall be deemed to have been received by the recipient on the day it is transmitted only if an electronic submission report (maintained by the sender) indicates that the transmission of such Notice was successful.

#### **30.6 Service on DPA Contracting Authority**

- (a) Where any Notice is required to be served on DPA Contracting Authority, the obligation to serve such Notice shall be fulfilled by serving it on DPA Contracting Authority in accordance with the provisions of this DPA Section 30.

### **31. AMENDMENTS**

- (a) Without limiting the provisions of Schedule 6 – DPA Variation Procedure, this 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 Agreement.

### **32. WAIVER**

- (a) No waiver made or given by a Party under or in connection with this 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.

**33. RELATIONSHIP BETWEEN THE PARTIES**

- (a) The Parties are independent contractors. This Agreement is not intended to and does not create or establish between the Parties, or between DPA Contracting Authority and any Dev Co Party, any relationship as partners, joint venturers, employer and employee, master and servant, or (except as otherwise provided in this Agreement) of principal and agent, and does not create or establish any relationship whatsoever between DPA Contracting Authority and any representative or employee of Dev Co or the Dev Co Parties.
- (b) The Parties further agree that:
  - (i) except as expressly provided in this Agreement, neither Party shall be, or be deemed to be, an agent of the other Party, and neither Party shall have authority hereunder to represent that it is an agent of the other Party, or to accept any order, or enter into any contract or agreement, or make any representations or warranties of any kind to any person, or to assume or create any obligation, express or deemed, on behalf of or binding, or purportedly binding upon, the other Party;
  - (ii) neither Party shall be required to make or pay employment benefits, contributions for Employment Insurance, Canada Pension Plan, Workers' Compensation Board or other similar levies with respect to any persons employed or engaged by the other Party;
  - (iii) except as otherwise expressly provided in this Agreement, each Party shall be free from the control of the other Party as to the manner in which it shall perform its obligations, or cause same to be performed, under this Agreement; and
  - (iv) any person which a Party may engage as an agent, employee, subcontractor or otherwise, to perform such Party's obligations as permitted under this Agreement, shall, unless the Parties otherwise agree in writing, be engaged by such Party to act solely on behalf of such Party, and such person shall not act, or be deemed to act, on behalf of the Party that did not engage its services.

**34. GENERAL DUTY TO MITIGATE**

- (a) DPA Contracting Authority and Dev Co shall at all times take commercially reasonable steps to minimize and mitigate any loss for which the relevant Party is entitled to bring a claim against the other Party pursuant to this Agreement.

**35. ACTUAL KNOWLEDGE**

- (a) Except where limited to its actual knowledge and/or such knowledge which it, at law, may from time to time, be deemed to have, Dev Co and DPA Contracting Authority shall, for all purposes of this Agreement, be deemed to have such knowledge in respect of the Project as is actually held (or ought reasonably to be held) by the directors, officers and senior management of Dev Co and in the case of DPA Contracting Authority, its directors, officers and senior management, and the DPA Contracting Authority Representative or the DPA Dev Co Representative, as applicable. For clarity, except as expressly set out to the contrary, a reference in this Agreement to the "knowledge" of Dev Co or of DPA Contracting Authority, shall be construed in a manner consistent with the foregoing sentence.



**36. ENTIRE AGREEMENT**

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

**37. NO RELIANCE**

- (a) Each of the Parties acknowledge that:
  - (i) it has not entered into this 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 Agreement or not, except those expressly made, given or repeated in this 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 Agreement; and
  - (ii) this DPA Section 37 shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Agreement which was induced by fraud, for which the remedies available shall be all those available under the law governing this Agreement.

**38. SEVERABILITY**

- (a) Each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law. If any provision of this 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 Agreement. If any such provision of this 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 Agreement as near as possible to its original intent and effect.

**39. ENUREMENT**

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

**40. GOVERNING LAW AND JURISDICTION**

- (a) This Agreement, and each of the documents contemplated by or delivered under or in connection with this 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) Subject to the DPA Dispute Resolution Procedure, both Parties hereby irrevocably attorn to the exclusive jurisdiction of the courts of the Province of Ontario and all courts competent to hear appeals therefrom.
- (c) Nothing in this Agreement affects the rights, protections and immunities of the Crown under the *Crown Liability and Proceedings Act* (Ontario).

**41. REMEDIES CUMULATIVE**

- (a) Except as otherwise set forth in this Agreement, the rights, powers and remedies of each Party set forth in this 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 Agreement.

**42. FURTHER ASSURANCES**

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

**43. COSTS**

- (a) 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 Agreement.

**44. LANGUAGE OF THIS AGREEMENT**

- (a) Each Party acknowledges having requested and being satisfied that this Agreement and related documents be drawn in English. Chacune des parties reconnaît avoir demandé que ces documents soient rédigés en anglais et s'en déclare satisfaite.
- (b) For greater certainty, all correspondence, notices, drawings, test reports, certificates, specifications, information, operating and maintenance instructions, name plates, identification labels, instructions and notices to the public and staff and all other written, printed or electronically readable matter required in accordance with, or for purposes envisaged by, this Agreement shall be in English.

**45. PROOF OF AUTHORITY**

- (a) DPA Contracting Authority reserves the right to require any person executing this Agreement on behalf of Dev Co to provide proof, in a form acceptable to DPA Contracting Authority, that such person has the requisite authority to execute this Agreement on behalf of and to bind Dev Co.

**46. COUNTERPARTS**

- (a) This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all of the Parties shall constitute a full, original and binding agreement for all purposes. Delivery of an executed counterpart by sending a copy by electronic mail or other electronic transmission shall be as effective as the manual delivery of an executed counterpart.

**47. GOVERNMENT ENTITIES AS THIRD PARTY BENEFICIARIES**

- (a) The provisions of DPA Sections 4.4(a), 11.2(a), and 11.3(a), any DPA Works PA Requirements described in Section 59.17(a)(i) of the Draft Project Agreement, and each other provision of this Agreement which is to the benefit of a Government Entity are:
- (i) intended for the benefit of each Government Entity and, if set out in the relevant Section, each Government Entity's directors, officers, employees, board appointees, agents and representatives, and shall be enforceable by each of such persons and his or her heirs, executors, administrators and other legal representatives (collectively, the "**DPA Third Party Beneficiaries**"); and
  - (ii) are in addition to, and not in substitution for, any other rights that the DPA Third Party Beneficiaries may have by contract or otherwise.
- (b) DPA Contracting Authority shall hold the rights and benefits of DPA Sections 4.4(a), 11.2(a), and 11.3(a), any DPA Works PA Requirements described in Section 59.17(a)(i) of the Draft Project Agreement, and each other provision of this Agreement which is to the benefit of a Government Entity in trust for and on behalf of the DPA Third Party Beneficiaries and DPA Contracting Authority hereby accepts such trust and agrees to hold the benefit of and enforce performance of such covenants on behalf of the DPA Third Party Beneficiaries.

**48. COPYRIGHT NOTICE**

- (a) The Parties acknowledge that King's Printer for Ontario is the exclusive owner of the copyright in this Agreement.

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**IN WITNESS WHEREOF** the Parties have executed this Agreement as of the Effective Date.

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

By: \_\_\_\_\_  
Name: **[REDACTED]**  
Title: **[REDACTED]**

I have authority to bind the corporation.

**TRILLIUM HEALTH PARTNERS**

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

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

We have authority to bind the corporation.

**ED PCL TRILLIUM DEV CO LIMITED  
PARTNERSHIP, [REDACTED]**

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

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

We have authority to bind the corporation.