

**PROJECT AGREEMENT  
(REDACTED VERSION)**

**TO DESIGN, BUILD AND FINANCE  
BRAMPTON COURTHOUSE ADDITION PHASE 2  
& TORONTO REGION BAIL CENTRE PROJECT**

**CONFIDENTIAL**

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## **SCHEDULES**

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Schedule 1	- Definitions and Interpretation
Schedule 2	- Completion Documents
Schedule 3	- Subcontractor's Direct Agreement
Schedule 4	- Lenders' Direct Agreement
Schedule 5	- Construction Contractor's Direct Agreement
Schedule 6	- Independent Certifier Agreement
Schedule 7	- Letters of Credit
Schedule 8	- Project Co Parties
Schedule 9	- Key Individuals
Schedule 10	- Review Procedure
Schedule 11	- Design Quality Plan and Construction Quality Plan
Schedule 12	- Performance Guarantee of Construction Guarantor
Schedule 13	- Project Co Proposal Extracts
Schedule 14	- Outline Commissioning Program
Schedule 15	- Output Specifications
Schedule 16	- Title Encumbrances
Schedule 17	- Works Report Requirements
Schedule 18	- Communications
Schedule 19	- Works Scheduling Requirements
Schedule 20	- Payment Procedures
Schedule 21	- Construction Period Failures
Schedule 22	- Variation Procedure
Schedule 23	- Compensation on Termination
Schedule 24	- <b>[REDACTED]</b>
Schedule 25	- Insurance and Performance Security Requirements
Schedule 26	- Record Provisions
Schedule 27	- Dispute Resolution Procedure
Schedule 28	- FF&E List
Schedule 29	- Refinancing
Schedule 30	- Insurance Trust Agreement
Schedule 31	- Project Co Information
Schedule 32	- Background Check Requirements
Schedule 33	- Facility Construction Requirements
Schedule 34	- Site and Lands
Schedule 35	- <b>INTENTIONALLY DELETED</b>
Schedule 36	- Contractor Site Specific Safety Manual Requirements

**THIS PROJECT AGREEMENT is entered into as of the 1<sup>st</sup> day of June, 2021**

**BETWEEN:**

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO as represented by the Minister of Government and Consumer Services, as represented by Ontario Infrastructure and Lands Corporation, 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**

**(“Contracting Authority”)**

**AND:**

**TRANS/FORM BY POMERLEAU INC., a corporation incorporated under the laws of [REDACTED]**

**(“Project Co”)**

**WHEREAS:**

- A. MAG, with the assistance of Contracting Authority, wishes to procure the design, construction and financing of the Facility (the **“Project”**).
- B. Contracting Authority commenced the procurement process for the Project, as hereinafter defined, by issuance of a request for qualifications for the Project on January 14, 2020.
- C. Contracting Authority and Project Co wish to enter into this project agreement (the **“Project Agreement”**) which sets out the terms and conditions upon which Project Co shall perform the Works.
- D. The overriding priorities of MAG and Contracting Authority in entering into and implementing this Project Agreement are enabling MAG Staff, MAG Occupants, Non-MAG Occupants and other Province Persons to carry out all Contracting Authority Activities in a secure, dignified and efficient manner.
- E. The Project will proceed as a public-private partnership project and complies with the principles set out in MOI’s Building a Better Tomorrow: An Infrastructure Planning, Financing and Procurement Framework for Ontario’s Public Sector (the **“IPFP Framework”**).
- F. The IPFP Framework establishes 5 fundamental principles which guide the financing and procurement of public infrastructure projects in Ontario:
  - 1. The public interest is paramount.
  - 2. Value for money must be demonstrable.



3. Appropriate public control/ownership must be preserved.
  4. Accountability must be maintained.
  5. All processes must be fair, transparent and efficient.
- G. The IPFP Framework states that, consistent with the principle of appropriate public ownership/control, public ownership of assets will be preserved in the public sector.
- H. With a view to ensuring that both Parties are able to properly and effectively discharge their respective duties, functions and responsibilities under Applicable Law, it is the intent that Contracting Authority and Project Co work collaboratively, responsibly and cooperatively throughout the Project Term.

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

## **1. DEFINITIONS AND INTERPRETATION**

### **1.1 Definitions and Interpretation**

- (a) This Project Agreement shall be interpreted in accordance with Schedule 1 – Definitions and Interpretation.
- (b) This Project Agreement is comprised of this executed agreement and the following documents, all of which are hereby incorporated by reference into and form part of this Project Agreement:

<b>Schedule No.</b>	<b>Description</b>
Schedule 1	- Definitions and Interpretation
Schedule 2	- Completion Documents
Schedule 3	- Subcontractor's Direct Agreement
Schedule 4	- Lenders' Direct Agreement
Schedule 5	- Construction Contractor's Direct Agreement
Schedule 6	- Independent Certifier Agreement
Schedule 7	- Letters of Credit
Schedule 8	- Project Co Parties
Schedule 9	- Key Individuals
Schedule 10	- Review Procedure
Schedule 11	- Design Quality Plan and Construction Quality Plan
Schedule 12	- Performance Guarantee of Construction Guarantor
Schedule 13	- Project Co Proposal Extracts
Schedule 14	- Outline Commissioning Program
Schedule 15	- Output Specifications

Schedule 16	-	Title Encumbrances
Schedule 17	-	Works Report Requirements
Schedule 18	-	Communications
Schedule 19	-	Works Scheduling Requirements
Schedule 20	-	Payment Procedures
Schedule 21	-	Construction Period Failures
Schedule 22	-	Variation Procedure
Schedule 23	-	Compensation on Termination
Schedule 24	-	<b>[REDACTED]</b>
Schedule 25	-	Insurance and Performance Security Requirements
Schedule 26	-	Record Provisions
Schedule 27	-	Dispute Resolution Procedure
Schedule 28	-	FF&E List
Schedule 29	-	Refinancing
Schedule 30	-	Insurance Trust Agreement
Schedule 31	-	Project Co Information
Schedule 32	-	Background Check Requirements
Schedule 33	-	Facility Construction Requirements
Schedule 34	-	Site and Lands
Schedule 35	-	<b>INTENTIONALLY DELETED</b>
Schedule 36	-	Contractor Site Specific Safety Manual Requirements

- (c) The documents comprising this Project 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 Section 1.2 shall apply.
- (d) Except for those parts of Project Co's proposal which are, in the sole discretion of Contracting Authority, incorporated by reference into this Project Agreement by the Project Co Proposal Extracts, on Financial Close the Request for Proposals and Project Co's proposal shall be superseded entirely by this Project Agreement and rendered null and void, and shall not be relied upon or used by Project Co, Contracting Authority or anyone else (including anyone pursuant to Schedule 27 – Dispute Resolution Procedure or any arbitral body or any court) in any way to interpret or qualify the scope of the Works, any obligations or liabilities of Project Co, or anything else contained in this Project Agreement.
- (e) Unless it is specifically provided that a consent, approval or satisfaction is in the sole discretion of Contracting Authority, no consent, approval or satisfaction of Contracting Authority or the Contracting Authority Representative shall be unreasonably withheld or delayed.
- (f) Unless it is specifically provided that a consent, approval or satisfaction is in the sole discretion of Project Co, no consent, approval or satisfaction of Project Co or the Project Co Representative shall be unreasonably withheld or delayed.

- (g) The organization of the Output Specifications into divisions, sections and parts shall not control Project Co in dividing the Works among the Project Co Parties or in establishing the extent of the Works to be performed by a trade.
- (h) The Parties acknowledge and agree that this Project Agreement is in respect of two facilities, namely the BCA Facility and the TRBC Facility. For clarity, unless expressly set out otherwise in this Project Agreement:
- (i) where the term “Facility” appears, it means that the applicable provision applies to each of the BCA Facility and the TRBC Facility as an individual Facility;
  - (ii) where the term “Site” appears, it means that the applicable provision applies to each of the BCA Site and the TRBC Site as an individual Site; and
  - (iii) where each of the following terms appear,
    - (A) “Construction Document Submittals”;
    - (B) “Design Development Submittals”
    - (C) “Environmental Reports”;
    - (D) “Geotechnical Reports”;each term is independently applicable to each of the BCA Facility and the TRBC Facility as an individual Facility.

## **1.2 Conflict of Terms**

- (a) In the event of ambiguities, conflicts or inconsistencies between or among any of the provisions of this Project 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 Project Agreement signed by the Parties and Variation Confirmations shall govern and take precedence only over those specific provisions of this Project 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 Project Agreement;
  - (iv) Schedule 1 – Definitions and Interpretation;
  - (v) Schedule 27 – Dispute Resolution Procedure;

- (vi) Schedule 20 – Payment Procedures;
  - (vii) Schedule 21 – Construction Period Failures
  - (viii) Schedule 28 – FF&E List;
  - (ix) Schedule 15 – Output Specifications;
  - (x) Schedule 25 – Insurance and Performance Security Requirements;
  - (xi) Schedule 22 – Variation Procedure;
  - (xii) Schedule 10 – Review Procedure;
  - (xiii) Schedule 14 – Outline Commissioning Program;
  - (xiv) Schedule 11 – Design Quality Plan and Construction Quality Plan;
  - (xv) Schedule 29 – Refinancing;
  - (xvi) Schedule 23 – Compensation on Termination;
  - (xvii) Schedule 26 – Record Provisions;
  - (xviii) the other Schedules in the order in which they are listed in Section 1.1(b); and
  - (xix) Schedule 13 – Project Co Proposal Extracts.
- (b) Subject to Section 1.2(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 Works, the provision that applies to the specific part of the Works shall govern for that specific part of the Works.
- (c) If any ambiguity, conflict or inconsistency is not readily resolved by the foregoing provisions of this Section 1.2, then Project Co or Contracting Authority, upon discovery of same, shall immediately give Notice to the Contracting Authority Representative. The Contracting Authority Representative shall, within 10 Business Days after such Notice, make a determination of which provision governs and give Notice of such determination, in writing, to Project Co.
- (d) Contracting Authority and Project Co shall comply with the determination of the Contracting Authority Representative pursuant to this Section 1.2 unless Contracting Authority or Project Co disputes the decision of the Contracting Authority Representative in which event such Dispute may be referred for resolution in accordance with Schedule 27 – Dispute Resolution Procedure.

### **1.3 Conflict of Documents**

- (a) In the event of any ambiguities, conflicts or inconsistencies between this Project Agreement and the Lenders' Direct Agreement, the Lenders' Direct Agreement shall prevail. Notwithstanding the forgoing, if there is any right or remedy in favour of Contracting Authority set out in the Lenders' Direct Agreement or any part thereof which is not set out or provided for in the Project Agreement, such additional right or remedy shall not constitute an ambiguity, conflict or inconsistency.

### **1.4 Legal Requirements**

- (a) Whenever standards of Applicable Law differ, the most stringent standards shall govern.

## **2. COMMERCIAL CLOSE AND FINANCIAL CLOSE**

### **2.1 Effective Date**

- (a) The provisions of Sections 1.1, 1.2, 1.4, 2.1, 2.2, 2.3, 2.4, 3.1, 4.14 to 4.20, 5 to 15, 16.5, 17 to 23, 25 to 30, and 40 to 51 and Schedules 1, 2, 8 to 13, 16, 18, 22, and 24 to 27 of this Project Agreement will come into effect on the date of this Project Agreement ("**Commercial Close**"). All other provisions and schedules will come into effect only on Financial Close.

### **2.2 Standby Letter of Credit**

(a) **INTENTIONALLY DELETED**

- (b) Unless a Standby Letter of Credit is drawn by Contracting Authority in accordance with the provisions of this Project Agreement, Contracting Authority shall release and deliver the Standby Letter(s) of Credit to Project Co on Financial Close.

- (c) Project Co shall ensure that the Standby Letter(s) of Credit (and any replacement therefor) is renewed prior to its expiry date if, as at such date, Financial Close will not, or may reasonably be expected not to, have occurred.

- (d) If Project Co delivers multiple Standby Letters of Credit from multiple Letter of Credit Providers in accordance with Section 9.1(2) of the Request for Proposals, Project Co acknowledges and agrees that:

(i) Contracting Authority may draw upon any Standby Letter of Credit provided by any Letter of Credit Provider in any specified rateable amount;

(ii) Contracting Authority may draw on any Standby Letter of Credit provided by any Letter of Credit Provider in a disproportionate amount to such Letter of Credit Providers' contribution to security;

- (iii) Contracting Authority may draw upon any Standby Letter of Credit provided by any Letter of Credit Provider even in the event that such Letter of Credit Provider is no longer a Project Co Party; and
- (iv) The provision of multiple Standby Letters of Credit shall not in any way prejudice or adversely affect the rights of Contracting Authority to draw on the Standby Letter(s) of Credit in accordance with this Project Agreement, including in a circumstance where the default giving rise to Contracting Authority's right to draw on the Standby Letter(s) of Credit is not the result of any act or omission of the Letter of Credit Provider(s) whose Standby Letter of Credit is drawn upon.

### **2.3 Financial Close**

- (a) No later than 30 days prior to the Financial Close Target Date, Project Co will deliver to Contracting Authority drafts of all documents referred to in Section 1 of Schedule 2 - Completion Documents.
- (b) On or before the Financial Close Target Date:
  - (i) Project Co shall deliver to Contracting Authority the documents referred to in Section 1 of Schedule 2 - Completion Documents; and
  - (ii) Contracting Authority shall deliver to Project Co the documents referred to in Section 2 of Schedule 2 - Completion Documents.
- (c) If Project Co fails to deliver to Contracting Authority any of the documents referred to in Section 1 of Schedule 2 - Completion Documents by the Financial Close Target Date (other than as a direct result of a breach by Contracting Authority of its obligations under Section 2.3(b)(ii)) and Contracting Authority does not waive such requirement, Contracting Authority will be entitled to draw on the Standby Letter of Credit immediately and to retain the proceeds thereof as liquidated damages, and may terminate this Project Agreement in its entirety by written Notice having immediate effect. The Parties agree that such liquidated damages are not a penalty but represent a genuine and reasonable pre-estimate of the damages that Contracting Authority will suffer as a result of the happening of the specified event. Such payment shall constitute full and final settlement of any and all damages that may be claimed by Contracting Authority as a result of Project Co not achieving Financial Close. The Parties agree that such liquidated damages shall be payable whether or not Contracting Authority incurs or mitigates its damages, and that Contracting Authority shall not have any obligation to mitigate any such damages.
- (d) If Contracting Authority fails to deliver to Project Co any of the documents referred to in Section 2 of Schedule 2 - Completion Documents by the Financial Close Target Date (other than as a direct result of a breach by Project Co of its obligations under Section 2.3(b)(i)) and Project Co does not waive such requirement, Project Co will be entitled

to the return of the Standby Letter of Credit and to terminate this Project Agreement in its entirety by written Notice having immediate effect.

- (e) Project Co shall deliver to Contracting Authority each of the items referred to in Section 3 of Schedule 2 – Completion Documents by the applicable date set out in such Section.

## **2.4 Disruption in Financial Markets**

- (a) If Financial Close cannot be achieved by the Financial Close Target Date by reason solely of a Severe Market Disruption, subject to Project Co's obligation to renew the Standby Letter of Credit pursuant to Section 2.2, the Financial Close Target Date will be extended until the date falling 10 Business Days (or such other period as the Parties agree, acting reasonably) after the date on which such Severe Market Disruption ceases.
- (b) If a Severe Market Disruption exists, then, at any time before such Severe Market Disruption ceases and prior to Financial Close, Contracting Authority may in its sole discretion either:
  - (i) terminate this Project Agreement in its entirety by written Notice having immediate effect; or
  - (ii) direct Project Co to assign to Contracting Authority and Contracting Authority will assume:
    - (A) the Project Agreement, and all of Project Co's right, title and interest in the Project Data, the Intellectual Property Rights and the Project Co Permits, Licences, Approvals and Agreements; and
    - (B) those contracts between Project Co and any Project Co Party which Contracting Authority elects to be assigned.
- (c) If Contracting Authority exercises its rights pursuant to Section 2.4(b), and, provided Project Co has, if directed, delivered the assignments provided for in Section 2.4(b)(ii)(A) and (B) above, Project Co will be entitled to the return of its Standby Letter of Credit and to payment of an amount equal to the Proposal Fee pursuant to Section 10.3.2 of the Request for Proposals plus [REDACTED]% of such fee. Contracting Authority's obligation to return the Standby Letter of Credit and to pay such fee shall be contingent on the receipt of a waiver, in form and substance satisfactory to Contracting Authority, that such fee represents full and final satisfaction of any obligation or liability of Contracting Authority, IO and any other Government Entity to Project Co and any Project Co Parties in connection with the Project Agreement and the Request for Proposals process.

### **3. GUARANTEED PRICE**

#### **3.1 Guaranteed Price and Adjustments**

- (a) Project Co represents and warrants that the Guaranteed Price, exclusive of HST, is \$82,030,908.19, and is equal to the sum of the Cost of the Works and the Cost of the Financing. The Cost of the Works and the Cost of the Financing are as set out in the Financial Model. For clarity, the Guaranteed Price includes the Separate FF&E and Transition Services Fee.
- (b) Project Co represents and warrants that the Project Debt Interest Cost is based upon the Interest Reference Rate. The Project Debt Interest Cost will be adjusted once on, or within the 2 Business Days immediately prior to, Financial Close on the basis of the actual increase or decrease in the Project Debt Interest Cost resulting directly from any change upward or downward in the Interest Reference Rate as compared to the Interest Reference Rate as at the RFP Financial Submission Deadline.
- (c) The Parties:
  - (i) acknowledge that the Project Debt Interest Cost is a component of the Cost of the Financing and that the Project Debt Interest Cost is subject to adjustment under Section 3.1(b) as at the date set out in Section 3.1(b); and
  - (ii) acknowledge and agree that subject to adjustments made in accordance with the provisions of this Project Agreement, the final Guaranteed Price shall be determined on the basis of such final adjusted Cost of the Financing and the final adjusted Cost of the Works as of the date set out in Section 3.1(b).
- (d) Subject to the provisions of Section 3.1(c), the Parties agree that the Guaranteed Price will not be subject to adjustment despite changes in the Works, unless such changes in the Works arise pursuant to a Variation Confirmation. The Parties further agree that the Guaranteed Price will only be adjusted where the Project Agreement specifically and expressly refers to an adjustment to the Guaranteed Price, and no claim for an adjustment to the Guaranteed Price on any legal or equitable basis outside of the specific and express rights to an adjustment of the Guaranteed Price set out in the Project Agreement will be allowed. In order to be effective, any permitted adjustment to the Guaranteed Price must be provided for in a Variation Confirmation under Schedule 22 – Variation Procedure.

#### **3.2 Cash Allowances**

- (a) Project Co shall open the Cash Allowance Account, deposit the Cash Allowance Amount into the Cash Allowance Account no later than two Business Days following Financial Close to which the Cash Allowance shall be applied and shall manage the Cash Allowance Account in accordance with Section 3.2(b).
- (b) The cash flow process applicable to the Cash Allowance Account will be as follows:



- (i) Project Co will hold and manage all monies in the Cash Allowance Account in trust for, for the benefit of and as directed by Contracting Authority;
  - (ii) interest earned on the Cash Allowance Account will accrue in the Cash Allowance Account and will be for the benefit of Contracting Authority;
  - (iii) Project Co shall provide a reconciliation of the Cash Allowance Account to Contracting Authority on a monthly basis;
  - (iv) The Security Escort Services Cash Allowance Amount shall be the maximum amount payable to Project Co on an aggregate basis for the Security Escort Services Cash Allowance Item. For greater certainty, Contracting Authority shall not be liable for any payment requirements for the Security Escort Services Cash Allowance Item, including applicable HST, for invoices that exceed in the aggregate the Security Escort Services Cash Allowance Amount;
  - (v) if, on the earlier of (A) Final Completion and (B) the Termination Date, there exists a positive balance in the Cash Allowance Account, such balance will be the property of Contracting Authority and will be paid by Project Co to Contracting Authority or as Contracting Authority directs; and
  - (vi) the Parties agree to mutually review the operation of the Cash Allowance Account on a regular basis and make any appropriate modifications to ensure its efficient operation.
- (c) Project Co shall provide monthly reports to the Contracting Authority Representative that include the following information:
- (i) itemized and aggregate amounts committed to date for all Cash Allowance Items;
  - (ii) itemized and aggregate amounts spent to date for all Cash Allowance Items; and
  - (iii) the projected cost of each remaining Cash Allowance Item and the projected effect of such costs on the Cash Allowance Account.
- (d) In addition to the monthly reports described in Section 3.2(c), Project Co shall, on a monthly basis, provide to the Contracting Authority Representative a request for payment approval (each, a “**Request for Payment Approval**”) that includes the following information:
- (i) details of all vendor or Project Co Party invoices that are due for payment that month, including relevant supporting documentation;
  - (ii) evidence that the commitment by Project Co to purchase the Cash Allowance Items has been approved by Contracting Authority; and

- (iii) any discounts, rebates, refunds, chargebacks, credits, price adjustments and other allowances available to Project Co in connection with the Cash Allowance Items.
- (e) Contracting Authority shall, within 10 Business Days of receipt of a Request for Payment Approval, advise Project Co, in writing, whether or not payment of the invoices set out in such Request for Payment Approval is approved. Contracting Authority shall only be permitted to withhold its approval if Contracting Authority determines that the Request for Payment Approval does not contain the information that Contracting Authority requires, acting reasonably, to discharge its obligations under this Section 3.2. If Contracting Authority withholds its approval pursuant to this Section 3.2(e) and subsequently receives the information that Contracting Authority requires, acting reasonably, to discharge its obligations under this Section 3.2, it shall, within 10 Business Days of its receipt of such information, provide to Project Co, in writing, Contracting Authority's approval for the invoices set out in the aforementioned Request for Payment Approval.
- (f) If Contracting Authority approves the payment of the invoices set out in a Request for Payment Approval, Project Co shall make payment to the relevant vendors or each Project Co Party from the Cash Allowance Account.
- (g) Project Co acknowledges and agrees that:
  - (i) neither it, nor any Project Co Party, shall be entitled to any mark-ups for profit, overhead or other costs associated with the Cash Allowance Items;
  - (ii) all discounts, rebates, refunds, chargebacks, credits, price adjustments and other allowances available to Project Co in connection with the Cash Allowance Items shall be attributed solely to and shall benefit the pricing of the Cash Allowance Items;
  - (iii) all costs and expenses related to the administration of the Cash Allowance Account, including, without limitation, the preparation of Requests for Payment Approval and any required reporting, shall be borne by Project Co and shall not be charged to the Cash Allowance Account;
  - (iv) the Cash Allowance Amount will be deposited and the Cash Allowance Account will be managed in accordance with the Works Schedule and any costs, expenses or delays related to funding or managing the Cash Allowance Account are the responsibility of Project Co; and
  - (v) any costs or expenses in respect of the Security Escort Services Cash Allowance Item that exceed in the aggregate the Security Escort Services Cash Allowance Amount are the responsibility of Project Co.

## **4. PAYMENT**

### **4.1 General**

- (a) Subject to the provisions of the Project Agreement (including, for clarity Section 3.1(d)) and in accordance with and subject to Applicable Law respecting holdbacks, Contracting Authority shall make the payments set out in this Article 4.
- (b) Details of Payment Procedures are set out in Schedule 20 – Payment Procedures.

### **4.2 Acknowledgement by Project Co**

- (a) Project Co acknowledges and agrees with Contracting Authority that Contracting Authority is not responsible for the payment of any base progress payments pursuant to the Design and Construction Contract nor any legislative holdbacks in respect thereof.

### **4.3 Lump Sum Payments**

- (a) Subject to Sections 4.4(a) and 4.8, Contracting Authority covenants and agrees to pay to Project Co: (i) the Interim Completion Payment and the applicable HST on the Interim Completion Payment Date; and (ii) the Substantial Completion Payment and the applicable HST on the Substantial Completion Payment Date.
- (b) On the later of the Substantial Completion Date and the date on which Project Co has completed (i) the procurement, installation and commissioning of all FF&E in accordance with Section 21, including, for certainty, completion of all obligations of Project Co pursuant to Section 21, other than the design responsibilities set forth in Section 21.5(a); and (ii) the Transition, including, for greater certainty, the transfer and installation of all Transferred Existing Facilities Items in accordance with Section 21 and 24.14, Contracting Authority shall pay to Project Co the Separate FF&E and Transition Services Fee.

### **4.4 Directions of Payments**

- (a) Project Co hereby irrevocably directs Contracting Authority to make any Interim Completion Payment and any Substantial Completion Payment, together with applicable HST, to the Lenders' Agent or as the Lenders' Agent may direct. Contracting Authority shall pay the Interim Completion Payment and the Substantial Completion Payment as directed by Project Co in accordance with this Section 4.4(a) and shall not accept any redirection without the consent of the Lenders' Agent. Contracting Authority will pay the amounts that Project Co is entitled to hereunder once the conditions for payment set out in this Project Agreement, if any, have been satisfied. Project Co acknowledges and agrees that payment by Contracting Authority of the Interim Completion Payment and the Substantial Completion Payment to the Lenders' Agent in accordance with this Section 4.4(a) constitutes payment by Contracting Authority to Project Co in satisfaction of Contracting Authority's

obligation to pay the Interim Completion Payment and the Substantial Completion Payment, as applicable, to Project Co under this Project Agreement and in satisfaction of any trust obligation of Contracting Authority with respect to such payments under section 7 of the Construction Act pursuant to section 10 of the Construction Act.

**4.5 Payment of Legislative Holdback**

- (a) Payment of Legislative Holdback shall be made in accordance with Schedule 20 – Payment Procedures.

**4.6 Payment of Finishing Holdback**

- (a) Payment of Finishing Holdback shall be made in accordance with Schedule 20 – Payment Procedures.

**4.7 Completion Holdback and Interim Completion Holdback**

- (a) Completion Holdback and Interim Completion Holdback shall be paid in accordance with Schedule 20 – Payment Procedures.

**4.8 Compensation on Termination**

- (a) If this Project Agreement is terminated pursuant to Sections 35.3(a), 36.2(a)(ii), 37.1, 37.2 or 37.3, then:
  - (i) Schedule 23 - Compensation on Termination shall apply and Contracting Authority shall pay Project Co any applicable compensation on termination; and
  - (ii) the provisions of Sections 4.3 through 4.7, inclusive, shall no longer apply.
- (b) Project Co hereby irrevocably directs Contracting Authority to make any Compensation Payment to the Lenders’ Agent, or as the Lenders’ Agent may direct. Contracting Authority shall pay the Compensation Payment as directed by the Lenders’ Agent and shall not accept any redirection without the consent of Lenders’ Agent. Contracting Authority will pay the Compensation Payment in accordance with the provisions of Schedule 23 – Compensation on Termination. Project Co acknowledges and agrees that payment by Contracting Authority of the Compensation Payment to the Lenders’ Agent in accordance with this Section 4.8 constitutes payment by Contracting Authority to Project Co in satisfaction of Contracting Authority’s obligation to pay the Compensation Payment to Project Co under this Project Agreement and in satisfaction of any trust obligation of Contracting Authority with respect to such payments under section 7 of the Construction Act pursuant to section 10 of the Construction Act.

**4.9 Payment Due under Insurance Policies**

- (a) In the event of loss or damage occurring where payment becomes due under the property and boiler insurance policies, payments shall be made in accordance with the provisions of the Insurance Trust Agreement.

**4.10 HST**

- (a) Contracting Authority covenants and agrees to pay to Project Co the HST that may be exigible with respect to any payments made by Contracting Authority to Project Co hereunder.

**4.11 Set-Off**

- (a) The Parties agree that their rights of set-off at law or in equity are limited to the right of:
- (i) Contracting Authority to set off against any amounts otherwise due to Project Co pursuant to the terms of this Project Agreement, any amounts (including, without limitation, any amounts payable in accordance with Article 45 or any amounts payable as liquidated damages pursuant to Article 46A) that,
    - (A) are due to Contracting Authority by Project Co pursuant to the terms of this Project Agreement or by the Construction Guarantor pursuant to the Performance Guarantee of the Construction Guarantor; or
    - (B) are being disputed in accordance with Schedule 27 – Dispute Resolution Procedure.
  - (ii) Project Co to set off against any amounts otherwise due to Contracting Authority pursuant to the terms of this Project Agreement, any amounts (including, without limitation, any amounts payable in accordance with Article 45) that,
    - (A) are due to Project Co by Contracting Authority pursuant to the terms of this Project Agreement; or
    - (B) are being disputed in accordance with Schedule 27 – Dispute Resolution Procedure.
- (b) Where a set-off, deduction or withholding is being exercised against amounts payable under a Proper Invoice, Contracting Authority shall deliver a notice of non-payment in the prescribed form and manner, no later than 14 days after receiving the Proper Invoice.

#### **4.12 Effect of Payment**

- (a) Subject to Section 39.2, no payment hereunder shall be construed as an acceptance or approval of incomplete, defective or improper performance by Project Co of any of its obligations under this Project Agreement, nor shall it operate to relieve Project Co from the performance of any of its obligations under this Project Agreement which have not been performed.

#### **4.13 No Other Entitlement**

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

#### **4.14 Taxes**

- (a) All amounts specified in this Project Agreement, including, for clarity, any compensation payable on termination, are expressed exclusive of HST, but inclusive of all other Taxes payable pursuant to Applicable Law. For clarity, Contracting Authority shall not be required to pay any interest and/or penalties that are imposed on or assessed against Project Co or any Project Co Party for non-compliance with Applicable Law. If Project Co is required by Applicable Law to collect any such HST from Contracting Authority, Contracting Authority shall pay such HST to Project Co simultaneously with the amount to which such applicable HST relates or applies.
- (b) Contracting Authority shall pay when due and payable, all property taxes or payments in lieu of property taxes that are assessed in respect of ownership or use of the Lands, the Facility or the Existing Facilities.
- (c) Contracting Authority shall pay all applicable HST properly payable in accordance with the *Excise Tax Act* (Canada) by Contracting Authority upon and in connection with payments by Contracting Authority to Project Co under this Project Agreement.

#### **4.15 Changes in Scope of Taxation**

- (a) If, as a result of a Change in Law, the application of Taxes under Part IX of the *Excise Tax Act* (Canada) or any provincial sales tax legislation changes with respect to the provision of any goods or services by Project Co in connection with the performance of the Works, Contracting Authority and Project Co agree to co-operate to determine how such change affects their respective obligations under this Project Agreement to the extent not already addressed in this Agreement.

#### **4.16 Changes in Recoverability of Tax Credits**

- (a) Contracting Authority will pay to Project Co from time to time, as the same is incurred by Project Co, amounts equal to any Irrecoverable Tax to the extent such Irrecoverable Tax results from a Change in Law. Project Co will pay to Contracting Authority from

- time to time, as the same is incurred by Project Co, amounts equal to any Recoverable Tax to the extent such Recoverable Tax results from a Change in Law.
- (b) For the purposes of this Section 4.16, the term “**Irrecoverable Tax**” means HST or an irrecoverable sales tax levied by the Province in lieu of all or a portion of HST incurred by Project Co in respect of the supply of any good or service to Contracting Authority which is consumed, used or supplied, or to be consumed, used or supplied, exclusively by Project Co in the course of carrying out the Works to the extent that Project Co is unable to recover or be credited with input tax credits, refunds, rebates or exemptions for such HST.
- (c) For the purposes of this Section 4.16, the term “**Recoverable Tax**” means HST incurred by Project Co in respect of the supply of any good or service to Contracting Authority which is consumed, used or supplied, or to be consumed, used or supplied, exclusively by Project Co in the course of carrying out the Works to the extent that Project Co is able to recover or be credited with input tax credits, refunds, rebates or exemptions for such HST.

#### **4.17 Information and Assistance Provided by Project Co**

- (a) Project Co shall, at Contracting Authority’s request and cost, assist Contracting Authority in applying for and obtaining all remissions and credits of Taxes to which Contracting Authority is entitled.
- (b) Contracting Authority may apply for a global or general exemption, waiver, remission, or refund of some or all Taxes which may otherwise be applicable in relation to this Project Agreement. Project Co shall, at Contracting Authority’s cost, assist Contracting Authority in making any applications for such global or general exemption, waiver, remission or refund and shall provide Contracting Authority with such documentation as Contracting Authority may reasonably require to support such application and, in any event, shall provide such consent as Contracting Authority may require. Any exemption, waiver, remission, refund or other recovery of Taxes obtained by Contracting Authority through such application shall accrue to the sole benefit of Contracting Authority.
- (c) Project Co will provide Contracting Authority with any information reasonably requested by Contracting Authority from time to time in relation to any Taxes chargeable in accordance with this Project Agreement and payable by Contracting Authority to Project Co from time to time.

#### **4.18 Residency – Income Tax Act (Canada)**

- (a) Project Co shall not undertake any action or transaction that, if undertaken, would cause or result in Project Co becoming a Non-Resident without Contracting Authority’s prior written consent, which consent may be withheld in Contracting Authority’s sole discretion.

**4.19 Taxes – General**

- (a) Project Co shall not, without the prior written consent of Contracting Authority (which consent may be withheld in its sole discretion), undertake any action or transaction that, if undertaken, would cause Contracting Authority to have (or result in Contracting Authority having) any obligation to deduct, withhold or remit any Taxes that are required by Applicable Law to be deducted, withheld or remitted from any amounts paid or credited to Project Co or any Project Co Party under this Project Agreement or under any other Ancillary Document.

**4.20 Taxes – Indemnity**

- (a) If (i) Project Co becomes a Non Resident, or (ii) Contracting Authority is or becomes required by Applicable Law to deduct or withhold any amount in respect of Taxes on or in respect of any amounts paid or credited to Project Co or a Project Co Party by Contracting Authority under the Project Agreement or under any of the Project Documents, then Contracting Authority shall be entitled to make any applicable deductions or withholdings required by Applicable Law from any amount paid or credited or to be paid or credited to Project Co or a Project Co Party on or after the date on which (A) Project Co or the Project Co Party becomes a Non Resident and at all times while it remains a Non Resident; or (B) Contracting Authority is required by Applicable Law to deduct or withhold amounts in respect of any such amounts, in each case, in respect of all Taxes that are required by Applicable Law to be deducted or withheld from amounts paid or credited to a Non Resident or otherwise as required by Applicable Law; and all amounts paid or credited by Contracting Authority under this Project Agreement or under any other Ancillary Document to Project Co or a Project Co Party shall be paid or credited net of such deductions or withholdings.
- (b) If (i) Project Co becomes a Non Resident, or (ii) Contracting Authority is or becomes required by Applicable Law to deduct and withhold any amount in respect of Taxes on or in respect of any amounts paid or credited to Project Co or a Project Co Party by Contracting Authority under the Project Agreement or under any of the Project Documents, Project Co shall, in each case, indemnify and hold harmless Contracting Authority for (A) the full amount of all Taxes (“**Indemnifiable Taxes**”) that arise, are imposed on or are required to be paid by Contracting Authority in respect of any amounts paid or credited by Contracting Authority to Project Co or any Project Co Party under this Project Agreement or under any other Ancillary Document as a result of either of the foregoing items less any amount withheld or deducted by Contracting Authority in respect of such Taxes, and (B) any liability payable or incurred in connection with Indemnifiable Taxes (including penalties, interest and reasonable expenses associated with Tax compliance, reporting and contesting such liability for Indemnifiable Taxes, including reasonable professional expenses payable or incurred in connection therewith) arising from or with respect to Indemnifiable Taxes, whether or not they were correctly or legally asserted (“**Associated Liabilities**”). Payment under this indemnification shall be made within 30 days from the date Contracting Authority makes written demand for it. A certificate containing reasonable detail as to



the amount of Indemnifiable Taxes and Associated Liabilities submitted to Project Co by Contracting Authority shall be conclusive evidence, absent manifest error, of the amount due from Project Co to Contracting Authority. Contracting Authority shall be entitled to exercise its rights of set off under Section 4.11 against any amounts owing under this indemnification.

#### **4.21 Construction Period Deductions**

- (a) Project Co shall comply with the provisions of Schedule 21 – Construction Period Failures to this Project Agreement. Project Co acknowledges that the Substantial Completion Payment is subject to Construction Period Deductions in accordance with Schedule 21 - Construction Period Failures to this Project Agreement.

### **5. SCOPE OF AGREEMENT**

#### **5.1 Scope of Agreement**

- (a) Project Co shall undertake the Project and perform the Works in accordance with and subject to the provisions of this Project Agreement.
- (b) Project Co shall exercise its rights and perform its obligations at its own cost and risk without recourse to Contracting Authority, except as otherwise provided in this Project Agreement. Project Co's sole recourse to IO with respect to the subject matter of this Project Agreement shall be to IO in its capacity as agent of the Province.

### **6. REPRESENTATIONS AND WARRANTIES**

#### **6.1 Project Co Representations and Warranties**

- (a) Project Co represents and warrants to Contracting Authority that as of the date of this Project Agreement:
  - (i) Project Co is **[REDACTED]**, 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 Project Agreement and to perform its obligations hereunder;
  - (ii) Project Co is duly registered to carry on business as an extra-provincial corporation in the Province of Ontario;
  - (iii) Project Co is a wholly owned subsidiary of the Construction Contractor;
  - (iv) Project Co will have a Canadian residency requirement for withholding tax purposes;
  - (v) To the knowledge of Project Co, no Restricted Person has directly or indirectly, an Economic Interest in Project Co or the Project;

- (vi) Project Co and the Project Co Parties, collectively, have extensive experience and are knowledgeable in the design and construction of courthouse facilities and have the required ability, experience, skill and capacity to perform the Works in a timely and professional manner as set out in this Project Agreement;
- (vii) Project Co has the requisite power, authority and capacity to execute and deliver and perform this Project 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 Project Agreement to be done, executed, delivered or performed;
- (viii) no steps or proceedings have been taken or are pending to supersede or amend the constating documents, articles or by-laws of Project Co in a manner that would impair or limit its ability to perform the obligations of Project Co under this Project Agreement;
- (ix) this Project Agreement has been duly authorized, executed, and delivered by Project Co and constitutes a legal, valid, and binding obligation of Project Co, enforceable against Project 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;
- (x) the execution, delivery, and performance by Project Co of this Project 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;
- (xi) no Project Co Event of Default has occurred and is continuing;
- (xii) all of the information regarding Project Co set out in Schedule 31 – Project Co Information is true and correct in all material respects;

- (xiii) there are no actions, suits, proceedings, or investigations pending or threatened against Project Co or, to Project Co's knowledge, any Project 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 Project Co or in any impairment of its ability to perform its obligations under this Project Agreement, and Project 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;
- (xiv) Project Co has carefully reviewed the whole of this Project Agreement, and all other documents made available to Project Co by or on behalf of Contracting Authority, and, to Project Co's knowledge, nothing contained herein or therein inhibits or prevents Project Co from completing the Works or performing the Works in accordance with this Project Agreement in a good and safe manner so as to achieve and satisfy the requirements of this Project Agreement;
- (xv) Project Co is able to meet its obligations as they generally become due;
- (xvi) Project Co is registered under Division V of Part IX of the *Excise Tax Act* (Canada) and its HST registration number is [REDACTED];
- (xvii) the Scheduled Interim Completion Date is a realistic date and is achievable by Project Co performing the Works in accordance with the Project Agreement;
- (xviii) the Scheduled Substantial Completion Date is a realistic date and is achievable by Project Co performing the Works in accordance with this Project Agreement;
- (xix) Project Co is not a Non-Resident;
- (xx) Project Co has obtained all necessary Project Co Permits, Licences, Approvals and Agreements required to commence the Works;
- (xxi) the manager or supervisory personnel Project Co has assigned to the Project are highly experienced;
- (xxii) Project Co has a sufficient staff of qualified and competent personnel to replace its designated supervisors, subject to Contracting Authority's approval, in the event of death, incapacity or resignation;
- (xxiii) Project Co and certain of the Project Co Parties have conducted an investigation and examination of the Project Agreement, the Background Information and any other documents made available to Project Co by Contracting Authority so as to ascertain the nature or location of the Works and the Site, the physical conditions of the Existing Facilities and Site and protocols, rules and regulations if any, conditions relating to the transportation, handling and storage

of materials and availability of labour and the character and availability of equipment, materials and facilities needed to perform the Works;

- (xxiv) Project Co has secured the Financing and is in a position to complete the Financing on or before the Financial Close Target Date, subject to the satisfaction of reasonable conditions that are customary in closing financing for projects similar to the Project;
- (xxv) No Restricted Person has Direct or Indirect Power or Control over any member of the Project Co Group in relation to the decisions, management, actions or policies of Project Co or in relation to the operation, management and ownership of the Project; and
- (xxvi) either
  - (A) The COR-Certified Construction Project Co Party is in possession of its COR Certification in good standing as required under this Project Agreement and has the ability to maintain such COR Certification in good standing at all times during the performance of the Works in accordance with its terms, provisions and conditions, or
  - (B) The COR-Qualified Construction Project Co Party:
    - (I) is in possession of its OHSAS 18001 Accreditation which remains in good standing and has the ability to maintain such OHSAS 18001 Accreditation in good standing at all times during the performance of the Works until such COR-Qualified Construction Project Co Party receives its COR Certification as required under this Project Agreement, and
    - (II) has made an application to the IHSA for its COR Certification as required under this Project Agreement.

## **6.2 Contracting Authority Representations and Warranties**

- (a) Contracting Authority represents and warrants to Project Co that as of Commercial Close:
  - (i) IO 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 Project Agreement as agent for the Province;
  - (ii) subject to Sections 6.2(a)(v)(C), (D), (E) and (F), IO is entering into this Project Agreement as agent for the Province and has the requisite power, authority and

capacity to execute and deliver this Project Agreement and to bind the Province to this Project Agreement, and Project Co is entitled to rely upon IO's authority to bind the Province in respect of all other agreements, instruments, undertakings and documents executed and delivered by IO as agent for the Province that are required by this Project Agreement to be executed and delivered by the Province;

- (iii) subject to Sections 6.2(a)(v)(C), (D), (E) and (F), Contracting Authority has the requisite power, authority and capacity to perform its obligations under this Project 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 Project Agreement to be done, executed, delivered or performed;
- (iv) IO has obtained all necessary approvals to enter into this Project Agreement as agent for the Province;
- (v) this Project Agreement has been duly authorized, executed, and delivered by Contracting Authority and constitutes a legal, valid, and binding obligation of Contracting Authority, enforceable against Contracting Authority 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 Project 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)*;

- (vi) the execution, delivery, and performance by Contracting Authority of this Project 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)*, as amended, or any regulations made in respect thereof;
  - (B) the *Executive Council Act (Ontario)*;
  - (C) any Applicable Law; or
  - (D) any covenant, contract, agreement, or understanding relating to the Project or the Lands to which it is a party or by which it or any of its properties or assets is bound or affected;
- (vii) no Contracting Authority Event of Default has occurred and is continuing;
- (viii) Contracting Authority is able to meet its obligations as they generally become due;
- (ix) Contracting Authority has rights of use and access to, on and over the Lands and the Facility or has the requisite power to obtain such rights that are sufficient to enable Contracting Authority to grant or to cause to be granted to Project Co the licence rights contemplated in Section 16.

## **7. BACKGROUND INFORMATION**

### **7.1 No Liability**

- (a) Except as expressly provided in Sections 7.4, 18.2, 18.3 and 18.4, none of Contracting Authority nor any Province Person shall be liable to Project Co or any Project Co Party for, and neither Project Co nor any Project Co Party shall seek to recover from Contracting Authority or any Province Person, any damages, losses, costs, liabilities or expenses which may arise (whether in contract, tort or otherwise) from the adoption, use or application of the Background Information by, or on behalf of, Project Co or any Project Co Party.

### **7.2 No Warranty**

- (a) Except as expressly provided in Sections 7.4, 18.2, 18.3 and 18.4:
  - (i) neither Contracting Authority nor any Province Person gives any warranty or undertaking of whatever nature in respect of the Background Information and, specifically (but without limitation), neither Contracting Authority nor any Province Person warrants that the Background Information represents all of the information in its possession or control (either during the conduct of the procurement process for the Project or at the time of execution and delivery of

this Project Agreement) relevant or material to or in connection with the Project or the obligations of Project Co under this Project Agreement or under any of the Project Documents; and

- (ii) neither Contracting Authority nor any Province Person shall be liable to Project Co or any Project Co Party in respect of any failure, whether before, on or after the execution and delivery of this Project Agreement:
  - (A) to disclose or make available to Project Co or any Project Co Party any information, documents or data;
  - (B) to review or update the Background Information; or
  - (C) to inform Project Co or any Project Co Party of any inaccuracy, error, omission, defect or inadequacy in the Background Information.

### **7.3 No Claims**

- (a) Project Co acknowledges and confirms that:
    - (i) it has conducted its own analysis and review of the Background Information and has, before the execution and delivery of this Project Agreement, satisfied itself as to the accuracy, completeness and fitness for purpose of any such Background Information upon which it places reliance; and
    - (ii) except as expressly provided in Sections 7.4, 18.2, 18.3 and 18.4, it shall not be entitled to and shall not, and shall ensure that no Project Co Party shall, make any claim against Contracting Authority or any Province Person (whether in contract, tort or otherwise), including any claim in damages, for extensions of time or for additional payments under this Project Agreement on the grounds:
      - (A) of any misunderstanding or misapprehension in respect of the Background Information; or
      - (B) that the Background Information was incorrect or insufficient,
- nor shall Project Co be relieved from any of its obligations under this Project Agreement on any such ground.

### **7.4 Technical Reports**

- (a) Contracting Authority agrees that, if at the date of this Project Agreement, except as disclosed in any Background Information or as otherwise disclosed by Contracting Authority or any Province Person or known by Project Co or any Project Co Party, any of the information in the Technical Reports is, to the actual knowledge of Contracting Authority, incorrect or there is relevant information in the possession or control of 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 Project Co's ability to perform the Works or materially adversely affects Project Co's cost of performing the Works, such incorrect information shall, subject to and in accordance with Schedule 22 – Variation Procedure, result in a Variation.

- (b) For the purposes of Section 7.4(a), “to the actual knowledge of Contracting Authority” means to the actual knowledge of the IO project manager – project delivery for the Project.

## **8. PROJECT DOCUMENTS**

### **8.1 Project Documents**

- (a) Project Co shall perform its obligations under, and observe all of the provisions of, each of the Project Documents to which it is a party, and shall ensure that each Project Co Party shall perform its obligations under, and observe all of the provisions of, each of the Project Documents to which such Project Co Party is a party, so as to ensure that other parties to such Project Documents shall not be entitled to terminate same.
- (b) In the event that Project Co receives a notice of default, notice of non-payment or notice of adjudication under any of the Project Documents, it shall promptly, and, in any event, no later than 2 Business Days after receipt thereof, deliver a copy of such notice of default, non-payment or adjudication to Contracting Authority.
- (c) Upon the written request of Contracting Authority or the Contracting Authority Representative, Project Co will deliver or cause to be delivered to Contracting Authority or the Contracting Authority Representative a copy of any notices or consents delivered or received by Project Co under any of the Project Documents.

### **8.2 Ancillary Documents**

- (a) Project Co shall not:
- (i) terminate or agree to the termination of all or part of any Ancillary Document, except pursuant to Sections 26.3, 48.3 and 49.2 or otherwise to prevent or cure a Project Co Event of Default (provided that commercially reasonable alternative measures would not prevent or cure such Project Co Event of Default);
  - (ii) make or agree to any amendment, restatement or other modification to any Ancillary Document that materially adversely affects Project Co's ability to perform its obligations under this Project Agreement or that has the effect of increasing any liability of Contracting Authority, whether actual or potential;
  - (iii) breach its obligations (or waive, exercise, or allow to lapse any rights it may have) or permit others to breach their obligations (or waive, exercise, or allow to lapse any rights they may have) under any Ancillary Document, if any such



breach (or waiver, exercise or lapse) would materially adversely affect Project Co's ability to perform its obligations under this Project Agreement or that have the effect of increasing any liability of Contracting Authority, whether actual or potential; or

- (iv) enter into, or permit the entry into by any other person of, any agreement replacing all or part of any Ancillary Document, except in the circumstances referenced in Section 8.2(a)(i),

without the prior written consent of Contracting Authority, provided that, where consent is requested pursuant to Section 8.2(a)(i) or 8.2(a)(iv), such consent shall not be withheld, and shall be provided within a reasonable time, where the relevant matter referred to in Section 8.2(a)(i) or 8.2(a)(iv) will not materially adversely affect Project Co's ability to perform its obligations under this Project Agreement or have the effect of increasing any liability of Contracting Authority, whether actual or potential. In the event of termination or agreement to the termination of all or part of any Ancillary Document as described in Section 8.2(a)(i), or the entering into of any agreement replacing all or part of any Ancillary Document as described in Section 8.2(a)(iv), Project Co shall, to the extent applicable, comply with all provisions herein relating to changes in Subcontractors, including Section 48.3.

### **8.3 Changes to Lending Agreements and Refinancing**

- (a) Subject to the terms of the Lenders' Direct Agreement, Project Co shall not terminate, amend or otherwise modify the Lending Agreements, or waive or exercise any of its rights under the Lending Agreements, if at the time such action is contemplated and effected, it would materially adversely affect Project Co's ability to perform its obligations under this Project Agreement or the Project Documents or have the effect of increasing the liability of Contracting Authority whether actual or potential, unless such action is a Permitted Borrowing or a Refinancing effected in accordance with the provisions of Schedule 29 - Refinancing.

### **8.4 Compliance with Lending Agreements**

- (a) Project Co shall keep the Lending Agreements in good standing to the extent necessary to perform its obligations under this Project Agreement and the Project Documents, and shall ensure that none of the terms and conditions of the Lending Agreements shall prevent Project Co from performing its obligations under this Project Agreement or the Project Documents.

## **9. CONTRACTING AUTHORITY RESPONSIBILITIES**

### **9.1 General**

- (a) Contracting Authority shall, at its own cost and risk:
- (i) perform all of its obligations under, and observe all provisions of, this Project Agreement in compliance with Applicable Law; and
  - (ii) cooperate with Project Co in the fulfillment of the purposes and intent of this Project Agreement, provided, however, that Contracting Authority shall not be under any obligation to perform any of Project Co's obligations under this Project Agreement.
- (b) Contracting Authority shall, and shall cause all Contracting Authority Parties to, take reasonable steps to minimize undue interference with the provision of the Works by Project Co or any Project Co Party.
- (c) Nothing in this Project Agreement shall in any way fetter the right, authority and discretion of Contracting Authority, MAG or any Province Person in fulfilling its statutory or other functions under Applicable Law, and Project Co understands and agrees that nothing in this Project Agreement shall preclude IO, as agent for Contracting Authority, (or any designate appointed pursuant to Section 52.1 of this Project Agreement) from performing, discharging or exercising its duties, responsibilities, and powers under Applicable Law. Project Co further agrees that it shall comply, and shall cause all relevant Project Co Parties to comply, with all written directions issued by or on behalf of IO, as agent for Contracting Authority, (or any designate appointed pursuant to Section 52.1 of this Project Agreement) from time to time, subject to Section 30.1(c).

### **9.2 Contracting Authority Permits, Licences, Approvals and Agreements**

- (a) Contracting Authority shall, at its own cost and risk:
- (i) obtain on or before Financial Close (or such other date as described in the Contracting Authority Permits, Licences, Approvals and Agreements), maintain, and, as applicable, renew all Contracting Authority Permits, Licences, Approvals and Agreements which may be required for the performance of the Works; and
  - (ii) comply with all Permits, Licences, Approvals and Agreements in accordance with their terms.
- (b) Contracting Authority shall, at its own cost, provide or cause to be provided such information, documentation, and administrative assistance as Project Co may reasonably request and as Contracting Authority may reasonably be able to provide, and shall execute such applications or documents as are required to be in its name, to

enable Project Co to obtain, maintain or renew any Project Co Permits, Licences, Approvals and Agreements or to demonstrate compliance with any Permits, Licences, Approvals and Agreements, provided that, except as otherwise provided in Appendix 1 – Permits, Licences, Approvals and Agreements of Schedule 1 – Definitions and Interpretation, Contracting Authority shall not be responsible for obtaining, or for any delay in obtaining, or for the failure of Project Co to obtain, any Project Co Permit, Licence, Approval and Agreement, unless such delay or failure is caused by any act or omission of Contracting Authority or any Contracting Authority Party. For greater certainty, Contracting Authority shall not be obligated to:

- (i) invoke Crown immunity or exercise any other of its legal rights in order to avoid or eliminate the requirement to obtain any Permits, Licences, Approvals and Agreements; or
- (ii) automatically grant Project Co Permits, Licences, Approvals and Agreements for which it is the authorizing entity and will apply its usual procedures and criteria in considering applications from Project Co for such Project Co Permits, Licences, Approvals and Agreements.

## **10. PROJECT CO RESPONSIBILITIES – GENERAL**

### **10.1 Other Business**

- (a) Project Co shall not engage in any activities which are not specifically related to, required by and conducted for the purpose of the Project without the prior written consent of Contracting Authority, in its sole discretion.

### **10.2 Complete and Operational Facility**

- (a) Project Co shall design, engineer, construct and commission the Facility so as to provide Contracting Authority with a complete and operational Facility in accordance with the Output Specifications and the Project Co Proposal Extracts, all in accordance with and subject to the terms of this Project Agreement.

### **10.3 General Responsibilities and Standards**

- (a) Project Co shall, at its own cost and risk, perform and complete the Works:
  - (i) in accordance with the Works Schedule and the Project Co Phasing Plan and, in this regard, shall commence the Works no later than the day following Financial Close and, subject to adjustment as provided for in the Project Agreement, (A) achieve Interim Completion by the Scheduled Interim Completion Date; (B) achieve Substantial Completion by the Scheduled Substantial Completion Date; and (C) achieve Final Completion by the Scheduled Final Completion Date;
  - (ii) in compliance with Applicable Law;

- (iii) so as to satisfy the Output Specifications;
  - (iv) in compliance with all Permits, Licences, Approvals and Agreements and so as to preserve the existence and continued effectiveness of any such Permits, Licences, Approvals and Agreements;
  - (v) in accordance with Good Industry Practice and to meet the standards followed by professionals, manufacturers, contractors and trades who are experienced in work on courthouse facilities that are comparable to the Facility;
  - (vi) in a manner consistent with Quality Plans and Project Co Proposal Extracts;
  - (vii) in a timely and professional manner;
  - (viii) with due regard to the health and safety of persons and property;
  - (ix) subject to the other provisions of this Project Agreement, in a manner which will not impair the ability of Contracting Authority, any Province Person or any Government Entity to comply with Applicable Law;
  - (x) subject to the other provisions of this Project Agreement, in a manner which will not impair the performance of the Contracting Authority Activities; and
  - (xi) in accordance with all other terms of this Project Agreement.
- (b) Project Co shall cooperate with Contracting Authority in the fulfillment of the purposes and intent of this Project Agreement, provided however that Project Co shall not be under any obligation to perform any of Contracting Authority's obligations under this Project Agreement.

## **11. PROJECT CO RESPONSIBILITIES – DESIGN AND CONSTRUCTION**

### **11.1 Development of Design**

- (a) Project Co shall, at its own cost, develop and complete the design of the Facility and all Design Data in accordance with the requirements of this Project Agreement, including Schedule 10 – Review Procedure and this Section 11.1.
- (b) The further development of the design and the process by which it is progressed must fully comply with the requirements of this Project Agreement.
- (c) In order to develop the detailed design of the Facility and to achieve Design Acceptability, Project Co shall consult with the user groups, stakeholders and the Contracting Authority Design Team in an interactive process. The development of the detailed design based on user group and stakeholder input shall in no way be considered a Variation.

- (d) The Parties agree that Appendix A to Schedule 10 – Review Procedure is an initial list of Design Data and other items that will require design review, which Design Data and other items shall include design, procurement and construction documentation (to a scale and format required by the Contracting Authority Design Team) for each of the following:
- (i) 100% design development documentation, being design development drawings, reports, schedules and specifications progressed from the date of this Project Agreement with extensive user group input, showing all architectural, engineering and landscape design information sufficient to allow for the development of working drawings (the “**Design Development Submittals**”);
  - (ii) 100% working drawing documentation, being construction drawings, reports, schedules and specifications progressed from the Design Development Submittals, showing all architectural, engineering and landscape design information in accordance with the requirements of this Project Agreement (the “**Construction Document Submittals**”);
  - (iii) Permit, Licence, Approval and Agreement drawings (phased, in conjunction with or to support the Design Development Submittals or the Construction Document Submittals, as applicable); and
  - (iv) all other documentation required pursuant to Schedule 10 – Review Procedure.
- (e) Project Co shall submit to the Contracting Authority Representative for review in accordance with Schedule 10 – Review Procedure all Design Data and other items listed in Section 11.1(d).
- (f) Project Co shall participate in design meetings every two weeks with the Contracting Authority Design Team and frequent consultations with user groups, including on an interim and ad hoc basis, and as needed, in order to fully achieve Design Acceptability.
- (g) The Design Data and other items listed in Section 11.1(d) must contain, at a minimum, the following additional information:
- (i) identification of the stage of design or construction to which the documentation relates;
  - (ii) all design or construction drawings and specifications necessary to enable the Contracting Authority Design Team to make an informed decision as to whether Project Co is permitted to proceed pursuant to Schedule 10 – Review Procedure;
  - (iii) for each stage of the design or construction documentation, a schedule identifying all changes to the relevant documentation that has occurred from the previous stage of design or construction documentation; and

- (iv) where changes have been submitted, an indication of how the changes meet the requirements of this Project Agreement.
- (h) All design review meetings held by Project Co which Contracting Authority wishes to attend shall be held in Toronto, Ontario unless Contracting Authority otherwise agrees in writing.
- (i) If Project Co commences or permits the commencement of the next level of design or construction of any part or parts of the Facility prior to being entitled to proceed in accordance with Schedule 10 – Review Procedure and it is subsequently determined in accordance with Schedule 10 – Review Procedure or Schedule 27 – Dispute Resolution Procedure that the design or construction does not comply with this Project Agreement, then Project Co shall forthwith, at its own cost and risk, undo, remove from the Site, replace and restore, as applicable, any parts of the design or construction that do not comply with this Project Agreement.
- (j) Neither Contracting Authority nor any Province Person will have any liability:
  - (i) if a document submitted by Project Co and reviewed by Contracting Authority, the Contracting Authority Representative or the Contracting Authority Design Team results in non-compliance with this Project Agreement by Project Co or a breach by Project Co of Applicable Law; or
  - (ii) for any loss or claim arising due to some defect in any documents, drawings, specifications or certificates submitted by Project Co.
- (k) Project Co and Contracting Authority will cooperate with each other in the design review process. Notwithstanding such cooperation by Contracting Authority, such review shall not constitute acceptance of the Works, and Project Co shall remain solely responsible for compliance in full with all requirements of this Project Agreement.
- (l) Project Co shall allow the Contracting Authority Design Team, at any time, a reasonable opportunity to view any items of Design Data, which shall be made available to the Contracting Authority Representative as soon as practicable following receipt of a written request from the Contracting Authority Representative.
- (m) Project Co shall cause the Construction Contractor to establish and maintain a computerized design database which Project Co and Contracting Authority may access remotely by computer to view drawings comprised within the Design Data and to electronically store and print copies of such Design Data.

## **11.2 Start-Up Meeting**

- (a) Within 10 Business Days of the date of this Project Agreement, Project Co and the Design Team shall attend a start-up meeting (the “**Start-Up Meeting**”) with Contracting Authority to set out the design development process in greater detail.

- (b) The agenda for the Start-Up Meeting shall include the following:
- (i) Project Co's plan to develop a successful partnership with Contracting Authority and MAG for the purpose of supporting Contracting Authority and MAG in achieving their vision, mission and core values;
  - (ii) Project Co's plan to ensure that the Works are completed in accordance with the requirements set forth in this Project Agreement;
  - (iii) Project Co's process to ensure optimum design quality;
  - (iv) Project Co's approach to a fully integrated interior design process that includes every element of interior finishes, furniture, fixtures, FF&E, occupant signage and wayfinding;
  - (v) a proposed schedule of Works Submittals which is consistent with the Proposed Works Schedule and which provides for a progressive and orderly flow of Works Submittals from Project Co to the Contracting Authority Representative to allow sufficient time for review of each Works Submittal by the Contracting Authority Design Team, taking into account both the resources available to the Contracting Authority Design Team to conduct such review and whether delay in the review of the subject matter of the Works Submittal will have a material impact on Project Co's ability to progress future anticipated Works Submittals and the Works in accordance with the Works Schedule;
  - (vi) Project Co's plan to successfully integrate feedback from user groups and the Contracting Authority Design Team;
  - (vii) Project Co's approach to timing, construction, adjustment and user feedback on required mock-ups; and
  - (viii) a communication process that includes an electronic data room and the use of a computerized document tracking system that has the capacity to report, on request, the status of all design and construction documentation, and that takes into account the security protocol described in Section 41.5(f).

### **11.3 Design Workshops**

- (a) In order to obtain user input in the preparation of, and prior to submitting, the Design Development Submittals and the Construction Document Submittals, the Parties will hold design review meetings (the "**Design Review Meetings**") with the Contracting Authority Design Team and hold user group design workshops (the "**Design Workshops**") beginning immediately after Commercial Close upon the following terms:

- (i) the Project Co Representative shall arrange the Design Review Meetings and Design Workshops in consultation with the Contracting Authority Representative;
- (ii) all Design Review Meetings and Design Workshops shall be held in Toronto, Ontario, unless Contracting Authority agrees otherwise in writing;
- (iii) the Parties shall cooperate to develop a reasonable schedule for the Design Workshops respecting user availability issues inherent in an operating courthouse facility and the scheduling parameters set out in Section 11.3(a)(iv), and shall incorporate such schedule into the Works Schedule;
- (iv)
  - (A) each Contracting Authority user group shall require a minimum 3 rounds of meetings prior to the 100% Design Development Submittal, and a minimum of 2 meetings between 100% Design Development Submittal and 100% Construction Document Submittal;
  - (B) there shall be a minimum of ten (10) Business Days between Design Workshops involving the same Contracting Authority user group unless otherwise agreed to by Contracting Authority;
  - (C) no more than five (5) Contracting Authority user groups shall meet with Project Co in any given week;
  - (D) there shall be no more than one (1) meeting involving the same Contracting Authority user groups in the same week unless otherwise agreed to by Contracting Authority in its sole discretion; and
  - (E) the above criteria are for planning purposes only; actual user group availability shall be determined by Contracting Authority following Financial Close.
- (v) Project Co shall circulate to the Contracting Authority Design Team an agenda for each of the Design Review Meetings and each of the Design Workshops no later than 5 Business Days prior to the relevant Design Review Meeting and/or Design Workshop;
- (vi) in advance of a Design Review Meeting, Project Co may submit to the Contracting Authority Design Team for comment any interim drafts of any designs or plans required under this Project Agreement, which submissions shall be used to inform Contracting Authority on the development of the Facility design and provide an opportunity for dialog on compliance with the requirements of the Project Agreement. If a Proposal Part corresponds to the interim submissions, then Project Co shall ensure that the interim submissions are substantially the same content and level of detail as the corresponding Proposal Part. For greater certainty,



- (A) interim submissions shall be informal and shall not be reviewed in accordance with Schedule 10 of the Project Agreement; and
  - (B) the requirement for Project Co to submit interim submissions that are substantially the same content and level of detail as the corresponding Proposal Part, shall not,
    - (I) lessen, reduce or otherwise modify or amend Contracting Authority's rights under the Project Agreement to review any Design Development Submittals in accordance with Schedule 10 of the Project Agreement; or
      - (I) constitute acceptance by the Contracting Authority of the corresponding Proposal Part or any Design Development Submittal in accordance with Schedule 10 of the Project Agreement;
  - (vii) the Design Review Meetings and Design Workshops shall be held in person, except where otherwise agreed by the Parties, acting reasonably;
  - (viii) Project Co shall maintain minutes of the Design Review Meetings and Design Workshops, including possible design solutions and changes in design, and, within 2 Business Days after each Design Review Meeting and Design Workshop, Project Co shall provide to the Contracting Authority Design Team a copy of the minutes, together with a copy of any notes, comments, sketches, drawings, tracings, lay-outs, plans or diagrams prepared at the Design Review Meeting and Design Workshop;
  - (ix) Contracting Authority and Project Co agree that the subject matter of the Design Review Meetings and Design Workshops shall not be regarded as Submittals to which Schedule 10 – Review Procedure applies, and that Contracting Authority shall not be bound by the input provided in connection with the Design Review Meetings and Design Workshops;
  - (x) Project Co shall submit to Contracting Authority the Design Development Submittals or the Construction Document Submittals, as applicable, for review pursuant to Schedule 10 - Review Procedure and Schedule 19 – Works Scheduling Requirements; and
  - (xi) the Parties agree that, with respect to the Design Development Submittals and the Construction Document Submittals, the period for review shall be as prescribed in Schedule 10 - Review Procedure.
- (b) Prior to the 100% Design Development Submittals, the Parties will hold Design Review Meetings and/or Design Workshops (as required by Contracting Authority) with

respect to the following matters and any other Design Review Meetings and Design Workshops required by Project Co or Contracting Authority, each acting reasonably:

- (i) all items listed in Section 1 of Appendix A of Schedule 10 – Review Procedure;
  - (ii) space planning and room layouts;
  - (iii) interior materials, finishes and colours;
  - (iv) millwork;
  - (v) accessibility (with Stakeholder participation);
  - (vi) structural design in relation to underground parking expansion, including plans and sections;
  - (vii) mechanical and electrical systems including plant layouts and functionality;
  - (viii) information/communication technology;
  - (ix) security systems;
  - (x) base building systems to support audio visual systems;
  - (xi) systems integration strategy and design, including integration with the Existing Facility systems;
  - (xii) energy efficiency considerations;
  - (xiii) approach to life cycle and warranties;
  - (xiv) approach to commissioning;
  - (xv) life safety report including exit strategy for each phase of development;
  - (xvi) construction phasing and decanting approach;
  - (xvii) interior elevations;
  - (xviii) FF&E;
  - (xix) door/hardware functionality; and
  - (xx) signage and wayfinding.
- (c) Prior to the 100% Construction Documents Submittals, the Parties will hold Design Review Meetings and/or Design Workshops (as required by Contracting Authority) with respect to the following matters and any other Design Review Meetings and/or

Design Workshops required by Project Co or Contracting Authority, each acting reasonably:

- (i) all items listed in Section 2 of Appendix A of Schedule 10 – Review Procedure, as required;
  - (ii) millwork details;
  - (iii) office area layout details;
  - (iv) FF&E coordination details;
  - (v) information/communications and technology strategy and design;
  - (vi) systems integration strategy and design, including integration with the Existing Facility systems;
  - (vii) signage and wayfinding;
  - (viii) detailed engineering system solutions;
  - (ix) approach to life cycle and warranties; and
  - (x) approach to commissioning.
- (d) The purpose of the Design Review Meetings and Design Workshops is to facilitate the incorporation of Contracting Authority, MAG and Stakeholder input, involvement and feedback into the Design Data prior to submission of such Design Data in accordance with Schedule 10 - Review Procedure.

#### **11.4 Design Acceptability**

- (a) Contracting Authority confirms that, as at the date of this Project Agreement, it and MAG have reviewed the Site and landscape design, blocking and stacking diagrams and updated space/area analysis and that, subject to any qualifications or comments noted thereon, such submittals satisfy the Output Specifications in respect of Design Acceptability, so far as can reasonably be determined given the level of detail in the submittals.
- (b) With each of the Design Development Submittals, Project Co shall submit to Contracting Authority, for its review pursuant to Schedule 10 - Review Procedure, a draft report (each a “**Design Acceptability Report**”) to specifically identify, with reference to the Output Specifications, such matters of Design Acceptability that Project Co wishes the Contracting Authority Design Team to review and consider as part of the Design Development Submittals. Each Design Acceptability Report shall demonstrate how the Output Specifications are satisfied in respect of Design Acceptability.

- (c) With the Construction Document Submittals, Project Co shall submit to Contracting Authority, for review by Contracting Authority and MAG, pursuant to Schedule 10 - Review Procedure, a final Design Acceptability Report, and Contracting Authority shall confirm that, subject to any qualifications or comments noted thereon, such Construction Document Submittals satisfy the Output Specifications in respect of Design Acceptability, so far as can reasonably be determined given the level of detail in the Construction Document Submittals.
- (d) Each Design Acceptability Report must be prepared in accordance with the technical submission requirements to be provided by Contracting Authority to Project Co after identification of the preferred proponent and must address the way in which the Design Data meets the requirements of Design Acceptability.
- (e) Design Acceptability is a salient factor of importance to Contracting Authority and MAG to all stages of development of the Facility and shall be taken into account in the review of all Submittals submitted in accordance with the Review Procedure.

### **11.5 Performance of Design Obligations**

- (a) In the design and engineering of the Project, Project Co, its consultants and the Project Co Parties shall, at a minimum, exercise the standard of care normally exercised by licensed or registered professional architectural and engineering personnel having specialized knowledge and experience in performing design activities of a similar nature, scope and complexity.
- (b) Project Co shall ensure that all parts of the Works shall, as required by Applicable Law, be performed or reviewed by licensed or registered professional engineers and architects registered to practice in the Province of Ontario. Such architects and engineers shall certify and, if required by Applicable Law, sign and seal, all designs, drawings and technical reports confirming that they comply with all prevailing design standards and design practices for such work in the Province of Ontario, all other applicable standards, Output Specifications and codes, and as otherwise required by Applicable Law.
- (c) Project Co shall ensure that the Design Team certifies that the design and construction of the Facility is in accordance with the requirements of this Project Agreement as contemplated pursuant to Appendix A of Schedule 10 - Review Procedure. During construction and commissioning of the Facility, the Design Team shall review Shop Drawings, inspect the Works and review the reports, test results, certificates, confirmations, opinions and inspections prepared by other persons in connection with or relating to the construction and commissioning of the Facility, all to the extent necessary to satisfy the Design Team that the Works have been performed in compliance with this Project Agreement.
- (d) Project Co shall ensure that the Design Team has, and has assigned, sufficient resources necessary to satisfy the construction monitoring activities and frequency of certification

required by the Design Team as contemplated pursuant to Schedule 10 - Review Procedure.

### **11.6 Works Submittals**

- (a) Any and all items, documents and anything else required or specified by the Project Agreement in respect of the Works to be submitted to, reviewed or otherwise processed by Contracting Authority prior to Substantial Completion or after Substantial Completion in respect of the completion of the Minor Deficiencies and the rectification of any Works, the Facility or any part thereof as required by the Project Agreement, including any and all subsequent revisions, amendments and changes thereto, shall be subject to review by Contracting Authority pursuant to Schedule 10 - Review Procedure.

### **11.7 Documents at the Site**

- (a) Project Co shall keep one copy of the current digital files of the Project Agreement, Project Documents, Project Schedules, submittals, reports, Variation Confirmations, Project Co Variation Notices, Variation Directives, partnering documents, records of meetings and all other documents necessary for the administration of the Project at the Site, all in good order and available to Contracting Authority, Lenders' Consultant and Contracting Authority Representative. Project Co shall keep a daily log available to Contracting Authority, Lenders' Consultant and Contracting Authority Representative at all times.
- (b) Project Co shall, where practical, keep one copy of current standards and manufacturers' literature specified in the Project Documents at the Site in good order and available to Contracting Authority Representative and Lenders' Consultant and their representatives for the duration of the Works.

### **11.8 General Construction Obligations**

- (a) Without limiting Section 10.3:
  - (i) Project Co is solely responsible for all construction means, methods and techniques used to undertake the Works and must provide everything (including labour, plant, equipment and materials) necessary for the construction and commissioning of the Facility, and all other performance of the Works.
  - (ii) Project Co shall in a timely and professional manner and in accordance with the requirements of this Project Agreement:
    - (A) construct the Works diligently, expeditiously and in a thorough and workman-like manner consistent with Schedule 11 - Quality Management;

- (B) ensure that no works other than the Works under this Project Agreement are constructed on the Site or the Facility by Project Co, any Project Co Party or any person for whom Project Co is responsible at law;
- (C) protect the Works from all of the elements, casualty and damage;
- (D) in respect of plant, equipment, Products and materials incorporated in the Works, use plant, equipment, Products and materials that:
  - (I) are of a kind that are consistent with the Output Specifications;
  - (II) are new, of good quality and are used, handled, stored and installed in accordance with Applicable Law and Good Industry Practice, including, with respect to health and safety, so as not to be hazardous or dangerous; and
  - (III) where they differ from the Output Specifications, have been substituted with Contracting Authority's prior written consent in accordance with Section 11.20.
- (iii) Project Co shall not cause power interruptions to the base building systems on the Sites including electricity systems, mechanical systems, security systems and life safety systems without the prior written consent of Contracting Authority.
- (iv) Without limiting Project Co's obligations pursuant to Section 11.12 or Project Co's indemnity pursuant to Section 45.1, Project Co shall, at all times throughout the progress of the Works, be responsible for maintaining and securing the Site to prevent access onto the Site and the Facility of any persons not entitled to be there, and the licence granted to Project Co pursuant to Section 16.1 shall include rights for Project Co to do so.

## **11.9 Permits, Licences, Approvals and Agreements**

- (a) Project Co shall, at its own cost and risk:
  - (i) obtain, maintain, and, as applicable, renew all Project Co Permits, Licences, Approvals and Agreements which may be required for the performance of the Works;
  - (ii) assume the obligations of Project Co under the Contracting Authority Permits, Licences, Approvals and Agreements as set out in Appendix 1 – Permits, Licences, Approvals and Agreements of Schedule 1 – Definitions and Interpretation, including, without limitation, the administration of all Contracting Authority Security Deposits which are subject to being released and returned to Contracting Authority and the administration of the renewal or replacement of the Contracting Authority Security Deposits if and as required,

and Project Co shall cooperate with Contracting Authority and any other person, perform the obligations under the Permits, Licences, Approvals and Agreements for which Project Co is responsible which are conditions for the release to Contracting Authority of any such Contracting Authority Security Deposits, and take all such necessary actions to have such Contracting Authority Security Deposits released and returned to Contracting Authority;

- (iii) comply with all Permits, Licences, Approvals and Agreements in accordance with their terms; and
  - (iv) provide all security, including all letters of credit, that may be required in connection with any Project Co Permits, Licences, Approvals and Agreements.
- (b) Where any Project Co Permits, Licences, Approvals and Agreements have requirements that may impose any conditions, liabilities or obligations on Contracting Authority or any Province Person, Project Co shall not obtain, amend or renew (other than upon the same terms and conditions) such Project Co Permits, Licences, Approvals and Agreements without the prior written consent of Contracting Authority, provided that neither Contracting Authority nor any Province Person shall be responsible for obtaining, amending or renewing or for the failure of Project Co to obtain, amend or renew any Project Co Permits, Licences, Approvals and Agreements. Contracting Authority shall comply, or shall require compliance, with any conditions, liabilities or obligations as are imposed on Contracting Authority or any Province Person by the requirements of any Project Co Permits, Licences, Approvals and Agreements obtained with Contracting Authority's consent under this Section 11.9(b).
- (c) Contracting Authority shall provide Project Co with such information and administrative assistance as Project Co may reasonably require in relation to the Permits, Licences, Approvals and Agreements. In respect of Section 11.9(a)(ii), Contracting Authority shall: (i) provide Project Co with relevant information and copies of notices received under the applicable Contracting Authority Permits, Licences, Approvals and Agreements and (ii) execute any documents under the applicable the Contracting Authority Permits, Licences, Approvals and Agreements which Applicable Law dictates that only Contracting Authority can execute.
- (d) Project Co shall, at its own cost, provide or cause to be provided such information, documentation, and administrative assistance as Contracting Authority may reasonably request and as Project Co may reasonably be able to provide, and shall execute such applications and documents as are required to be in its name, to enable Contracting Authority to obtain, maintain or renew any Contracting Authority Permits, Licences, Approvals and Agreements or to demonstrate compliance with any Permits, Licences, Approvals and Agreements, provided that, except as otherwise provided in Appendix 1 – Permits, Licences, Approvals and Agreements of Schedule 1 – Definitions and Interpretation, Project Co shall not be responsible for obtaining or for any delay in obtaining or for the failure of Contracting Authority to obtain any Contracting

Authority Permits, Licences, Approvals and Agreements, unless such delay or failure is caused by any act or omission of Project Co or any Project Co Party.

#### **11.10 Protection of Work and Property**

- (a) Project Co shall protect the Works and the property of Contracting Authority at the Site, including property adjacent to the Site and the Existing Facilities, from damage which may arise as a result of Project Co's operations under this Project Agreement, and shall be responsible for such damage, except damage which occurs as a result of acts or omissions by Contracting Authority or any Contracting Authority Party.
- (b) Should Project Co, in the performance of this Project Agreement, damage the Works or the property of Contracting Authority at the Site, including property adjacent to the Site and the Existing Facilities, Project Co shall be responsible to Make Good such damage at Project Co's expense.
- (c) Should damage occur to the Works or the property of Contracting Authority at the Site, including property adjacent to the Site and the Existing Facilities, for which Project Co is not responsible, as provided in Section 11.10(a), Project Co shall Make Good such damage to the Works and, if Contracting Authority so directs, to the property of Contracting Authority and the Guaranteed Price, the Scheduled Interim Completion Date and the Scheduled Substantial Completion Date shall be adjusted in accordance with Schedule 22 – Variation Procedure.
- (d) Project Co shall not undertake to repair and/or replace any damage whatsoever to adjoining property without first consulting Contracting Authority and receiving written instructions as to the course of action to be followed.
- (e) Notwithstanding Section 11.10(d), where there is danger to life or property which arises out of or in connection with the performance of the Works, either Party may, but Project Co shall, take such emergency action as is necessary to remove the danger.
- (f) If any Project Co Party has caused damage to the work of another contractor related to the Project, Project Co agrees upon due notice to settle with the other contractor by negotiation or arbitration in accordance with Section 11.13(e) and Schedule 27 – Dispute Resolution Procedure. If the other contractor makes a claim against Contracting Authority on account of damage alleged to have been so sustained, the dispute shall be dealt with in substantially the same manner as contemplated in Section 11.13(e) and Schedule 27 – Dispute Resolution Procedure.

#### **11.11 Liability Unaffected**

- (a) Project Co shall not be relieved of any liability or obligation under this Project Agreement by the retainer or appointment of any Project Co Party, and Project Co shall cause each Project Co Party, to the extent such Project Co Party performs, or is



- specified hereunder to perform, the Works, to comply with the obligations of Project Co to Contracting Authority in the same manner and to the same extent as Project Co.
- (b) No inspection, review, comment, approval, verification, confirmation, certification, acknowledgement or audit pursuant to the provisions of this Project Agreement by Contracting Authority, the Contracting Authority Representative, or Lenders' Consultant, or anyone on their behalf, nor any failure of any of them to do so, shall relieve Project Co from performing or fulfilling any of its obligations under this Project Agreement or be construed as an acceptance of the Works or any part thereof.

### **11.12 Safety**

- (a) Project Co shall:
- (i) comply with the Contractor Site Specific Safety Manual;
  - (ii) keep the Site, the Works and the Facility in a safe and orderly state, as appropriate in accordance with Good Industry Practice, to avoid danger to persons on the Site, in the Facility and in the immediate vicinity of the Site;
  - (iii) take such measures as are reasonable in accordance with Good Industry Practice to prevent access to the Site and the Facility of any persons or creatures not entitled to be there;
  - (iv) comply, and cause each Project Co Party to comply, with Applicable Law relating to health and safety, including without limitation the *Occupational Health and Safety Act* (Ontario) and all regulations thereto;
  - (v) cause a COR-Certified Construction Project Co Party or, prior to receipt of COR Certification, a COR-Qualified Construction Project Co Party, to perform, all of the obligations of the "constructor", and indemnify Contracting Authority, each Province Person and each Government Entity against any and all of the liabilities of the "constructor", under the *Occupational Health and Safety Act* (Ontario) and all regulations thereto; and
  - (vi) provide Contracting Authority with a certificate of good standing from WSIB or any successor thereto once every 90 days.
- (b) Project Co shall cause the Construction Contractor to deliver at least one (1) copy of the Contractor Site Specific Safety Manual to the Lands no later than the first Business Day following Financial Close (or such other date as may be agreed by the Parties) and maintain the Contractor Site Specific Safety Manual (as it may be amended by the Construction Contractor from time to time) at the Lands until the Final Completion, and following Final Completion, during the performance of the Works.
- (c) At any time that the Works are being carried out in or around the Existing Facilities Project Co shall at all times:

- (i) ensure that it complies with all safety requirements set out in the Project Agreement, including those set out in Section 11.12(a) above; and
- (ii) keep the Existing Facilities in a safe and orderly state, as appropriate and in accordance with Good Industry Practice, to avoid any danger to the employees, visitors and other persons attending the Existing Facilities.

### **11.13 Additional Works**

- (a) Contracting Authority reserves the right to carry out Additional Works. Contracting Authority may assign to Project Co responsibility for:
  - (i) directing the methods and means of construction of the Additional Works;
  - (ii) coordinating and scheduling the Additional Works; and/or
  - (iii) providing safety training in respect of the Additional Works.
- (b) In connection with the Additional Works, Contracting Authority shall:
  - (i) to the extent that Contracting Authority has assigned responsibility for such matters to Project Co pursuant to Section 11.13(a), cause Additional Contractors to comply with the instructions of Project Co relating to the methods and means of construction of the Additional Works, coordination and scheduling of the Additional Works and safety training in respect of the Additional Works;
  - (ii) cause Additional Contractors to comply with the instructions of Project Co relating to matters of health and safety on the Site;
  - (iii) enter into separate contracts with Additional Contractors containing terms and provisions which (A) are consistent with the terms and provisions of this Project Agreement (including Schedule 27 – Dispute Resolution Procedure), (B) to the extent that Contracting Authority has assigned responsibility for such matters to Project Co pursuant to Section 11.13(a), require Additional Contractors to comply with all directions of Project Co in respect of any matter regarding methods and means of construction of the Additional Works, coordination and scheduling of the Additional Works and safety training in respect of the Additional Works and (C) require Additional Contractors to comply with the instructions of Project Co relating to matters of health and safety on the Site;
  - (iv) ensure that insurance coverage is provided in respect of the Additional Works as would be required by a prudent owner similarly situated and that such insurance is coordinated with the insurance coverage of Project Co as it affects the Works to provide seamless insurance coverage to Project Co and Contracting Authority (including, if appropriate, naming Contracting Authority and Project Co as additional insureds and/or loss payees) and, in any event, such

- insurance shall provide for commercial general liability insurance of not less than \$[REDACTED]; and
- (v) take all necessary steps to avoid labour disputes or other disputes on the Project arising from the Additional Works.
- (c) In connection with the Additional Works, Project Co shall:
- (i) to the extent that Contracting Authority has assigned responsibility for such matters to Project Co pursuant to Section 11.13(a), and subject to the performance by Contracting Authority of its obligations under Sections 11.13(b)(i) and 11.13(b)(iii), direct the methods and means of construction of the Additional Works, coordinate and schedule the Additional Works with the Works to be performed under this Project Agreement, as applicable, and provide safety training in respect of the Additional Works;
  - (ii) subject to the performance by Contracting Authority of its obligations under Section 11.13(b)(i) and 11.13(b)(iii), assume overall responsibility for compliance by the Additional Contractors and Additional Works with all aspects of Applicable Law relating to health and safety at the Site, including all the responsibilities of the ‘constructor’ under the *Occupational Health and Safety Act* (Ontario) in accordance with such Act prior to Substantial Completion and, at the request of Contracting Authority exercised in a manner consistent with the said Act, at any time that Project Co is acting as a ‘constructor’ on the Site following Substantial Completion;
  - (iii) afford Additional Contractors reasonable opportunity to introduce and store their products and use their construction machinery and equipment to execute the Additional Works;
  - (iv) participate with Contracting Authority and Additional Contractors in reviewing their construction schedules when directed to do so by Contracting Authority; and
  - (v) where all or part of the performance of the Works is affected by, or depends upon, the completion and/or proper execution of the Additional Works, promptly, and prior to proceeding with the affected Works, report to Contracting Authority in writing any readily apparent deficiencies in the Additional Works. Failure by Project Co to so report shall invalidate any claims against Contracting Authority by reason of such readily apparent deficiencies.
- (d) If, in respect of Additional Works carried out prior to Substantial Completion at the Site:
- (i) any Additional Contractors cause any damage to the Works;

- (ii) to the extent that Contracting Authority has assigned responsibility for such matters to Project Co pursuant to Section 11.13(a), Project Co incurs any additional costs or there is any delay in the Works as a result of any Additional Contractors not complying with the reasonable instructions of Project Co regarding methods and means of construction, coordination and scheduling or safety; or
- (iii) Project Co incurs any additional costs or there is any delay in the Works as a result of any such Additional Works,

then, provided such delay in the Works or additional costs are not as a result of Project Co's failure to perform any of its obligations under Section 11.13(c) or any act or omission of Project Co or a Project Co Party, any such delay in the Works or additional costs in respect of the Works shall, subject to and in accordance with Article 31, be treated as a Delay Event and, subject to and in accordance with Article 32, be treated as a Compensation Event.

- (e) Claims, disputes, and other matters in question between Project Co and Additional Contractors shall be dealt with in substantially the same manner as contemplated in Section 8 of Schedule 27 – Dispute Resolution Procedure, provided the Additional Contractors are subject to binding reciprocal obligations in the contracts between Contracting Authority and the Additional Contractors. Project Co shall be deemed to have consented to binding arbitration of any dispute with any Additional Contractor whose contract with Contracting Authority contains a binding reciprocal agreement to arbitrate.
- (f) In connection with the Additional Works, Project Co may propose a Variation as follows:
  - (i) Project Co shall have a period of 10 Business Days following Notice from Contracting Authority of Contracting Authority's intention to carry out such Additional Works, including a reasonable description of such Additional Works, to propose a Variation if such Additional Works are (A) reasonably expected to void a warranty in favour of Project Co from a Project Co Party or equipment supplier and given in accordance with Good Industry Practice, or (B) reasonably expected to have a material adverse effect on Project Co's ability to perform any of the Works, including a material delay in the Works or material additional costs in respect of the Works;
  - (ii) if Project Co has proposed a Variation in accordance with Section 11.13(f)(i), Contracting Authority shall, within 10 Business Days of such proposal, either issue a Variation Enquiry or give Notice to Project Co that it does not agree that a Variation is required;

- (iii) either Party may refer the question of whether a Variation is required pursuant to Section 11.13(f)(i) for resolution in accordance with Schedule 27 – Dispute Resolution Procedure; and
- (iv) where Contracting Authority has, under Section 11.13(f)(ii), given Notice to Project Co that it does not agree that a Variation is required, Contracting Authority shall, within 10 Business Days of a subsequent agreement or of a determination that a Variation is required, issue a Variation Enquiry and the relevant provisions of Schedule 22 – Variation Procedure shall apply except that:
  - (A) Contracting Authority shall not be entitled to withdraw any such Variation Enquiry unless Contracting Authority determines not to proceed with the Additional Works or to proceed only in a manner that the Additional Works will not result in a warranty becoming void (as contemplated in Section 11.13(f)(i)) and will not result in any material negative effect (including material additional costs) on Project Co’s ability to perform any of the Works and Project Co has agreed with such conclusion, or the Parties otherwise agree; and
  - (B) the Parties shall, without prejudice to their respective obligations under this Project Agreement, use commercially reasonable efforts to mitigate any adverse effects of such Additional Works, including, with respect to any void or voidable warranty and any increase in costs arising therefrom.
- (g) Placing, installing, applying or connecting the Additional Works performed by Additional Contractors on and to the Works performed by Project Co will not relieve Project Co from its obligations under the Project Agreement with respect to the Works, except to the extent Project Co is entitled to a Delay Event or Compensation Event in accordance with Section 11.13(d) or as expressly described in any Variation Confirmation.

#### **11.14 Protest and Trespass**

- (a) Except as otherwise provided in this Project Agreement, Contracting Authority shall not be responsible for the presence on or around the Site or the Lands, or any other interference affecting the Site or the Lands, the Facility, the Existing Facility or the Works, of any persons participating in a Protest Action (“**Protesters**”) or any other persons otherwise not entitled to be on or around the Site or the Lands (“**Trespassers**”). For greater certainty, the presence of, or interference by, any Protesters or Trespassers on or around the Site or the Lands shall not be a breach of the obligation of Contracting Authority to grant licence rights of use and access to Project Co on and over the Lands pursuant to Section 16.

- (b) The management of any Protesters or Trespassers shall be the responsibility of Project Co prior to Substantial Completion and of Contracting Authority following Substantial Completion (in each case to the extent same is not otherwise the responsibility of the Police Service).
- (c) If at any time prior to Substantial Completion any part of the Site or the Lands is occupied, or access to the Site or the Lands is prevented or interfered with, by Protesters or Trespassers, Project Co shall use all appropriate measures reasonable in the circumstances to manage such Protesters or Trespassers and promptly notify the Contracting Authority Representative of such occurrence and of the action which Project Co proposes to take in respect thereof. Project Co may exercise any legal remedy available to it to remove Protesters or Trespassers from the Site or the Lands, provided that if Project Co does so elect to exercise any such legal remedy, Project Co shall give the Contracting Authority Representative not less than 24 hours' Notice prior to commencing any legal proceeding for that purpose (except in a case of Emergency, danger to persons or material destruction or material damage to property where, in such circumstances, such Notice may be given to Contracting Authority less than 24 hours prior to the commencement of such legal proceeding) and shall continually update the Contracting Authority Representative as to the status of any such legal proceeding in reasonable detail and at reasonable intervals, and provided further that:
- (i) Project Co shall not give directly or indirectly to any Protester or Trespasser any inducement, monetary or otherwise, with a view to avoiding, limiting or influencing the manner of protest activities by that Protester or Trespasser or by other Protesters or Trespassers; and
  - (ii) Project Co shall not by virtue of this Section 11.14(c) be prevented from entering into *bona fide* settlements of claims brought against it by Protesters or Trespassers which provide for reasonable payments in satisfaction of such claims or agreeing to any reasonable cost orders in any proceedings.
- (d) Project Co may request the assistance of Contracting Authority (at the cost of Project Co) to remove Protesters or Trespassers where Project Co demonstrates to Contracting Authority's reasonable satisfaction that:
- (i) Project Co is pursuing all legal remedies available to it to remove the Protesters or Trespassers (provided that for this purpose Project Co may but shall not be obligated to prosecute injunctive or other judicial remedies beyond the court of first instance); and
  - (ii) the continued presence of the Protesters or Trespassers is having a material adverse effect on the conduct of the Works that Project Co is unable to mitigate.

Following such request, Contracting Authority shall notify Project Co whether Contracting Authority can lawfully provide any assistance in relation to the removal of the Protesters or Trespassers that is not independently available to Project Co and, to

- the extent that such assistance can be lawfully provided, Contracting Authority shall provide such assistance (at the cost of Project Co) to the extent it is, in the discretion of Contracting Authority, reasonable and appropriate in the circumstances to do so.
- (e) If Project Co experiences a Protest Action on the Site (including at the Existing Facilities) and Lands and Project Co has,
- (i) fully complied with the provisions of Sections 11.12, 11.14(a), 11.14(b), 11.14(c) and 11.14(d); and
  - (ii) has exhausted all legal remedies available to it to seek injunctive relief or other judicial remedies from a court of first instance and to enforce such injunction or other remedy granted by such court to remove Protesters and Trespassers in such Protest Action from the Site (including at the Existing Facilities) and Lands, provided that Project Co shall not be obligated to prosecute injunctive or other judicial remedies beyond the court of first instance with respect to such removal of Protestors and Trespassers,
- then,
- (iii) such Protest Action shall, subject to and in accordance with Section 31, be treated as a Delay Event; and
  - (iv) Project Co shall be entitled to a Variation subject to and in accordance with Schedule 22 – Variation Procedure except that payment to Project Co in accordance with this Section 11.14(e)(iv) shall exclude, in accordance with Section 11.14(f), the first \$[REDACTED] of all Direct Costs which would have been payable to Project Co in accordance with this Section 11.14(e)(iv).
- (f) For clarity, the first \$[REDACTED] of all Direct Costs which would have been payable to Project Co by Contracting Authority under Section 11.14(e)(iv) shall be at Project Co's sole cost and expense. For the purposes of calculating the first \$[REDACTED] of Direct Costs, such amount shall not include,
- (i) any amount or amounts which Project Co or a Project Co Party recovers, or is entitled to recover, under any insurance policy, or would have recovered if it had complied with the requirements of this Project Agreement in respect of insurance or the terms of any policy of insurance required under this Project Agreement, which amount, for greater certainty, shall not include any excess or deductibles or any amount over the maximum amount insured under any such insurance policy; or
  - (ii) any Senior Debt Service Amount or Junior Debt Service Amount accrued and paid or which became payable in accordance with the Lending Agreements during the period of the Delay Event set out in Section 11.14(e)(iii), which, but for such Delay Event, would not have been paid by Project Co to the Lenders.

### **11.15 Defective Works**

Prior to Interim Completion in respect of the TRBC Facility and prior Substantial Completion in respect of the BCA Facility:

- (a) Project Co shall promptly Make Good any deficiency, defect or error in the Works or failure of the Works to conform to the Project Agreement, or any deficiency, defect or error in relation to any Product (collectively, a “**Construction Defect**”) whether or not such Construction Defect has been incorporated into the Facility and whether or not the Construction Defect is the result of poor workmanship, use of defective Products or Category 1 FF&E or damage through carelessness or other act or omission of Project Co. The correction of Construction Defects shall be at Project Co’s sole cost and expense. Project Co shall Make Good, in a manner acceptable to the Independent Certifier, all Construction Defects, whether or not they are specifically identified by the Independent Certifier, and Project Co shall prioritize the correction of any Construction Defects so as not to interfere with or derogate from the Works Schedule, provided that Project Co shall prioritize the correction of any Construction Defects that in the sole discretion of Contracting Authority is determined to adversely affect the day to day operation of Contracting Authority.
- (b) Project Co shall Make Good promptly other contractors’ work destroyed or damaged by such rectifications at Project Co’s expense.
- (c) If in the opinion of the Independent Certifier it is not expedient for Project Co to correct any Construction Defects, Contracting Authority may deduct from the amount of the Guaranteed Price the difference in value between the Works as performed and that called for by the Project Agreement. If Contracting Authority and Project Co do not agree on the difference in value, they shall refer the matter to the Independent Certifier for adjudication and the determination may be given effect as a Variation.

### **11.16 Warranty Obligations**

- (a) Project Co represents, warrants and covenants that:
  - (i) the Works shall conform to the requirements of this Project Agreement, Good Industry Practice, Applicable Law and all professional engineering principles generally accepted as standards of the industry in the Province of Ontario;
  - (ii) the Works shall be free of defects, including design defects, errors and omissions; and
  - (iii) materials and equipment shall be of good quality and in compliance with this Project Agreement.
- (b) During each Warranty Period and subject to Section 11.16(c), Project Co shall promptly, at its sole cost and expense, correct and Make Good all Construction Defects arising in respect of the Works. For greater certainty, Project Co is required to correct



- and Make Good Construction Defects related to any Product and any Category 1 FF&E during the applicable Warranty Period despite Project Co having obtained on Contracting Authority's behalf industry-standard or other equipment warranties in accordance with Section 11.16(f). For all work to correct Construction Defects, the applicable Warranty Period shall be extended for a further one year from the date of the last work completed in respect of such corrective Works. For clarity, any extension of a Warranty Period for the purposes of a correction shall only apply to the relevant Construction Defect and not the Works as a whole.
- (c) In addition to the obligation to correct and Make Good Construction Defects during the Warranty Period, Project Co shall at its expense correct and Make Good any Construction Defects that could not reasonably have been ascertained by a competent person in accordance with Good Industry Practice during a visual inspection of the Works ("**Construction Latent Defect**"), provided Contracting Authority gives Project Co written Notice of the Construction Latent Defect within the time frame applicable to such Construction Latent Defect pursuant to the *Limitations Act*, 2002 (Ontario).
- (d) The warranties described in this Section 11.16 shall cover labour and material, including, the costs of removal and replacement of covering materials. The warranties shall not limit extended warranties on any Product or item of Category 1 FF&E called for elsewhere in the Output Specifications or otherwise provided by any manufacturer of such Product or item of Category 1 FF&E.
- (e) If Project Co fails to correct and Make Good any Construction Defects or Construction Latent Defects in accordance with Sections 11.16(b) and 11.16(c) and in the time period specified in Section 11.17(a) or Section 11.17(b), as applicable, without prejudice to any other right or remedy Contracting Authority may have, Contracting Authority may correct such Construction Defects or Construction Latent Defects at Project Co's sole cost and expense.
- (f) Project Co shall obtain warranties from the manufacturers of each of the Products and items of Category 1 FF&E for the duration(s) and in accordance with the applicable requirements specified in the Output Specifications in the name of and to the benefit of both Project Co and Contracting Authority. Where, in respect of a Product warranty or Category 1 FF&E warranty, the Output Specifications do not specify a specific duration and/or other requirements, Project Co shall obtain industry-standard warranties from the applicable manufacturers in the name of and to the benefit of Project Co and Contracting Authority and shall use commercially reasonable efforts to ensure that such Product warranties and Category 1 FF&E warranties extend for as long a period from the Substantial Completion Date as can be obtained from the applicable manufacturer, but in any event such Product warranties and Category 1 FF&E warranties shall extend no less than one year from the Substantial Completion Date. Each Product warranty and Category 1 FF&E warranty shall be issued by the applicable manufacturer and delivered to Project Co no later than 30 days prior to the Substantial Completion Date. Project Co shall ensure that each Product warranty and Category 1 FF&E warranty, including any Product warranty or Category 1 FF&E warranty

extended under this Section 11.16(f), is fully assigned to Contracting Authority, at no cost or expense to Contracting Authority, at the end of the Warranty Period, as such Warranty Period may be extended in accordance with Section 11.16(b).

- (g) Subject to Section 11.13, Project Co acknowledges that Contracting Authority may, in its sole discretion, maintain, repair and/or alter any part or parts of the Works during the applicable Warranty Period and agrees that such work shall not impact any of the warranties provided by Project Co hereunder, provided that such work is carried out in accordance with Good Industry Practice and that such work does not materially alter the affected part or parts of the Works.

### **11.17 Prompt Repair of Warranty Work**

- (a) Project Co acknowledges that the timely performance of warranty work is critical to the ability of Contracting Authority to maintain effective operations of the Facility. Project Co shall use commercially reasonable efforts to respond to any requirement by Contracting Authority to correct Construction Defects and Construction Latent Defects within the time periods required by Contracting Authority (which, for certainty, may, in respect of an Emergency, require immediate correction). Project Co further acknowledges that if Contracting Authority is unable to contact Project Co and/or the corrective work is not commenced within such time period as may be required by Contracting Authority (including, for clarity, immediately in the event of an Emergency), Contracting Authority's own forces may take such emergency steps as are reasonable and appropriate to correct such Construction Defects and Construction Latent Defects, at Project Co's sole cost and expense and, except in the case of damage caused by Contracting Authority's own forces, such emergency steps taken by Contracting Authority's own forces shall not invalidate any warranties in respect of such portion of the Works affected by such corrective actions of Contracting Authority's own forces.
- (b) Subject to Section 11.17(a), Project Co shall promptly, and in any event not more than 30 days after receipt of written Notice thereof from Contracting Authority, Make Good any Construction Defects which may develop within the applicable Warranty Period and any Construction Latent Defects, and also Make Good any damage to other Works caused by the correction of such Construction Defects and Construction Latent Defects. All such corrective work shall be at Project Co's sole cost and expense and shall not be treated as, or entitle Project Co to request or form the basis of a claim for, a Variation, additional compensation or damages. The above-noted time period of 30 days shall be subject to the following:
  - (i) If the corrective work cannot be completed in the 30 days specified, Project Co shall be in compliance if Project Co:
    - (A) commences and is diligently proceeding with the corrective work within the specified time;

- (B) provides Contracting Authority with a schedule acceptable to Contracting Authority for such correction;
  - (C) reports to Contracting Authority on the status and the progress of the corrective work on an ongoing basis (including on a daily basis if requested by Contracting Authority); and
  - (D) Makes Good the Construction Defects, Construction Latent Defects or damage, as the case may be, or in accordance with such schedule.
- (c) If Project Co fails to correct and Make Good Construction Defects, Construction Latent Defects and/or damages, as the case may be, in the time specified in Section 11.17(a) or Section 11.17(b), as applicable, or subsequently agreed upon, without prejudice to any other right or remedy Contracting Authority may have, Contracting Authority may correct such works at the sole risk, cost and expense of Project Co and may draw down on the Warranty Letter of Credit to fund or as reimbursement for such costs and expenses.
- (d) The performance of corrective work and Making Good of Construction Defects, Construction Latent Defects and/or damages, as the case may be, for which Project Co is responsible shall be commenced and completed as expeditiously as possible in accordance with Section 11.17(a) or Section 11.17(b), as applicable, and shall be executed at times convenient to Contracting Authority and this may require work outside normal working hours at Project Co's expense. Any extraordinary measures required to complete such Work, as directed by Contracting Authority to accommodate the operation of the Facility or other aspects of the Project as constructed, shall be at Project Co's sole cost and expense.
- (e) The foregoing express warranties shall not deprive Contracting Authority of any action, right or remedy otherwise available to Contracting Authority at law or in equity for breach of any of the provisions of the Project Agreement or any Ancillary Document by Project Co, and the periods referred to in this Section 11.17, shall not be construed as a limitation on the time in which Contracting Authority may pursue such other action, right or remedy.
- (f) Notwithstanding the time periods specified in Sections 11.17(a) and 11.17(b), Project Co shall promptly, and in any event within 24 hours after receipt of notice thereof from Contracting Authority, Make Good any Construction Defects in the Courthouse Security Systems in accordance with this Section 11.17.

### **11.18 Warranty Letter of Credit**

- (a) On or before the Substantial Completion Date, Project Co shall deliver, or cause to be delivered, to Contracting Authority an unconditional and irrevocable letter of credit from any one or more of the Schedule I Canadian chartered banks or any other financial institutions approved by Contracting Authority in Contracting Authority's sole and

- absolute discretion, 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 Contracting Authority, in its sole and absolute discretion, in favour and for the direct and exclusive benefit of Contracting Authority, in the form set out in Schedule 7B – Warranty Letter of Credit (the “**Warranty Letter of Credit**”). The Warranty Letter of Credit shall be in the amount equal to [REDACTED] (\$[REDACTED]) (the “**Required Amount**”).
- (b) Notwithstanding Section 4.3(a), if the Warranty Letter of Credit has not been delivered to Contracting Authority by the Substantial Completion Payment Date, Contracting Authority may withhold from the Substantial Completion Payment a holdback amount of [REDACTED] (\$[REDACTED]) (the “**Warranty Cash Amount**”). In such an event, the Warranty Cash Amount may be withheld by Contracting Authority until,
- (i) if the Warranty Letter of Credit is delivered to Contracting Authority after the Substantial Completion Payment Date, the date that is five Business Days following the date that the Warranty Letter of Credit has been delivered to Contracting Authority; or
- (ii) if the Warranty Letter of Credit is not delivered to Contracting Authority after the Substantial Completion Payment Date, the Warranty Security Return Date,
- and, upon the applicable day, the Warranty Cash Amount, less the amount of any claims previously satisfied by a draw in accordance with Section 11.18(b), shall be paid by Contracting Authority to Project Co.
- (c) Until receipt of the Warranty Letter of Credit, Contracting Authority may use the Warranty Cash Amount in the place of, in the same manner as and for the same purpose as the Warranty Letter of Credit. The withholding of the Warranty Cash Amount in accordance with Section 11.18(b) shall be Contracting Authority’s sole remedy for failure on the part of Project Co to deliver the Warranty Letter of Credit by the Substantial Completion Payment Date and, for greater certainty, Contracting Authority shall not be entitled to withhold payment of the balance of the Substantial Completion Payment as a result of any such failure on the part of Project Co to deliver the Warranty Letter of Credit.
- (d) Contracting Authority shall be entitled to draw on the Warranty Letter of Credit or the Warranty Cash Amount, as applicable:
- (i) in an amount equal to the amount of the costs estimated by the Independent Certifier for Contracting Authority to rectify defects, deficiencies or non-compliant items in the Work, together with all other damages suffered by Contracting Authority, including any costs incurred by Contracting Authority in accordance with Sections 11.16 and 11.17 as a result of Project Co’s failure to comply with its obligations under Sections 11.16 and 11.17; and/or

- (ii) to satisfy any amounts that are due and have remained outstanding for 30 days by Project Co pursuant to the terms of this Project Agreement or by the Construction Guarantor pursuant to Schedule 12 – Form of Performance Guarantee of Construction Guarantor.
- (e) Contracting Authority may make multiple calls on the Warranty Letter of Credit.
- (f) In the event that Contracting Authority draws on the Warranty Letter of Credit or the Warranty Cash Amount, Project Co shall forthwith, and in any event within 5 Business Days following such draw, provide Contracting Authority with a replacement or additional letter of credit such that the Warranty Letter of Credit(s) is at all times during the period between Substantial Completion and the Warranty Security Return Date in the Required Amount.
- (g) Unless the Warranty Letter of Credit is fully drawn by Contracting Authority in accordance with the provisions of this Project Agreement, Contracting Authority shall release and deliver the Warranty Letter of Credit to Project Co on the Warranty Security Return Date.
- (h) In the event the Warranty Letter of Credit has an expiry date that is prior to Warranty Security Return Date and Project Co does not renew (or does not cause the renewal of) the Warranty Letter of Credit and does not provide (or cause the provision of) proof of such renewal to Contracting Authority before the date that is 20 calendar days before the Warranty Letter of Credit's expiry date, then at any time during such 20 calendar day period and upon providing prior written Notice to Project Co, Contracting Authority may draw upon the full amount of the Warranty Letter of Credit and deposit the cash proceeds thereof in a segregated bank account selected by Project Co (provided that such bank account must be at a bank that meets the thresholds described in Section 11.18(a) and if Project Co does not promptly select such bank account then such bank account may be selected by Contracting Authority in its sole and absolute discretion) and such cash proceeds shall thereupon stand in place of the Warranty Letter of Credit until Project Co delivers (or causes the delivery of) a replacement Warranty Letter of Credit to Contracting Authority. All interest earned on such cash proceeds shall be for the benefit of Project Co. Contracting Authority shall be entitled to withdraw such cash proceeds in the same manner that it is permitted to draw upon the Warranty Letter of Credit under Section 11.18(b). Upon the delivery of a replacement Warranty Letter of Credit by Project Co to Contracting Authority, all remaining cash proceeds and all accrued interest thereon from such segregated bank account shall be returned to Project Co or as Project Co may direct within five Business Days after the delivery of such replacement Warranty Letter of Credit by Project Co to Contracting Authority.

### **11.19 Minimize Disturbance and Works in Existing Facilities**

- (a) Project Co acknowledges that in addition to the use of Good Industry Practice, this Project Agreement includes instructions as to the manner in which the Works are to be performed in order to minimize disturbance to the Existing Facilities, including with

- respect to noise, dust control, security, access to the Lands and the particular requirements in respect of those portions of the Works which are to be carried out within the Existing Facilities and in respect of those portions of the Works where connections are being made to the Existing Facilities. In addition, Project Co acknowledges that it has familiarized itself with the facility and/or building operations of the Existing Facilities and will perform the Works taking into account the requirements of Contracting Authority to maintain normal facility and/or building operations of the Existing Facilities. Project Co further acknowledges that the Cost of the Works includes all premium time and overtime that may be required to perform the Works in accordance with this Project Agreement and Good Industry Practice. Project Co shall develop and implement protocols in furtherance of the foregoing in accordance with the Output Specifications.
- (b) Project Co recognizes that the carrying on of Contracting Authority Activities during construction is a priority for Contracting Authority and acknowledges that it has reviewed the Project Documents. Project Co shall use all methods required to comply with the instructions set out in this Project Agreement during the performance of the Works. Project Co shall fully cooperate with Contracting Authority in complying with said instructions during the performance of the Works. Any costs incurred by Project Co in complying with said instructions shall be part of the Guaranteed Price.
- (c) Project Co acknowledges that the Project Agreement includes specifications which include instructions respecting Contracting Authority's use of the Existing Facilities. Project Co acknowledges having read and understood the said instructions and agrees to comply with the procedures set out therein. Project Co shall be responsible for any costs and expenses resulting in its failure to comply with these procedures.

#### **11.20 Substitutions**

- (a) Whenever equipment, components, materials, supplies, tools, and other items are specified or otherwise described in this Project Agreement by using the name or catalogue or model number of a particular manufacturer, fabricator, vendor or distributor, or any other material name or description, the naming or identification of the item is intended to establish the type and the minimum function and quality required, and equipment, components, materials, supplies, tools, and other items of other manufacturers, fabricators, vendors or distributors shall not be substituted without the prior written consent of Contracting Authority, in its sole discretion.

#### **11.21 Change in Standards**

- (a) Where this Project Agreement requires Project Co to comply with a technical standard in respect of the design and construction of the Facility, and that standard has changed between the date of this Project Agreement and the date that such compliance is required, then Project Co shall give Notice to Contracting Authority of such change. If, after such Notice, Contracting Authority requires compliance with the changed standard (rather than the standard applicable as of the date of this Project Agreement),

then, to the extent such change impacts the Works and would not have otherwise been taken into account by compliance with Good Industry Practice, such changed standard shall, subject to and in accordance with Schedule 22 - Variation Procedure, result in a Variation. If Contracting Authority does not require compliance with the changed standard, then Project Co shall continue to comply with the standard applicable as of the date of this Project Agreement, without a Variation therefor. This Section 11.21 shall not apply where a change in a technical standard is also a Change in Law.

## **11.22 Subcontractors and Suppliers**

- (a) Project Co shall preserve and protect the rights of the Parties under this Project Agreement with respect to the works to be performed under Subcontract, and shall:
- (i) enter into Subcontracts or written agreements with Project Co Parties to require them to perform their work as provided in the Project Agreement;
  - (ii) incorporate the relevant terms and conditions of the Project Agreement into all contracts or written agreements with Project Co Parties; and
  - (iii) be as fully responsible to Contracting Authority for acts and omissions of the Project Co Parties as for acts and omissions of persons directly employed by Project Co.
- (b) Attached in Part 1 of Schedule 8 – Project Co Parties is a list of all Project Co Parties that Project Co has engaged or caused to be engaged for the performance of the Work as of the date of execution of this Project Agreement. Project Co agrees to update such list from time to time as additional Project Co Parties are engaged. Any of these named Project Co Parties listed by Project Co may be changed by Project Co upon prior Notice to (but without the approval of) the Contracting Authority Representative, provided however, that if the Contracting Authority Representative reasonably objects to any change to a mechanical or electrical Subcontractor that is a Project Co Party, then Project Co shall select an alternative replacement mechanical or electrical Subcontractor to which the Contracting Authority Representative does not reasonably object.
- (c) Project Co hereby agrees to contractually obligate the Construction Contractor to enter into the Construction Contractor’s Direct Agreement and, subject to Section 11.22(d), to cause the Construction Contractor to cause each of the other Project Co Parties, including Suppliers leasing any construction machinery and equipment, to enter into the Subcontractor’s Direct Agreement, to evidence, among other things, that Contracting Authority shall have the right to cure any default by the Construction Contractor under the Subcontract.
- (d) With the exception of the Subcontracts specifically listed in items (a) through (d) in Part 2 of Schedule 8 – Project Co Parties, none of Project Co, the Construction Contractor or the applicable Project Co Party are obliged to enter into a Subcontractor’s

Direct Agreement in respect of Subcontracts having a total estimated cost of \$[REDACTED] or less.

- (e) Subject to Section 11.22(d), Project Co agrees to deliver to Contracting Authority the Subcontractor's Direct Agreements by the applicable due dates set out in Part 2 of Schedule 8 – Project Co Parties. If, following the date that 100% Construction Document Submittals are submitted to Contracting Authority in accordance with Schedule 10 – Review Procedure, Project Co is required to enter into any additional Subcontractor's Direct Agreement pursuant to this Section 11.22, Project Co shall deliver such Subcontractor's Direct Agreements to Contracting Authority within 30 days of execution.

### **11.23 Apprenticeship Plan and Program**

- (a) No later than 90 days after Financial Close, Project Co shall provide a plan setting out Project Co's Project-specific approach to promoting apprenticeship training opportunities in connection with the completion of Works on the Project (the "**Apprenticeship Plan**") for review and approval by Contracting Authority. The Apprenticeship Plan shall include,
- (i) specific objectives and methods for training and apprenticeship opportunities for the Project on a trade-by-trade basis;
  - (ii) apprenticeship opportunities for each trade required on the Project;
  - (iii) the number of apprentices to be employed for the Works, shall be in accordance with journey person to apprentice ratios established in section 60 of the *Ontario College of Trades and Apprenticeships Act, 2009*, or in any successor legislation thereto;
  - (iv) a confirmation that apprenticeships will be registered with the Ministry of Training, Colleges and Universities and the Ontario College of Trades, as applicable;
  - (v) a program to ensure the required supply of apprentices to meet Project Co's Apprenticeship Plan targets and requirements;
  - (vi) a program to support apprentices on the Project to complete their apprenticeships prior to Substantial Completion and, for those whose apprenticeships are not complete by the Substantial Completion Date a program to support apprentices, on a commercially reasonable basis, to complete their apprenticeships after the Substantial Completion Date; and
  - (vii) a focused apprenticeship program for at-risk youth, historically disadvantaged groups including low-income, racialized and immigrant populations, women, aboriginal persons, newcomers to Ontario, veterans, persons with disabilities, and residents of the community(ies) in which the Project is located.



- (b) Project Co shall implement the approved Apprenticeship Plan.
- (c) On each anniversary of Commercial Close until the Substantial Completion Date (on which date the last submission under this Section 11.23(c) shall be made), Project Co shall provide an annual report to Contracting Authority on the implementation of the Apprenticeship Plan which report shall include,
  - (i) statistics on the number of apprentices involved in the Project relative to the number of journeypersons, for each month of the Project; and
  - (ii) detailed information setting out Project Co's progress toward achieving the objectives set out in the Apprenticeship Plan, including an identification of any barriers that prevented Project Co from achieving its objectives.
- (d) Contracting Authority may require Project Co to amend its Apprenticeship Plan if, in its opinion, acting reasonably, Project Co is failing to maximize apprenticeship opportunities on the Project pursuant to the then current Apprenticeship Plan.
- (e) Contracting Authority may, in its sole discretion, release Project Co's Apprenticeship Plan to the public. Project Co's Apprenticeship Plan shall not be Confidential Information.

**11.24 Intentionally Deleted**

**11.25 COR Certification**

- (a) Project Co shall, at its own cost and risk, at all times during the performance of the Works cause a COR-Qualified Construction Project Co Party or COR-Certified Construction Project Co Party, as the case may be, to:
  - (i) to the extent a COR-Qualified Construction Project Co Party has not obtained COR Certification prior to Financial Close,
    - (A) use best efforts to obtain its COR Certification no later than eighteen months following Financial Close. In the event that Contracting Authority is satisfied, in its sole discretion, that the COR-Qualified Construction Project Co Party has used best efforts to obtain its COR Certification in accordance with this Section 11.25 and the COR-Qualified Construction Project Co Party has not obtained COR Certification by the end of such eighteen month period, then Contracting Authority shall establish a time period during which the COR-Qualified Construction Project Co Party shall obtain its COR Certification, which time period shall not be less than 30 days, and
    - (B) maintain in good standing and, as applicable, renew its OHSAS 18001 Accreditation until such time as the COR-Qualified Construction Project Co Party has obtained its COR Certification, and

- (ii) once the COR-Qualified Construction Project Co Party is certified (hereafter referred to as a “**COR-Certified Construction Project Co Party**”), maintain in good standing, and, as applicable, renew its COR Certification; and
  - (iii) comply with all requirements of its OHSAS 18001 Accreditation (if a COR-Qualified Construction Project Co Party) or COR Certification (if a COR-Certified Construction Project Co Party), in accordance with its terms.
- (b) Without limiting any other provision of this Project Agreement, if at any time during the performance of the Works:
- (i) a COR-Qualified Construction Project Co Party fails to obtain its COR Certification in accordance with this Project Agreement and Contracting Authority determines that the failure to obtain the COR Certification is as a result of such COR-Qualified Construction Project Co Party not using best efforts to obtain such certification and Contracting Authority delivers a Notice to Project Co indicating that a COR-Qualified Construction Project Co Party has failed to obtain its COR Certification in accordance with this Project Agreement; or
  - (ii) a COR-Qualified Construction Project Co Party fails to maintain its OHSAS 18001 Accreditation in good standing in accordance with its terms or in accordance with this Project Agreement; or
  - (iii) a COR-Certified Construction Project Co Party fails to maintain its COR Certification in good standing in accordance with its terms or in accordance with this Project Agreement;  
  
(each a “**H&S Certification Default Event**”); or
  - (iv) Contracting Authority delivers a Notice to Project Co indicating that Contracting Authority is of the reasonable opinion that a COR-Qualified Construction Project Co Party will fail to maintain its OHSAS 18001 Accreditation in good standing in accordance with its terms or in accordance with this Project Agreement; or
  - (v) Contracting Authority delivers a Notice to Project Co indicating that Contracting Authority is of the reasonable opinion that a COR-Certified Construction Project Co Party will fail to maintain its COR Certification in good standing in accordance with its terms or in accordance with this Project Agreement,
- Project Co shall:
- (vi) immediately upon the occurrence of a H&S Certification Default Event, notify Contracting Authority that a H&S Certification Default Event has occurred, and:

- (A) produce and deliver to Contracting Authority a report identifying the reasons for the failure to obtain or maintain in good standing the COR Certification or OHSAS 18001 Accreditation, as the case may be;
  - (B) produce and deliver to Contracting Authority a plan showing the steps that are to be taken to have the COR Certification or OHSAS 18001 Accreditation, as the case may be, obtained or reinstated in good standing within a period of not more than 30 days (the “**H&S Certification Reinstatement Plan**”), which H&S Certification Reinstatement Plan shall be subject to review and approval by Contracting Authority and, to the extent Contracting Authority requires any amendments or revisions to be made to the H&S Certification Reinstatement Plan, Project Co shall take, and shall cause the COR-Qualified Construction Project Co Party or the COR-Certified Construction Project Co Party, as the case may be, to take, all reasonable steps as may be necessary to make all such required amendments and revisions and deliver to Contracting Authority an amended H&S Certification Reinstatement Plan not more than 5 Business Days from the date on which such request is made by Contracting Authority;
  - (C) no later than 5 Business Days after the H&S Certification Default Event occurs, arrange to have conducted a complete H&S Construction Inspection in accordance with Section 15.1(h); or and
  - (D) arrange to have conducted an H&S Construction Re-Inspection in accordance with Section 15.1(k), if required, or
- (vii) within 5 Business Days of receipt of the Notice from Contracting Authority under Section 11.25(b)(iv) or (v):
- (A) produce and deliver to the Contracting Authority Representative a report identifying the manner in which the COR Certification or OHSAS 18001 Accreditation, as the case may be, shall be maintained in good standing or obtained, as applicable;
  - (B) produce and deliver to the Contracting Authority Representative a plan showing the steps that are to be taken to ensure that the COR Certification or OHSAS 18001 Accreditation, as the case may be, will be maintained in good standing without interruption (the “**H&S Certification Maintenance Plan**”), which H&S Certification Maintenance Plan shall be subject to review and approval by Contracting Authority and, to the extent Contracting Authority requires any amendments or revisions to be made to the H&S Certification Maintenance Plan, Project Co shall take all reasonable steps as may be necessary to make all such required amendments and revisions and deliver to Contracting Authority an amended H&S Certification

Maintenance Plan not more than 5 Business Days from the date on which such request is made by Contracting Authority; and

- (C) arrange to have conducted a complete H&S Construction Inspection in accordance with Section 15.1(h), and
- (D) arrange to have conducted an H&S Construction Re-Inspection in accordance with 15.1(k), if required.

## **11.26 Demolition Requirements**

- (a) Without limiting Project Co's obligation to perform the Works at all times in accordance with Applicable Law, in respect of any Demolition, Project Co shall, and shall cause each Project Co Party that is performing any part of the Demolition to, at such person's own cost and risk and at all times during the performance of the Works:
  - (i) conduct all work in connection with any Demolition at all times in compliance with Section 3 of the Performance Standards Regulation and the Building Code;
  - (ii) ensure that all persons having responsibility for the supervision of any such Demolition are qualified as either a professional engineer, limited license holder or provisional license holder (as such terms are used in the Performance Standards Regulation) (such person is hereinafter referred to as a "**Demolition Supervisor**");
  - (iii) observe and perform the Demolition in a manner that is consistent with the recommendations set forth in the Demolition Guidelines in all material respects; and
  - (iv) in respect of any Complex Structure Demolition to be conducted by Project Co or any Project Co Party:
    - (A) prepare detailed specifications relating to such Complex Structure Demolition which specifications will include, without limitation, a detailed risk assessment and risk mitigation plan assessing all apparent or inferable risks that might be associated with the Demolition, colour-coded Load-Path Diagrams (which will include a description of the Demolition Requirements set forth herein) to supplement the Site work plans and blueprints relating to the Demolition and all other technical requirements relating to the Complex Structure Demolition (the "**Demolition Specifications**");
    - (B) at all times when a Complex Structure Demolition is being performed that the Demolition Specifications, Demolition work plan and Load-Path Diagram, be present and available at the Site at which such Complex Structure Demolition is being performed; and

- (C) ensure at all times when a Complex Structure Demolition is being performed that a Demolition Supervisor will be on the Site at which such Complex Structure Demolition is being performed and actively supervising all activities in respect of the Complex Structure Demolition;

(collectively the “**Demolition Requirements**”).

- (b) If at any time while any Demolition is being performed pursuant to this Project Agreement, Project Co or any Project Co Party that is performing any part of any Demolition receives notice from Contracting Authority or any Province Person or Governmental Authority that the Demolition is being conducted in a manner that is:
  - (i) not in compliance with the Demolition Requirements; or
  - (ii) not otherwise in accordance with this Project Agreement (such event referred to as a “**Demolition Default Event**”),

Project Co shall, and shall cause any applicable Project Co Party to:

- (A) immediately upon the occurrence of a Demolition Default Event, notify Contracting Authority that a Demolition Default Event has occurred, unless Contracting Authority was the person that provided notice of the Demolition Default Event;
- (B) cease all work in respect of such Demolition; and
- (C) within 5 Business Days of receipt of a Notice of a Demolition Default Event produce and deliver to the Contracting Authority Representative:
  - (I) a report identifying the reasons for the occurrence of the Demolition Default Event; and
  - (II) a Demolition Plan showing the steps that are to be taken to rectify the Demolition Default Event within a period of not more than 30 days from the occurrence of the Demolition Default Event, which Demolition Plan shall be subject to review and approval by Contracting Authority and, to the extent Contracting Authority requires any amendments or revisions to be made to such Demolition Plan, Project Co and the applicable Project Co Party shall take all reasonable steps as may be necessary to make all such required amendments and revisions and deliver to Contracting Authority an amended and revised Demolition Plan not more than 5 Business Days from the date on which such request is made by Contracting Authority.

- (c) No Demolition shall be recommenced at the Site that was the subject of the Demolition Default Event until:
- (i) Contracting Authority is satisfied that Project Co or the applicable Project Co Party has taken all necessary steps to remediate such Demolition Default Event in accordance with Demolition Plan; and
  - (ii) Contracting Authority has received a report, in form and substance satisfactory to Contracting Authority, prepared by a professional engineer that the Demolition Default Event has been remediated and the Site has been properly prepared for the Demolition to proceed in accordance with the Demolition Plan.

### **11.27 Pandemic and Epidemic Plans**

- (a) No later than 90 days following Financial Close, Project Co shall, at its cost, submit a plan to Contracting Authority that sets out the activities and reporting to Contracting Authority that Project Co will implement as part of the Works to prepare for and respond to any potential or actual pandemic or epidemic that may affect the Works (including the COVID-19 pandemic or any subsequent outbreak of COVID-19) and satisfies the requirements of Section 11.27(b) (the “**Pandemic and Epidemic Response and Mitigation Plan**”).
- (b) The Pandemic and Epidemic Response and Mitigation Plan shall, at a minimum, satisfy the following requirements:
- (i) the detailed steps Project Co and its Subcontractors have undertaken and will undertake to prepare for and respond to the effects of the COVID-19 pandemic or any potential future pandemic or epidemic that could occur and affect the Works, including a subsequent outbreak of COVID-19; and
  - (ii) in the event that, at any time during the Project Term, a specific pandemic or epidemic (including the COVID-19 pandemic or subsequent outbreak of COVID-19) is reasonably foreseeable and imminently likely to occur and affect the Works, Project Co shall update its Pandemic and Epidemic Response and Mitigation Plan accordingly, which shall, at a minimum, satisfy the requirements set out in Section 11.27(a), and be applicable mutatis mutandis in respect of such pandemic or epidemic.
- (c) The Pandemic and Epidemic Response and Mitigation Plan and all updates to such plan shall be subject to review by Contracting Authority pursuant to Schedule 10 – Review Procedure.
- (d) In the event that, at any time prior to Substantial Completion, a specific pandemic or epidemic (including the COVID-19 pandemic or any subsequent outbreak of COVID-19) is reasonably foreseeable and likely to occur and affect the Works or otherwise occurs and affects the Works, Project Co shall, at its cost, promptly (at the request of

Contracting Authority or on its volition) update the Pandemic and Epidemic Response and Mitigation Plan on a monthly basis and submit each update with the next Works Report until such time as the Parties agree, acting reasonably, that either the pandemic or epidemic will not occur and affect the Works or such epidemic or pandemic has ended, no longer affects the Works and no further updates to such plan are required. Following the review by Contracting Authority of each updated Pandemic and Epidemic Response and Mitigation Plan pursuant to Schedule 10 – Review Procedure, Project Co shall, without limiting any other obligation of Project Co under the Project Agreement or Applicable Law, implement such plan in accordance with Schedule 10 – Review Procedure, at its cost and risk other than as provided for in Section 29.4.

- (e) Any Pandemic and Epidemic Response and Mitigation Plan (including any update thereto) or the potential or actual impact of any pandemic or epidemic on the Works may, at the request of a Party, be discussed at any meeting of the Works Committee or at any other meeting between the Parties reasonably requested by a Party during the Project Term. Any Party may, acting reasonably, require that any such other meeting be on a “without prejudice basis”.

## **12. REPRESENTATIVES**

### **12.1 The Contracting Authority Representative**

- (a) Subject to the limitations set out in Section 12.1(d), the Contracting Authority Representative shall exercise the functions and powers identified in this Project Agreement as functions or powers to be performed by the Contracting Authority Representative and such other functions and powers of Contracting Authority under this Project Agreement as Contracting Authority may notify Project Co from time to time.
- (b) Contracting Authority may, from time to time by written Notice to Project Co, change the 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 Contracting Authority Representative has been appointed, or when the Contracting Authority Representative is unable, through illness, incapacity or any other reason whatsoever, to perform the Contracting Authority Representative’s functions under this Project Agreement, Contracting Authority shall perform or may, by written Notice to Project Co, promptly appoint an alternative Contracting Authority Representative to perform the functions which would otherwise be performed by the Contracting Authority Representative. Upon receipt of such written Notice, Project Co and the Project Co Representative shall be entitled to treat any act of such alternative Contracting Authority Representative which is permitted by this Project Agreement as being authorized by Contracting Authority, and Project Co and the Project Co Representative shall not be required to determine whether authority has in fact been given.

- (d) The Contracting Authority Representative shall not, except as otherwise provided in this Project Agreement, be entitled to modify or waive any provision of this Project Agreement or to authorize a Variation.
- (e) Subject to the limitations set out in Sections 12.1(a) and 12.1(d), unless otherwise notified in writing, Project Co and the Project Co Representative shall be entitled to treat any act of the Contracting Authority Representative which is authorized by this Project Agreement as being authorized by Contracting Authority, and Project Co and the Project Co Representative shall not be required to determine whether authority has in fact been given.

## **12.2 The Project Co Representative**

- (a) Subject to the limitations set out in Section 12.2(d), the Project Co Representative shall have full authority to act on behalf of Project Co for all purposes of this Project Agreement.
- (b) Project Co may change the Project Co Representative with the prior written consent of Contracting Authority, not to be unreasonably withheld or delayed.
- (c) During any period when the Project Co Representative is unable, through illness, incapacity or any other reason whatsoever, to perform the Project Co Representative's functions under this Project Agreement, Project Co shall perform or may, by written Notice to Contracting Authority, promptly appoint an alternative Project Co Representative to perform the functions which would otherwise be performed by the Project Co Representative, provided that, Project Co must seek Contracting Authority's consent in accordance with Section 12.2(b) if such alternative Project Co Representative is in place for more than 180 days. Upon receipt of such written Notice, Contracting Authority and the Contracting Authority Representative shall be entitled to treat any act of such alternative Project Co Representative which is permitted by this Project Agreement as being authorized by Project Co, and Contracting Authority and the Contracting Authority Representative shall not be required to determine whether authority has in fact been given.
- (d) The Project Co Representative shall not, except as otherwise provided in this Project Agreement, be entitled to modify or waive any provision of this Project Agreement.
- (e) Subject to the limitations set out in Section 12.2(d), unless otherwise notified in writing, Contracting Authority and the Contracting Authority Representative shall be entitled to treat any act of the Project Co Representative which is authorized by this Project Agreement as being authorized by Project Co, and Contracting Authority and the Contracting Authority Representative shall not be required to determine whether authority has in fact been given.



### **12.3 Communications to Representatives**

- (a) At the time that a Party appoints or changes the appointment of the Contracting Authority Representative or the Project 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.

### **12.4 Key Individuals**

- (a) The individuals who are critical to the performance of the Works are identified in Schedule 9 – Key Individuals. Project Co shall use commercially reasonable efforts to ensure that such persons remain involved in the Works in the capacity set out in Schedule 9 – Key Individuals and, in particular, will not, for the duration of the Works, require or request any such person to be involved in any other project on behalf of Project Co or any Project Co Party if, in the opinion of Contracting Authority, acting reasonably, such involvement would have a material adverse effect on the Works.
- (b) If Project Co considers it necessary to replace any individual identified in Schedule 9 – Key Individuals, Project Co shall provide Contracting Authority with relevant information on the proposed replacement and shall consult with Contracting Authority before finalizing the appointment of such replacement. Project Co shall not replace any of the individuals identified in Schedule 9 – Key Individuals without the prior written consent of Contracting Authority, which consent shall not be withheld or delayed where the proposed replacement is suitably qualified and experienced and of equal or better quality and experience than the individual being replaced.
- (c) If Contracting Authority determines, acting reasonably, that it is in the best interests of Contracting Authority that any individual identified in Schedule 9 – Key Individuals be replaced, Contracting Authority shall notify Project Co (including a detailed explanation of the reasons for such determination), and, within 30 days of receipt by Project Co of such Notice, Project Co shall provide Contracting Authority with relevant information on the proposed replacement and shall consult with Contracting Authority before finalizing the appointment of such replacement.

## **13. WORKS SCHEDULE AND WORKS REPORT**

### **13.1 Completion of the Works**

- (a) Project Co shall complete the Works in accordance with this Project Agreement and achieve:
- (i) Interim Completion by the Scheduled Interim Completion Date;
  - (ii) Substantial Completion by the Scheduled Substantial Completion Date; and
  - (iii) Final Completion by the Scheduled Final Completion Date.

## **13.2 The Works Schedule**

- (a) From Financial Close until the Draft Works Schedule becomes the Works Schedule pursuant to Section 13.2(d), the Proposed Works Schedule shall be deemed to be the Works Schedule and, until such time, the following provisions of the Project Agreement applicable to the Works Schedule shall be applicable to the Proposed Works Schedule as though the Proposed Works Schedule was the Works Schedule: 3.2(g)(iv) 10.3(a)(i), 11.2(b)(v), 11.3(a)(iii), 11.15(a), 13.4(a), 13.6(a), 14.2(d), 21.5(h)(ii), 21.8, 24.15(c), 25.7(a)(i) and 31.2(o); the definition of “Critical Non-Conformance” set forth in Schedule 1 – Definitions and Interpretation; Sections 2.1, 2.4 and 2.7 of, and Section 3.2 of Appendix A to, Schedule 10 – Review Procedure; Section 4.2 of Schedule 14 – Outline Commissioning Program; Section 1(d) of Schedule 17 – Work Report Requirements; and Section 1.6(b) of Schedule 22 – Variation Procedure.
- (b) Project Co shall, in accordance with Schedule 19 – Works Scheduling Requirements, prepare and submit to Contracting Authority and the Independent Certifier:
- (i) within 45 calendar days of Financial Close, the Draft Works Schedule and a report indicating the differences between the Proposed Works Schedule and the Draft Works Schedule;
  - (ii) every month within 10 Business Days following the end of each calendar month from Financial Close until Final Completion, a Progress Works Schedule;
  - (iii) every month within 10 Business Days following the end of each calendar month from Financial Close until the Final Completion Date, a Look-ahead Schedule;
  - (iv) within 10 calendar days following the written request from Contracting Authority, acting reasonably, a Works Area Micro-Schedule for any specific area, and every two weeks thereafter an updated Works Area Micro-Schedule for the specific area until the Works in the area is complete;
  - (v) within 15 calendar days of the Final Completion Date, the As-built Works Schedule and the final Works Report; and
  - (vi) at any time prior to Substantial Completion, within 5 calendar days following the written request by Contracting Authority, existing current or past versions of the Works Schedule or Works Report,
- each meeting the requirements of Schedule 19 – Works Scheduling Requirements to the satisfaction of Contracting Authority that support the completion of the Works in accordance with Section 13.1.
- (c) Contracting Authority shall, within 15 Business Days of receipt thereof, provide Project Co with comments on the first Draft Works Schedule in accordance with Schedule 10 – Review Procedure. Project Co shall revise and resubmit the Draft Works Schedule to the extent required by Schedule 10 – Review Procedure within 15 Business Days of

- receipt of any comments from Contracting Authority. Contracting Authority shall provide any comments on each subsequent Draft Works Schedule within 5 Business Days of receipt thereof. Section 32.5(a) shall apply in respect of any Compensation Event that occurs after the date that is 66 days following Financial Close and prior to Contracting Authority assigning the comment “NO COMMENT” or “MINOR NON-CONFORMANCE” to the Draft Works Schedule referred to in Section 13.2(b)(i), provided that in the event Contracting Authority does not provide Project Co with its comments on the Draft Works Schedule within such 15 Business Day time period, such 66 day time period shall be automatically extended by the number of days that Contracting Authority failed to provide such comments following the expiry of such 15 Business Day time period. For greater certainty, Contracting Authority’s comments on the Project Co Phasing Plan shall be limited to comments in respect of non-conformances with the requirements set out in this Project Agreement, including Schedule 33 - Facility Construction Requirements.
- (d) When agreed by the Parties, the Draft Works Schedule shall become the Works Schedule, and on such date the Works Schedule shall replace the Proposed Works Schedule.
- (e) Project Co shall submit a draft Works Area Micro-Schedule in accordance with Section 13.2(b)(iv) and Schedule 19 – Works Scheduling Requirements for any portion of the Progress Works Schedule relating to any specific area of the Works involving:
- (i) integration or commissioning activities where the current scheduling information is not sufficiently detailed to allow for the effective use of resources of Contracting Authority; or
  - (ii) work activities by either Project Co or Contracting Authority that are dependent upon the activities of the other Party,
- where such activity, in Contracting Authority’s opinion, acting reasonably, requires enhanced scheduling detail from Project Co to support the effective coordination of such activity in that specific area.
- (f) Contracting Authority shall provide Project Co with comments on the draft of a Works Area Micro-Schedule in accordance with Schedule 10 - Review Procedure. Project Co shall revise the draft of the Works Area Micro-Schedule to the extent required by Schedule 10 - Review Procedure within 5 days of receipt of any comments from Contracting Authority.
- (g) When agreed by the Parties in writing, the draft of the Works Area Micro-Schedule shall become the Works Area Micro-Schedule for that specific area.

- (h) At the request of the Contracting Authority Representative, the Project Co Representative shall review the Works Schedule with the Contracting Authority Representative to explain to the Contracting Authority Representative's satisfaction:
  - (i) the activity logic and planning assumptions contained in the Works Schedule;
  - (ii) any proposed changes to the critical path of the Works;
  - (iii) the impact of the Works on the Works Milestones; and
  - (iv) any other matter raised by the Contracting Authority Representative concerning the Project Schedule.
- (i) Project Co shall participate in meetings and conduct workshops with Contracting Authority in relation to the Project Schedule in accordance with Section 3 of Schedule 19 – Works Scheduling Requirements.
- (j) Project Co and Contracting Authority shall comply with the provisions of Schedule 19 – Works Scheduling Requirements.
- (k) Contracting Authority shall provide Project Co with comments on the As-built Works Schedule in accordance with Schedule 10 – Review Procedure. Project Co shall revise the As-built Works Schedule to the extent required by Schedule 10 - Review Procedure within 10 days of receipt of any comments from Contracting Authority.
- (l) Any comment or lack of comment by Contracting Authority in regards to any Project Schedule indicating potential Delay Events pursuant to Section 31.1(a) of the Project Agreement shall not constitute any acknowledgement or acceptance of the potential delay.

### **13.3 Intentionally Deleted**

### **13.4 Failure to Maintain Schedule**

- (a) Without limiting any other provision of this Project Agreement but subject to Article 31, if, at any time:
  - (i) the actual progress of the Works has significantly fallen behind the Works Schedule or a Recovery Schedule, as applicable, including, for clarity, any failure of Project Co to achieve a Works Milestone, including Interim Completion by the Interim Completion Date; or
  - (ii) the revised implementation strategy, forecast dates for future activities or staging has changed to the extent that it is no longer practical to compare the

Current Progress Works Schedule to the Works Schedule or the current Recovery Schedule, using Project Co's scheduling software;

- (iii) Contracting Authority is of the opinion that:
- (A) the actual progress of the Works has significantly fallen behind the Current Progress Works Schedule;
  - (B) Project Co will not achieve Interim Completion by the Scheduled Interim Completion Date;
  - (C) Project Co will not achieve Substantial Completion by the Scheduled Substantial Completion Date;
  - (D) Project Co will not achieve Substantial Completion by the Longstop Date; or
  - (E) the revised implementation strategy, forecast dates for future activities or staging has changed to the extent that it is no longer practical to compare the Current Progress Works Schedule to the Works Schedule or the current Recovery Schedule,

Contracting Authority may give Notice to Project Co and Project Co shall be required:

- (iv) within 5 Business Days of receipt, or within one month in the circumstances set forth in Sections 13.4(a)(ii) or 13.4(a)(iii)(D), of notice from Contracting Authority, to produce and deliver to each of the Contracting Authority Representative and the Independent Certifier:
- (A) a schedule (the "**Recovery Schedule**") which shall comply with all requirements of a Progress Works Schedule as set out in Section 8 of Schedule 19 – Works Scheduling Requirements, except that:
    - (I) its title shall be "Recovery Schedule", and
    - (II) for the first Recovery Schedule, the Works Schedule baseline shall be shown in the Recovery Schedule using the scheduling software's baseline functionality to visually indicate the variance between the Works Schedule and the first Recovery Schedule, or
    - (III) for subsequent Recovery Schedules, if applicable, the current Recovery Schedule baseline shall be shown in the new Recovery Schedule using the scheduling software's baseline functionality to visually indicate the variance between the current Recovery Schedule and the new Recovery Schedule,

- (B) and, if applicable, the Recovery Schedule shall show the new strategy or steps that are to be taken by Project Co to eliminate or reduce the delay to:
  - (I) achieve Interim Completion by the Scheduled Interim Completion Date;
  - (II) achieve Substantial Completion by the Scheduled Substantial Completion Date; or
  - (III) if Substantial Completion will not be achieved by the Scheduled Substantial Completion Date, achieve Substantial Completion by the Longstop Date; and
- (C) a report (the “**Recovery Schedule Report**”) which shall comply with all requirements of a Works Schedule Progress Report as set forth in Section 1(d) of Schedule 17 – Works Report Requirements except that:
  - (I) its title shall be “Recovery Schedule Report”;
  - (II) the Recovery Schedule Report shall describe in narrative form:
    - (i) all variances between the Works Schedule and the Recovery Schedule, or, if applicable, between the current Recovery Schedule and a new Recovery Schedule; and
    - (ii) if applicable, the reasons for the delay and/or changes to the implementation strategy together with a description of the new strategy or steps that are to be taken by Project Co to eliminate or reduce the delay to Project Co:
      - a) achieving Interim Completion by the Scheduled Interim Completion Date;
      - b) achieving Substantial Completion by the Scheduled Substantial Completion Date; or
      - c) achieving Substantial Completion by the Longstop Date, as applicable,
  - (v) if applicable, bring the progress of the Works back on schedule in accordance with the deliverables provided for in Section 13.4(a)(iv).
- (b) Contracting Authority may, acting reasonably, give notice to the Lenders’ Agent pursuant to Section 13 of the Lenders’ Direct Agreement that Project Co is failing to

- maintain the schedule, together with the relevant information supporting Contracting Authority's opinion that Project Co is failing to maintain the schedule.
- (c) For greater certainty, provided that Project Co has complied with this Section 13.4 and is not in default under Section 35.1(a)(iii), the failure to achieve Interim Completion by the Scheduled Interim Completion Date on its own shall not be a Project Co Event of Default for the purposes of Section 35.1(a)(vi).

#### **13.4A Notification of Early Interim Completion**

- (a) Unless Project Co obtains the prior written consent of the Contracting Authority, in its sole discretion, Project Co shall not be entitled to the Interim Completion Certificate prior to, and the Interim Completion Date shall not be earlier than, the Scheduled Interim Completion Date.
- (b) If Project Co advises Contracting Authority that it expects to be able to achieve Interim Completion prior to the Scheduled Interim Completion Date, the Contracting Authority Representative shall be entitled to require Project Co to produce and submit to the Contracting Authority Representative a revised Progress Works Schedule or Recovery Schedule, as applicable, showing the manner and the periods in which the Works shall be performed and what the revised date for Interim Completion would be so as to enable Contracting Authority to consider at its sole discretion:
- (i) whether to agree to an earlier Scheduled Interim Completion Date; and
  - (ii) what modifications, if any, shall be required to this Project Agreement in order to accommodate such earlier Scheduled Interim Completion Date.

All costs associated with any such modifications to this Project Agreement shall be borne by Project Co.

#### **13.5 Notification of Early Substantial Completion**

- (a) Unless Project Co obtains the prior written consent of Contracting Authority, in Contracting Authority's sole discretion, Project Co shall not be entitled to the Substantial Completion Certificate prior to, and the Substantial Completion Date and Substantial Completion Payment Date shall not be earlier than, the Scheduled Substantial Completion Date.
- (b) If Project Co advises Contracting Authority that Project Co expects to be able to achieve Substantial Completion prior to the Scheduled Substantial Completion Date, the Contracting Authority Representative shall be entitled to require Project Co to produce and submit to the Contracting Authority Representative a revised Progress Works Schedule or Recovery Schedule, as applicable, showing the manner and the periods in which the Works shall be performed and what the revised date for Substantial Completion would be so as to enable Contracting Authority to consider at its sole discretion:

- (i) whether to agree to an earlier Scheduled Substantial Completion Date; and
  - (ii) what modifications, if any, shall be required to this Project Agreement in order to accommodate such earlier Scheduled Substantial Completion Date.
- (c) All costs associated with any such modifications to this Project Agreement shall be borne by Project Co.

### **13.6 Works Report**

- (a) Project Co shall continuously monitor the progress of the Works in relation to the Works Schedule and, within 10 Business Days following the end of each calendar month from Financial Close until the Final Completion Date, Project Co shall provide to the Contracting Authority Representative and the Independent Certifier a works report (each, a “**Works Report**”), which will include:

- (i) an executive summary describing the general status of the Works and progress made over the relevant month;
- (ii) a Current Progress Works Schedule and a Look-ahead Schedule, all in accordance with Schedule 19 – Works Scheduling Requirements;
- (iii) a narrative description of any Disputes related to the Works, including any action that has taken place over the relevant month to resolve such Disputes;
- (iv) a narrative description of the status of any Proceeding at Risk Matter that has not been resolved pursuant to Section 14.6(b), in accordance with Schedule 27 – Dispute Resolution Procedure or otherwise;
- (v) an update on those matters set out in Schedule 17 – Works Report Requirements; and
- (vi) any other information specifically requested by Contracting Authority on the progress of the Works,

all in form and substance satisfactory to Contracting Authority, acting reasonably. For greater certainty, for all updates and revisions to the Project Schedules, Project Co must provide a revised critical path reflecting the updated or revised Works Schedule.

- (b) Project Co shall use and interact with, and ensure that the Construction Contractor uses and interacts with, the On-line (web based) Project Management (“**OCPM**”) software system specified by Contracting Authority. It is contemplated that the OCPM software system will automate certain aspects of the processes identified in Schedule 10 – Review Procedure, Schedule 11 – Design Quality Plan and Construction Quality Plan, Schedule 22 – Variation Procedure and Schedule 17 – Works Report Requirements and other processes as determined by Contracting Authority in its sole discretion.



## **14. WORKS COMMITTEE**

### **14.1 Establishment**

- (a) The Parties shall, within 30 days following Financial Close, establish a committee (the “**Works Committee**”) consisting of:
- (i) 3 representatives appointed by MAG from time to time;
  - (ii) the following 3 representatives appointed by Contracting Authority:
    - (A) the Contracting Authority Representative; and
    - (B) 2 other representatives appointed by Contracting Authority from time to time; and
  - (iii) the following 3 representatives appointed by Project Co:
    - (A) the Project Co Representative;
    - (B) 1 representative of the Construction Contractor; and
    - (C) such other representative appointed by Project Co from time to time.
- (b) The Independent Certifier shall be required to attend meetings as a non-voting member of the Works Committee. The Design Compliance Consultant shall be entitled to, but not required to, attend meetings as a non-voting member of the Works Committee. Members of the Works Committee may invite, on prior notice to all members, such advisors and consultants as they require from time to time to attend meetings and provide briefings to the Works Committee.
- (c) The Contracting Authority Representative shall be the chairperson of the Works Committee.

### **14.2 Function and Role**

- (a) The Works Committee shall assist the Parties by promoting cooperative and effective communication with respect to matters related to the Works. The Works Committee shall interface with the FF&E Steering Committee as and when required.
- (b) The Works Committee shall be responsible for receiving and reviewing all matters related to the Works, including:
- (i) any design, construction and commissioning issues;
  - (ii) the Project Schedules;

- (iii) any issues arising from reports or documents provided by Project Co or the Independent Certifier;
  - (iv) any quality assurance and safety issues;
  - (v) the Works Reports;
  - (vi) the recommendations of the Transition Subcommittee;
  - (vii) any special matters referred to the Works Committee by Contracting Authority, MAG or Project Co;
  - (viii) any Proceeding at Risk Matters referred to the Works Committee in accordance with Section 14.6;
  - (ix) any community and media relations issues in accordance with Schedule 18 – Communications;
  - (x) monitoring the Interim Completion Commissioning Program and Final Commissioning Program; and
  - (xi) any other issues pertaining to the Works.
- (c) Subject to Section 14.2(d), any unanimous decision of the Works Committee shall be final and binding on the Parties. If the Works Committee is unable to reach a unanimous decision, either Party may refer the matter for resolution in accordance with Schedule 27 – Dispute Resolution Procedure.
- (d) The Works Committee shall not have authority to make decisions with respect to or approve:
- (i) any amendment to or waiver of any provision of this Project Agreement;
  - (ii) any change to a major milestone date set out in the Works Schedule, the Scheduled Interim Completion Date, the Scheduled Substantial Completion Date or the Scheduled Final Completion Date;
  - (iii) any Variation;
  - (iv) any change that may materially adversely affect Project Co’s ability to achieve Interim Completion by the Scheduled Interim Completion Date, Substantial Completion by the Scheduled Substantial Completion Date or Final Completion by the Scheduled Final Completion Date; or
  - (v) any matter with respect to which Contracting Authority has a right of consent or in respect of which Contracting Authority may exercise discretion pursuant to this Project Agreement.

**14.3 Term of Works Committee**

- (a) Unless otherwise agreed by the Parties, the Works Committee shall operate until the Final Completion Date.

**14.4 Replacement of Committee Members**

- (a) Contracting Authority and MAG shall be entitled to replace any of their respective representatives on the Works Committee by written Notice to Project Co. Contracting Authority will use commercially reasonable efforts to deliver prior written Notice of any such replacement to Project Co. Project Co may replace any of its representatives on the Works Committee with the prior written consent of Contracting Authority.

**14.5 Procedures and Practices**

- (a) The members of the Works Committee may:
- (i) adopt such procedures and practices for the conduct of the activities of the Works Committee as they consider appropriate from time to time;
  - (ii) invite to any meeting of the Works Committee such other persons as the members of the Works Committee may agree;
  - (iii) exclude from any meeting of the Works Committee such persons as the members of the Works Committee may agree; and
  - (iv) receive and review reports from any person or organization agreed to by the members of the Works Committee.
- (b) Once established, the Works Committee shall meet at least once each month for each Facility from Financial Close until the Final Completion Date, unless otherwise agreed by the members of the Works Committee or the Parties.
- (c) Any one of the Project Co Representative, the Contracting Authority Representative and any of MAG's representatives on the Works Committee may convene a special meeting of the Works Committee at any time. Special meetings of the Works Committee may be convened on not less than 5 Business Days' notice to all members of the Works Committee identifying the agenda items to be discussed at the special meeting, provided that, in an Emergency, a meeting may be called at any time on such notice as may be reasonable in the circumstances.
- (d) Unless otherwise agreed by the members of the Works Committee, the Works Committee shall meet in Toronto, Ontario in respect of the TRBC Facility and Brampton, Ontario in respect of the BCA Facility. Meetings of the Works Committee may be held by means of such telephonic, electronic or other communication facilities as permit all persons participating in the meeting to communicate with each other simultaneously and instantaneously. A person participating in a meeting by such means

- will be deemed to be present at such meeting, provided that each member of the Works Committee must attend in person at least once each calendar quarter.
- (e) Two representatives of Contracting Authority (one of whom shall be the Contracting Authority Representative), two representatives of Project Co (one of whom shall be the Project Co Representative) and two representatives of MAG shall constitute a quorum at any meeting of the Works Committee. A quorum of members may exercise all the powers of the Works Committee. The members shall not transact business at a meeting of the Works Committee unless a quorum is present.
  - (f) Minutes of all meetings, recommendations and decisions of the Works Committee, including those made by telephone or other form of communication, shall be recorded and maintained by Project Co. Project Co shall circulate copies of such minutes within 5 Business Days of the holding of the meeting or the making of the recommendation or decision. Unless Contracting Authority notifies Project Co within 5 Business Days of receipt of the minutes that Contracting Authority disagrees with the contents of the minutes, Project Co, Contracting Authority and MAG shall be deemed to have approved such minutes. Project Co shall maintain a complete set of all minutes of the meetings of the Works Committee and shall make such minutes available for inspection by Contracting Authority during regular business hours.

#### **14.6 Proceeding at Risk**

- (a) If at any time:
  - (i) the Contracting Authority Representative has noted a Critical Non-Conformance; or
  - (ii) the Contracting Authority Representative has noted a Works Submittal as “CRITICAL NON-CONFORMANCE” in accordance with Schedule 10 – Review Procedure (each of the matters described in clauses (i) and (ii) of this Section 14.6(a), a “**Proceeding at Risk Matter**”);

then Contracting Authority may issue to Project Co (with a copy to the Independent Certifier) a Notice (the “**Proceeding at Risk Notice**”) identifying Contracting Authority’s reasons for issuing the Proceeding at Risk Notice and requesting Project Co to deliver any relevant Design Data and any other information reasonably required by Contracting Authority from Project Co to review the Proceeding at Risk Matter.

- (b) Following the issuance of a Proceeding at Risk Notice, the Contracting Authority Representative and the Project Co Representative, together with the other members of the Works Committee, shall each promptly and diligently make a reasonable bona fide effort to resolve the Proceeding at Risk Matter.

- (c) Contracting Authority may, in its sole discretion, give notice to the Lenders' Agent pursuant to Section 13 of the Lenders' Direct Agreement that Project Co is Proceeding at Risk, together with a copy of the Proceeding at Risk Notice.
- (d) Following the issuance of a Proceeding at Risk Notice, either Party may refer the Proceeding at Risk Matter for resolution in accordance with Schedule 27 – Dispute Resolution Procedure.
- (e) The Proceeding At Risk Notice, review, and comments made during the process set out in this Section 14.6 are for general conformity to the obligations and requirements of this Project Agreement, and any such Notice, review and comment shall not relieve Project Co of the risk and responsibility for the Works and for meeting all of its obligations under and satisfying all the requirements of this Project Agreement, and shall not create any new or additional obligations or liabilities for Contracting Authority.

## **15. QUALITY ASSURANCE**

### **15.1 Quality Plans and Systems**

- (a) Project Co shall cause all of the Works to be the subject of quality management systems, which shall include a Design Quality Plan and a Construction Quality Plan (collectively, the “**Quality Plans**”), which may be incorporated into one document.
- (b) All Quality Plans shall be consistent with the requirements of the Output Specifications, the Interim Completion Commissioning Program and the Final Commissioning Program.
- (c) The Design Quality Plan is attached as part of Schedule 11 – Design Quality Plan and Construction Quality Plan.
- (d) The Construction Quality Plan shall, at a minimum, comply with the requirements of the outline of the Construction Quality Plan attached as part of Schedule 11 – Design Quality Plan and Construction Quality Plan. Project Co shall submit its proposed Construction Quality Plan to Contracting Authority within 60 days following Financial Close.
- (e) All Quality Plans shall be subject to review by Contracting Authority pursuant to Schedule 10 – Review Procedure, and Project Co shall not be entitled to implement or cause the implementation of any Quality Plan unless and until Project Co is entitled to proceed with such implementation pursuant to Schedule 10 – Review Procedure.
- (f) Project Co shall implement the Quality Plans, shall perform and cause to be performed the Works in compliance with the Quality Plans, including by causing the Construction Contractor to implement the Design Quality Plan and the Construction Quality Plan.

- (g) Where any aspect of the Works is performed by more than one Project Co Party, then this Article 15, in so far as relevant or appropriate to the activities to be performed by such Project Co Party, shall apply in respect of each of them and references in this Article 15 to such Project Co Party, including the Construction Contractor, shall be construed accordingly.
- (h) Subject to Section 15.1(i), Project Co shall cause the Construction Contractor, at its sole cost and expense, to conduct an inspection of its facilities and of its health and safety management systems on an annual basis until Final Completion or as otherwise required in accordance with Sections 11.25(b)(vi)(C) and 11.25(b)(vii)(C) (each an “**H&S Construction Inspection**”), which H&S Construction Inspections shall:
- (i) be conducted by a Certified H&S Inspector; and
  - (ii) during the performance of the Works, include, at a minimum
    - (A) a review of general compliance with all applicable *Occupational Health and Safety Act* (Ontario) requirements, compliance with all safety manuals applicable to the Site at which the Works are being conducted, including, but not limited to, the Contractor Site Specific Safety Manual; and
    - (B) a review of the Construction Contractor’s job hazard analysis documentation on any Site which could endanger or put at risk the safety of any Person working at the Site.
- (i) The first H&S Construction Inspection shall occur no later than the ninetieth (90<sup>th</sup>) day following Financial Close or, if that day is not a Business Day, on the Business Day immediately succeeding such day.
- (j) Project Co shall cause the results of each H&S Construction Inspection (such results referred to as the “**H&S Construction Inspection Report**”) to be delivered to Contracting Authority and the Works Committee not more than 5 Business Days from the date on which a H&S Construction Inspection is completed. An H&S Construction Inspection Report arising from an H&S Construction Inspection shall be tabled and presented by Project Co for discussion by the Works Committee at the next meeting of the Works Committee that follows the date on which such H&S Construction Inspection Report was issued.
- (k) To the extent an H&S Construction Inspection Report discloses any non-compliance by the COR-Qualified Construction Project Co Party or the COR-Certified Construction Project Co Party, as the case may be, with the terms of the COR Certification or OHSAS 18001 Accreditation, as the case may be, Contracting Authority shall have the right to require Project Co to cause the COR-Qualified Construction Project Co Party or the COR-Certified Construction Project Co Party, as the case may be at its sole cost and expense:

- (i) to take any corrective and remedial action required by the H&S Construction Inspection Report to correct any such non-compliance and Project Co shall cause the COR-Qualified Construction Project Co Party or the COR-Certified Construction Project Co Party, as the case may be, to comply with all instructions given by the Certified H&S Inspector in respect of actions required to be taken to correct any such non-compliance, and
- (ii) to arrange to have conducted by a Certified H&S Inspector such follow-up H&S Construction Inspections of those facilities and health management systems associated with the non-compliances identified in the relevant H&S Construction Inspection Report (each an “**H&S Construction Re-Inspection**”) within 3 Business Days from the date on which any such request is made by Contracting Authority, until any and all corrective and remedial actions required by the Certified H&S Inspector with respect to the correction of each identified non-compliance is completed to the satisfaction of the Certified H&S Inspector, and
- (iii) to cause the results of each H&S Construction Re-Inspection (such results referred to as the “**H&S Construction Re-Inspection Report**”) to be delivered to Contracting Authority and the Works Committee not more than 3 Business Days from the date on which a H&S Construction Re-Inspection is completed. An H&S Construction Re-Inspection Report arising from an H&S Construction Re-Inspection shall be tabled and presented by Project Co for discussion by the Works Committee at the next meeting of the Works Committee that follows the date on which such H&S Construction Re-Inspection Report was issued.

## **15.2 Changes to Plans**

- (a) Project Co shall submit to Contracting Authority, in accordance with Schedule 10 – Review Procedure, any changes to any of the Quality Plans required to comply with Section 15.1, and shall amend such Quality Plans as required pursuant to Schedule 10 – Review Procedure.

## **15.3 Quality Manuals and Procedures**

- (a) If any Quality Plan refers to, relies on or incorporates any quality manual or procedure, then such quality manual or procedure or the relevant parts of it shall be submitted to Contracting Authority at the time that the relevant Quality Plan, or part thereof or change thereto, is submitted in accordance with Schedule 10 – Review Procedure, and the contents of such quality manual or procedure shall be taken into account in the consideration of the relevant Quality Plan, or part thereof or change thereto, in accordance with Schedule 10 – Review Procedure.

## **15.4 Quality Monitoring**

- (a) Without limiting Contracting Authority's other rights pursuant to this Project Agreement, including Section 27, Contracting Authority may, from time to time, directly or indirectly, perform periodic monitoring, spot checks and auditing of Project Co's quality management systems, including all relevant Quality Plans and any quality manuals and procedures. Project Co shall ensure that Contracting Authority also has the right to perform periodic monitoring, spot checks and auditing of the Construction Contractor's quality management systems.
- (b) Project Co shall cooperate, and shall cause the Construction Contractor to cooperate, with Contracting Authority in monitoring quality management systems and shall provide Contracting Authority with all information and documentation reasonably required in connection with Contracting Authority's rights under this Section 15.4.

## **16. LICENCE**

### **16.1 Licence to Site**

- (a) Effective from the date of Financial Close until the Termination Date and subject to this Article 16 and Project Co's compliance with the Lease Agreements, Contracting Authority hereby grants or shall cause to be granted, and shall continuously until the earlier of the termination of the Project Agreement or Final Completion grant or cause to be granted, to Project Co and all Project Co Parties such non-exclusive licence rights of use and access to, on and over the Site and the Facility in accordance with the Project Co Phasing Plan (which, for clarity, are applicable only during the Works), except such rights set out as a Project Co responsibility to obtain under the Permits, Licences, Approvals and Agreements tables attached as Appendix "A" to Schedule 1 – Definitions and Interpretation, as are required by Project Co and such Project Co Parties and sufficient (subject to Project Co performing its obligations described in the Permits, Licences, Approvals and Agreements tables attached as Appendix "A" to Schedule 1 – Definitions and Interpretation) to allow Project Co and such Project Co Parties to perform the Works. Following Final Completion, Contracting Authority shall grant, or cause to be granted, to Project Co and all Project Co Parties such rights of use and access to, on and over the Lands and the Facility as are required by Project Co and such Project Co Parties and sufficient (subject to Project Co performing its obligations described in the Permits, Licences, Approvals and Agreements tables attached as Appendix "A" to Schedule 1 – Definitions and Interpretation) to allow Project Co and such Project Co Parties to carry out its remaining obligations under the Project Agreement.
- (b) In consideration for the licence granted pursuant to Section 16.1(a), Project Co shall provide the Works subject to and in accordance with this Project Agreement.
- (c) Without derogating from any of Contracting Authority's rights hereunder, in particular and subject to this Section 16.1(c), the rights of access to the Lands prior to the Interim



- Completion Date and the Substantial Completion Date for purposes of the Interim Completion Contracting Authority Commissioning and the Contracting Authority Commissioning, as applicable, Contracting Authority acknowledges that, in respect of the Works, Project Co and the Project Co Parties require, and Contracting Authority shall provide, access to the Lands and the Facility in accordance with the Project Co Phasing Plan without material interference by Contracting Authority or any Province Person from the date of Financial Close until the Termination Date. Project Co further acknowledges that following Final Completion, its access to the Lands and the Facility shall be subject to the Contracting Authority Activities.
- (d) None of the rights granted pursuant to this Section 16 shall extend beyond the boundaries of the Lands, or to any lands other than the Lands, other than easements and similar interests of Contracting Authority which benefit the Lands, obtained after the date of this Project Agreement, to the extent the same are necessary for the Works. Notwithstanding the foregoing, Contracting Authority shall provide Project Co with limited access to the Existing Facilities to the extent necessary to perform the Works and subject to such reasonable conditions as are imposed by Contracting Authority.
- (e) Project Co agrees to: (i) cordon off areas within the Existing Facilities where Project Co is performing the Works required under the Project Documents and as approved by the Contracting Authority Representative; and (ii) use such access to the Existing Facilities, including loading docks, freight elevators and access routes as provided in the Output Specifications and as otherwise directed by the Contracting Authority Representative.
- (f) The licence and access rights provided in this Section 16 shall terminate as of the Termination Date.

## **16.2 Non-Exclusive Licence/Development of Lands**

- (a) Project Co acknowledges and agrees that the rights granted to Project Co and the Project Co Parties hereunder shall be non-exclusive and that Contracting Authority and any person authorized by Contracting Authority may occupy and possess the Lands, the Facility and the Existing Facilities without the prior consent of Project Co, including for the purposes of carrying out the Contracting Authority Activities. In exercising such rights Project Co shall not, and shall require that the Project Co Parties shall not, except as permitted under this Project Agreement, disrupt the performance of the Contracting Authority Activities including any Contracting Authority Activities performed pursuant to the New Toronto Courthouse Transition Schedule.
- (b) Without limiting Section 16.2(a), Project Co acknowledges that Contracting Authority may from time to time use or develop (including by way of subdivision or expansion), or permit the use or development of, or dispose of, portions of the Lands or the Facility other than those portions of the Lands or the Facility necessary for the performance of the Works. To the extent that such use or development or disposition materially adversely interferes with Project Co's licence rights hereunder or materially adversely

interferes with Project Co's ability to perform the Works, such use or development or disposition shall, subject to and in accordance with Schedule 22 – Variation Procedure, result in a Variation.

### **16.3 Limited Access Areas**

- (a) For purposes related to the provision of Contracting Authority Activities or related to security and confidentiality, effective upon Substantial Completion of the Facility, Contracting Authority may limit or restrict Project Co's and each Project Co Party's access to designated portions of the Site or the Facility unless a person seeking access obtains the prior written consent of Contracting Authority, which consent may be subject to such reasonable conditions as are imposed by Contracting Authority.

### **16.4 Naming and Signage**

- (a) Project Co acknowledges that Contracting Authority reserves and retains (i) all rights to designate the name for the Facility and the Existing Facilities and any part of the Facility and the Existing Facilities; (ii) all rights to signage in relation to the Site, the Facility and the Existing Facilities; and (iii) all rights, Trade-Marks, naming or branding regarding the Facility and the Existing Facilities or any part of the Facility and the Existing Facilities. It is agreed, however, that, with the prior written consent of Contracting Authority, which may take into consideration any applicable governmental guidelines, including the guidelines set out in Schedule 18 – Communications, Project Co, the Project Co Parties and the Senior Lenders may, for the period prior to Substantial Completion, erect and maintain signage which may include such parties' logos and trade names identifying their respective roles in connection with the development and construction of the Project.

### **16.5 No Interest in Land**

- (a) Project Co acknowledges and agrees that, subject to the provisions of the Construction Act, in accordance with the principles of the IPFP Framework, neither Project Co nor the Lenders shall acquire any estate, right, title or ownership interest in the Lands, the Facility or the Existing Facilities or any other interest in the Site pursuant to this Project Agreement, the Project Documents or otherwise. Notwithstanding any provision herein or in any of the Project Documents to the contrary, all fee simple interest in and freehold title to the Site, or any part thereof, and the Project, shall at all times remain unencumbered by any interest of Project Co or the Lenders. Project Co and the Lenders shall have access to the Lands, the Facility and Existing Facilities under and subject to the licences and access rights granted under this Article 16 and the Lenders' Direct Agreement, respectively.

### **16.6 Non-Disturbance Agreement**

- (a) If Contracting Authority mortgages, charges or otherwise encumbers the Lands, Contracting Authority shall notify Project Co and, at the request of Project Co, provide

Project Co with an agreement, in form satisfactory to Project Co, acting reasonably, executed by the mortgagee, chargee or other encumbrancer of the Lands permitting Project Co and the Lenders' Agent to access and use the Lands under the licence granted pursuant to this Section 16 and the Lenders' Direct Agreement, respectively, free from interference from the mortgagee, chargee or other encumbrancer or any person claiming by or through the mortgagee, chargee or other encumbrancer. This Section 16.6 shall not apply in respect of any portion of the Lands used or developed pursuant to Section 16.2(b) if neither the licence granted pursuant to this Section 16 nor the Works pertain to such portion of the Lands.

## **17. TITLE ENCUMBRANCES**

### **17.1 Title Encumbrances**

- (a) Project Co shall perform all obligations under the Title Encumbrances for or on behalf of Contracting Authority, other than:
- (i) obligations under any Title Encumbrance which Project Co is not legally capable of performing for or on behalf of Contracting Authority (including, for clarity, any and all obligations under the Contracting Authority Mortgages);
  - (ii) obligations under any Title Encumbrance added after the date of this Project Agreement unless such obligations are provided in the Output Specifications as obligations of Project Co or the Parties agree that such obligations are obligations of Project Co;
  - (iii) obligations under any Title Encumbrance which the applicable Governmental Authority may formally relieve or waive, with the consent of Contracting Authority, with respect to any Development Approval; and
  - (iv) obligations under the Title Encumbrances that Appendix "A" – Permits, Licences, Approvals and Agreements of Schedule 1 – Definitions and Interpretation provide for Contracting Authority performing.
- (b) All Works performed by or on behalf of Project Co shall be performed in a manner which does not breach the Title Encumbrances, the Lease Agreements or any of the Development Approvals.
- (c) Subject to Encumbrances that Project Co shall remove pursuant to Section 17.2 and Section 17.3, the performance of the Works shall not give rise to a right for any person to obtain title to or any interest in the Lands, the Facility or the Existing Facilities or any part of it or them, except in accordance with the terms of this Project Agreement.

### **17.2 No Site Encumbrances**

- (a) Project Co shall not create, incur, permit or suffer to exist any Encumbrance to be filed, issued or registered against the Lands, the Facility or the Existing Facilities or any part

- thereof or any interest therein due to an act or omission of Project Co or any Project Co Party.
- (b) In the event that the Lands, the Facilities or the Existing Facilities or any part thereof or any interest therein becomes subject to any Encumbrance arising in relation to the performance of the Works which has not been consented to in writing by Contracting Authority, Project Co shall immediately take all steps necessary to remove, vacate or discharge such Encumbrance. If such Encumbrance is not removed, vacated or discharged within 10 Business Days of the filing, issuance or registration of such Encumbrance then, without prejudice to any other rights or remedies it may have, Contracting Authority will be at liberty to take whatever steps it deems necessary and appropriate to remove, vacate or discharge the Encumbrance, including payment of any amount owing or claimed thereunder, and seek immediate recovery from Project Co of the amount of any such payment and any associated costs, including legal costs (on a full indemnity basis), all of which shall be payable on demand.

### **17.3 Construction Act (Ontario)**

- (a) The Parties acknowledge that Section 17.2 shall apply to claims for lien made against the Lands, the Facility or the Existing Facilities pursuant to the Construction Act and shall also apply to claims made against Contracting Authority or the holdback under the Construction Act as though such a claim were an Encumbrance against the Lands as referred to therein.
- (b) Project Co shall withhold from each Subcontractor the holdbacks required under the Construction Act and shall deal with such holdbacks in accordance with the Construction Act.
- (c) Project Co acknowledges that, notwithstanding that the same may be permitted under the Construction Act, there will be no early release of any amount of the Legislative Holdback which the Contracting Authority is required to retain under the Construction Act prior to the Legislative Holdback Payment Date, and that the same will be paid solely in accordance with 4.5.
- (d) Project Co shall, as a condition of final payment under any Subcontract for which lien rights or rights in respect of the holdback may be claimed under the Construction Act, require that a certificate of completion under section 33(1) of the Construction Act for such Subcontract be issued and the relevant Subcontractor provide statutory declarations or other assurances confirming that all those engaged by the Subcontractor have been paid in accordance with Applicable Law.
- (e) Project Co shall promptly provide Contracting Authority with a copy of any materials which are provided to the Lenders to evidence compliance with the Construction Act.
- (f) Upon request by Contracting Authority, Project Co shall perform and deliver to Contracting Authority a sub-search of title on the Lands or any part thereof. Contracting

Authority shall pay the reasonable costs of any such search except (i) a search that reveals Encumbrances that are not permitted by this Project Agreement, (ii) a search requested based on a reasonable suspicion that an Encumbrance that is not permitted by this Project Agreement has been registered on title to the Lands, and (iii) a search requested for the purpose of confirming that an Encumbrance that is not permitted by this Project Agreement has been discharged from title to the Lands.

- (g) Project Co shall cause a Payment Certifier to be appointed under the Design and Construction Contract and shall cause such Payment Certifier to certify the substantial performance of the Design and Construction Contract in accordance with the Construction Act.

## **18. SITE CONDITION**

### **18.1 Acceptance of Site Condition**

- (a) Subject to Sections 7.4, 18.2, 18.3 and 18.4, Project Co acknowledges and agrees that it has investigated the Existing Facilities and Sites and their surroundings in accordance with Good Industry Practice taking into account all matters relating to the Existing Facilities and Sites (including the buildings, structures and works, on, over and under the Sites existing on the date hereof and the Background Information) prior to executing this Project Agreement and agrees to accept the Existing Facilities, the Site and the Site Conditions on an “as is, where is” basis. Without limiting the generality of the foregoing, but subject to Sections 7.4, 18.2, 18.3 and 18.4, Project Co shall not be entitled to make any claim of any nature whatsoever against Contracting Authority or any Province Person on any grounds relating to the Existing Facilities and the Site, including the fact that incorrect or insufficient information on any matter relating to the Existing Facilities and Site was given to it by any person, whether or not Contracting Authority or a Province Person, unless the relevant person has given Project Co an express written entitlement to rely on information relating to the Existing Facilities and Site provided by such person to Project Co.
- (b) Subject to Sections 7.4, 18.2, 18.3 and 18.4, Project Co acknowledges and agrees that it has and shall be deemed to have:
  - (i) performed all necessary Site due diligence and investigations and investigated and examined the Site and its surroundings and any existing works on, over or under the Site in accordance with Good Industry Practice, taking into account all matters relating to the Site, including the buildings, structures and works, on, over and under the Site existing on the date hereof;
  - (ii) in accordance with Good Industry Practice, taking into account all matters relating to the Site, including the buildings, structures and works, on, over and under the Site existing on the date hereof, satisfied itself as to the nature of the Site Conditions, the ground and the subsoil, the level and quantity of groundwater, the form and nature of the Site, the loadbearing and other relevant

properties of the Site, the risk of injury or damage to property affecting the Site, the nature of the materials (whether natural or otherwise) to be excavated and the nature of the design, work and materials necessary for the execution and delivery of the Works;

- (iii) satisfied itself as to the presence of any Contamination on, in or under the Site, or migrating to or from the Site in accordance with Good Industry Practice, taking into account all matters relating to the Site, including the buildings, structures and works, on over and under the Site existing on the date hereof;
  - (iv) satisfied itself as to the adequacy of the Site, the rights of access to, from and through the Site and any accommodation it may require for the purposes of fulfilling its obligations under this Project Agreement;
  - (v) satisfied itself as to the possibility of interference by persons of any description whatsoever with access to or use of, or rights in respect of, the Site; and
  - (vi) satisfied itself as to the precautions, times and methods of working necessary to prevent any nuisance or interference, whether public or private, being caused to any third parties.
- (c) Project Co further acknowledges and agrees that, other than as referred to or contained in this Project Agreement, no representations or warranties have been made, nor documentation delivered to Project Co or any Project Co Party, which would indicate that Project Co would be unable to perform the Works in a lawful manner.

## **18.2 Contamination**

- (a) Contracting Authority shall be responsible for Contamination on, in or under, or migrating to or from, the Site, except for any such Contamination:
- (i) that was described in, or was properly inferable, readily apparent or readily discoverable from, the Hazardous Substance Reports, the Environmental Reports or the Geotechnical Reports;
  - (ii) that could have been properly inferable, readily apparent or readily discoverable on the basis of visual inspections conducted in accordance with Good Industry Practice, including as referred to in Section 18.1, taking into account all matters relating to the Site, including the buildings, structures and works, on, over and under the Site existing on the date hereof; or
  - (iii) that is caused by Project Co or any Project Co Party,
- (any such Contamination for which Contracting Authority is responsible is referred to herein as the “**Contracting Authority Contamination**”).

- (b) Upon the discovery of any Contracting Authority Contamination, Project Co shall immediately inform the Contracting Authority Representative and shall comply with all Applicable Law in respect thereof at Contracting Authority's cost pursuant to Section 18.2(d).
- (c) In the event that Contracting Authority wishes Project Co to perform actions which are in addition to any required pursuant to Section 18.2(b), then Contracting Authority shall issue an instruction to Project Co specifying what action Contracting Authority requires Project Co to take and Project Co shall promptly and diligently comply with all such instructions at Contracting Authority's cost pursuant to Section 18.2(d).
- (d) If Sections 18.2(b) and 18.2(c) require Project Co to perform any alteration, addition, demolition, extension or variation in the Works as a result of Contamination for which Contracting Authority is responsible pursuant to Section 18.2(a) and which would not otherwise be required under this Project Agreement, then any such alteration, addition, demolition, extension or variation in the Works shall, subject to and in accordance with Section 31, be treated as a Delay Event and, subject to and in accordance with Section 32, be treated as a Compensation Event.

### **18.3 Items of Geological, Historical or Archaeological Interest or Value**

- (a) As between the Parties, all fossils, artifacts and other objects having artistic, historic, archaeological or monetary value, including human remains and burial sites, which may be found on or at the Site are or shall be the sole and absolute property of Contracting Authority.
- (b) Upon the discovery of any item referred to in Section 18.3(a) during the course of the Works, Project Co shall:
  - (i) immediately inform the Contracting Authority Representative of such discovery;
  - (ii) take all steps not to disturb the item and, if necessary, cease any Works in so far as performing such Works would endanger the item or prevent or impede its excavation;
  - (iii) take all necessary steps to preserve and ensure the preservation of the item in the same position and condition in which it was found; and
  - (iv) comply, and ensure compliance by all Project Co Parties, with Applicable Law and all requirements of Governmental Authorities with respect to such discovery, including the *Funeral, Burial and Cremation Services Act 2002 (Ontario)* and the Heritage Guidelines and Protocols.
- (c) In the event that Contracting Authority wishes Project Co to perform actions which are in addition to any required pursuant to Section 18.3(b), then Contracting Authority shall

issue an instruction to Project Co specifying what action Contracting Authority requires Project Co to take and Project Co shall promptly and diligently comply with all such instructions at Contracting Authority's cost pursuant to Section 18.3(d).

- (d) If Sections 18.3(b) and 18.3(c) require Project Co to perform any alteration, addition, Demolition, extension or variation in the Works as a result of such discovery and which would not otherwise be required under this Project Agreement, then any such alteration, addition, Demolition, extension or variation in the Works shall, subject to and in accordance with Article 31, be treated as a Delay Event and, subject to and in accordance with Article 32, be treated as a Compensation Event.

#### **18.4 Existing Facilities Unknown Conditions**

- (a) With respect to the Existing Facilities, Contracting Authority shall be responsible for all Unknown Conditions, except for any such Unknown Conditions that:
- (i) were expressly described in the Background Information;
  - (ii) that could have been properly inferable, readily apparent or readily discoverable on the basis of visual inspections conducted in accordance with Good Industry Practice of accessible areas of the Existing Facilities, taking into account the restrictions and other limitations imposed by Contracting Authority prior to the Technical Submission Deadline including on Project Co's and the Project Co Parties' ability to conduct destructive inspections at the Existing Facilities. Contracting Authority acknowledges that it did not permit Project Co or the Project Co Parties to perform destructive inspections at the Existing Facilities prior to the Technical Submission Deadline;
  - (iii) were within the actual knowledge of Project Co or a Project Co Party as of Technical Submission Deadline; or
  - (iv) are caused by or contributed to by a failure by Project Co or any Project Co Party to perform the Works in accordance with the Project Agreement.

For greater certainty, with respect to any Unknown Conditions described in Section 18.4(a)(i) to Section 18.4(a)(iv) (inclusive), such Unknown Conditions shall be the responsibility of Project Co.

- (b) For the purposes of Section 18.4(a)(iii), 'actual knowledge' shall mean knowledge that, prior to the Technical Submission Deadline, is actually held by the person who was identified as the project manager (or analogous position) for the Project in Project Co's proposal in response to the Request for Proposals or by any member of the Design Team.
- (c) Upon the discovery of a Unknown Condition, Project Co shall immediately inform the Contracting Authority Representative and, if and to the extent that the Parties disagree as to whether or not the Unknown Condition is the responsibility of Contracting



- Authority or the responsibility of Project Co pursuant to Section 18.4(a), the matter shall be resolved in accordance with Schedule 27 – Dispute Resolution Procedure.
- (d) In the event that the Parties agree or it is determined pursuant to Section 18.4(c) that Contracting Authority is responsible for a Unknown Condition then Contracting Authority shall issue an instruction to Project Co specifying what action Contracting Authority requires Project Co to take in respect of such Unknown Condition and Project Co shall promptly and diligently comply with all such instructions at Contracting Authority's cost pursuant to Section 18.4(f).
- (e) In the event that the Parties agree or it is determined pursuant to Section 18.4(c) that Project Co is responsible for a Unknown Condition then Project Co shall promptly and diligently proceed to remedy or rectify such Unknown Condition at its own cost and without any extension of time or additional payment under this Project Agreement.
- (f) If Section 18.4(d) requires Project Co to perform any alteration, addition, construction, demolition, extension or variation in the Works as a result of a Unknown Condition for which Contracting Authority is responsible and which would not otherwise be required under this Project Agreement, then any such alteration, addition, construction, demolition, extension or variation shall, subject to and in accordance with Schedule 22 – Variation Procedure, result in a Variation.

## **19. GOVERNMENTAL AUTHORITY AND THIRD PARTY FINANCIAL OBLIGATIONS**

### **19.1 Financial Obligations**

- (a) Subject to Section 19.1(c), Project Co shall be responsible for all Financial Obligations under or in respect of all Permits, Licences, Approvals and Agreements including to any Utility Company, any Governmental Authority or any other third party in respect of the Works, including:
- (i) any development charges relating to the Works, the Facility or the Site;
  - (ii) any engineering administration and inspection fees required in respect of works or services required to be performed;
  - (iii) any security deposits and letters of credit required under any Permits, Licences, Approvals and Agreements; and
  - (iv) any other amounts payable under any Project Co Permits, Licences, Approvals and Agreements.
- (b) The Parties agree that any refund, partial rebate or credit granted by any applicable Utility Company or any applicable Governmental Authority or any other third party relating to the Financial Obligations referred to in Section 19.1(a) shall be for the benefit of Contracting Authority to the extent such Financial Obligations were paid by

Contracting Authority and shall be for the benefit of Project Co to the extent such Financial Obligations were paid by Project Co.

- (c) Contracting Authority shall be responsible for all Financial Obligations required under the Contracting Authority Permits, Licences, Approvals and Agreements that are expressly described in Appendix “A” – Permits, Licences, Approvals and Agreements to Schedule 1 – Definitions and Interpretation as being the responsibility of Contracting Authority.

## **20. CONTRACTING AUTHORITY ACCESS AND MONITORING**

### **20.1 Contracting Authority Access During the Works**

- (a) Subject to Section 20.1(b) but without limiting any of Contracting Authority’s rights in respect of the Lands and the Existing Facilities, Project Co acknowledges and agrees that Contracting Authority, the Province Persons and the Government Entities and their respective representatives shall, prior to Final Completion, have unrestricted access to the Lands, the Facility and any workshop where materials, plant or equipment are being manufactured, prepared or stored at all reasonable times during normal working hours. For clarity, nothing in this Section 20.1 shall restrict or impede Contracting Authority’s right to use and access the Existing Facilities or any part of the Site not required at that time for Project Co’s performance of the Works in accordance with the terms hereof.
- (b) In exercising their access rights under Section 20.1(a), Contracting Authority, the Province Persons and the Government Entities and their respective representatives shall:
- (i) provide reasonable prior Notice appropriate to the circumstances (other than for any offices or other facilities provided at the Site for Contracting Authority and/or Province Persons);
  - (ii) comply with all relevant safety procedures and any reasonable directions with regard to site safety that may be issued by or on behalf of the Project Co Representative from time to time; and
  - (iii) if required by Project Co, be accompanied by a representative of Project Co or a Project Co Party.

### **20.2 Increased Monitoring**

- (a) If, at any stage, Contracting Authority is of the opinion, acting reasonably, that there are defects in the Works or that Project Co has failed to comply, in any material respect, with the requirements of this Project Agreement, Contracting Authority may, without prejudice to any other right or remedy available to it, by Notice to Project Co, increase the level of monitoring of Project Co from that set out in this Project Agreement to such level as Contracting Authority considers reasonable taking into account the nature of the relevant defect or failure until such time as Project Co shall have demonstrated, to

Contracting Authority's satisfaction, that it is capable of performing and will perform, in all material respects, its obligations related to the Works under this Project Agreement. Project Co will compensate Contracting Authority for any reasonable costs incurred as a result of such increased monitoring.

### **20.3 Right to Open Up**

- (a) Contracting Authority shall have the right, at any time prior to the Final Completion Date, to request Project Co to open up and inspect (or allow Contracting Authority to inspect) any part or parts of the Works, or to require testing of any part or parts of the Works, where Contracting Authority reasonably believes that such part or parts of the Works is or are defective or that Project Co has failed to comply with the requirements of this Project Agreement (including the Design Data) relevant to such part or parts of the Works, and Project Co shall comply with such request. When Contracting Authority makes such a request, Contracting Authority shall include reasonably detailed reasons with such request.
- (b) If an inspection shows that the relevant part or parts of the Works is or are defective or that Project Co has failed to comply with the requirements of this Project Agreement (including the Design Data) relevant to such part or parts of the Works, Project Co shall rectify all such defects and non-compliance diligently and at no cost to Contracting Authority and Project Co shall not be entitled to any additional compensation or extension of time in relation thereto.
- (c) If an inspection shows that the relevant part or parts of the Works is or are not defective and that Project Co has complied with the requirements of this Project Agreement (including the Design Data) relevant to such part or parts of the Works, the exercise by Contracting Authority of its rights pursuant to this Section 20.3 shall, subject to and in accordance with Section 31, be treated as a Delay Event and, subject to and in accordance with Section 32, be treated as a Compensation Event.

### **20.4 No Relief from Obligations**

- (a) The Parties acknowledge that the exercise by Contracting Authority or the Contracting Authority Representative of the rights under this Article 20 shall in no way affect the obligations of Project Co under this Project Agreement except as set out in this Article 20.

### **20.5 Right of Access of Additional Contractors to Works**

- (a) Subject to Section 11.13, Project Co shall grant, and shall cause all Project Co Parties to grant, Additional Contractors access to those parts of the Works as may be necessary for the Additional Contractors to carry out any Additional Works.

**21. FURNITURE, FIXTURES AND EQUIPMENT**

**21.1 FF&E Steering Committee**

- (a) The Parties shall, within 30 days following Financial Close, establish a committee (the “**FF&E Steering Committee**”) consisting of:
- (i) 5 representatives appointed by Contracting Authority from time to time, namely, the Contracting Authority project manager, the MAG project coordinator, the Design Compliance Consultant and other technical and facility representatives appointed by Contracting Authority from time to time; and
  - (ii) 2 representatives of Project Co, one of whom shall be the Project Co Representative, appointed by Project Co from time to time.
- (b) Members of the FF&E Steering Committee may invite, on prior notice to all members, such advisors and consultants as they require from time to time to attend meetings and to provide briefings to the FF&E Steering Committee.
- (c) The FF&E Steering Committee shall assist the Parties by promoting cooperative and effective communication with respect to matters related to FF&E, including the interaction between FF&E commissioning and Plant commissioning.
- (d) The primary role of the FF&E Steering Committee shall be to review all matters, including budget review, and make all required decisions related to Category 1 FF&E and Category 2 FF&E, including, without limitation:
- (i) Project Co’s proposals and recommendations for the quantity, make, model, vendor and any terms and conditions of financing or payment, as the case may be, for all Category 1 FF&E;
  - (ii) Project Co’s proposals and recommendations with respect to re-use and refurbishment of Category 2 FF&E; and
  - (iii) Project Co’s proposals and recommendations with respect to scheduling the procurement or transfer and/or refurbishment, as applicable, installation and commissioning of all Category 1 FF&E, Category 2 FF&E and Transferred Existing Facilities Items.
- (e) The members of the FF&E Steering Committee may adopt such other procedures and practices for the conduct of the activities of the FF&E Steering Committee as they consider appropriate from time to time.
- (f) 3 representatives of Contracting Authority and 1 representative of Project Co shall constitute a quorum at any meeting of the FF&E Steering Committee. A quorum of members may exercise all of the powers of the FF&E Steering Committee. The

members shall not transact business at a meeting of the FF&E Steering Committee unless a quorum is present.

## **21.2 Separate FF&E and Transition Services Fee and Categories of FF&E**

- (a) Contracting Authority shall pay Project Co the Separate FF&E and Transition Services Fee pursuant to and in accordance with Section 4.3(b) and for all services in connection with Category 1 FF&E and Category 2 FF&E described in this Section 21, including pursuant to Sections 21.5(b) to (g), Section 21.6 and Section 21.8. For greater certainty, Contracting Authority shall also pay Project Co for the Existing Facilities inventory services described in Section 21.5(b) by way of the Separate FF&E and Transition Services Fee.
- (b) FF&E is divided into the following categories:
- (i) **Category 1 FF&E:** As part of the services applicable to the Separate FF&E and Transition Services Fee, Project Co shall be responsible for the procurement of, and for monitoring and coordinating the delivery and installation of, all Category 1 FF&E and for all other services to be performed by Project Co in respect of Category 1 FF&E pursuant to the requirements of this Section 21, other than the design and specification services set forth in Section 21.5(a). For further clarity, the applicable FF&E vendor shall be responsible for the delivery and installation of Category 1 FF&E. The design and specification services to be performed by Project Co in respect of Category 1 FF&E pursuant to Section 21.5(a) form part of the Works and are not paid for by way of the Separate FF&E and Transition Services Fee.
  - (ii) **Category 2 FF&E:** As part of the services applicable to the Separate FF&E and Transition Services Fee, Project Co shall be responsible for (A) the decommissioning (where required), management of refurbishment (where required), coordination of rental contracts for temporary replacement and temporary storage (if required) of Category 2 FF&E, (B) the relocation and coordination of relocation of Category 2 FF&E, (C) the installation and commissioning of Category 2 FF&E, (D) the inventory services at the Existing Facilities, and (E) all other services to be performed by Project Co in respect of Category 2 FF&E and the Transferred Existing Facilities Items pursuant to the requirements of this Section 21, other than the design and specification services set forth in Section 21.5(a). The design and specification services to be performed by Project Co in respect of Category 2 FF&E pursuant to Section 21.5(a) form part of the Works and are not paid for by way of the Separate FF&E and Transition Services Fee.
  - (iii) **Category 3 FF&E:** Not Used.
  - (iv) **Category 4 FF&E:** The installation and commissioning of Category 4 FF&E is not required to be performed by Project Co. All services to be performed by

Project Co pursuant to this Section 21 in respect of Category 4 FF&E form part of the Works and are not paid for by way of the Separate FF&E and Transition Services Fee. The design service to be performed by Project Co in respect of Category 4 FF&E pursuant to Section 21.5(a) form part of the Works and are not paid for by way of the Separate FF&E and Transition Services Fee.

- (v) **Category 5 FF&E:** Not Used.
- (c) For greater certainty, any item labelled, described or specified as ‘fixed furnishings’, ‘casework’ or ‘millwork’ in the Output Specifications, is not included in any category of FF&E for the purposes of this Project Agreement, including, for certainty, this Section 21.
- (d) For greater certainty, all services to be performed by Project Co pursuant to Section 21.5(a) form part of the Works and are not paid for by way of the Separate FF&E and Transition Services Fee.
- (e) The FF&E Steering Committee shall not have authority to make decisions with respect to, or approve any amendment to or increase or decrease of, the MAG FF&E Budget (as set forth in Section 21.3(b)).

### **21.3 FF&E Budget**

- (a) MAG will carry a budget for the following: (i) the purchase, delivery to the Facility loading dock, related unpacking, moving to the final location in the Facility and installation of all Category 1 FF&E; (ii) the cost of refurbishment (as required) of Category 2 FF&E; and (iii) the cost of furniture rental (as required), either for temporary replacement of Category 2 FF&E at the Existing Facilities, or for furnishing swing spaces or completed phases in the event final FF&E is not yet procured.
- (b) The MAG FF&E budget is estimated to be \$[REDACTED].

### **21.4 Contracting Authority FF&E Responsibilities**

- (a) Contracting Authority shall review and confirm Project Co’s proposals for the method of procurement, quantity, make, model, vendor and any terms and conditions of payment, as the case may be, for:
  - (b) all Category 1 FF&E, based upon tenders, quotations or proposals obtained by Project Co under Section 21.6 and MAG shall enter into all purchase orders and other contracts with respect to the purchase of all Category 1 FF&E, and
  - (c) all Category 2 FF&E, based on tenders, quotations or proposals obtained by Project Co under Section 21.6 and MAG shall enter into all purchase orders and other contracts with respect to the refurbishment of Category 2 FF&E and the rental of temporary replacement of Category 2 FF&E at the Existing Facilities or for furnishing swing spaces or completed phases in the event final FF&E is not yet procured.

- (d) Project Co shall enter into all purchase orders and other contracts with respect to Transferred Existing Facilities Items (other than the refurbishment and temporary replacement contracts contemplated in Section 21.4(a) but including, for clarity, all contracts for the move and transfer of the Transferred Existing Facilities Items from the Existing Facilities to the Facility), and Contracting Authority shall approve the entering into by Project Co of all purchase orders and other contracts with respect to all Transferred Existing Facilities Items.
- (e) For greater certainty:
- (i) Project Co, and not Contracting Authority, shall be liable as “purchaser” to the vendor under every purchase order, contract and manufacturer’s installation invoice related to the Transferred Existing Facilities Items (other than contracts relating to the refurbishment and/or temporary replacement of Category 2 FF&E, contemplated in Section 21.4(a) but including, for clarity, contracts for the move and transfer of Transferred Existing Facilities Items from the Existing Facilities to the Facility) in accordance with the relevant invoice terms and the provisions of this Section 21, and shall make all payments related thereto in accordance with the relevant invoice terms; and
  - (ii) MAG, and not Project Co, shall be liable as “purchaser” to the vendor under every purchase order, contract and manufacturer’s installation invoice related to the Category 1 FF&E and the refurbishment and temporary replacement contracts for Category 2 FF&E described in Section 21.4(a) in accordance with the relevant provisions of this Section 21, and shall make all payments related thereto in accordance with the relevant invoice terms.
  - (iii) Contracting Authority is responsible for the removal and disposal of any FF&E identified for removal or disposal in the areas affected by the Works. For clarity, this will happen incrementally throughout the project based on the Project Co Phasing Plan. Project Co may be required to store these FF&E items temporarily on site until such time that Contracting Authority can remove them.

## **21.5 Project Co FF&E Responsibilities**

### **(a) Design**

In addition to any of Project Co’s other design responsibilities set forth in this Project Agreement (including, for certainty, the Output Specifications), Project Co shall be responsible for:

- (i) the production of floor layouts showing all FF&E and clearly indicating each category of Category 1 FF&E, Category 2 FF&E, Category 4 FF&E, and Transferred Existing Facilities Items; and

- (ii) the production of all Design Data associated with the layouts and servicing of all FF&E and coordinating all structural, mechanical, and electrical information and communications technology building system services requirements to enable the accurate production of a complete working system for all FF&E.
- (b) **Existing Facilities Inventory Services**
- (i) Project Co shall be responsible for providing inventory services for the areas affected by the Works at the BCA Existing Facilities and reviewing and updating the existing TRBC Inventory Report at the TRBC Existing Facility and, in connection with providing such services, Project Co shall be responsible for the following:
    - (A) conducting an on-site inventory of all furniture, fixtures, and equipment identified in Section 21.5(b)(ii) located at the BCA Existing Facilities at the times determined by the FF&E Steering Committee and documenting the inventory results in a detailed spreadsheet. Project Co shall be responsible for updating the inventory spreadsheet from time to time as required or at the request of Contracting Authority prior to the date of payment by Contracting Authority of the Separate FF&E and Transition Services Fee;
    - (B) providing pictures of all existing inventory items. All pictures shall be labeled with associated item tag codes for reference;
    - (C) after completion of the on-site inventory pursuant to Section 21.5(b)(i)(A), rating the existing condition of the inventoried FF&E items to determine which items may be re-used at the BCA Facility;
    - (D) identifying all specialized FF&E items located at the BCA Existing Facilities that are required at the BCA Facility to enable the performance of Contracting Authority Activities;
    - (E) after completion of the on-site inventory pursuant to Section 21.5(b)(i)(A), physically tagging all inventoried items and linking the tag code with the spreadsheet and the key plans;
    - (F) including, at a minimum, the following information in the inventory spreadsheet described in Section 21.5(b)(i)(A) in respect of each inventoried item: existing location, detailed description, size, picture tag, current condition, power requirement, colour, new suggested location, etc.
    - (G) preparing and providing floor layout plans to indicate existing location of each inventoried item and coordinating the tag code with the floor layout plans;



- (H) providing a column in the inventory spreadsheet indicating the BCA Facility space code associated with the inventoried FF&E items;
- (I) reviewing all Facility floor layouts to determine where inventoried FF&E items can be suitably used in the Facility, and reviewing same with Contracting Authority, MAG and the FF&E Steering Committee;
- (J) liaising with local MAG managers and supervisors to accurately document information related to current users of each FF&E item at the Existing Facilities, and obtaining information identifying which FF&E items are operationally required for re-use;
- (K) on the date determined by the FF&E Steering Committee, provide a recommendation to Contracting Authority and MAG for each inventoried item and categorize it into one of the following three groups:
  - (I) Recommended for transfer to the Facility in current condition;
  - (II) Recommended for transfer to the Facility but requires refurbishment, and provide a budget estimate for refurbishment and recommendation for temporary replacement of Category 2 FF&E, and provide a budget estimate for temporary replacement; or
  - (III) Not recommended for transfer to the Facility,
- (L) on the date determined by the FF&E Steering Committee, providing a draft Existing Facilities Inventory Report summarizing the recommendations in Section 21.5(b)(i)(K), containing such other information as prescribed by this Section 21.5 and containing such other information as may be reasonably requested by Contracting Authority or MAG. The draft report must include floor layouts indicating the proposed location in the Facility for all recommended items of FF&E located at the Existing Facilities or, in the case of TRBC, located at the inventoried facilities, to be transferred to the Facility, a spreadsheet indicating each re-used item (including current location and proposed new location by Facility space code) as well as a budget for refurbishment and temporary replacement. Without limitation to Project Co's obligation to identify FF&E for reuse pursuant to this Section 21.5(b), Part IIA and IIB Accommodation Schedules of Schedule 15 – Output Specifications indicates where the illustrative scheme assumes reuse of FF&E;
- (M) reviewing the draft Existing Facilities Inventory Report and recommendations with the FF&E Steering Committee, Contracting Authority and MAG along with the budget for the refurbishment and

- temporary replacement of Category 2 FF&E. The FF&E Steering Committee shall make the final decision with respect to all inventoried FF&E and all Transferred Existing Facilities Items;
- (N) on the date determined by the FF&E Steering Committee, documenting the results of all BCA Existing Facilities inventory services performed by Project Co pursuant to Section 21.5(b)(i)(A) to (K) in a final Existing Facilities Inventory Report and updates to the TRBC Inventory Report and providing it to the FF&E Steering Committee for approval;
  - (O) once the final decision is made by the FF&E Steering Committee, updating the FF&E floor layouts to include and indicate the approved Category 2 FF&E items and Transferred Existing Facilities Items with item tag codes that are associated with the Existing Facilities FF&E inventory and transferable list for new placement at the Facility; and
  - (P) for clarity, performing the inventory services at the BCA Existing Facilities.
- (ii) Project Co shall perform an inventory of the following items in connection with the performance of BCA Existing Facilities inventory services described in Section 21.5(b)(i):
- (A) Furniture: all loose furniture items at the BCA Existing Facilities, including, but not limited to:
    - (I) systems furniture, including panels, work surfaces, pedestals, overhead storage, task lighting, etc.;
    - (II) case-goods: desks, meeting tables, side tables, tables, lunchroom tables, credenzas, bookcases, etc.;
    - (III) seating: desk or task chairs, side chairs, guest chairs, meeting room chairs, jury chairs, counsel chairs, sofas, stools, lounge chairs, multiple secured seating, etc.;
    - (IV) storage: filing cabinets, storage/supplies cabinets, miscellaneous cabinets, pedestals, coat cabinets, high-density mobile (non-electronic) filing, bookcases, shelving units, gun cabinets, metal shelving, etc.; and
    - (V) miscellaneous: lecterns, easels, file carts, whiteboards, desk lights, lamps, safes, coat racks, art, artefacts, etc.
    - (VI) Fixtures: all fixtures, including but not limited to: crests, fixed public seating, lockers, bulletin boards, shelving, and any other fixtures located at the BCA Existing Facilities; and

(B) Equipment: all equipment located at the BCA Existing Facilities including but not limited to: copiers, printers, fax machines, shredding machines, electrified mobile or condensed filing systems, audio visual equipment, cash registers, debit card machines, counterfeit detection machines, tape recorders, televisions, VCR/DVD and Blu-ray players, scanners, postage meters, binding machines, ice machines, water coolers, magnetometers, identification equipment, X-ray machines, security equipment, scanners, postage machines, coffee-makers, kettles, microwaves, refrigerators, stoves, dishwashers, other appliances, and any other office or specialty equipment located at the BCA Existing Facilities, but excluding information technology equipment such as personal computers, terminals, servers and LAN room equipment.

(iii) The timing of the inventory services described in Section 21.5(b) as performed by Project Co shall be approved by Contracting Authority, acting reasonably.

(c) **FF&E Procurement, Planning and Coordinating**

Project Co shall be responsible for preparing, revising, coordinating and finalizing the plan to procure or transfer, decommission, install and commission, as applicable, all Category 1 FF&E and Category 2 FF&E based on the development of Project Co's Design Data and the latest information available from the Contracting Authority Representative and based on the preparation of detailed FF&E floor layouts pursuant to Section 21.5(a).

(d) **Refurbishment Management – Category 2 FF&E**

Project Co shall provide all refurbishment management services in connection with Category 2 FF&E, including organizing, coordinating, scheduling and procuring on behalf of MAG all service contracts and additional components for the refurbishment of all applicable Category 2 FF&E (as determined by the FF&E Steering Committee, based on recommendations received from Project Co) for re-use at the Facility.

(e) **Temporary Replacement Management, Relocation Management and Relocation – Category 2 FF&E and Transferred Existing Facilities Items**

(i) Project Co shall be responsible for:

(A) organizing, coordinating and scheduling the temporary replacement of Category 2 FF&E (as determined by the FF&E Steering Committee, based on recommendations received from Project Co) at the Existing Facilities and procuring on behalf of MAG all rental contracts for the temporary replacement of all applicable Category 2 FF&E at the Existing Facilities in order to maintain normal operations at the Existing Facilities with minimal disruption;

- (B) planning, managing and executing the phased relocation (including, for certainty, executing the move and transfer from the Existing Facilities to the Facility) of (a) all information technology equipment such as personal computers, monitors, peripherals (docking station, mouse, keyboard, speakers, etc.), and terminals (a list of the foregoing will be provided by Contracting Authority to Project Co), (b) all contents, including, but not limited to, contents of offices, chambers, workstations, libraries, all file and storage systems, storage rooms, exhibits, etc. located at the Existing Facilities (the items in this Section 21.5(e)(i)(B) (a) and (b) are referred to herein collectively as the “**Contents and Information Technology**”), and (c) all Category 2 FF&E (the Category 2 FF&E together with the Contents and Information Technology are collectively referred to herein as the “**Transferred Existing Facilities Items**”) from the Existing Facilities to the Facility in accordance with Good Industry Practice and ensuring the security, safety and confidentiality of all Transferred Existing Facilities Items;
  - (C) working closely with MAG and other courthouse occupants to successfully plan and coordinate the relocation of all Transferred Existing Facilities Items;
  - (D) the decommissioning (where applicable), disassembly at the Existing Facilities, transfer to the Facility and reinstallation at the Facility of all Transferred Existing Facilities Items (except for those items identified in Section 21.5(e)(ii));
  - (E) packing and unpacking of all Transferred Existing Facilities Items (except for contents of desks, workstations, courtroom desks and dais’) according to Good Industry Practice; and
  - (F) providing security staff and/or off-duty police as required by Contracting Authority to ensure security and confidentiality throughout all phases of the relocation contemplated in this Section 21.5(e) in accordance with Good Industry Practice.
- (ii) The scope of the relocation contemplated in this Section 21.5(e) does not include:
- (A) disconnecting and reconnecting personal computers, terminals, servers, and LAN room equipment; or
  - (B) relocating personal items of Existing Facility occupants, including personal art, personal artefacts or personal wall hangings.

- (iii) Project Co shall coordinate the removal, relocation, storage and reinstallation of printers / copiers / MFDs, computers and safes with Contracting Authority and Third-Party Vendors where applicable.
  - (iv) All relocations shall take place outside normal business hours in order to avoid disruption to normal courthouse operations and the Contracting Authority Activities. Normal courthouse operations and Contracting Authority Activities must be maintained throughout all relocation phases.
- (f) **Delivery, Installation, and Commissioning**
- Project Co shall be responsible for:
- (i) scheduling and coordinating the vendors' delivery of all Category 1 FF&E to the loading dock of the Facility;
  - (ii) scheduling and coordinating the vendors' delivery of all Category 1 FF&E from the loading docks of the Facility to the final individual locations within the Facility;
  - (iii) coordinating and scheduling to determine the delivery date of all Category 1 FF&E, and shall be responsible for providing temporary offsite storage, as well as associated transportation (if required);
  - (iv) monitoring the vendors' offloading, unpacking, handling, storing, placing and completing the installation of all Category 1 FF&E in accordance with the Design Data and manufacturer's instructions;
  - (v) coordinating, scheduling and completing the commissioning of all Category 1 FF&E and all Transferred Existing Facilities Items (other than the contents of desks, workstations, courtroom desks and dais') in accordance with the Final Commissioning Program;
  - (vi) coordinating, scheduling and completing the deficiency review with vendors to ensure the quality, quantity, final location and finish details are accurate for all Category 1 FF&E and all Transferred Existing Facilities Items within one week of each item's delivery and installation. Project Co shall produce a room by room deficiency list with an individual room layout sketch for deficiency work. Project Co shall issue a deficiency report to coordinate, track, and update all deficiency items.
  - (vii) cooperating with and providing reasonable assistance to all Category 1 FF&E vendors in respect of Category 1 FF&E, including but not limited to, the vendors' delivery, offloading, unpacking, handling, storing, placing, moving, installing and connecting all Category 1 FF&E; and

- (viii) as required by Contracting Authority from time to time, providing and facilitating Category 1 FF&E vendors' (including, for clarity, their employees, agents, representatives, contractors and subcontractors) access to and within the Site and the Facility, including, but not limited to, accommodating the vendors' use of elevators.

For greater certainty, Project Co shall only be responsible for monitoring and coordinating the delivery and installation of Category 1 FF&E. The applicable Category 1 FF&E vendors shall be responsible for the delivery and installation of all Category 1 FF&E.

(g) **FF&E Budget**

Project Co shall be responsible for preparing, maintaining, and updating an FF&E budget with respect to Category 1 FF&E and Category 2 FF&E, and conducting an ongoing review of the proposed budget with the FF&E Steering Committee.

(h) **FF&E Training**

- (i) For and in respect of each item of FF&E procured by Project Co and operated by Contracting Authority, MAG Staff, Police Services staff or any other police services staff, as the case may be, Project Co shall, in accordance with Schedule 14 – Outline Commissioning Program, provide or arrange for adequate, appropriate and timely training in the item's proper operation and maintenance for each of them; and
- (ii) For and in respect of each item of FF&E procured by Project Co and operated by Contracting Authority, MAG Staff, Police Services staff or any other police services staff, as the case may be, Contracting Authority shall arrange for each of them to be available for training purposes in accordance with the Works Schedule and the Final Commissioning Program.

(i) **Substantial Completion**

For the purpose of achieving Substantial Completion, all Category 1 FF&E must be successfully assembled, installed and commissioned at the Facility in accordance with this Project Agreement and the Final Commissioning Program provided that, in respect of any item of Category 1 FF&E, such requirements shall be waived by Contracting Authority if, despite having used commercially reasonable efforts to do so, Project Co is unable to complete or cause the completion of the procurement, installation or commissioning of such item of Category 1 FF&E due to a delay in the performance of any of its obligations by Contracting Authority, an FF&E vendor or manufacturer.

(j) **Final Completion**

For the purpose of achieving Final Completion, all Transferred Existing Facilities Items must be successfully relocated, placed, unpacked, assembled, installed and

commissioned, as applicable, by Project Co at the Facility in accordance with the Final Commissioning Program provided that, in respect of any item of Transferred Existing Facilities Items, such requirements shall be waived by Contracting Authority if, despite having used commercially reasonable efforts to do so, Project Co is unable to complete the installation or commissioning of such item of Transferred Existing Facilities Items due to a delay in the performance of any of its obligations by Contracting Authority or an FF&E refurbisher of Transferred Existing Facilities Items.

(k) **Holdback**

Whether or not Final Completion has been achieved, until such time as Project Co has completed the procurement (if applicable), transfer (if applicable), installation (if applicable) and commissioning of all FF&E in accordance with this Section 21, Contracting Authority may withhold from any payment or payments due to Project Co a holdback amount equal to the greater of the Separate FF&E and Transition Services Fee and \$[REDACTED].

**21.6 Project Co Procurement and Other Responsibilities**

(a) Project Co shall act as purchasing and procurement manager for Contracting Authority and MAG and shall:

(i) in consultation with the FF&E Steering Committee, prepare and finalize the list and specifications (performance or preferred) of Category 1 FF&E based on the development of Project Co's Design Data and the latest information available from the Contracting Authority Representative and update the budget for Category 1 FF&E for approval by the FF&E Steering Committee. Unless otherwise determined by the FF&E Steering Committee, Category 1 FF&E items shall be divided by Project Co into the following proposed nine subcategories of RFP packages;

- (A) systems furniture;
- (B) private office casegoods;
- (C) tables (ex: meeting or interview room table, end table, coffee table, etc.);
- (D) task and meeting chairs;
- (E) filing cabinets;
- (F) soft seating and miscellaneous chairs (ex: side chair, lounge seating, lunchroom chairs, etc.);
- (G) lamps (ex: floor lamp, table lamp, etc.);
- (H) high density filing units; and

- (I) ergonomic desk accessories;
- (ii) in consultation with the FF&E Steering Committee, review the FF&E building system requirements and the FF&E design drawings for reconciliation with the services and space designed prior to purchasing or moving any FF&E;
- (iii) in consultation with the FF&E Steering Committee, coordinate a furniture fair as well as Design Workshops during the Design Development Submittals stages for all Category 1 FF&E items, or for a subset of Category 1 FF&E items as may be determined by the FF&E Steering Committee;
- (iv) in consultation with the FF&E Steering Committee, establish procurement processes that are fair and competitive, all in accordance with any applicable MAG policies and good purchasing and procurement practices;
- (v) use the Government of Ontario Vendors of Record List (the “**VOR**”) to procure all Category 1 FF&E, provided that, for certainty, the procurement process shall be established in accordance with Section 21.6(a)(iv);
- (vi) in consultation with the FF&E Steering Committee, prepare tenders, requests for quotations or requests for proposals (the “**FF&E Procurement Documentation**”), which shall be conducted in accordance with Section 21.4(a) and this Section 21.6, and which FF&E Procurement Documentation shall include an obligation for each vendor of Category 1 FF&E to be responsible for delivering and installing such FF&E and shall be in form and substance satisfactory to Contracting Authority;
- (vii) manage the procurement of, and procure on behalf of MAG, all Category 1 FF&E, and manage the procurement of and procure on behalf of MAG the refurbishment contracts and temporary replacement rental contracts in respect of applicable Category 2 FF&E, including:
  - (A) providing advice to the FF&E Steering Committee in respect of the evaluation of tenders, quotations or proposals from FF&E vendors;
  - (B) assisting the FF&E Steering Committee in the review of the tenders, quotations or proposals from FF&E vendors by clearly delineating the costs and performance of the Category 1 FF&E, the training methods and values, the testing and calibration protocols, the acceptable end results and the party responsible for such testing, be it the vendor, a third party or individuals engaged by Project Co;
  - (C) assisting the FF&E Steering Committee in review of tenders, quotations or proposals from Category 2 FF&E vendors of refurbishment and replacement services by clearly delineating the cost implications



- regarding relocation planning and scheduling, and performance of the Category 2 FF&E;
- (D) assisting the FF&E Steering Committee with the selection of tenders, quotations or proposals from FF&E vendors and vendors of refurbishment and replacement services;
  - (E) procure on behalf of MAG all purchase orders and other contracts with respect to the purchase by MAG of Category 1 FF&E;
  - (F) procure on behalf of MAG all contracts in respect of refurbishment and temporary replacement with respect to the applicable Category 2 FF&E;
  - (G) providing such documentation as Contracting Authority and MAG require, acting reasonably, to discharge its obligations under this Section 21;
  - (H) in consultation with the FF&E Steering Committee, arranging the furniture mock-ups of all Category 1 FF&E items, or a subset of Category 1 FF&E items as may be determined by the FF&E Steering Committee, with short listed FF&E vendors during procurement evaluations; and
  - (I) reviewing and approving all furniture specification lists and drawings, including all changes, if required, prior to issuing purchase orders with successful FF&E vendors;
- (viii) in accordance with the FF&E Procurement Documentation, act as a single point of contact for all FF&E vendors and vendors of refurbishment and replacement services;
  - (ix) test and calibrate any FF&E not tested and calibrated by vendors and coordinate the acceptance testing of all Category 1 FF&E and all Category 2 FF&E;
  - (x) for a one-year period following: (i) Interim Completion in respect of the TRBC Facility; and (ii) Substantial Completion in respect of the BCA Facility, coordinate and manage any warranty issues with the Category 1 FF&E vendors; and
  - (xi) for a one-year period following Substantial Completion, coordinate and manage any warranty issues with the Category 2 FF&E vendors in respect of refurbishment of Category 2 FF&E.
- (b) Contracting Authority acknowledges and agrees that it will be reasonable for Project Co not to accept a particular VOR for the procurement of Category 1 FF&E if:

- (i) a vendor on the VOR will not provide a 100% performance bond or alternative security in favour of Contracting Authority with the Construction Contractor named as dual obligee or beneficiary, as the case may be, thereunder; and
  - (ii) the vendor on the VOR will not include a provision in its purchase order/agreement whereby it agrees to execute and deliver, under seal, to the Construction Contractor a covenant to and in favour of the Construction Contractor that such vendor on the VOR will perform its obligations under such purchase order/agreement.
- (c) If:
- (i) Project Co does not agree on any of the vendors on the VOR as a result or in circumstances described in 21.6(b)(i) and (ii), or
  - (ii) the prices and other terms and conditions of sale offered by the supplier in respect of the items to be supplied under the purchase order/agreement are less favourable than its commitment as a vendor of record to the Government of Ontario,

then Project Co shall tender the FF&E supply contract, as applicable, to a supplier or suppliers acceptable to Contracting Authority (such acceptance not to be withheld unreasonably) under a competitive process consistent with Government of Ontario practice for the purchase of goods and services. Where Project Co is, for any reason, unable to tender the FF&E supply contract, as applicable, in accordance with the immediately preceding sentence, Project Co shall tender the FF&E supply contract, as applicable, to a supplier acceptable to Contracting Authority (such acceptance not to be withheld unreasonably) pursuant to an alternative competitive process satisfactory to Contracting Authority in its reasonable discretion. Project Co acknowledges and agrees that all contracts for the supply of Category 1 FF&E under this Project Agreement shall be between MAG and the applicable supplier, notwithstanding that such supplier is not a vendor on the VOR.

- (d) Based on the tenders, quotations and proposals received from FF&E vendors, Project Co shall make recommendations to the FF&E Steering Committee for the procurement of each item or type of Category 1 FF&E and for the procurement of Category 2 FF&E refurbishment contracts and rental contracts for temporary replacements. Each such recommendation shall include the following information:
- (i) item description, item number, and quantities;
  - (ii) the manufacturer, model number, vendor, specifications and options for the item;

- (iii) an analysis and recommendation as to which make, model number and vendor of the item provides the overall best value for Contracting Authority, and any other benefits of the recommendation;
- (iv) in respect of Category 1 FF&E only, an analysis of the effect of the items on the overall design of the Facility and the relevant areas within the Facility;
- (v) details of the warranties, vendor installation, service agreements, training, supplies, spare parts and start-up consumables included with the items by the relevant manufacturer or vendor;
- (vi) details of training for all applicable Contracting Authority and MAG staff;
- (vii) FF&E acceptance testing procedures (including, without limitation, the results and guidelines for acceptance) proposed by the relevant Category 1 FF&E vendor;
- (viii) FF&E acceptance procedures, if any (including, without limitation, the results and guidelines for acceptance) proposed by the relevant Category 2 FF&E vendor of refurbishment and/or temporary replacement services;
- (ix) the dates and times when the items shall be delivered to the Facility or the Existing Facilities, as applicable;
- (x) all costs, with a breakdown of applicable HST and net of all direct or indirect discounts, rebates, refunds, chargebacks, credits, price adjustments or any other allowances obtained across all categories of FF&E that effectively reduce the net selling price of such FF&E or reduce the service contract price, and any Taxes applicable to the items;
- (xi) the total amounts and timing of cash flows required to implement the recommendation and the full details of the calculation of such amounts;
- (xii) whether the procurement is a purchase, a lease, part of a managed equipment program, based on usage pricing or any other arrangement, and the terms and timing of payments thereof;
- (xiii) if so requested by Contracting Authority's Representative, a copy of each quote or proposal and all other relevant information in respect of the items and such other documentation as Contracting Authority may reasonably require, all of which shall be provided on a fully transparent and open basis to the Contracting Authority Representative; and
- (xiv) if no tenders, quotations and proposals are available or have been received by Project Co, an alternate recommended course of action for procurement by Project Co, including possible substitutes for such items.

- (e) In response to any recommendation made by Project Co in accordance with Section 21.6(d), Contracting Authority may do any of the following with respect to some or all of the items:
- (i) instruct Project Co to proceed with the procurement;
  - (ii) withdraw the requirement for Project Co to proceed with the procurement;
  - (iii) increase or decrease the quantities of any item, require the procurement of other items in substitution for such items or otherwise change the items to be procured or the terms on which such items are to be procured; and
  - (iv) reject any FF&E vendor (including, for certainty, any vendor of refurbishment contracts and rental contracts for temporary replacement of Category 2 FF&E) or item.
- (f) Project Co shall provide to the Contracting Authority Representative, as soon as reasonably practicable following a request therefor, such additional information as Contracting Authority may require in respect of any recommendation made by Project Co in accordance with Section 21.6(d).

#### **21.7 Minimizing Disruptions**

- (a) Project Co shall perform all of its obligations under this Section 21 so as to minimize, to the greatest extent reasonably possible, any disruption of the Works and the Contracting Authority Activities. Project Co acknowledges and agrees that such activities may require work outside of normal working hours in order to accommodate the efficient operation of the Facility and the Existing Facilities.

#### **21.8 Scheduling of FF&E Procurement, Refurbishment and Installation**

- (a) Project Co shall, in consultation with Contracting Authority, prepare a schedule for the procurement or transfer and/or refurbishment, as applicable, installation and commissioning of all FF&E, and shall incorporate the timing of procurement or transfer and/or refurbishment as applicable, installation and commissioning of all FF&E into the Works Schedule and the Final Commissioning Program. Such schedule shall include the date by which Contracting Authority must make a final determination of the quantity, make, service contract, model and vendor, as the case may be, of each piece or type of Category 1 FF&E.
- (b) Contracting Authority shall review and confirm Project Co's proposal for the quantity, make, service contract, model and vendor of each piece of Category 1 FF&E, and shall execute or cause to be executed any purchase order, contract, manufacturer's installation invoice and/or other documentation related to the Category 1 FF&E, by the relevant date set out in the Works Schedule, provided that Contracting Authority's Representative shall have received such documentation as Contracting Authority

requires, acting reasonably, to discharge its obligations under this Section 21 no later than 30 days prior to the relevant date set out in the Works Schedule.

**21.9 Maintenance of FF&E**

- (a) For greater certainty, Project Co shall not be responsible for the maintenance, repair, replacement, monitoring or refurbishment of any FF&E, except as set out in Schedule 15 – Output Specifications.

**22. ENVIRONMENTAL REQUIREMENTS**

**22.1 Environmental Requirements**

- (a) Project Co shall comply with all environmental requirements set out in Schedule 15 – Output Specifications.

**22.2 Greenhouse Gas Credits**

- (a) Any carbon or other greenhouse gas credits (including but not limited to allowances, offset credits and any other credits that may be recognized in any provincial, regional, national, international or other emissions trading system from time to time) which may be contracted for or otherwise guaranteed as a result of the Project shall be owned by Contracting Authority and Project Co shall have no entitlement to any of such credits whatsoever.

**23. INDEPENDENT CERTIFIER**

**23.1 Appointment**

- (a) On or prior to Financial Close, the Parties shall appoint an independent and suitably qualified and experienced consultant to act as the Independent Certifier for the purposes of this Project Agreement and, such consultant will be required to have independent, impartial and suitably qualified representatives able to serve as adjudicators, to adjudicate disputes pursuant to Schedule 27 and shall enter into an agreement with the Independent Certifier substantially in the form of Schedule 6 – Independent Certifier Agreement. If the Parties are unable to agree upon the Independent Certifier within such period of time, then the determination of the Independent Certifier shall be made in the same manner as the identification of a replacement Independent Certifier under Section 23.7(b).
- (b) Neither Party shall, without the prior written consent of the other Party, enter into any agreement with the Independent Certifier in connection with the Project other than the Independent Certifier Agreement, and Project Co shall ensure that no Project Co Party enters into any separate agreement with the Independent Certifier in connection with the Project.

### **23.2 Role of Independent Certifier**

- (a) The general role, obligations and functions of the Independent Certifier are described in Schedule 6 – Independent Certifier Agreement.

### **23.3 Changes to Terms of Appointment**

- (a) Neither Contracting Authority nor Project Co shall without the other's prior written approval:
  - (i) waive, settle, compromise or otherwise prejudice any rights or claims which the other may from time to time have against the Independent Certifier; or
  - (ii) vary the terms of the Independent Certifier Agreement or the service performed or to be performed by the Independent Certifier.
- (b) The Parties shall perform their respective obligations arising under or in connection with the Independent Certifier Agreement.

### **23.4 Right to Change Appointment**

- (a) The Parties acknowledge that the Independent Certifier shall provide certain services and reports to Project Co, the Lenders and the Project Co Parties in addition to performing the functions of the Independent Certifier under this Project Agreement. The Parties may agree to terminate the Independent Certifier Agreement upon 30 days' notice to the Independent Certifier. If such notice is given, then, pursuant to Section 23.7, a new Independent Certifier will be appointed. The Parties agree that, notwithstanding the 30 days' notice of termination, the Independent Certifier shall continue on a day-to-day basis thereafter until a new Independent Certifier is appointed.

### **23.5 Cooperation**

- (a) The Parties agree to cooperate with each other generally in relation to all matters within the scope of or in connection with the Independent Certifier Agreement. All instructions and representations issued or made by either of the Parties to the Independent Certifier shall be simultaneously copied to the other and both Parties shall be entitled to attend all inspections performed by or meetings involving the Independent Certifier.

### **23.6 Payment of Independent Certifier**

- (a) Project Co and Contracting Authority shall share equally the responsibility for the payment of all fees and costs of the Independent Certifier.

## **23.7 Replacement**

- (a) In the event of the Independent Certifier's engagement being terminated otherwise than for full performance, the Parties shall liaise and cooperate with each other in order to appoint a replacement consultant to act as the Independent Certifier as soon as reasonably practicable. The identity of any such replacement shall be as agreed by the Parties and the terms of his/her appointment shall, unless otherwise agreed, be as set out in the Independent Certifier Agreement.
- (b) In the event the Parties fail to agree upon the identity of a replacement Independent Certifier within five Business Days of the original Independent Certifier's appointment being terminated, then a replacement Independent Certifier shall be chosen as follows:
- (i) each Party shall, within five Business Days thereafter, select three suitably qualified and experienced replacements that would be acceptable to that Party, and shall provide Notice thereof to the other Party, with a ranking of preference for replacements;
  - (ii) if the Parties have both selected a common replacement, then such common replacement shall be the Independent Certifier, and if there is more than one common replacement, then the common replacement with the highest overall ranking (calculated by adding together the ordinal rank assigned by both Parties) shall be selected, and in the event of a tie, the lowest-cost of such tied replacements shall be selected; and
  - (iii) if the Parties have not selected a common replacement, then the determination of the new replacement may be referred for resolution in accordance with Schedule 27 – Dispute Resolution Procedure.

## **23A INTERIM COMPLETION COMMISSIONING AND COMPLETION**

### **23A.1 Interim Completion Commissioning Activities**

- (a) Project Co shall perform all Interim Completion Project Co Commissioning, and shall facilitate the performance of all Interim Completion Contracting Authority Commissioning, pursuant to the Interim Completion Commissioning Program.

### **23A.2 Interim Completion Commissioning Program**

- (a) Project Co shall prepare a draft of the Interim Completion Commissioning Program in respect of the Interim Completion Project Co Commissioning and the Interim Completion Contracting Authority Commissioning and shall provide a copy thereof to the Independent Certifier, the Contracting Authority Commissioning Consultant and the Contracting Authority Representative not less than 180 days prior to the Scheduled Interim Completion Date.
- (b) The Interim Completion Commissioning Program shall, at a minimum:

- (i) describe the requirements, and the timing and sequence of such requirements, necessary in order that the Interim Completion Project Co Commissioning shall be completed to achieve Interim Completion on or before the Scheduled Interim Completion Date;
  - (ii) describe the requirements, and the timing and sequence of such requirements, of the Interim Completion Contracting Authority Commissioning activities;
  - (iii) comply with all requirements of the Outline Commissioning Program and include all details, including for all appendices, required to be completed in the Outline Commissioning Program;
  - (iv) be consistent with the Outline Commissioning Program and impose no greater or more onerous obligations on Contracting Authority than those set out in the Outline Commissioning Program, unless otherwise agreed to by Contracting Authority;
  - (v) include the names of the individuals or companies proposed to perform all Interim Completion Project Co Commissioning;
  - (vi) include a schedule of each of the Interim Completion Project Co Commissioning Tests and the Interim Completion Contracting Authority Commissioning Tests proposed to be performed and the timeframe for completion, with start and end dates;
  - (vii) include a schedule of meetings to be held between the Parties to coordinate the performance of the Interim Completion Project Co Commissioning and the Interim Completion Contracting Authority Commissioning;
  - (viii) provide for the re-verification of systems following the Interim Completion Contracting Authority Commissioning;
  - (ix) list the approvals required from any Governmental Authority, manufacturer or other person that are necessary to meet the requirements of the Interim Completion Commissioning Program or Applicable Law ; and
  - (x) comply with the requirements and the timing and sequence of such requirements of the applicable Transition.
- (c) Contracting Authority shall provide Project Co with comments on the draft Interim Completion Commissioning Program in accordance with the procedures contemplated by Schedule 10 – Review Procedure, and Project Co shall revise the draft Interim Completion Commissioning Program to the extent contemplated by Schedule 10 – Review Procedure within 30 days of receipt of any comments from Contracting Authority.



- (d) When agreed by the Parties, the Interim Completion Commissioning Program shall replace the Outline Commissioning Program with respect to Interim Completion.

**23A.3 Commencement of Interim Completion Project Co Commissioning**

- (a) Project Co shall give 30 days' written notice to the Independent Certifier, the Contracting Authority Commissioning Consultant and the Contracting Authority Representative of the proposed commencement of the Interim Completion Project Co Commissioning.
- (b) Project Co shall give at least five Business Days' notice to, and shall invite, the Independent Certifier, the Contracting Authority Commissioning Consultant and the Contracting Authority Representative to witness, and to comment on, each aspect of the Interim Completion Project Co Commissioning. Project Co shall, together with such notice, provide all information that the Independent Certifier, the Contracting Authority Commissioning Consultant and the Contracting Authority Representative may reasonably require in relation thereto, including:
- (i) tests proposed;
  - (ii) test methodology; and
  - (iii) expected test results.

**23A.4 Interim Completion Certificate**

- (a) Project Co shall give the Independent Certifier and the Contracting Authority Representative at least ten Business Days' notice prior to the date upon which Project Co anticipates delivering the Interim Completion Notice.
- (b) Project Co shall deliver notice to the Independent Certifier and the Contracting Authority Representative notice upon the satisfaction of all of the requirements for Interim Completion under this Project Agreement (the "**Interim Completion Notice**"). The Interim Completion Notice shall (i) describe, in reasonable detail, the satisfaction of the requirements for Interim Completion, (ii) include as appendices all of the Interim Completion Deliverables described in the Interim Completion Deliverables List, and (iii) include Project Co's opinion that the conditions for issuance of the Interim Completion Certificate under this Project Agreement have been satisfied.
- (c) Within two Business Days of receiving the Interim Completion Notice from Project Co, the Independent Certifier shall review the Interim Completion Notice to determine whether or not the Interim Completion Notice includes all of the Interim Completion Deliverables described in the Interim Completion Deliverables List. For the purposes of this Section 23A.4(c), if the Interim Completion Notice contains a Interim Completion Deliverable that, in the reasonable opinion of the Independent Certifier, is of such poor quality that it would impede, in a material way, the ability of Contracting Authority and the Independent Certifier to assess whether or not the requirements for

Interim Completion under this Project Agreement have been satisfied, then such Interim Completion Deliverable shall be deemed to have not been included as part of the Interim Completion Notice. Following such review and determination by the Independent Certifier and before the expiry of such two Business Day period, the Independent Certifier shall either deliver notice to Project Co and Contracting Authority:

- (i) confirming that the Interim Completion Notice includes all of the Interim Completion Deliverables described in the Interim Completion Deliverables List (the “**IC Interim Completion Deliverables Confirmation**”); or
- (ii) setting out a list of the Interim Completion Deliverables that were not included in the Interim Completion Notice (an “**IC Interim Completion Deliverables Deficiencies List**”).

If the Independent Certifier provides a notice to Project Co and Contracting Authority setting out an IC Interim Completion Deliverables Deficiencies List pursuant to this Section 23A.4(c), then Project Co shall subsequently submit a new and replacement version of the Interim Completion Notice pursuant to Section 23A.4(b), which, for greater certainty, includes all of the Interim Completion Deliverables, and the process described in this Section 23A.4(c) shall be repeated until the IC Interim Completion Deliverables Confirmation is provided by the Independent Certifier to Project Co and Contracting Authority.

- (d) Contracting Authority shall, within five Business Days after receipt of the IC Interim Completion Deliverables Confirmation, provide the Independent Certifier and Project Co with Contracting Authority’s opinion as to whether the conditions for issuance of the Interim Completion Certificate have been satisfied or, if applicable, any reasons as to why Contracting Authority considers that the Interim Completion Certificate should not be issued.
- (e) Within five Business Days after Project Co’s receipt of Contracting Authority’s opinion pursuant to Section 23A.4(d), the Parties shall cause the Independent Certifier to determine whether the conditions for issuance of the Interim Completion Certificate have been satisfied, having regard for the opinions of both Project Co and Contracting Authority, to determine whether any Interim Completion Minor Deficiencies exist, and to issue to Contracting Authority and to Project Co either:
  - (i) the Interim Completion Certificate, confirming the date of issue as the Interim Completion Date and setting out the Interim Completion Minor Deficiencies List (if applicable) in accordance with Section 23A.8; or
  - (ii) a report detailing the matters that the Independent Certifier considers are required to be performed by Project Co to satisfy the conditions for issuance of the Interim Completion Certificate.

- (f) Where the Independent Certifier has issued a report in accordance with Section 23A.4(e)(ii) and Project Co has not referred a Dispute in relation thereto for resolution in accordance with Schedule 27 – Dispute Resolution Procedure Project Co shall, within 5 Business Days after receipt of such report, provide the Independent Certifier and the Contracting Authority Representative with:
- (i) a detailed list indicating the rectification actions proposed for all matters raised in such report;
  - (ii) the schedule for completion of all such rectification actions; and
  - (iii) any additional Interim Completion Project Co Commissioning that needs to be undertaken as a result of the rectification actions,
- and Project Co shall perform all such additional rectification actions and Project Co Commissioning in a timely manner. Upon completion thereof, and for each subsequent application for Interim Completion, Project Co shall submit a new Interim Completion Notice and the process described in Sections 23A.4(b) to (f), inclusive, shall be repeated until the Substantial Completion Certificate has been issued.
- (g) For greater certainty, the Independent Certifier’s decision to issue the IC Interim Completion Deliverables Confirmation shall not limit or otherwise affect (i) any of Project Co’s obligations under this Project Agreement to satisfy the requirements of Substantial Completion or (ii) the opinion of Contracting Authority or the determination of the Independent Certifier as to whether the conditions for issuance of the Interim Completion Certificate have been satisfied pursuant to Section 24.4(d) and Section 24.4(e) respectively.
- (h) The Independent Certifier’s decision to issue or not to issue the Interim Completion Certificate shall be final and binding on the Parties solely in respect of determining the Interim Completion Payment Date and a Dispute in relation to the Interim Completion Payment Date shall not be subject to resolution pursuant to Schedule 27 – Dispute Resolution Procedure, provided, however, that any other Dispute in relation to the Independent Certifier’s decision to issue or not to issue the Interim Completion Certificate may be referred for resolution pursuant to the Dispute Resolution Procedure.
- (i) Project Co shall provide As-Built Drawings and specifications, Design Data, spare parts and Shop Drawings as soon as possible and in any event no later than 30 days after the Interim Completion Date.
- (j) The submission of the Interim Completion Notice by Project Co in accordance with Section 23A.4(b) shall constitute a waiver by Project Co of all claims whatsoever against Contracting Authority under this Project Agreement, arising prior to the submission of the Interim Completion Notice, except:

- (i) without prejudice to specific notice requirements in this Project Agreement, those made in writing by Project Co (either on its own account or arising out of a claim of a Project Co Party) arising prior to the submission of the Interim Completion Notice and still unsettled; and
- (ii) any third party claim which was not known to Project Co or a Project Co Party or could not reasonably have been known to Project Co or a Project Co Party at such time and with respect to which Project Co or a Project Co Party is entitled to indemnification from Contracting Authority in accordance with this Project Agreement.

**23A.5 Interim Completion Operation and Maintenance Manuals**

- (a) Project Co shall prepare and deliver to Contracting Authority draft copies of all necessary operation and maintenance manuals for the TRBC Facility in the format set out in the Output Specifications no later than 30 days prior to the Interim Completion Date.

**23A.6 Interim Completion Contracting Authority Commissioning**

- (a) The Parties acknowledge that the Interim Completion Contracting Authority Commissioning shall be performed both before and after the Interim Completion Date. Prior to Interim Completion, Project Co shall give Contracting Authority full access to the Site, the Facility, any portion of the Existing Facilities in which any Works are to be performed and all relevant parts thereof at such times as may be set out in the Interim Completion Commissioning Program to enable Contracting Authority to undertake the Interim Completion Contracting Authority Commissioning in accordance with the Interim Completion Commissioning Program. Contracting Authority shall comply, and shall ensure that all Contracting Authority Parties comply, with the directions, procedures and safety guidelines established by Project Co for the Site and shall use commercially reasonable efforts to minimize disruption to the Works in performing the Interim Completion Contracting Authority Commissioning.
- (b) Contracting Authority acknowledges that, during the Interim Completion Contracting Authority Commissioning Period, Project Co and each Subcontractor will be active in the Facility and, if applicable, in the Existing Facilities, in both the rectification of Interim Completion Minor Deficiencies and the completion of Interim Completion Project Co Commissioning, and Contracting Authority shall take commercially reasonable steps to allow such activities to proceed in accordance with the Interim Completion Commissioning Program.
- (c) Project Co acknowledges that, prior to and during the Interim Completion Contracting Authority Commissioning Period, Project Co and each Subcontractor shall cooperate with Contracting Authority and all Contracting Authority Parties and use commercially reasonable efforts to ensure that all requirements, and the timing and sequence of such requirements, of the Interim Completion Contracting Authority Commissioning

activities are able to be completed in the timeframe for completion set out in the Interim Completion Commissioning Program.

**23A.7 Interim Completion Countdown Notice and Substantial Completion Deliverables**

- (a) Project Co shall deliver a notice (the “**Interim Completion Countdown Notice**”) to Contracting Authority and the Independent Certifier specifying the date on which Project Co anticipates that Interim Completion will be achieved (the “**Anticipated Interim Completion Date**”).
- (b) The Interim Completion Countdown Notice shall be delivered not less than 90 days prior to the Anticipated Interim Completion Date. If Project Co fails to deliver the Interim Completion Countdown Notice not less than 90 days prior to the Scheduled Interim Completion Date, the Anticipated Interim Completion Date shall be deemed to be the same date as the Scheduled Interim Completion Date.
- (c) In accordance with Section 13.4A(a), the Anticipated Interim Completion Date shall not be earlier than the Scheduled Interim Completion Date without the prior written consent of Contracting Authority, in its sole discretion.
- (d) Within 15 Business Days of the Independent Certifier’s receipt of the Interim Completion Countdown Notice in accordance with Section 23A.7(a), the Independent Certifier, in consultation with Project Co and Contracting Authority, shall prepare and deliver to Project Co and Contracting Authority a list of deliverables (the “**Interim Completion Deliverables List**”) that (A) are to be appended to and form part of the Interim Completion Notice to be submitted by Project Co pursuant to Section 23A.4(b), and (B) will constitute a minimum amount of evidence necessary for Project Co, in the Interim Completion Notice, to describe, in reasonable detail, the satisfaction of the requirements for Interim Completion and to support Project Co’s opinion that the conditions for issuance of the Interim Completion Certificate have been satisfied (collectively, the “**Interim Completion Deliverables**”).
- (e) From time to time until the date that is 60 days prior to the Anticipated Interim Completion Date, the Independent Certifier, in consultation with Project Co and Contracting Authority, may amend the Interim Completion Deliverables List, including to set out any additional Interim Completion Deliverables not identified in the Interim Completion Deliverables List pursuant to Section 23A.7(d). Each amended Interim Completion Deliverables List shall, following its preparation, be deemed to be the Interim Completion Deliverables List for the purposes of this Project Agreement and be promptly delivered to Project Co and Contracting Authority.
- (f) For greater certainty, nothing in Section 23A.7(d) or Section 23A.7(e) limits or otherwise affects any of Project Co’s obligations under this Project Agreement to satisfy the requirements of Substantial Completion or to describe, in reasonable detail, the satisfaction of such requirements in the Interim Completion Notice pursuant to Section 23A.4(b).

**23A.8 Interim Completion Minor Deficiencies**

- (a) In the event that any Interim Completion Minor Deficiencies exist when Project Co gives the Interim Completion Notice, the Independent Certifier, in consultation with Project Co and Contracting Authority, shall prepare a list of all Interim Completion Minor Deficiencies (the “**Interim Completion Minor Deficiencies List**”) identified at that time and an estimate of the cost and the time for rectifying such Interim Completion Minor Deficiencies. Contracting Authority may withhold from the Interim Completion Payment a holdback amount that, subject as hereinafter provided, is [REDACTED] % of the amount estimated by the Independent Certifier for Contracting Authority to complete and rectify all such Interim Completion Minor Deficiencies at that time (the “**Interim Completion Holdback**”), which holdback shall be held in an interest bearing account.
- (b) The Interim Completion Minor Deficiencies List will contain the schedule for the completion and rectification of the Interim Completion Minor Deficiencies. The timeframe for the completion or rectification of each Interim Completion Minor Deficiency shall be no later than four months following the Interim Completion Date. In determining the relevant time for rectifying Interim Completion Minor Deficiencies, Project Co shall schedule the completion and rectification of Interim Completion Minor Deficiencies so as to minimize, to the greatest extent reasonably possible, any impairment of Contracting Authority’s use and enjoyment of the Facility or disruption of the Works or Contracting Authority Activities.
- (c) The Independent Certifier must prepare the Interim Completion Minor Deficiencies List in relation to the Interim Completion Notice before the Interim Completion Certificate is issued, but shall not withhold the Interim Completion Certificate by reason solely that there are Interim Completion Minor Deficiencies.
- (d) Contracting Authority may, in its sole discretion, waive any requirement for Interim Completion, including with respect to FF&E, and the failure to meet any such requirement shall constitute a Interim Completion Minor Deficiency.

**23A.9 Rectification of Interim Completion Minor Deficiencies**

- (a) Project Co shall, in consultation with the Contracting Authority Representative and so as to minimize, to the greatest extent reasonably possible, any disruption of the Works or the Contracting Authority Activities, complete and rectify all Interim Completion Minor Deficiencies:
  - (i) within 45 days of the issuance of the Interim Completion Minor Deficiencies List for all Interim Completion Minor Deficiencies where no time for completion and rectification has been specified by the Independent Certifier;

- (ii) within the time for completion and rectification of any Interim Completion Minor Deficiency where such a time was specified by the Independent Certifier in the Interim Completion Minor Deficiencies List; and
  - (iii) no later than four months following the Interim Completion Date for all Interim Completion Minor Deficiencies.
- (b) Project Co acknowledges and agrees that the completion and rectification of Interim Completion Minor Deficiencies may require work outside of normal working hours in order to accommodate the efficient operation of the TRBC Facility.

**23A.10 Failure to Rectify Interim Completion Minor Deficiencies**

- (a) If Project Co fails to complete and rectify any Interim Completion Minor Deficiency within the time for its completion and rectification in Section 23A.9, Contracting Authority may engage others to perform the work necessary to complete and rectify such Interim Completion Minor Deficiency, at the risk and cost of Project Co, and Contracting Authority may deduct such cost from the Interim Completion Holdback, the Substantial Completion Payment, the Completion Holdback or the Seasonal Works Holdback, as applicable, and interest accrued thereon.
- (b) Within two Business Days after completion and rectification of all Interim Completion Minor Deficiencies (the “**Interim Completion Minor Deficiencies Completion Date**”), Contracting Authority shall release to Project Co the amount of the Interim Completion Holdback less any amounts deducted in accordance with Section 23A.10(a), together with all interest accrued thereon and applicable HST.
- (c) Where Contracting Authority exercises its rights pursuant to Section 23A.10(a), if the cost of such completion and rectification exceeds the amount of the Interim Completion Holdback and interest, then Project Co shall reimburse Contracting Authority for all such excess cost.

**23A.11 Effect of Certificate/Use**

- (a) The issue of the Interim Completion Certificate and any taking over or use by Contracting Authority of any part of the Facility under the terms of this Project Agreement, shall, in no way:
- (i) limit the obligations of Project Co under this Project Agreement including in respect of any defects, deficiencies or items of outstanding work existing or discovered prior to or after the date of any of such certificates or the date of the Interim Completion Minor Deficiencies List; or
  - (ii) be construed as an approval by Contracting Authority of the Works or the way in which they have been carried out.

**24. COMMISSIONING AND COMPLETION**

**24.1 Commissioning Activities**

- (a) Project Co shall perform all Project Co Commissioning, and shall facilitate the performance of all Contracting Authority Commissioning, pursuant to the Final Commissioning Program.

**24.2 Final Commissioning Program**

- (a) Project Co shall prepare a draft of the Final Commissioning Program in respect of the Project Co Commissioning and the Contracting Authority Commissioning and shall provide a copy thereof to the Independent Certifier, the Contracting Authority Commissioning Consultant and the Contracting Authority Representative not less than 180 days prior to the Scheduled Substantial Completion Date.
- (b) The Final Commissioning Program shall, at a minimum:
- (i) describe the requirements, and the timing and sequence of such requirements, necessary in order that the Project Co Commissioning shall be completed to achieve:
    - (A) Substantial Completion on or before the Scheduled Substantial Completion Date; and
    - (B) Final Completion on or before the Scheduled Final Completion Date;
  - (ii) describe the requirements, and the timing and sequence of such requirements, of the Contracting Authority Commissioning activities;
  - (iii) comply with all requirements of the Outline Commissioning Program and include all details, including for all appendices, required to be completed in the Outline Commissioning Program;
  - (iv) be consistent with the Outline Commissioning Program and impose no greater or more onerous obligations on Contracting Authority than those set out in the Outline Commissioning Program, unless otherwise agreed to by Contracting Authority;
  - (v) include the names of the individuals or companies proposed to perform all Project Co Commissioning;
  - (vi) include a schedule of each of the Project Co Commissioning Tests and the Contracting Authority Commissioning Tests proposed to be performed and the timeframe for completion, with start and end dates;



- (vii) include a schedule of meetings to be held between the Parties to coordinate the performance of the Project Co Commissioning and the Contracting Authority Commissioning;
  - (viii) provide for the re-verification of systems following the Contracting Authority Commissioning;
  - (ix) list the approvals required from any Governmental Authority, manufacturer or other person that are necessary to meet the requirements of the Final Commissioning Program or Applicable Law; and
  - (x) comply with the requirements and the timing and sequence of such requirements of the applicable Transition.
- (c) Contracting Authority shall provide Project Co with comments on the draft Final Commissioning Program in accordance with the procedures contemplated by Section 4.1 of Schedule 10 – Review Procedure, and Project Co shall revise the draft Final Commissioning Program to the extent contemplated by Schedule 10 – Review Procedure within 30 days of receipt of any comments from Contracting Authority.
- (d) When agreed by the Parties, the Final Commissioning Program shall replace the Outline Commissioning Program with respect to Substantial Completion and Final Completion.

### **24.3 Commencement of Project Co Commissioning**

- (a) Project Co shall give 30 days’ written notice to the Independent Certifier, the Contracting Authority Commissioning Consultant and the Contracting Authority Representative of the proposed commencement of the Project Co Commissioning.
- (b) Project Co shall give at least five Business Days’ notice to, and shall invite, the Independent Certifier, the Contracting Authority Commissioning Consultant and the Contracting Authority Representative to witness, and to comment on, each aspect of the Project Co Commissioning. Project Co shall, together with such notice, provide all information that the Independent Certifier, the Contracting Authority Commissioning Consultant and the Contracting Authority Representative may reasonably require in relation thereto, including:
- (i) tests proposed;
  - (ii) test methodology; and
  - (iii) expected test results.

#### **24.4 Substantial Completion Certificate**

- (a) Project Co shall give the Independent Certifier and the Contracting Authority Representative at least ten Business Days' notice prior to the date upon which Project Co anticipates delivering the Substantial Completion Notice (the "**10-Day Notice**").
- (b) Project Co shall deliver notice to the Independent Certifier and the Contracting Authority Representative upon the satisfaction of all of the requirements for Substantial Completion under this Project Agreement (the "**Substantial Completion Notice**"). The Substantial Completion Notice shall (i) describe, in reasonable detail, the satisfaction of the requirements for Substantial Completion, (ii) include as appendices all of the Substantial Completion Deliverables described in the Substantial Completion Deliverables List, and (iii) include Project Co's opinion that the conditions for issuance of the Substantial Completion Certificate under this Project Agreement have been satisfied.
- (c) Within two Business Days of receiving the Substantial Completion Notice from Project Co, the Independent Certifier shall review the Substantial Completion Notice to determine whether or not the Substantial Completion Notice includes all of the Substantial Completion Deliverables described in the Substantial Completion Deliverables List. For the purposes of this Section 24.4(c), if the Substantial Completion Notice contains a Substantial Completion Deliverable that, in the reasonable opinion of the Independent Certifier, is of such poor quality that it would impede, in a material way, the ability of Contracting Authority and the Independent Certifier to assess whether or not the requirements for Substantial Completion under this Project Agreement have been satisfied, then such Substantial Completion Deliverable shall be deemed to have not been included as part of the Substantial Completion Notice. Following such review and determination by the Independent Certifier and before the expiry of such two Business Day period, the Independent Certifier shall either deliver notice to Project Co and Contracting Authority:
  - (i) confirming that the Substantial Completion Notice includes all of the Substantial Completion Deliverables described in the Substantial Completion Deliverables List (the "**IC Substantial Completion Deliverables Confirmation**"); or
  - (ii) setting out a list of the Substantial Completion Deliverables that were not included in the Substantial Completion Notice (an "**IC Substantial Completion Deliverables Deficiencies List**").

If the Independent Certifier provides a notice to Project Co and Contracting Authority setting out an IC Substantial Completion Deliverables Deficiencies List pursuant to this Section 24.4(c), then Project Co shall subsequently submit a new and replacement version of the Substantial Completion Notice pursuant to Section 24.4(b), which, for greater certainty, includes all of the Substantial Completion Deliverables, and the process described in this Section 24.4(c) shall be repeated until the IC Substantial

- Completion Deliverables Confirmation is provided by the Independent Certifier to Project Co and Contracting Authority.
- (d) Contracting Authority shall, within five Business Days after receipt of the IC Substantial Completion Deliverables Confirmation, provide the Independent Certifier and Project Co with Contracting Authority's opinion as to whether the conditions for issuance of the Substantial Completion Certificate have been satisfied or, if applicable, any reasons as to why Contracting Authority considers that the Substantial Completion Certificate should not be issued.
- (e) Within five Business Days after Project Co's receipt of Contracting Authority's opinion pursuant to Section 24.4(d), the Parties shall cause the Independent Certifier to determine whether the conditions for issuance of the Substantial Completion Certificate have been satisfied, having regard for the opinions of both Project Co and Contracting Authority, to determine whether any Minor Deficiencies exist, and to issue to Contracting Authority and to Project Co either:
- (i) the Substantial Completion Certificate confirming the date of issue as the Substantial Completion Date and setting out the Minor Deficiencies List (if applicable) in accordance with Section 24.8; or
  - (ii) a report detailing the matters that the Independent Certifier considers are required to be performed by Project Co to satisfy the conditions for issuance of the Substantial Completion Certificate.
- (f) Where the Independent Certifier has issued a report in accordance with Section 24.4(e)(ii) and Project Co has not referred a Dispute in relation thereto for resolution in accordance with Schedule 27 – Dispute Resolution Procedure, Project Co shall, within 5 Business Days after receipt of such report, provide the Independent Certifier and the Contracting Authority Representative with:
- (i) a detailed list indicating the rectification actions proposed for all matters raised in such report;
  - (ii) the schedule for completion of all such rectification actions; and
  - (iii) any additional Project Co Commissioning that needs to be undertaken as a result of the rectification actions,

and Project Co shall perform all such additional rectification actions and Project Co Commissioning in a timely manner. Upon completion thereof, and for each subsequent application for Substantial Completion, Project Co shall submit a new 10-Day Notice and a new Substantial Completion Notice and the process described in Sections 24.4(b) to (f), inclusive, shall be repeated until the Substantial Completion Certificate has been issued.

- (g) In the event that the Substantial Completion Certificate has not been issued within 30 days after the delivery of a 10-Day Notice or the delivery of a Substantial Completion Notice, such 10-Day Notice or Substantial Completion Notice, as applicable, shall be deemed to have been rescinded by Project Co and Project Co shall be required to deliver a new 10-Day Notice in order to initiate a new application for Substantial Completion.
- (h) For greater certainty, the Independent Certifier's decision to issue the IC Substantial Completion Deliverables Confirmation shall not limit or otherwise affect (i) any of Project Co's obligations under this Project Agreement to satisfy the requirements of Substantial Completion or (ii) the opinion of Contracting Authority or the determination of the Independent Certifier as to whether the conditions for issuance of the Substantial Completion Certificate have been satisfied pursuant to Section 24.4(d) and Section 24.4(e) respectively
- (i) The Independent Certifier's decision to issue or not to issue the Substantial Completion Certificate shall be final and binding on the Parties solely in respect of determining the Substantial Completion Payment Date and a Dispute in relation to the Substantial Completion Payment Date shall not be subject to resolution pursuant to Schedule 27 – Dispute Resolution Procedure, provided, however, that any other Dispute in relation to the Independent Certifier's decision to issue or not to issue the Substantial Completion Certificate may be referred for resolution pursuant to the Dispute Resolution Procedure.
- (j) Project Co shall provide As-Built Drawings, Record Drawings and specifications, Design Data, spare parts and Shop Drawings as soon as possible and in any event no later than the Substantial Completion Date.
- (k) The submission of the Substantial Completion Notice by Project Co in accordance with Sections 24.4(b) shall constitute a waiver by Project Co of all claims whatsoever against Contracting Authority under this Project Agreement, arising prior to the submission of the Substantial Completion Notice, except:
  - (i) without prejudice to specific notice requirements in this Project Agreement, those made in writing by Project Co (either on its own account or arising out of a claim of a Project Co Party) arising prior to the submission of the Substantial Completion Notice and still unsettled; and
  - (ii) any third party claim which was not known to Project Co or a Project Co Party or could not reasonably have been known to Project Co or a Project Co Party at such time and with respect to which Project Co or a Project Co Party is entitled to indemnification from Contracting Authority in accordance with this Project Agreement.

## **24.5 Operation and Maintenance Manuals**

- (a) Project Co shall prepare and deliver to Contracting Authority draft copies of all necessary operation and maintenance manuals for the BCA Facility in the format set

out in the Output Specifications no later than 30 days prior to the Substantial Completion Date.

#### **24.6 Contracting Authority Commissioning**

- (a) The Parties acknowledge that the Contracting Authority Commissioning shall be performed both before and after the Substantial Completion Date. Prior to Substantial Completion, Project Co shall give Contracting Authority, MAG, MAG Occupants, Non-MAG Occupants and any employees and subcontractors of any of the foregoing full access to the Site, the Facility, any portion of the Existing Facilities in which any Works are to be performed and all relevant parts thereof at such times as may be set out in the Final Commissioning Program to enable Contracting Authority, MAG, MAG Occupants and Non-MAG Occupants to undertake the Contracting Authority Commissioning in accordance with the Final Commissioning Program. Contracting Authority shall comply, and shall ensure that all MAG, MAG Occupants and Non-MAG Occupants and all other Contracting Authority Parties comply, with the directions, procedures and safety guidelines established by Project Co for the Site and shall use commercially reasonable efforts to minimize disruption to the Works in performing the Contracting Authority Commissioning..
- (b) Contracting Authority acknowledges that, during the Contracting Authority Commissioning Period, Project Co and each Subcontractor will be active in the Facility and, if applicable, in the Existing Facilities, in both the completion and rectification of Minor Deficiencies and the completion of Project Co Commissioning, and Contracting Authority shall take commercially reasonable steps to allow such activities to proceed in accordance with the Final Commissioning Program.
- (c) Project Co acknowledges that, prior to and during the Contracting Authority Commissioning Period, Project Co and its Subcontractors shall cooperate with Contracting Authority, MAG, MAG Occupants, Non-MAG Occupants and all other Contracting Authority Parties and use commercially reasonable efforts to ensure that all requirements, and the timing and sequence of such requirements, of the Contracting Authority Commissioning activities are able to be completed in the timeframe for completion set out in the Final Commissioning Program..

#### **24.7 Countdown Notice**

- (a) Project Co shall deliver a notice (the “**Countdown Notice**”) to Contracting Authority and the Independent Certifier specifying the date on which Project Co anticipates that Substantial Completion will be achieved (the “**Anticipated Substantial Completion Date**”).
- (b) The Countdown Notice shall be delivered not less than 90 days prior to the Anticipated Substantial Completion Date. If Project Co fails to deliver the Countdown Notice not less than 90 days prior to the Scheduled Substantial Completion Date, the Anticipated

- Substantial Completion Date shall be deemed to be the same date as the Scheduled Substantial Completion Date.
- (c) Project Co acknowledges and agrees that Contracting Authority requires a minimum of 90 days' notice prior to the Anticipated Substantial Completion Date to prepare for the Contracting Authority Commissioning.
  - (d) In accordance with Section 13.5(a), the Anticipated Substantial Completion Date shall not be earlier than the Scheduled Substantial Completion Date without the prior written consent of Contracting Authority, in its sole discretion.
  - (e) Within 15 Business Days of the Independent Certifier's receipt of the Countdown Notice in accordance with Section 24.7(a), the Independent Certifier, in consultation with Project Co and Contracting Authority, shall prepare and deliver to Project Co and Contracting Authority a list of deliverables (the "**Substantial Completion Deliverables List**") that (A) are to be appended to and form part of the Substantial Completion Notice to be submitted by Project Co pursuant to Section 24.4(b), and (B) will constitute a minimum amount of evidence necessary for Project Co, in the Substantial Completion Notice, to describe, in reasonable detail, the satisfaction of the requirements for Substantial Completion and to support Project Co's opinion that the conditions for issuance of the Substantial Completion Certificate have been satisfied (collectively, the "**Substantial Completion Deliverables**").
  - (f) From time to time until the date that is 60 days prior to the Anticipated Substantial Completion Date, the Independent Certifier, in consultation with Project Co and Contracting Authority, may amend the Substantial Completion Deliverables List, including to set out any additional Substantial Completion Deliverables not identified in the Substantial Completion Deliverables List pursuant to Section 24.7(e). Each amended Substantial Completion Deliverables List shall, following its preparation, be deemed to be the Substantial Completion Deliverables List for the purposes of this Project Agreement and be promptly delivered to Project Co and Contracting Authority.
  - (g) For greater certainty, nothing in Section 24.8(e) or Section 24.8(f) limits or otherwise affects any of Project Co's obligations under this Project Agreement to satisfy the requirements of Substantial Completion or to describe, in reasonable detail, the satisfaction of such requirements in the Substantial Completion Notice pursuant to Section 24.4(b).

## **24.8 Minor Deficiencies**

- (a) In the event that any Minor Deficiencies exist when Project Co gives the Substantial Completion Notice, the Independent Certifier, in consultation with Project Co and Contracting Authority, shall prepare a list of all Minor Deficiencies (the "**Minor Deficiencies List**") identified at that time and an estimate of the cost for Contracting Authority, and the time for Project Co, to complete and rectify such Minor Deficiencies. Contracting Authority may withhold from the Substantial Completion

- Payment a holdback amount that, subject as hereinafter provided, is [REDACTED] % of the amount estimated by the Independent Certifier for Contracting Authority to complete and rectify all such Minor Deficiencies identified in the Minor Deficiencies List (the “**Completion Holdback**”), which holdback shall be held in an interest bearing account.
- (b) The Minor Deficiencies List will contain the schedule for the completion and rectification of the Minor Deficiencies. The timeframe for the completion or rectification of each Minor Deficiency shall be no later than six months following the Substantial Completion Date, other than for Minor Deficiencies that are seasonal in nature and cannot be completed within six months following the Substantial Completion Date (“**Seasonal Minor Deficiencies**”). In determining the relevant time for completing and rectifying Minor Deficiencies, Project Co shall schedule the completion and rectification of Minor Deficiencies so as to minimize, to the greatest extent reasonably possible, any impairment of Contracting Authority’s and MAG’s use and enjoyment of the Facility or disruption of the Works or Contracting Authority Activities.
- (c) The Independent Certifier must prepare the Minor Deficiencies List in relation to the Substantial Completion Notice as soon as reasonably practicable and, in any event, before the Substantial Completion Certificate is issued, but shall not withhold the Substantial Completion Certificate by reason solely that there are Minor Deficiencies.
- (d) No later than 20 Business Days prior to the Anticipated Final Completion Date, Contracting Authority may direct the Independent Certifier to amend, in consultation with Project Co and Contracting Authority, the Minor Deficiencies List on one occasion to include a list of any and all Minor Deficiencies that were identified after the preparation of, or not included in, the Minor Deficiencies List pursuant to Section 24.8(a). The Independent Certifier shall prepare the amended Minor Deficiencies List as soon as reasonably practicable and, in any event, within 10 Business Days of such direction given by Contracting Authority. The amended Minor Deficiencies List shall, following its preparation, be deemed to be the Minor Deficiencies List for the purposes of this Project Agreement including, without limitation, for the purposes of Sections 24.8 to 24.10 inclusive. The amount of the Completion Holdback or the Seasonal Works Holdback, as applicable, shall not be affected by the amended Minor Deficiencies List.
- (e) Where the Independent Certifier has been directed by Contracting Authority to amend the Minor Deficiencies List pursuant to Section 24.8(d), the Independent Certifier shall specify a completion and rectification time for any newly added Minor Deficiencies that is no greater than 10 Business Days from the date of the issuance of such amended Minor Deficiencies List.
- (f) Contracting Authority may, in its sole discretion, waive any requirement for Substantial Completion, including with respect to FF&E, and the failure to meet any such requirement shall constitute a Minor Deficiency.

**24.9 Rectification of Minor Deficiencies**

- (a) Project Co shall, in consultation with the Contracting Authority Representative and so as to minimize, to the greatest extent reasonably possible, any disruption of the Works or the Contracting Authority Activities, complete and rectify all Minor Deficiencies:
- (i) within 45 days of the issuance of the Minor Deficiencies List pursuant to Section 24.8(a) for all Minor Deficiencies other than Seasonal Minor Deficiencies where no time for completion and rectification has been specified by the Independent Certifier;
  - (ii) within the time for completion and rectification of any Minor Deficiency where such a time was specified by the Independent Certifier in the Minor Deficiencies List;
  - (iii) no later than six months following the Substantial Completion Date for all Minor Deficiencies other than Seasonal Minor Deficiencies; and
  - (iv) no later than six months following the Minor Deficiencies Completion Date for all Seasonal Minor Deficiencies.
- (b) Project Co acknowledges and agrees that the completion and rectification of Minor Deficiencies may require work outside of normal working hours in order to accommodate the efficient operation of the Facility and the Existing Facilities.

**24.10 Failure to Rectify Minor Deficiencies**

- (a) If Project Co fails to complete and rectify any Minor Deficiency within the time for its completion and rectification in Section 24.9, Contracting Authority may engage others to perform the work necessary to complete and rectify such Minor Deficiency, at the risk and cost of Project Co, and Contracting Authority may deduct such cost from the Completion Holdback or the Seasonal Works Holdback, as applicable, and interest accrued thereon.
- (b) Where there exist incomplete or unrectified Seasonal Minor Deficiencies and all other Minor Deficiencies have been completed or rectified, within two Business Days after completion and rectification of all Minor Deficiencies other than Seasonal Minor Deficiencies (the “**Minor Deficiencies Completion Date**”), Contracting Authority shall release to Project Co the amount of the Completion Holdback less:
- (i) a holdback amount that is the greater of:
    - (A) **[REDACTED]** % of the amount estimated by the Independent Certifier pursuant to Section 24.8(a) for Contracting Authority to complete and rectify all remaining Seasonal Minor Deficiencies identified by the Independent Certifier; and



- (B) [REDACTED] % of the Completion Holdback,  
(the “**Seasonal Works Holdback**”), which holdback shall be held in an interest bearing account;
- (ii) any amounts deducted in accordance with Section 24.10(a), together with all interest accrued thereon and applicable HST; and
- (iii) the amount of any Finishing Holdback required to be maintained by Contracting Authority as at such date, which Finishing Holdback amount shall be paid by Contracting Authority to Project Co in accordance with Section 4.6.
- (c) Within 2 Business Days of the Final Completion Date, Contracting Authority shall release to Project Co the amount of the Completion Holdback or the Seasonal Works Holdback, as applicable (together with all interest accrued thereon and applicable HST) less any amounts deducted in accordance with Section 24.10(a) and less the amount of any Finishing Holdback required to be maintained by Contracting Authority as at such date, which Finishing Holdback amount shall be paid by Contracting Authority in accordance with Section 4.6.
- (d) Where Contracting Authority exercises its rights pursuant to Section 24.10(a), if the cost of such completion and rectification exceeds the amount of the Completion Holdback or the Seasonal Works Holdback, as applicable, and interest, then Project Co shall reimburse Contracting Authority for all such excess cost.

#### **24.11 Final Completion Countdown Notice**

- (a) Project Co shall deliver a Notice (the “**Final Completion Countdown Notice**”) to Contracting Authority and the Independent Certifier specifying the date (which, for greater certainty, will be on or before the Scheduled Final Completion Date) on which Project Co anticipates that Final Completion will be achieved (the “**Anticipated Final Completion Date**”).
- (b) The Final Completion Countdown Notice shall be delivered not less than 60 days prior to the Anticipated Final Completion Date. If Project Co fails to deliver the Final Completion Countdown Notice not less than 60 days prior to the Scheduled Final Completion Date, the Anticipated Final Completion Date shall be deemed to be the same date as the Scheduled Final Completion Date.

#### **24.12 Final Completion Certificate**

- (a) Project Co shall give the Independent Certifier and the Contracting Authority Representative at least ten Business Days’ Notice prior to the date upon which Project Co anticipates delivering the Final Completion Notice.
- (b) Project Co shall give the Independent Certifier and the Contracting Authority Representative Notice (the “**Final Completion Notice**”) upon the satisfaction of all

- requirements for Final Completion, which Final Completion Notice shall describe, in reasonable detail, the satisfaction of the requirements for Final Completion, including the completion and rectification of all Minor Deficiencies, together with Project Co's opinion as to whether the conditions for issuance of the Final Completion Certificate have been satisfied. The Final Completion Notice shall also include the following documentation:
- (i) Project Co's written request for release of the Completion Holdback or the Seasonal Works Holdback, as applicable, including a declaration that no written notice of lien arising in relation to the performance of the Works has been received by it that has not been withdrawn by the lien claimant;
  - (ii) Project Co's Statutory Declaration CCDC 9A (2001);
  - (iii) Project Co's WSIB Certificate of Clearance; and
  - (iv) a written statement that the Works have been performed to the requirements of the Ancillary Documents, itemizing approved changes in the Works, the Independent Certifier's written instructions, and modifications required by Governmental Authorities.
- (c) Contracting Authority shall, within five Business Days after receipt of the Final Completion Notice, provide the Independent Certifier and Project Co with Contracting Authority's opinion as to whether the conditions for issuance of the Final Completion Certificate have been satisfied and, if applicable, any reasons as to why it considers that the Final Completion Certificate should not be issued.
- (d) Within five Business Days after Project Co's receipt of Contracting Authority's opinion pursuant to Section 24.12(c), the Parties shall cause the Independent Certifier to determine whether the conditions for issuance of the Final Completion Certificate have been satisfied, having regard for the opinions of both Project Co and Contracting Authority, and to issue to Contracting Authority and to Project Co either:
- (i) the Final Completion Certificate confirming the date of issue as the Final Completion Date; or
  - (ii) a report detailing the matters that the Independent Certifier considers are required to be performed by Project Co to satisfy the conditions for issuance of the Final Completion Certificate.
- (e) Where the Independent Certifier has issued a report in accordance with Section 24.12(d)(ii) and Project Co has not referred a Dispute in relation thereto for resolution in accordance with Schedule 27 – Dispute Resolution Procedure, Project Co shall, within five Business Days after receipt of such report, provide the Independent Certifier and the Contracting Authority Representative with:

- (i) a detailed list indicating the rectification actions proposed for all matters raised in such report;
- (ii) the schedule for completion of all such rectification actions; and
- (iii) any additional Project Co Commissioning that needs to be undertaken as a result of the rectification actions,

and Project Co shall perform all such additional rectification actions in a timely manner. Upon completion thereof, Project Co may give a further Final Completion Notice and Sections 24.12(c) to (e), inclusive, shall be repeated until the Final Completion Certificate has been issued.

- (f) Any Dispute in relation to the Independent Certifier's decision to issue or not to issue the Final Completion Certificate may be referred for resolution in accordance with Schedule 27 – Dispute Resolution Procedure.
- (g) The submission of the Final Completion Notice by Project Co in accordance with Section 24.12(b), shall constitute a waiver by Project Co of all claims whatsoever against Contracting Authority, arising prior to the submission of the Final Completion Notice, except:
  - (i) without prejudice to specific Notice requirements in this Project Agreement, those made in writing by Project Co (either on its own account or arising out of a claim of a Project Co Party) prior to the Final Completion Notice and still unsettled; and
  - (ii) any third party claim which was not known to Project Co or a Project Co Party or could not reasonably have been known to Project Co or a Project Co Party at such time and with respect to which Project Co or a Project Co Party is entitled to indemnification from Contracting Authority in accordance with this Project Agreement.

#### **24.13 Effect of Certificates/Use**

- (a) The issue of the Substantial Completion Certificate and the Final Completion Certificate and any taking over or use by Contracting Authority of any part of the Facility under the terms of this Project Agreement, and any commencement of any Contracting Authority Activities, shall, in no way:
  - (i) limit the obligations of Project Co under this Project Agreement including in respect of any defects, deficiencies or items of outstanding work existing or discovered prior to or after the date of any of such certificates or the date of the Minor Deficiencies List or of the amended Minor Deficiencies List described in Section 24.8(d); or

- (ii) be construed as an approval by Contracting Authority or any Province Person of the Works or the way in which they have been carried out.

#### **24.14 Transitions**

- (a) Project Co shall, in cooperation with the Transition Subcommittee:
  - (i) plan, coordinate, manage and execute the physical transitions within the Facility, including, without limitation:
    - (A) the transfer, storage and installation of all Category 1 FF&E and Category 2 FF&E in accordance with the Interim Completion Commissioning Program and Final Commissioning Program; and
    - (B) the physical transitions of certain resources relating to the operations and activities as identified by Contracting Authority;

(each such transition is a “**Transition**” and, collectively, all of them are the “**Transitions**”). For clarity, each Transition shall be carried out by Project Co at all times in accordance with the applicable requirements of Schedule 11 – Design Quality Plan and Construction Quality Plan.

- (b) Project Co shall, within 30 days following Financial Close, prepare and submit to Contracting Authority a list of prospective candidates (each a “**Transition Advisor Candidate**”) for appointment as the Transitions advisor (the “**Transition Advisor**”), each of which must have experience planning and executing courthouse relocation assignments of similar size, scope and complexity and who will, in accordance with this Section 24.14 (i) ensure that a complete and all-encompassing service is provided that will fulfill all aspects of each Transition and all related planning, occupancy planning and operational preparedness planning required by Contracting Authority and (ii) perform the physical relocation of all items involved in such Transitions.
- (c) Subject to Section 24.14(b), Project Co shall conduct a competitive bid process for the selection of the Transition Advisor from among the Transition Advisor Candidates. Project Co shall consult with Contracting Authority in the design and implementation of such competitive bid process, including the development of the evaluation criteria, and shall accommodate any reasonable request of Contracting Authority with respect thereto. Contracting Authority shall be entitled to participate in the evaluation and selection of the successful Transition Advisor Candidate for appointment as Transition Advisor.

#### **24.15 Transition Subcommittee**

- (a) The Parties shall, within 30 days following Financial Close, establish a transition subcommittee of the Works Committee (the “**Transition Subcommittee**”) consisting of 3 representatives of each Party. A representative of the Transition Advisor shall be required to attend meetings of the Transition Subcommittee. Members of the

- Transition Subcommittee may invite, on prior notice to all members, such other advisors and consultants as they require from time to time to attend meetings and provide briefings to the Transition Subcommittee.
- (b) The Transition Subcommittee shall assist the Parties by promoting cooperative and effective communication with respect to matters related to each Transition, including issues related to decanting to and within the Facility and the transfer and installation of all Category 1 FF&E and Category 2 FF&E.
  - (c) The primary role of the Transition Subcommittee shall be to oversee and coordinate each Transition in a timely and efficient manner and in accordance with the Works Schedule and with the Interim Completion Commissioning Program and the Final Commissioning Program.
  - (d) The Transition Subcommittee shall be responsible for receiving and reviewing all matters related to each Transition and shall make recommendations to the Works Committee, which, after consulting with the Works Committee, Contracting Authority may accept or reject in its sole discretion.
  - (e) The members of the Transition Subcommittee may adopt such procedures and practices for the conduct of the activities of the Transition Subcommittee as they consider appropriate from time to time.
  - (f) The Transition Subcommittee shall operate until the Final Completion Date.

## **25. HUMAN RESOURCES**

### **25.1 Admittance of Personnel**

- (a) Contracting Authority shall have the right to refuse admittance to, or order the removal from the Site, the Existing Facilities and/or the Facility of any person employed by (or acting on behalf of) Project Co, or any Project Co Party, whose presence, in the reasonable opinion of Contracting Authority is likely to have an adverse effect on the performance of the Contracting Authority Activities or who, in the reasonable opinion of Contracting Authority is not a fit and proper person to be at the Site, the Existing Facilities and/or the Facility for any reason, including a failure to comply with any applicable Contracting Authority policy or any immediate obligation of Contracting Authority to ensure the safety and well-being of persons at the Site, the Existing Facilities and/or the Facility.

### **25.2 Confirmation of Action**

- (a) Any action taken under Section 25.1 shall promptly be confirmed by Contracting Authority to Project Co and, for greater certainty, shall not relieve Project Co of any of its obligations under this Project Agreement.

**25.3 Notification of Personnel**

- (a) If and when so requested by Contracting Authority, Project Co shall, within 3 Business Days of such request, provide a list of the names of, as applicable, all persons performing the Works or that it expects may require admission, in connection with this Project Agreement, to any premises occupied by Contracting Authority, specifying the capacities in which those persons are concerned with this Project Agreement and, subject to Applicable Law, giving such other particulars as Contracting Authority may reasonably require.

**25.4 Finality as to Admission**

- (a) Any decision of Contracting Authority made pursuant to Section 25.1 shall be final and conclusive.

**25.5 Adherence to Governmental Authority Regulations, Policies and Directions**

- (a) Project Co shall ensure that it and all Project Co Parties comply at all times with any regulations, policies or directions set by any Governmental Authority related to labour, employment and/or human resources, including, for clarity, any and all MAG Staff training policies.

**25.6 Background Check Requirements and Changes in Background Check Requirements**

- (a) Project Co shall, at its sole cost and expense (except as otherwise specifically provided in Schedule 32 - Background Check Requirements), comply with the requirements of Schedule 32 - Background Check Requirements, and ensure that all Designated Project Co Employees, potential Project Co Staff and persons outlined in Schedule 32 - Background Check Requirements comply with the requirements of such Schedule.
- (b) If Project Co has complied with the provisions of Schedule 32 - Background Check Requirements in relation to a particular member of Project Co Staff or a Designated Project Co Employee and Contracting Authority requires that a member of Project Co Staff or a Designated Project Co Employee, as the case may be, be removed from the Project (including, for clarity, the Facility) on the grounds of public interest and/or security, Project Co shall remove such member of Project Co Staff or Designated Project Co Employee from the Project.
- (c) If Project Co has not complied with the provisions of Schedule 32 - Background Check Requirements, in relation to a particular member of Project Co Staff or a Designated Project Co Employee and Contracting Authority requires that member of Project Co Staff or such Designated Project Co Employee, as the case may be, be removed from the Project (including, for clarity, the Facility) on the grounds of public interest and/or security Project Co shall remove such member of Project Co Staff or Designated Project Co Employee from the Project.

- (d) Contracting Authority shall notify Project Co of any proposed change to the Background Check Requirements as soon as practicable (and in any event prior to the change taking effect). Contracting Authority shall consult with Project Co about such changes, but the final decision shall be Contracting Authority's.
- (e) Any change in Background Check Requirements from those in existence on Commercial Close shall, to the extent such change materially adversely interferes with Project Co's ability to perform the Works or materially adversely affects Project Co's cost of performing the Works, subject to and in accordance with Schedule 22 – Variation Procedure, result in a Variation.
- (f) Contracting Authority may, in its sole discretion, notify Project Co that Project Co shall not be obliged, for the period of time specified in the notice, to comply with any change of the Background Check Requirements and that Project Co should continue to comply with Background Check Requirements in effect prior to any change.

## **25.7 Staff Competency**

- (a) Project Co shall ensure that:
  - (i) there shall at all times be a sufficient number of competent persons employed or engaged by Project Co or any Project Co Party (including all relevant grades of supervisory staff) engaged in the performance of the Works with the requisite level of skill and experience to perform the Works in accordance with this Project Agreement. For greater certainty, this obligation shall include ensuring that there are a sufficient number of such skilled and experienced persons employed or engaged by Project Co or any Project Co Party to complete the Works in accordance with the Works Schedule;
  - (ii) all persons employed or engaged by Project Co or any Project Co Party (including all relevant grades of supervisory staff) engaged in the performance of the Works receive such training and supervision as is necessary to ensure the proper performance of this Project Agreement and compliance with all (i) health and safety rules, procedures and requirements and Authority Requirements; and
  - (iii) it creates and maintains, and causes all Project Co Parties to create and maintain, a process which allows it to assess, monitor and correct, on an ongoing basis, the competency of persons employed or engaged by Project Co or any Project Co Party (including all relevant grades of supervisory staff) engaged in performing the Works to ensure the proper performance of this Project Agreement.

**25.8 Intentionally Deleted**

**25.9 Intentionally Deleted**

**25.10 Notification of Convictions**

- (a) To the extent permitted by Applicable Law, Project Co shall ensure that Contracting Authority is kept advised at all times of any person employed or engaged by Project Co or any Project Co Party in the provision of any of the Works who, subsequent to the commencement of such employment or engagement, (i) has been arrested or detained; (ii) receives a Relevant Conviction; or (iii) is charged with an offence that could lead to a Relevant Conviction (of which Project Co or a Project Co Party becomes aware or whose previous Relevant Convictions become known to Project Co or a Project Co Party). Project Co shall use commercially reasonable efforts to obtain, or to cause all Project Co Parties to obtain, all consents as may be required by Applicable Law or otherwise authorizing the disclosure of such information to Contracting Authority as contemplated in this Section 25.
- (b) Project Co shall not permit any Project Co Staff or Designated Project Co Employee who performs any of the Works who has been charged with an offence that could lead to a Relevant Conviction to perform such Works, including to access the Site or the Facility to perform his work, while such charge is outstanding.

**25.11 Disciplinary Action**

- (a) Contracting Authority, acting reasonably, may notify Project Co of any Project Co or Project Co Party employee who engages in misconduct or, in the opinion of Contracting Authority, is incompetent or negligent in the performance of duties or whose presence or conduct on the Site, the Existing Facilities, and/or the Facility, or at work is otherwise considered by Contracting Authority to be undesirable or to constitute a threat to the health and/or safety of any of the users of the Site, the Existing Facilities and/or the Facility or would otherwise bring the administration of justice into disrepute or adversely affect the integrity of the justice system. Upon investigation, Project Co may institute, or cause the relevant Project Co Party to institute, disciplinary proceedings, which shall be in accordance with the requirements of Applicable Law, and shall advise Contracting Authority in writing of the outcome of any disciplinary action taken in respect of such person, to the extent such notification is permitted by Applicable Law.

**25.12 Human Resources Policies**

- (a) Project Co shall ensure that there are set up and maintained by Project Co and by all Project Co Parties, and that each of them shall comply and cause compliance with, human resources policies and procedures covering all relevant matters relating to the Works (including, for example, health and safety). Project Co shall ensure that the terms and the implementation of such policies and procedures comply with Applicable



Law, Authority Requirements, the Background Check Requirements and Good Industry Practice and that they are published in written form and that copies of them (and any revisions and amendments to them) are available to Contracting Authority on a timely basis.

- (b) If Contracting Authority provides any comments on, or requests any amendments, modifications or changes to, the policies or procedures maintained pursuant to Section 25.12(a), Project Co shall consider such comments and amendments, modifications and changes and discuss them with Contracting Authority. Project Co shall incorporate those comments, amendments, modifications and changes with which it agrees, acting reasonably, to the extent that such comments, amendments, modifications or changes comply with Applicable Laws.

### **25.13 Management Organizations**

- (a) Project Co shall provide, and shall ensure that all Project Co Parties provide, to Contracting Authority, as required to keep such information current, the names of the management teams responsible for the provision of the Works.

## **26. CONTRACTING AUTHORITY'S REMEDIAL RIGHTS**

### **26.1 Exercise of Remedial Rights**

- (a) Contracting Authority may exercise all rights set out in this Article 26 at any time and from time to time if:
  - (i) Contracting Authority, acting reasonably, considers that a breach by Project Co of any obligation under this Project Agreement, or any act or omission on the part of Project Co or any Project Co Party:
    - (A) does or can reasonably be expected to create a serious threat to the health, safety or security of any user of any part of or the whole of the Site, the Facility and/or the Existing Facilities, including employees, volunteers, visitors to the Existing Facilities or the Facility, including Province Persons, Courthouse Service Users and other members of the public;
    - (B) does or can reasonably be expected to result in a materially adverse interruption in the Works;
    - (C) does or can reasonably be expected to materially prejudice Contracting Authority's ability to carry out the Contracting Authority Activities; or
    - (D) may potentially compromise the reputation or integrity of Contracting Authority or any Province Person or the nature of the Province's judicial system, so as to affect public confidence in that system,

provided that:

- (E) in respect of a breach by Project Co of any obligation under this Project Agreement, or any act or omission on the part of Project Co or any Project Co Party, which can reasonably be expected to cause any of the consequences set out in Sections 26.1(a)(i)(A), 26.1(a)(i)(B) or 26.1(a)(i)(C), Contracting Authority shall not exercise its rights under this Section 26 unless Project Co has failed to cure the relevant breach, act or omission within 5 Business Days of Notice from Contracting Authority or, if such breach, act or omission cannot reasonably be cured within such 5 Business Day period, Project Co thereafter fails to diligently and continuously pursue such cure and to cure such breach, act or omission within a reasonable period thereafter, provided that Project Co shall not be entitled to a cure period if any of the consequences set out in Sections 26.1(a)(i)(A), 26.1(a)(i)(B) or 26.1(a)(i)(C) actually occur; and
  - (F) in respect of Section 26.1(a)(i)(D), Contracting Authority shall not exercise its rights under this Section 26 unless Project Co has failed to cure the relevant breach, act or omission within 5 Business Days of Notice from Contracting Authority or, if such breach, act or omission cannot reasonably be cured within such 5 Business Day period, Project Co thereafter fails to diligently and continuously pursue such cure and to cure such breach, act or omission within a reasonable period thereafter;
- (ii) Project Co has not caused the COR-Qualified Construction Project Co Party or the COR-Certified Construction Project Co Party, as the case may be, to perform its obligations with respect to its COR Certification or OHSAS 18001 Accreditation, as the case may be, in accordance with Section 11.25 or Project Co has not caused the COR-Qualified Construction Project Co Party or the COR-Certified Construction Project Co Party, as the case may be, to perform its obligations with respect to H&S Construction Inspections in accordance with Section 15.1(h) or to perform its obligations to rectify any non-compliance noted in any H&S Construction Inspection Report in accordance with Section 15.1(k); or
  - (iii) Project Co has not performed or is not performing its obligations in respect of the Demolition Requirements in accordance with Section 11.26(a) or Project Co has not performed or is not performing its obligations to rectify any Demolition Default Event in accordance with Section 11.26(b).

## **26.2 Emergency**

- (a) Notwithstanding that Project Co is not in breach of its obligations under this Project Agreement, Contracting Authority may exercise all of the rights set out in this

Article 26 at any time and from time to time if Contracting Authority, acting reasonably, considers the circumstances to constitute an Emergency.

### **26.3 Rectification**

- (a) Without prejudice to Contracting Authority's rights under Article 35 and any other rights under this Project Agreement, in any of the circumstances set out in Sections 26.1 or 26.2, Contracting Authority may, by written Notice, require Project Co to take such steps as the Contracting Authority, acting reasonably, considers necessary or expedient to mitigate, rectify or protect against such circumstance, including, if applicable, the termination and replacement of any Subcontractor or a limited suspension of the performance of the Works, and Project Co shall use commercially reasonable efforts to comply with Contracting Authority's requirements as soon as reasonably practicable.
- (b) If Contracting Authority gives Notice to Project Co pursuant to Section 26.3(a) and either:
  - (i) Project Co does not either confirm, within 5 Business Days of such Notice or such shorter period as is appropriate in the case of an Emergency that it is willing to take the steps required in such Notice or present an alternative plan to Contracting Authority to mitigate, rectify and protect against such circumstances that Contracting Authority may accept or reject acting reasonably; or
  - (ii) Project Co fails to take the steps required in such Notice or accepted alternative plan within such time as set out in such Notice or accepted alternative plan or within such longer time as Contracting Authority, acting reasonably, shall think fit,

then Contracting Authority may take such steps as it considers to be appropriate, acting reasonably, including requiring the termination and replacement of Project Co Parties, either itself or by engaging others (including a third party) to take any such steps.

- (c) Notwithstanding the foregoing provisions of this Section 26.3, in the event of an Emergency, the notice under Section 26.3(a) shall be given as promptly as possible having regard to the nature of the Emergency and Contracting Authority may, prior to Project Co's confirmation under Section 26.3(b)(i), take such steps as are appropriate having regard to the nature of the Emergency.

### **26.4 Costs and Expenses**

- (a) Subject to Contracting Authority's obligations pursuant to Sections 26.5 and 26.6:
  - (i) Project Co shall bear all costs and expenses incurred by Project Co in relation to the exercise of Contracting Authority's rights pursuant to this Article 26; and

- (ii) Project Co shall reimburse Contracting Authority for all reasonable costs and expenses incurred by Contracting Authority in relation to the exercise of Contracting Authority's rights pursuant to this Article 26, including in relation to Contracting Authority taking such steps, either itself or by engaging others (including a third party) to take any such steps as Contracting Authority considers appropriate and as are in accordance with this Article 26.

## **26.5 Reimbursement Events**

- (a) In this Sections 26.5, a “**Reimbursement Event**” means:
  - (i) an act or omission of Project Co or any Project Co Party or a breach of any obligation under this Project Agreement, but only to the extent such act, omission or breach is caused by Contracting Authority or a Contracting Authority Party; or
  - (ii) an Emergency that is not caused or contributed to by an act or omission of Project Co or any Project Co Party or a breach by Project Co or any Project Co Party of any obligation under this Project Agreement.
- (b) If Contracting Authority either takes steps itself or requires Project Co to take steps in accordance with this Article 26 as a result of a Reimbursement Event:
  - (i) Contracting Authority shall reimburse Project Co for the reasonable costs and expenses incurred by Project Co in relation to the exercise of Contracting Authority's rights pursuant to this Article 26 that would not otherwise have been incurred by Project Co in the proper performance of its obligations under this Project Agreement; and
  - (ii) Contracting Authority shall bear all costs and expenses incurred by Contracting Authority in relation to the exercise of Contracting Authority's rights pursuant to this Article 26.

## **26.6 Reimbursement if Improper Exercise of Rights**

- (a) If Contracting Authority exercises its rights pursuant to this Article 26, but Contracting Authority was not entitled to do so, Contracting Authority shall reimburse Project Co for the reasonable costs and expenses directly incurred by Project Co over and above those that would otherwise have been incurred by Project Co in the proper performance of its obligations under this Project Agreement and that are directly and reasonably incurred by Project Co in complying with those written requirements of Contracting Authority issued as a result of Contracting Authority having exercised such rights.
- (b) Project Co acknowledges and agrees that Project Co has no right to require a determination of whether or not Contracting Authority is entitled to exercise its rights pursuant to this Article 26 before taking any such action that Contracting Authority may require and Project Co shall comply with all of Contracting Authority's

requirements. Only concurrently with or after complying with Contracting Authority's requirements shall Project Co be entitled to refer any dispute for resolution in accordance with Schedule 27 – Dispute Resolution Procedure.

**27. RECORDS, INFORMATION AND AUDIT**

**27.1 Records Provisions**

- (a) Project Co shall comply with Schedule 26 – Record Provisions.

**27.2 Information and General Audit Rights**

- (a) Project Co shall provide, and shall cause each Subcontractor to provide, to Contracting Authority all information, reports, documents, records and the like, including as referred to in Schedule 26 – Record Provisions, in the possession of, or available to, Project Co as Contracting Authority may reasonably require from time to time for any purpose in connection with this Project Agreement, other than Sensitive Information. Project Co shall use commercially reasonable efforts to ensure that, for such purpose, all such information, reports, documents, records and the like in the possession of, or available to, the Construction Contractor shall be available to Project Co and Project Co shall include relevant terms in all Subcontracts to this effect.
- (b) Project Co shall also provide to Contracting Authority, and shall require each Subcontractor, including the Construction Contractor, to provide to Contracting Authority (at Contracting Authority's reasonable cost), all information, reports, documents, records and the like required to be provided pursuant to Section 27.2(a) which subsequently come into the possession of, or become available to, Project Co or each Subcontractor, as Contracting Authority may reasonably require from time to time to enable Contracting Authority to provide reports, notices, returns and the like pursuant to Applicable Law, including information and documentation pertaining to the physical condition of the Site, security, health and safety, fire safety, emergency preparedness, environmental matters, employees and human resources related matters, other than Sensitive Information.
- (c) Project Co shall promptly after receipt provide Contracting Authority with a copy of any material notice, order, direction, requirement or other similar communication received by it or by any Subcontractor from any Governmental Authority in relation to any of the Works, or the Site, and Project Co shall include relevant terms in all Subcontracts to this effect.
- (d) Project Co shall promptly notify Contracting Authority of any actions, suits, proceedings, or investigations commenced, pending or threatened against Project Co or, to Project Co's knowledge, any Subcontractor 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 Project Co or in any impairment of its ability to perform its obligations under this Project Agreement.
- (e) All information, reports, documents and records in the possession of, or available to, Project Co, including as referred to in Schedule 26 – Record Provisions, which are required to be provided to or available to Contracting Authority hereunder, shall be subject and open to inspection and audit by Contracting Authority at any time and from time to time, which inspection and audit shall take place during normal business hours and at Project Co’s normal places of business unless Contracting Authority and Project Co otherwise agree. Contracting Authority shall also have the right to monitor and audit the performance of any and all parts of the Works wherever located, and Project Co shall cooperate with, and shall require each Subcontractor to cooperate with, and provide access to the representatives of Contracting Authority monitoring and auditing such parts of the Works, including providing them with access and copies (at Contracting Authority’s reasonable cost) of all relevant information, reports, documents and records pertaining to the performance of such parts of the Works. Except as otherwise provided herein, all of Contracting Authority’s costs for the inspections, audits and monitoring shall be borne by Contracting Authority.
- (f) In conducting an audit of Project Co under Section 27.2(e) or as otherwise provided under this Project Agreement, Contracting Authority shall have all rights necessary or incidental to conducting an audit, including the right to have access to and inspect and take copies (at Contracting Authority’s reasonable cost) of all books and records of Project Co required to be provided to or available to Contracting Authority hereunder, upon reasonable notice and at reasonable times. Project Co shall fully cooperate with Contracting Authority and its auditors in the conduct of any audits, including by making available all such records and accounts (other than Sensitive Information) in existence at that time as they may require to perform a full and detailed audit, and Project Co further agrees to promptly review and settle with Contracting Authority all matters arising from such audits, including the refunding of monies to Contracting Authority where applicable. At the reasonable request of Contracting Authority’s auditors, Project Co shall provide such information, reports, documents and records as Contracting Authority’s auditors may reasonably require, other than Sensitive Information.
- (g) Contracting Authority’s rights pursuant to this Section 27.2 shall be in addition to, and shall not limit, any other audit, information, inspection or similar rights under this Project Agreement.
- (h) Contracting Authority’s rights pursuant to this Section 27.2 shall not limit or restrict any Governmental Authority’s right of review, audit, information or inspection under Applicable Law. Contracting Authority’s right pursuant to this Section 27.2 may also be exercised by the Auditor General of Ontario, Her Majesty the Queen in Right of Canada and the Auditor General of Canada without the requirement for further action on the part of Contracting Authority.

**27.3 Lenders' Consultant Reports**

- (a) Project Co shall cause the Lenders' Agent to cause, in accordance with Section 5(j) of Schedule 4 – Lenders' Direct Agreement, the Lenders' Consultant to provide Contracting Authority a copy of any written assessment or report of the Works under the Design and Construction Contract, including but not limited to, any certificate of payment, concurrently with its delivery to the Lenders' Agent.

**28. COMMUNICATIONS**

**28.1 Communications**

- (a) Each of the Parties shall comply with Schedule 18 – Communications.

**29. CHANGES IN LAW**

**29.1 Performance after Change in Law**

- (a) Following any and all Changes in Law, Project Co shall perform the Works in accordance with the terms of this Project Agreement, including in compliance with Applicable Law.

**29.2 Works Change in Law**

- (a) On the occurrence of a Works Change in Law:
- (i) either Party may give Notice to the other of the need for a Variation as a result of such Works Change in Law;
  - (ii) the Parties shall meet within ten Business Days of such Notice to consult with respect to the effect of the Works Change in Law and to reach an agreement on whether a Variation is required as a result of such Works Change in Law, and, if the Parties have not, within ten Business Days of this meeting, reached an agreement, either Party may refer the question of whether a Works Change in Law has occurred or the effect of any Works Change in Law for resolution in accordance with Schedule 27 – Dispute Resolution Procedure; and
  - (iii) Contracting Authority shall, within ten Business Days of agreement or determination that a Variation is required, issue a Variation Enquiry and the relevant provisions of Schedule 22 – Variation Procedure shall apply except that:
    - (A) Project Co may only object to any such Variation Enquiry on the grounds that the implementation of the Variation would not enable it to comply with the Works Change in Law;

- (B) Project Co shall be responsible for obtaining all Development Approvals and Project Co Permits, Licences, Approvals and Agreements required in respect of the Variation;
- (C) Contracting Authority shall not be entitled to withdraw any such Variation Enquiry unless the Parties otherwise agree;
- (D) Project Co shall proceed to implement the Variation within such period as will enable it to comply with the Works Change in Law as soon as reasonably practicable; and
- (E) Project Co shall not be entitled to any payment or other compensation or relief from performance of its obligations under this Project Agreement in respect of any Works Change in Law or associated Variation other than as established pursuant to Schedule 22 – Variation Procedure.

### **29.3 Relevant Change in Law**

- (a) On the occurrence of a Relevant Change in Law, either Party shall be entitled to seek compensation for any increase or decrease (as the case may be) in the net cost to Project Co of performing the Works so as to put such Party in no better and no worse position than it would have been in had the Relevant Change in Law not occurred. Any such compensation shall be calculated in accordance with this Section 29.3.
- (b) On the occurrence of a Relevant Change in Law:
  - (i) either Party may give Notice to the other of the need for a Variation as a result of such Relevant Change in Law;
  - (ii) the Parties shall meet within ten Business Days of such Notice to consult with respect to the effect of the Relevant Change in Law and to reach an agreement on whether a Variation is required as a result of such Relevant Change in Law, and, if the Parties have not, within ten Business Days of this meeting, reached an agreement, either Party may refer the question of whether a Relevant Change in Law has occurred or the effect of any Relevant Change in Law for resolution in accordance with Schedule 27 – Dispute Resolution Procedure; and
  - (iii) Contracting Authority shall, within ten Business Days of agreement or determination that a Variation is required, issue a Variation Enquiry and the relevant provisions of Schedule 22 – Variation Procedure shall apply except that:
    - (A) Project Co may only object to any such Variation Enquiry on the grounds that the implementation of the Variation would not enable it to comply with the Relevant Change in Law;



- (B) Project Co shall be responsible for obtaining all Development Approvals and Project Co Permits, Licences, Approvals and Agreements required in respect of the Variation;
  - (C) Contracting Authority shall not be entitled to withdraw any such Variation Enquiry unless the Parties otherwise agree;
  - (D) Project Co shall proceed to implement the Variation within such period as will enable it to comply with the Relevant Change in Law as soon as reasonably practicable;
  - (E) the Parties shall, without prejudice to their respective general obligations to comply with the terms of this Project Agreement:
    - (I) use commercially reasonable efforts to mitigate the adverse effects of any Relevant Change in Law and take commercially reasonable steps to minimize any increase in costs arising from such Relevant Change in Law; and
    - (II) use commercially reasonable efforts to take advantage of any positive or beneficial effects of any Relevant Change in Law and take commercially reasonable steps to maximize any reduction in costs arising from such Relevant Change in Law; and
  - (F) any entitlement to compensation payable shall be in accordance with this Section 29.3, and any calculation of compensation shall take into consideration, inter alia:
    - (I) any failure by a Party to comply with Section 29.3(b)(iii)(E);
    - (II) any increase or decrease in its costs resulting from such Relevant Change in Law; and
    - (III) any amount which Project Co recovers under any insurance policy (or would recover if it complied with its obligations to insure under this Project Agreement or the terms of any policy of insurance required under this Project Agreement) which amount, for greater certainty, shall not include the amount of any excess or deductibles or any amount above the maximum insured amount applicable to any such insurance policy.
- (c) Project Co shall not be entitled to any payment or compensation or, except as provided in Article 31 or otherwise in this Project Agreement, relief in respect of any Relevant Change in Law, or the consequences thereof, other than in accordance with this Section 29.3, and Article 32 shall be construed accordingly.

**29.4 Pandemic and Epidemic Change in Law**

- (a) Subject to Section 29.4(d) on the occurrence of a Pandemic and Epidemic Change in Law, either Party shall be entitled to seek compensation for any increase or decrease (as the case may be) in the net cost to Project Co of performing the Works (“**Pandemic and Epidemic Change in Law Compensation**”). Any such compensation shall be calculated in accordance with this Section 29.4.
- (b) On the occurrence of a Pandemic and Epidemic Change in Law:
- (i) either Party may give notice to the other of the need for a Variation as a result of such Pandemic and Epidemic Change in Law;
  - (ii) the Parties shall meet within ten Business Days of such notice (or such longer period of time agreed to between the Parties, acting reasonably) to consult with respect to the effect of the Pandemic and Epidemic Change in Law and to reach an agreement on whether a Variation is required as a result of such Pandemic and Epidemic Change in Law, and, if the Parties have not, within ten Business Days (or such longer period of time agreed to between the Parties, acting reasonably) of this meeting, reached an agreement, either Party may refer the question of whether a Pandemic and Epidemic Change in Law has occurred or the effect of any Pandemic and Epidemic Change in Law for resolution in accordance with Schedule 27 – Dispute Resolution Procedure; and
  - (iii) Contracting Authority shall, within ten Business Days (or such longer period of time agreed to between the Parties, acting reasonably) of agreement or determination that a Variation is required, issue a Variation Enquiry and the relevant provisions of Schedule 22 – Variation Procedure shall apply except that:
    - (A) no profit shall be payable to Project Co, the Construction Contractor or any Subcontractor as Pandemic and Epidemic Change in Law Compensation and accordingly:
      - (I) any Pandemic and Epidemic Change in Law Compensation shall include Overhead calculated in accordance with Appendix C to Schedule 22 - Variation Procedure; and
      - (II) Overhead and Profit pursuant to Appendix B to Schedule 22 – Variation Procedure shall not apply;
    - (B) Project Co may only object to any such Variation Enquiry on the grounds that the implementation of the Variation would not enable it to comply with the Pandemic and Epidemic Change in Law;
    - (C) Contracting Authority shall not be entitled to withdraw any such Variation Enquiry unless the Parties otherwise agree;

- (D) without limiting any requirement of this Project Agreement, including Schedule 22 – Variation Procedure, Project Co shall provide Contracting Authority with any evidence and proper documentation Contracting Authority may reasonably require in order to assess the reasonableness of the Pandemic and Epidemic Change in Law Compensation. The Parties agree that evidence and proper documentation shall include:
- (I) proof of the Pandemic and Epidemic Change in Law;
  - (II) any proposed changes to the critical path of the Works;
  - (III) detailed information quantifying the change in costs incurred or to be incurred by Project Co and its Subcontractors in performing the Works related to the Pandemic and Epidemic Change in Law, including information on the financial impact of the Pandemic and Epidemic Change in Law on Project Co and its Subcontractors, invoices, proof of payments, and information setting out overhead, labour rates, unit rates, and other prices and quantities for materials, products, supplies, equipment, services, facilities and transportation and any other Direct Cost described in Appendix A of Schedule 22 – Variation Procedure; and
  - (IV) information confirming any amounts described in Section 29.4(b)(iii)(G)(III) received or that will or are likely to be received by Project Co and its Subcontractors.
- (E) Project Co shall proceed to implement the Variation within such period as will enable it to comply with the Pandemic and Epidemic Change in Law as soon as reasonably practicable;
- (F) the Parties shall, without prejudice to their respective general obligations to comply with the terms of this Project Agreement:
- (I) use commercially reasonable efforts to mitigate the adverse effects of any Pandemic and Epidemic Change in Law and take commercially reasonable steps to minimize any increase in costs arising from such Pandemic and Epidemic Change in Law; and
  - (II) use commercially reasonable efforts to take advantage of any positive or beneficial effects of any Pandemic and Epidemic Change in Law and take commercially reasonable steps to maximize any reduction in costs arising from such Pandemic and Epidemic Change in Law; and

- (G) any entitlement to Pandemic and Epidemic Change in Law Compensation payable shall be in accordance with this Section 29.4, and any calculation of such compensation shall take into consideration, inter alia:
  - (I) any failure by a Party to comply with Section 29.4(b)(iii)(C) or Section 29.4(b)(iii)(E);
  - (II) any increase or decrease in its costs resulting from such Pandemic and Epidemic Change in Law; and
  - (III) any amount which Project Co or a Subcontractor:
    - (1) recovers under any insurance policy (or would recover if it complied with its obligations to insure under this Project Agreement or the terms of any policy of insurance required under this Project Agreement), which amount, for greater certainty, shall not include the amount of any excess or deductibles or any amount above the maximum insured amount applicable to any such insurance policy; or
    - (2) receives as financial relief or support from a Governmental Authority.
- (c) Project Co shall not be entitled to any payment or compensation or, except as expressly provided in Section 31 or otherwise in this Project Agreement, relief in respect of any Pandemic and Epidemic Change in Law, or the consequences thereof, other than in accordance with this Section 29.4, and Section 32 shall be construed accordingly.
- (d) Project Co shall not be entitled to any relief under this Section 29.4 for a Pandemic and Epidemic Supply Chain Delay that may result from a Pandemic and Epidemic Change in Law. Any relief or compensation for Project Co for any Pandemic and Epidemic Supply Chain Delay shall be addressed under Section 33 of this Project Agreement.

## **30. VARIATIONS**

### **30.1 Variation Procedure**

- (a) Except as otherwise expressly provided in this Project Agreement, Schedule 22 – Variation Procedure shall apply in respect of Variations.
- (b) For greater certainty, Project Co shall, subject to and in accordance with Schedule 22 – Variation Procedure, be entitled to a Variation if a written direction issued by or on behalf of Contracting Authority to Project Co or any Project Co Party results in a variation, addition, reduction, substitution, omission, modification, deletion, removal or other change to the whole or any part of the Works.

- (c) Without limiting Project Co's obligations pursuant to Section 11.11(a) and Schedule 22 – Variation Procedure, Project Co shall include in each Subcontract, or shall otherwise cause each Project Co Party to comply with, the Variation Procedure, to the extent that the Variation Procedure requires Project Co to minimize the cost and impact of Variations.

### **30.2 Innovation and Value Engineering**

- (a) Project Co acknowledges that Contracting Authority at all times desires to reduce the overall cost to Contracting Authority of the Project, and Project Co agrees to cooperate, explore and work with Contracting Authority in investigating and considering innovation and value engineering and other cost saving measures.
- (b) If an innovation and value engineering proposal is at any time and from time to time originated and initiated solely by Project Co, Project Co may make a proposal (the “**Innovation Proposal**”) by Notice to Contracting Authority.
- (c) The Parties agree that the subject of an Innovation Proposal shall not include:
- (i) any Variation Enquiry initiated by Contracting Authority; or
  - (ii) any Variation resulting from a Change in Law; or
  - (iii) any change to the Contracting Authority Activities.
- (d) The Innovation Proposal must:
- (i) set out sufficient detail to enable Contracting Authority to evaluate the Innovation Proposal in full;
  - (ii) specify Project Co's reasons and justification for proposing the Innovation Proposal;
  - (iii) request Contracting Authority to consult with Project Co with a view to deciding whether to agree to the Innovation Proposal and, if so, what consequential changes Contracting Authority requires as a result;
  - (iv) indicate any implications of the Innovation Proposal, including a difference between the existing and the proposed requirements of this Project Agreement, and the comparative advantages of each to Project Co and Contracting Authority;
  - (v) indicate if there are any dates by which a decision by Contracting Authority must be made;
  - (vi) indicate the capital cost of the Innovation Proposal, including the cost of financing; and

- (vii) include such other information and documentation as may be reasonably requested by Contracting Authority to fully evaluate and consider the Innovation Proposal.
- (e) Contracting Authority shall, acting in good faith, evaluate the Innovation Proposal, taking into account all relevant issues, including whether:
  - (i) the Innovation Proposal affects the quality of the Works, the Facility, or the likelihood of successful completion of the Works;
  - (ii) the Innovation Proposal will benefit or interfere with the efficient operation of the Facility or the performance of the Contracting Authority Activities;
  - (iii) the Innovation Proposal will interfere with the relationship between Contracting Authority and third parties;
  - (iv) the financial strength of Project Co is sufficient to deliver the changed Works;
  - (v) the residual value of the Lands or Facility is affected;
  - (vi) the Innovation Proposal materially affects the risks or costs to which Contracting Authority is exposed; or
  - (vii) any other matter Contracting Authority considers relevant.
- (f) Contracting Authority may request clarification or additional information regarding the Innovation Proposal, and may request modifications to the Innovation Proposal.
- (g) Contracting Authority may, in its sole discretion, accept or reject any Innovation Proposal.
- (h) If Contracting Authority accepts the Innovation Proposal, with or without modification, the relevant Innovation Proposal shall be documented and evidenced by a written Variation Confirmation, together with any other documents necessary to amend this Project Agreement or any relevant Project Documents to give effect to the Innovation Proposal.
- (i) If, after taking into account the agreed implementation and reasonably allocated development costs incurred by Project Co in connection with the Innovation Proposal and any other uses of the Innovation Proposal by Project Co, the Innovation Proposal causes or will cause the costs of Project Co and/or of a Subcontractor to decrease, the net savings in the costs of Project Co and/or the Subcontractor will be shared equally by Project Co and Contracting Authority, and Contracting Authority's share of the net savings shall, if the Parties agree, be reflected in a lump sum payment.
- (j) If an Innovation Proposal causes or will cause the costs of Contracting Authority to decrease, the net savings in the costs of Contracting Authority will be shared:

- (i) equally by Project Co and Contracting Authority following the implementation of the Innovation Proposal until the Termination Date; and
- (ii) thereafter, Contracting Authority shall be entitled to the full benefit of the net savings in costs (if applicable),

and Project Co's share of the net savings shall be reflected in a lump sum payment.

## **31. DELAY EVENTS**

### **31.1 Definition**

- (a) For the purposes of this Project Agreement, "**Delay Event**" means any of the following events or circumstances only to the extent, in each case, that it causes a delay in achieving Interim Completion by the Scheduled Interim Completion Date or Substantial Completion by the Scheduled Substantial Completion Date:
  - (i) the implementation of a Variation to the extent Project Co has identified such delay in its Estimate and such delay has been documented in the Variation Confirmation;
  - (ii) any breach by Contracting Authority of any of Contracting Authority's obligations under this Project Agreement (including, subject to Section 31.2(o), any delay by Contracting Authority in giving access to the Site or to the Existing Facilities pursuant to Section 16.1(a)), any obstruction of the rights afforded to Project Co under Section 16.1(a) or any delay by Contracting Authority in carrying out its obligations set forth in Schedule 10 – Review Procedure), except to the extent that any such breach is caused, or contributed to, by Project Co or any Project Co Party;
  - (iii) an opening up of the Works pursuant to Section 20.3 where such Works are not subsequently found to be defective or not in compliance with the requirements of this Project Agreement (including the Output Specifications, the Project Co Proposal Extracts and the Design Data), unless such opening up of the Works was reasonable in the light of other defects or non-compliance previously discovered by Contracting Authority in respect of the same or a similar component of the Works or subset of the Works;
  - (iv) a requirement pursuant to Sections 18.2(b) or 18.2(c) for Project Co to perform any alteration, addition, Demolition, extension or variation in the Works, or to suspend or delay performance of the Works, upon the discovery of Contamination, which alteration, addition, Demolition, extension or variation in the Works, or suspension or delay in the performance of the Works, would not otherwise be required under this Project Agreement;
  - (v) a requirement pursuant to Sections 18.3(b) or 18.3(c) for Project Co to perform any alteration, addition, Demolition, extension or variation in the Works, or to

suspend or delay performance of the Works, upon the discovery of any fossils, artifacts and other objects having artistic, historic, archaeological or monetary value, including human remains and burial sites, which alteration, addition, Demolition, extension or variation in the Works, or suspension or delay in the performance of the Works, would not otherwise be required under this Project Agreement;

- (vi) subject to the provisions of Section 11.13, the execution of Additional Works on the Site by Additional Contractors;
- (vii) a requirement pursuant to Schedule 27 – Dispute Resolution Procedure for Project Co to proceed in accordance with the direction of Contracting Authority during the pendency of a Dispute, to the extent that the Dispute is subsequently determined in Project Co’s favour;
- (viii) a Relief Event;
- (ix) an event of Force Majeure;
- (x) a Relevant Change in Law;
- (xi) a Pandemic and Epidemic Change in Law; or
- (xii) a Protest Action in accordance with Section 11.14(e).

### **31.2 Consequences of a Delay Event**

- (a) Project Co shall provide written Notice to the Contracting Authority Representative and the Independent Certifier within 10 Business Days of becoming aware of the occurrence of any event or circumstance described in Section 31.1(a)(ii), (iv), (v), (vi), (xi), or (xii) which, at the time of its occurrence, is reasonably likely to form the basis of a future claim by Project Co for relief under Section 31.2(f) as a Delay Event.
- (b) Project Co shall, within 10 Business Days (or such longer period of time as the Parties may agree) after delivering such notification under Section 31.2(a), provide further written details to the Contracting Authority Representative and the Independent Certifier which shall include:
  - (i) identification of the category of Delay Event on which Project Co’s future claim for relief would be based if such event or circumstances were to form the basis for a claim for relief as a Delay Event;
  - (ii) details of the event or circumstances forming the basis of Project Co’s notification under Section 31.2(a);
  - (iii) details of the contemporary records which Project Co shall thereafter maintain to substantiate its claim for extra time if the event or circumstances detailed in



- accordance with Section 31.2(b)(ii) forms the basis of a future claim by Project Co for relief as a Delay Event;
- (iv) details of the consequences (whether direct or indirect, financial or non-financial) that such event or circumstances may have upon the Scheduled Interim Completion Date, Scheduled Substantial Completion Date or Scheduled Final Completion Date, if such event or circumstances forms the basis of a future claim by Project Co for relief as a Delay Event; and
  - (v) details of any measures that Project Co proposes to adopt to prevent such event or circumstances from forming the basis of a future claim by Project Co for relief as a Delay Event or to mitigate the consequences of such claim if such event or circumstances were to become a Delay Event.
- (c) If Project Co does not provide further written details to the Contracting Authority Representative and the Independent Certifier as required under Section 31.2(b) within the 10 Business Day period referred to in such Section, Project Co acknowledges and agrees that, after a further 10 Business Days, Project Co shall not be entitled to rely upon, and Contracting Authority shall not be obligated to consider, the Notice given under Section 31.2(a) for the purposes of determining Project Co's entitlement to relief under this Section 31.
- (d) As soon as possible but in any event within three Business Days of Project Co receiving, or becoming aware of, any supplemental information pertaining to the event or circumstances disclosed in Section 31.2(a), Project Co shall submit further particulars based on such information to the Contracting Authority Representative and the Independent Certifier.
- (e) The Contracting Authority Representative shall, after receipt of written details under Section 31.2(b), or of further particulars under Section 31.2(c), be entitled by written Notice to require Project Co to provide such further supporting particulars as the Contracting Authority Representative may reasonably consider necessary. Project Co shall comply with such further requests and afford the Contracting Authority Representative and the Independent Certifier reasonable facilities for their investigations, including, without limitation, on-site inspection.
- (f) In addition to complying with its obligations under Sections 31.2(a) and 31.2(b), Project Co shall provide written Notice to the Contracting Authority Representative and the Independent Certifier within 10 Business Days of becoming aware that an event or circumstance has satisfied, or will satisfy, in the opinion of Project Co, the applicable definition of a Delay Event. Project Co shall, within 15 Business Days after such notification, provide further written details of the Delay Event to the Contracting Authority Representative and the Independent Certifier including, if and as applicable, to supplement the information given in Sections 31.2(a), 31.2(d) and 31.2(e), to substantiate or support Project Co's claim which details shall include to the extent not previously provided:

- (i) a statement of which Delay Event upon which the claim is based;
  - (ii) details of the circumstances from which the Delay Event arises;
  - (iii) details of the contemporary records which Project Co shall maintain to substantiate its claim for extra time;
  - (iv) details of the consequences (whether direct or indirect, financial or non-financial) which such Delay Event may have upon the Scheduled Interim Completion Date, Scheduled Substantial Completion Date or Scheduled Final Completion Date, including a critical path analysis of the event or circumstances indicating the impact upon the Scheduled Interim Completion Date, Scheduled Substantial Completion Date or Scheduled Final Completion Date and;
  - (v) details of any measures which Project Co proposes to adopt to mitigate the consequences of such Delay Event.
- (g) As soon as possible, but in any event within three Business Days of Project Co receiving, or becoming aware of, any supplemental information which may further substantiate or support Project Co's claim under Section 31.2(f), Project Co shall submit further particulars based on such information to the Contracting Authority Representative and the Independent Certifier.
- (h) The Contracting Authority Representative shall, after receipt of written details under Section 31.2(f), or of further particulars under Section 31.2(g), be entitled by written Notice to require Project Co to provide such further supporting particulars as the Contracting Authority Representative may reasonably consider necessary. Project Co shall afford the Contracting Authority Representative and the Independent Certifier reasonable facilities for investigating the validity of Project Co's claim, including on-site inspection.
- (i) Subject to the provisions of this Section 31, the Contracting Authority Representative shall allow Project Co an extension of time equal to the critical path delay to the Schedule Interim Completion Date, Scheduled Substantial Completion Date or Scheduled Final Completion Date caused by the Delay Event and shall fix (A) a revised Scheduled Interim Completion Date; (B) a revised Scheduled Substantial Completion Date; or (C) a revised Scheduled Final Completion Date, as applicable, as soon as reasonably practicable and in any event within 10 Business Days of the later of:
- (i) the date of receipt by the Contracting Authority Representative of Project Co's Notice given in accordance with Section 31.2(f) and the date of receipt of adequate further particulars (if such are required under Section 31.2(g)), whichever is later; and

- (ii) the date of receipt by the Contracting Authority Representative of any supplemental information supplied by Project Co or requested by Contracting Authority in accordance with Section 31.2(g) and the date of receipt of any further particulars (if such are required under Section 31.2(h)), whichever is later.
- (j) Intentionally deleted.
- (k) If:
  - (i) the Contracting Authority Representative declines to fix (A) a revised Scheduled Interim Completion Date; (B) a revised Scheduled Substantial Completion Date; or (C) a revised Scheduled Final Completion Date, as applicable;
  - (ii) Project Co considers that a different (A) Scheduled Interim Completion Date; (B) Scheduled Substantial Completion Date; or (C) Scheduled Final Completion Date should be fixed; or
  - (iii) there is a dispute as to whether a Delay Event has occurred,then Project Co shall be entitled to refer the matter for resolution in accordance with Schedule 27 – Dispute Resolution Procedure.
- (l) To the extent that Project Co does not comply with its obligations under Sections 31.2(a) - (h), inclusive, and subject to Section 31.2(c), such failure shall be taken into account in determining Project Co's entitlement to an extension of time pursuant to this Section 31.
- (m) If the Works are behind schedule for a reason other than a Delay Event, or if a Project Co Party delays the progress of any portion of the Works necessary to complete the Works on schedule, Project Co shall use all reasonable measures to bring the Works back on schedule. Project Co shall exercise all means within its discretion, such as directing any Project Co Party that is creating delays to increase their labour forces and equipment, to improve the organization and expediting of the Works, or to work overtime as may be necessary. Project Co shall provide any additional supervision, coordination and expediting, including overtime by its own personnel as may be required to achieve this end. The costs and expenses incurred by the use of such measures and overtime shall be borne by Project Co and/or the Project Co Parties and there shall be no adjustment to the Guaranteed Price as a result of such costs and expenses and for clarity, no extension to the Scheduled Interim Completion Date and/or the Scheduled Substantial Completion Date.
- (n) Where there are concurrent delays, some of which are caused by Contracting Authority or others for whom Contracting Authority is responsible, and some of which are caused by Project Co or others for whom Project Co is responsible, Project Co shall not be

- entitled to either an extension in the Scheduled Interim Completion Date and/or the Scheduled Substantial Completion Date or additional compensation to the extent of the concurrent delays. Concurrent delays are those that are caused by two or more independent events which affect the Scheduled Interim Completion Date and/or the Scheduled Substantial Completion Date where the time period over which such delays occur overlap in time, but only for the duration of the overlap.
- (o) Subject to Sections 11.19(b) and 11.19(c), Contracting Authority shall provide Project Co with access to and use of the Site and the Existing Facility as required pursuant to Article 16 of this Project Agreement in a manner consistent with the Works Schedule and in accordance with the notification requirements and restrictions set out in the Project Agreement, provided that Project Co agrees that the inability of Contracting Authority to provide Project Co with access to an area for construction activities not on the critical path for reasons set out in Sections 11.19(b) and 11.19(c) will not result in the occurrence of a Delay Event (and, for greater certainty, there shall not be a resulting change to the Scheduled Interim Completion Date or the Scheduled Substantial Completion Date) or a Compensation Event (and, for certainty, there shall not be any resulting change to the Guaranteed Price).
- (p) In no event shall the extension of time for a Delay Event be more than the necessary extension of the critical path as a result of the Delay Event.

### **31.3 Mitigation**

- (a) If Project Co is (or claims to be) affected by a Delay Event, Project Co shall, and shall require all Project Co Parties to, take and continue to take commercially reasonable steps:
- (i) to eliminate or mitigate the consequences of such event upon the performance of its obligations under this Project Agreement;
  - (ii) to continue to perform its obligations under this Project Agreement to the extent possible notwithstanding the Delay Event; and
  - (iii) to resume performance of its obligations under this Project Agreement affected by the Delay Event as soon as practicable.
- (b) To the extent that Project Co does not comply with its obligations under this Section 31.3, such failure shall be taken into account in determining Project Co's entitlement to an extension of time pursuant to this Section 31.

## **32. COMPENSATION EVENTS**

### **32.1 Definition**

- (a) For the purposes of this Project Agreement, "**Compensation Event**" means any event referred to in Sections 31.1(a)(ii) (subject to Section 31.2(o)), 31.1(a)(iii), 31.1(a)(iv),

31.1(a)(v), 31.1(a)(vi) and 31.1(a)(vii) as a direct result of which Project Co has incurred loss or expense, whether or not any of these events has also caused a delay.

### **32.2 Consequences of a Compensation Event**

- (a) If a Compensation Event occurs, Project Co's sole right to compensation shall be as set out in this Section 32. For greater certainty, except as aforesaid, no other Delay Event shall entitle Project Co to receive any compensation, except as otherwise provided in:
- (i) Schedule 22 – Variation Procedure, in the case of a Delay Event referred to in Section 31.1(a)(i);
  - (ii) Section 34, in the case of a Delay Event referred to in Section 31.1(a)(ix);
  - (iii) Section 33, in the case of a Delay Event referred to in Section 31.1(a)(viii);
  - (iv) Section 29, in the case of a Delay Event referred to in Section 31.1(a)(x);
  - (v) Section 29.4, in the case of a Delay Event referred to in Section 31.1(a)(xi); and
  - (vi) Section 11.14(e)(iv), in the case of a Delay Event referred to in Section 31.1(a)(xii).
- (b) Subject to Sections 32.2(d), 32.3, 32.4 and 32.5, if it is agreed, or determined in accordance with Schedule 27 – Dispute Resolution Procedure, that there has been a Compensation Event, Project Co shall be entitled to such compensation as would place Project Co in no better or no worse position than it would have been in had the relevant Compensation Event not occurred. For greater certainty, in respect of a Compensation Event that is also a Delay Event, such compensation will include amounts which, but for the Delay Event, would have been paid by Contracting Authority to Project Co. Project Co shall promptly provide the Contracting Authority Representative with any information the Contracting Authority Representative may require in order to determine the amount of such compensation.
- (c) If Contracting Authority is required to compensate Project Co pursuant to this Section 32.2, then Contracting Authority may either pay such compensation as a lump sum payment or payments at times and in a manner to be agreed with Project Co, acting reasonably.
- (d) To the extent that Project Co does not comply with its obligations under Sections 31.2(a) - (h), inclusive, and subject to Section 31.2(c), such failure shall be taken into account in determining Project Co's entitlement to relief pursuant to this Section 32.

### **32.3 Mitigation**

- (a) If Project Co is (or claims to be) affected by a Compensation Event, Project Co shall, and shall require all Project Co Parties to, take and continue to take commercially

reasonable steps to minimize the amount of compensation due in accordance with this Section 32 in relation to any Compensation Event.

- (b) To the extent that Project Co does not comply with its obligations under this Section 32.3, such failure shall be taken into account in determining Project Co's entitlement to relief pursuant to this Section 32.

### **32.4 Insured Exposure**

- (a) The compensation payable to Project Co pursuant to this Section 32 shall be reduced by any amount which Project Co or a Project Co Party recovers, or is entitled to recover, under any insurance policy, or would have recovered if it had complied with the requirements of this Project Agreement in respect of insurance or the terms of any policy of insurance required under this Project Agreement, which amount, for greater certainty, shall not include any excess or deductibles or any amount over the maximum amount insured under any such insurance policy.

### **32.5 Delivery of Works Schedule**

- (a) If an event referred to in Sections 31.1(a)(iii), (iv), (v), (vi) or (vii) occurs after the date that is 66 days following Financial Close, as such date may be extended in accordance with Section 13.2(c), and prior to Contracting Authority assigning the comment "NO COMMENT" or "MINOR NON-CONFORMANCE" to the Draft Works Schedule referred to in Section 13.2(b)(i), Project Co shall not be entitled to receive any compensation under this Section 32 in respect of such Compensation Event, unless such Compensation Event is also a Delay Event, in which case Project Co shall be entitled to compensation in an amount equal to the lesser of:
  - (i) the Senior Debt Service Amount and the Junior Debt Service Amount accrued and paid or that became payable in accordance with the Lending Agreements during the period of delay; and
  - (ii) the compensation which, but for the application of this Section 32.5, Project Co would have been entitled to receive pursuant to Section 32.2(b).

## **33. RELIEF EVENTS**

### **33.1 Definition**

- (a) For the purposes of this Project Agreement, "**Relief Event**" means any of the following events or circumstances to the extent, in each case, that it causes any failure by a Party to perform any of its obligations under this Project Agreement:
  - (i) fire, explosion, lightning, storm, tempest, hurricane, tornado, flood, bursting or overflowing of water tanks, apparatus or pipes, ionizing radiation (to the extent it does not constitute Force Majeure) or earthquake;

- (ii) failure by any Utility Company, local authority or other like body to perform works or provide services;
- (iii) accidental loss or damage to the Works and/or the Facility or any roads servicing the Site;
- (iv) without prejudice to any obligation of Project Co to provide stand-by power facilities in accordance with this Project Agreement, failure or shortage of power, fuel or transport;
- (v) blockade or embargo that is not a Protest Action and that falls short of Force Majeure;
- (vi) any official or unofficial strike, lockout, work to rule or other labour-related action generally affecting the construction and/or operation of courthouse facilities (or a significant sector of that industry) in the Province of Ontario; or
- (vii) the occurrence of a Pandemic and Epidemic Supply Chain Delay,

provided, in each case, that such event does not arise (directly or indirectly) as a result of any act or omission of the Party claiming relief and/or (i) in the case of Project Co claiming relief, as a result of any act or omission of any Project Co Party and (ii) in the case of Contracting Authority claiming relief, as a result of any act or omission of any Province Person.

### **33.2 Consequences of a Relief Event**

- (a) Subject to Section 33.3, no right of termination, other than either Party's right to terminate this Project Agreement pursuant to Section 37.1, shall arise under this Project Agreement by reason of any failure by a Party to perform any of its obligations under this Project Agreement, but only to the extent that such failure to perform is caused by the occurrence of a Relief Event (it being acknowledged and agreed by the Parties that all other rights and obligations of the Parties under this Project Agreement remain unaffected by the occurrence of a Relief Event).
- (b) In respect of a Relief Event that is also a Delay Event pursuant to Section 31.1(a)(viii):
  - (i) Project Co shall only be relieved of its obligations under this Project Agreement to the extent, if any, provided for in Section 31; and
  - (ii) in respect of a Relief Event referred to in Section 33.1(a)(v), 33.1(a)(vi) or 33.1(a)(vii), on the earlier of (A) the Substantial Completion Date and (B) the date of payment of the Contracting Authority Default Termination Sum or Non-Default Termination Sum (and as a part thereof) in accordance with Schedule 23 – Compensation on Termination, Contracting Authority shall pay to Project Co an amount equal to the Senior Debt Service Amount accrued and paid or that became payable in accordance with the Lending Agreements during the

period of delay by Project Co or any Project Co Party to the Senior Lenders up to and including the Scheduled Substantial Completion Date or the date of payment of the Contracting Authority Default Termination Sum or Non-Default Termination Sum, as applicable, together with interest thereon at the rate payable on the Senior Debt Amount, which, but for the Delay Event, would not have been paid by Project Co to the Senior Lenders.

- (c) If a Relief Event occurs, Project Co shall not be entitled to receive any compensation other than as expressly provided in Sections 33.2(b)(ii) and 39.
- (d) Subject to Section 39, Project Co's sole right to payment or otherwise in relation to the occurrence of a Relief Event shall be as provided in this Section 33.

### **33.3 Mitigation and Process**

- (a) Where a Party is (or claims to be) affected by a Relief Event, such Party shall take commercially reasonable steps to mitigate the consequences of the Relief Event upon the performance of its obligations under this Project Agreement, shall resume performance of its obligations affected by the Relief Event as soon as practicable and shall use commercially reasonable efforts to remedy its failure to perform.
- (b) To the extent that the Party claiming relief does not comply with its obligations under this Section 33.3, such failure shall preclude such Party's entitlement to relief pursuant to this Section 33.
- (c) The Party claiming relief shall give written Notice to the other Party within 5 Business Days of such Party becoming aware of the relevant Relief Event. Such initial Notice shall give sufficient details to identify the particular event claimed to be a Relief Event.
- (d) A subsequent written Notice shall be given by the Party claiming relief to the other Party within a further 5 Business Days of the initial Notice, which Notice shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including, without limitation, the effect of the Relief Event on the ability of the Party to perform, the action being taken in accordance with Section 33.3(a), the date of the occurrence of the Relief Event, and an estimate of the period of time required to overcome the Relief Event and/or its effects.
- (e) The Party claiming relief shall notify the other as soon as the consequences of the Relief Event have ceased and of when performance of its affected obligations can be resumed.
- (f) If, following the issue of any Notice referred to in Section 33.3(d), the Party claiming relief receives or becomes aware of any further information relating to the Relief Event and/or any failure to perform, such Party shall submit such further information to the other Party as soon as reasonably possible.



**33.4 Insured Exposure**

- (a) The compensation payable to Project Co pursuant to this Section 33 shall be reduced by any amount which Project Co or a Project Co Party recovers, or is entitled to recover, under any insurance policy, or would have recovered if it had complied with the requirements of this Project Agreement in respect of insurance or the terms of any policy of insurance required under this Project Agreement, which amount, for greater certainty, shall not include any excess or deductibles or any amount over the maximum amount insured under any such insurance policy.

**34. FORCE MAJEURE**

**34.1 Definition**

- (a) For the purposes of this Project Agreement, “**Force Majeure**” means any of the following events or circumstances which directly causes either Party to be unable to perform all or a material part of its obligations under this Project Agreement:
- (i) war, civil war, armed conflict, terrorism, acts of foreign enemies or hostilities;
  - (ii) nuclear or radioactive contamination of the Works, the Facility and/or the Site, unless Project Co or any Project Co Party is the source or cause of the contamination;
  - (iii) chemical or biological contamination of the Works, the Facility and/or the Site from any event referred to in Section 34.1(a)(i);
  - (iv) pressure waves caused by devices traveling at supersonic speeds; or
  - (v) the discovery of any fossils, artefacts and other objects having artistic, historic, archaeological or monetary value, including human remains and burial sites, which, as a result of Applicable Law, requires the Works to be abandoned.

**34.2 Consequences of Force Majeure**

- (a) Subject to Section 34.3, the Party claiming relief shall be relieved from liability under this Project Agreement to the extent that, by reason of the Force Majeure, it is not able to perform its obligations under this Project Agreement.
- (b) In respect of an event of Force Majeure that is also a Delay Event pursuant to Section 31.1(a)(ix):
- (i) Project Co shall only be relieved of its obligations under this Project Agreement to the extent, if any, provided for in Section 31; and
  - (ii) on the earlier of (A) the Substantial Completion Date and (B) the date of payment of the Contracting Authority Default Termination Sum or Non-Default

Termination Sum (and as a part thereof) in accordance with Schedule 23 – Compensation on Termination, Contracting Authority shall pay to Project Co an amount equal to the Senior Debt Service Amount and the Junior Debt Service Amount accrued and paid or that accrued in accordance with the Lending Agreements during the period of delay by Project Co or any Project Co Party to the Lenders up to and including the Scheduled Substantial Completion Date or the date of payment of the Contracting Authority Default Termination Sum or Non-Default Termination Sum, as applicable, together with interest thereon at the rate payable on the principal amount of debt funded under the Lending Agreements, which, but for the Delay Event, would not have been paid by Project Co to the Lenders.

- (c) If an event of Force Majeure occurs prior to the Substantial Completion Date, Project Co shall not be entitled to receive any compensation other than as expressly provided in Sections 34.2(b)(ii) and 39.
- (d) Subject to Section 39, Project Co's sole right to payment or otherwise in relation to the occurrence of an event of Force Majeure shall be as provided in this Section 34.

### **34.3 Mitigation and Process**

- (a) Where a Party is (or claims to be) affected by an event of Force Majeure, such Party shall take commercially reasonable steps to mitigate the consequences of such event of Force Majeure upon the performance of its obligations under this Project Agreement, shall resume performance of its obligations affected by the event of Force Majeure as soon as practicable and shall use commercially reasonable efforts to remedy its failure to perform.
- (b) To the extent that the Party claiming relief does not comply with its obligations under Section 34.3(a), such failure shall be taken into account in determining such Party's entitlement to relief pursuant to this Section 34.
- (c) The Party claiming relief shall give written Notice to the other Party within 5 Business Days of such Party becoming aware of the relevant event of Force Majeure. Such initial Notice shall give sufficient details to identify the particular event claimed to be an event of Force Majeure.
- (d) A subsequent written Notice shall be given by the Party claiming relief to the other Party within a further 5 Business Days of the initial Notice, which Notice shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including, without limitation, the effect of the event of Force Majeure on the ability of the Party to perform, the action being taken in accordance with Section 34.3(a), the date of the occurrence of the event of Force Majeure, and an estimate of the period of time required to overcome the event of Force Majeure and its effects.

- (e) The Party claiming relief shall notify the other as soon as the consequences of the event of Force Majeure have ceased and of when performance of its affected obligations can be resumed.
- (f) If, following the issue of any Notice referred to in Section 34.3(d), the Party claiming relief receives or becomes aware of any further information relating to the event of Force Majeure and/or any failure to perform, such Party shall submit such further information to the other Party as soon as reasonably possible.

#### **34.4 Insured Exposure**

- (a) The compensation payable to Project Co pursuant to this Section 34 shall be reduced by any amount which Project Co or a Project Co Party recovers, or is entitled to recover, under any insurance policy, or would have recovered if it had complied with the requirements of this Project Agreement in respect of insurance or the terms of any policy of insurance required under this Project Agreement, which amount, for greater certainty, shall not include any excess or deductibles or any amount over the maximum amount insured under any such insurance policy.

#### **34.5 Modifications**

- (a) The Parties shall use commercially reasonable efforts to agree to any modifications to this Project Agreement which may be equitable having regard to the nature of an event or events of Force Majeure. Schedule 27 – Dispute Resolution Procedure shall not apply to a failure of Contracting Authority and Project Co to reach agreement pursuant to this Section 34.5.

### **35. PROJECT CO DEFAULT**

#### **35.1 Project Co Events of Default**

- (a) For the purposes of this Project Agreement, “**Project Co Event of Default**” means any one or more of the following events or circumstances:
  - (i) the occurrence of any of the following events other than as a consequence of a breach by Contracting Authority of its payment obligations hereunder:
    - (A) Project Co admits in writing its inability to pay its debts generally as they become due, or makes a general assignment for the benefit of creditors, or a receiver, manager, administrator, administrative receiver, receiver and manager, trustee, custodian or other similar official or any other like person is appointed by or on behalf of or at the instance of a creditor of Project Co with respect to Project Co or any of the property, assets or undertaking of Project Co, or any creditor of Project Co takes control, or takes steps to take control, of Project Co or any of Project Co’s assets, or any proceedings are instituted against Project Co that result in Project Co being declared or ordered bankrupt or in

administration, liquidation, winding-up, reorganization, compromise, arrangement, adjustment, protection, relief or composition of it or with respect to it or its debts or obligations, or any such proceedings are instituted by Project Co seeking any such result, or any such proceedings are instituted by a person other than Project Co, Contracting Authority, a Contracting Authority Party or a person related to any of them seeking such result and such proceedings have or will have a material adverse effect on the performance of the Works or of the Contracting Authority Activities (where such proceedings have not been withdrawn, stayed, discharged, or are otherwise of no further effect, within 90 days of being instituted), under any Applicable Law (including the *Bankruptcy and Insolvency Act* (Canada) and the *Companies' Creditors Arrangement Act* (Canada)) relating to bankruptcy, insolvency or reorganization of or relief with respect to debtors or debtors' obligations or assets or other similar matters, or seeking the appointment of a receiver, manager, administrator, administrative receiver, receiver and manager, trustee, custodian or other similar official or like person for it or with respect to any of its assets, or any resolutions are passed or other corporate actions of Project Co are taken to authorize any of the actions set forth in this Section 35.1(a)(i);

- (B) Project Co ceases performing a substantial portion of its business, or a substantial portion of such business is suspended or is not being performed, whether voluntarily or involuntarily, that has or will have a material adverse effect on Project Co's ability to perform its obligations under this Project Agreement;
  - (C) if any execution, sequestration, extent or other process of any court becomes enforceable against Project Co or if a distress or analogous process is levied against any property of Project Co that materially adversely affects Project Co's ability to perform its obligations hereunder; or
  - (D) Project Co shall suffer any event, or any event or set of circumstances occurs or comes about, analogous to the foregoing events or sets of circumstances set out this Section 35.1(a)(i) in any jurisdiction in which it is incorporated or resident and such event or set of circumstances would, if set out in Section 35.1(a)(i)(A), (B) or (C), constitute a Project Co Event of Default;
- (ii) Project Co failing to achieve Substantial Completion within 180 days after the Scheduled Substantial Completion Date (the "**Longstop Date**");

- (iii) Project Co either:
  - (A) failing to deliver a Recovery Schedule under Section 13.4(a)(iv)(A);
  - (B) delivering a Recovery Schedule under Section 13.4(a)(iv)(A) which indicates that Project Co will not achieve Substantial Completion by the Longstop Date; or
  - (C) delivering a Recovery Schedule under Section 13.4(a)(iv)(A) that is not acceptable to the Independent Certifier, acting reasonably, as to the matters set out in Sections 13.4(a)(iv) and 13.4(a)(v);
- (iv) Project Co making any representation or warranty herein that is false or misleading when made, and that has or will have at any time a material adverse effect on the performance of Works, the Contracting Authority Activities, or that may compromise (1) the Province's reputation or integrity or the nature of the Province's judicial system, or (2) the ability of the Province to conduct its business, so as to affect public confidence in that system, and, in the case of a false or misleading representation or warranty that is capable of being remedied, such breach is not remedied within 10 Business Days of receipt of Notice of the same from Contracting Authority;
- (v) Project Co committing a breach of Sections 41 or 42 ;
- (vi) Project Co committing a breach of its obligations under this Project Agreement which has or will have a material adverse effect on the performance of the Contracting Authority Activities (other than a breach that is otherwise referred to in Sections 35.1(a)(i) to (v) inclusive or 35.1(a)(vii) to (xvi) inclusive) other than where such breach is a consequence of a breach by Contracting Authority of its obligations under this Project Agreement, and upon becoming aware of such breach Project Co failing to remedy such breach in accordance with all of the following:
  - (A) Project Co shall:
    - (I) immediately commence and thereafter diligently continue to remedy the breach and to mitigate any adverse effects on Contracting Authority and the performance of Contracting Authority operations and the Contracting Authority Activities;
    - (II) put forward, within 5 Business Days of receipt of Notice of such breach from Contracting Authority, a reasonable plan and schedule for diligently remedying the breach and mitigating its effect, which plan and schedule shall specify in reasonable detail the manner in which, and the latest date by which, such breach is proposed to be remedied, which latest date shall in any event

be within 60 days of Notice of such breach, or if such breach is not capable of being rectified in such period then such longer period as is reasonable in the circumstances; and

- (III) thereafter perform its obligations to achieve all elements of such plan and schedule in accordance with its terms within the time for the performance of its obligations thereunder;
- (vii) Project Co wholly abandoning the Works for a period which exceeds three Business Days from receipt by Project Co of a written request to return to the Site, other than as a consequence of a breach by Contracting Authority of its obligations under this Project Agreement;
- (viii) Project Co failing to comply with Sections 48.1 or 48.3;
- (ix) the occurrence of any Change in Ownership or Change in Control which is prohibited by Section 48.4;
- (x) Project Co failing to remove an Encumbrance that arose due to an act or omission of Project Co or any Project Co Party (other than a Title Encumbrance and any Encumbrance derived through Contracting Authority) within 45 days of the earlier of:
  - (A) the registration of such Encumbrance against title to the Lands or any part thereof; and
  - (B) the date on which Project Co or any Project Co Party knew, or ought to have known, about the existence of the Encumbrance;
- (xi) Project Co failing to pay any sum or sums due to Contracting Authority under this Project Agreement, which sum or sums are not being disputed in accordance with Schedule 27 – Dispute Resolution Procedure or have not been set off by Project Co pursuant to Section 4.11(a)(ii), 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 Project Co of a Notice of non-payment from Contracting Authority;
- (xii) Project Co failing to comply with Section 49;
- (xiii) Project Co failing to comply with Section 8.3 or Schedule 29 - Refinancing;
- (xiv) Project Co failing to obtain any bond, security or insurance required to be obtained by or on behalf of Project Co pursuant to this Project Agreement or any such bond, security or insurance being vitiated or otherwise ceasing to be in full force and effect or in material compliance with the requirements set out in this Project Agreement, other than as a consequence of a breach by Contracting Authority of its obligations under this Project Agreement, and:

- (A) in respect of insurance, such breach by Project Co is not remedied within 10 Business Days of the occurrence of the breach; and
- (B) in respect of a bond or security, such breach by Project Co is not remedied within 5 Business Days of Project Co becoming aware of such breach;
- (xv) Project Co failing to comply with any determination, decision, order or award made against Project Co in accordance with Schedule 27 – Dispute Resolution Procedure;
- (xvi) Project Co failing to comply with Section 25.5 or 25.7.
- (xvii) A default by Project Co or any Project Co Party under any of the Ancillary Documents following the expiry of any applicable Notice and cure periods thereunder.

### **35.2 Notification of Occurrence**

- (a) Project Co shall, promptly upon Project Co becoming aware of the occurrence, notify Contracting Authority of the occurrence, and details, of any Project Co Event of Default and 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 Project Co Event of Default.

### **35.3 Right to Termination**

- (a) On the occurrence of a Project Co Event of Default, or at any time after Contracting Authority becomes aware of a Project Co Event of Default, Contracting Authority may, subject to Section 35.4, terminate this Project Agreement in its entirety by written Notice having immediate effect, prior to and without the need to obtain confirmation through the Schedule 27 – Dispute Resolution Procedure, such notice to be given to Project Co, and to any person specified in the Lenders’ Direct Agreement to receive such notice. The Parties agree that no irreparable harm shall occur if this Project Agreement is terminated and that any termination of the Project Agreement by either Party, if found to be wrongful, would be adequately compensated for by an award of damages.

### **35.4 Remedy Provisions**

- (a) In the case of a Project Co Event of Default referred to in Sections 35.1(a)(i)(B), 35.1(a)(i)(C), 35.1(a)(i)(D) (where the Project Co Event of Default referred to in Section 35.1(a)(i)(D) is analogous to a Project Co Event of Default referred to in Section 35.1(a)(i)(B) or 35.1(a)(i)(C)), 35.1(a)(iii), 35.1(a)(iv), 35.1(a)(v), 35.1(a)(vii), 35.1(a)(viii), 35.1(a)(ix), (where the Project Co Event of Default referred to in Section 35.1(a)(ix) is capable of being remedied), 35.1(a)(xi), 35.1(a)(xiii), 35.1(a)(xiv) (where the Project Co Event of Default referred to in Section 35.1(a)(xiv)) is not in respect of

- insurance), 35.1(a)(xv), or 35.1(a)(xvi), Contracting Authority shall, prior to being entitled to terminate this Project Agreement, give Notice of default to Project Co, and to any person specified in the Lenders' Direct Agreement to receive such Notice, and Project Co shall:
- (i) within five Business Days of such Notice of default, put forward a reasonable plan and schedule for diligently remedying the Project Co Event of Default, which schedule shall specify in reasonable detail the manner in, and the latest date by which, such Project Co Event of Default is proposed to be remedied, which latest date shall, in any event, be within 30 days of the Notice of default, or if such breach is not capable of being remedied in such period then such longer period as is acceptable to Contracting Authority, acting reasonably; and
  - (ii) thereafter, perform its obligations to achieve all elements of such plan and schedule in accordance with its terms within the time for the performance of its obligations thereunder.
- (b) Where Project Co puts forward a plan and schedule in accordance with Section 35.4(a)(i) that has a date for the Project Co Event of Default to be remedied that is beyond 30 days from the Notice of default, Contracting Authority shall have 5 Business Days from receipt of the same within which to notify Project Co that Contracting Authority does not accept such longer period in the plan and schedule and that the 30 day limit will apply, failing which Contracting Authority shall be deemed to have accepted the longer period in the plan and schedule.
- (c) If a Project Co Event of Default, of which a Notice of default was given under Section 35.4(a), occurs and:
- (i) Project Co fails to immediately commence and thereafter diligently continue to remedy the Project Co Event of Default and to mitigate any adverse effects on Contracting Authority and the performance of the Contracting Authority Activities; or
  - (ii) Project Co fails to put forward a plan and schedule pursuant to Section 35.4(a)(i); or
  - (iii) such Project Co Event of Default is not remedied within 30 days of such Notice of default or such longer period as is established pursuant to the plan and schedule established pursuant to Sections 35.4(a) and (b); or
  - (iv) where Project Co puts forward a plan and schedule pursuant to Section 35.4(a)(i) and Project Co fails to perform its obligations thereunder necessary to achieve all elements of such plan and schedule in accordance with its terms within the time for the performance of its obligations,



- then Contracting Authority may terminate this Project Agreement in its entirety by written notice with immediate effect, such Notice to be given to Project Co, and to any person specified in the Lenders' Direct Agreement to receive such Notice.
- (d) Notwithstanding that Contracting Authority may give the Notice referred to in Section 35.4(a), and without prejudice to the other rights of Contracting Authority in this Section 35.4, at any time during which a Project Co Event of Default is continuing, Contracting Authority may, at Project Co's risk and expense, take such steps as Contracting Authority considers appropriate, either itself or by engaging others (including a third party) to take such steps, to perform or obtain the performance of Project Co's obligations under this Project Agreement or to remedy such Project Co Event of Default.
- (e) Upon the occurrence of a Project Co Event of Default that Project Co has remedied pursuant to this Section 35.4, such occurrence of a Project Co Event of Default shall thereafter cease to be a Project Co Event of Default and Contracting Authority shall not be entitled to terminate this Project Agreement for that occurrence of a Project Co Event of Default.

### **35.5 Contracting Authority Costs**

- (a) Project Co shall reimburse 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 Contracting Authority in exercising its rights under this Section 35, including any relevant increased administrative expenses. Contracting Authority shall take commercially reasonable steps to mitigate such costs.

### **35.6 No Other Rights to Terminate**

- (a) Contracting Authority shall have no right or entitlement to terminate this Project Agreement, or to accept any repudiation of this Project Agreement, and shall not purport to exercise any such right or entitlement except as set forth in Sections 35 and 37.

## **36. CONTRACTING AUTHORITY DEFAULT**

### **36.1 Contracting Authority Events of Default**

- (a) For the purposes of this Project Agreement, "**Contracting Authority Event of Default**" means any one or more of the following events or circumstances:
- (i) Contracting Authority failing to pay any sum or sums due to Project Co under this Project Agreement, which sum or sums are not being disputed in accordance with Schedule 27 – Dispute Resolution Procedure or have not been set off by Contracting Authority pursuant to Section 4.11(a)(i), and which sum or sums, either singly or in aggregate, exceed(s) \$[REDACTED] (index linked), and:

- (A) in respect of the Interim Completion Payment, the Substantial Completion Payment or Legislative Holdback, such failure continues for a period of 10 Business Days; or
- (B) in respect of any other payment due and payable by Contracting Authority to Project Co under this Project Agreement, such failure continues for a period of 90 days,

in any such case, from receipt by Contracting Authority of a Notice of non-payment from or on behalf of Project Co;

- (ii) Contracting Authority committing a material breach of its obligations under Section 16 (other than as a consequence of a breach by Project Co of its obligations under this Project Agreement), which breach materially adversely affects the ability of Project Co to perform its obligations under this Project Agreement for a continuous period of not less than 60 days,
- (iii) an act of any Governmental Authority which renders it impossible for Project Co to perform all or substantially all of its obligations under this Project Agreement (other than as a consequence of a breach by Project Co of its obligations under this Project Agreement) for a continuous period of not less than 60 days, provided that, for greater certainty, the non-issuance of, or the imposition of any conditions or limitations in, any of the Project Co Permits, Licences, Approvals and Agreements shall not constitute an “act of any Governmental Authority”.

### **36.2 Project Co’s Options**

- (a) On the occurrence of a Contracting Authority Event of Default and while the same is continuing, Project Co may give Notice to Contracting Authority of the occurrence of such Contracting Authority Event of Default, which Notice will specify the details thereof, and, at Project Co’s option and without prejudice to its other rights and remedies under this Project Agreement, may:
  - (i) suspend performance of the Works until such time as Contracting Authority has remedied such Contracting Authority Event of Default; or
  - (ii) if such Contracting Authority Event of Default has not been remedied within 30 days of receipt by Contracting Authority of Notice of the occurrence of such Contracting Authority Event of Default, terminate this Project Agreement in its entirety by Notice in writing having immediate effect.

### **36.3 Project Co’s Costs**

- (a) Contracting Authority shall reimburse Project 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 Project Co in exercising its rights under this

Section 36, including any relevant increased administrative expenses. Project Co shall take commercially reasonable steps to mitigate such costs.

**36.4 No Other Rights to Terminate**

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

**37. RELIEF EVENT AND NON DEFAULT TERMINATION**

**37.1 Termination for Relief Event**

- (a) If a Relief Event occurs and the effects of the Relief Event continue for 180 days from the date on which the Party affected gives Notice to the other Party pursuant to Section 33.3(c), either Party may, at any time thereafter, terminate this Project Agreement by written Notice to the other Party having immediate effect, provided that the effects of the Relief Event continue during such period to prevent either Party from performing all or substantially all of its obligations under this Project Agreement.

**37.2 Termination for Force Majeure**

- (a) If an event of Force Majeure occurs and the Parties, having used commercially reasonable efforts, have failed to reach agreement on any modification to this Project Agreement pursuant to Section 34.5 within 180 days from the date on which the Party affected gives Notice to the other Party as set out therein, either Party may, at any time thereafter, terminate this Project Agreement by written Notice to the other Party having immediate effect, provided that the effects of the event of Force Majeure continue during such period to prevent either Party from performing all or substantially all of its obligations under this Project Agreement.

**37.3 Termination for Convenience**

- (a) Contracting Authority shall, in its sole discretion and for any reason whatsoever, be entitled to terminate this Project Agreement at any time on 180 days written notice to Project Co.
- (b) In the event of Notice being given by Contracting Authority in accordance with this Section 37.3, Contracting Authority shall, at any time before the expiration of such Notice, be entitled to direct Project Co to refrain from commencing, or allowing any third party to commence, the Works, or any part or parts of the Works where such Works have not yet been commenced.

**37.4 Automatic Expiry on Expiry Date**

- (a) This Project Agreement shall terminate automatically on the Expiry Date.

- (b) Project Co shall not be entitled to any compensation due to termination of this Project Agreement on expiry of the Project Term on the Expiry Date.

**37.5 Termination due to Protest Action**

- (a) If a Protest Action occurs which entitles Project Co to Delay Event relief pursuant to Section 31 and the effects of such Protest Action continue for 180 days from the date on which Project Co gives Notice to Contracting Authority pursuant to Section 31.2(a), Contracting Authority may, at any time thereafter, terminate this Project Agreement by written Notice to Project Co having immediate effect, provided that the effects of such Protest Action continue during such period.

**38. EFFECT OF TERMINATION**

**38.1 Termination**

- (a) Notwithstanding any provision of this Project Agreement, upon the service of a Notice of termination or termination on the Expiry Date pursuant to Section 37.4, this Section 38 shall apply in respect of such termination.

**38.2 Continued Effect – No Waiver**

- (a) Notwithstanding any breach of this Project Agreement by a Party, the other Party may elect to continue to treat this Project Agreement as being in full force and effect and to enforce its rights under this Project 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 Project Agreement, including any right to terminate this Project Agreement and any right to claim damages, shall not be deemed to be a waiver of such right for any continuing or subsequent breach.

**38.3 Continuing Performance**

- (a) Subject to any exercise by Contracting Authority of its rights to perform, or to seek, pursuant to this Project Agreement, a third party to perform, the obligations of Project Co, the Parties shall continue to perform their obligations under this Project Agreement (including, if applicable, pursuant to Schedule 23 – Compensation on Termination) notwithstanding the giving of any Notice of default or Notice of termination, until the termination of this Project Agreement becomes effective in accordance with this Section 38.

**38.4 Effect of Notice of Termination**

- (a) On the service of a Notice of termination, or termination on the Expiry Date pursuant to Section 37.4:
- (i) if termination is prior to the Substantial Completion Date, in so far as any transfer shall be necessary to fully and effectively transfer such property to

Contracting Authority as shall not already have been transferred to Contracting Authority pursuant to Section 44.1, Project Co shall transfer to, and there shall vest in, Contracting Authority, free from all Encumbrances (other than the Title Encumbrances and any Encumbrances caused or consented to by Contracting Authority), such part of the Works and Facility as shall have been constructed and such items of the Plant and equipment, including FF&E as shall have been procured by Project Co, and, if Contracting Authority so elects:

- (A) all plant, equipment and materials (other than those referred to in Section 38.4(a)(i)(B)) on or near to the Lands shall remain available to Contracting Authority for the purposes of completing the Works; and
  - (B) all construction plant and equipment shall remain available to Contracting Authority for the purposes of completing the Works, subject to payment by Contracting Authority of the Construction Contractor's reasonable charges;
- (ii) if termination is prior to the Substantial Completion Date, Project Co shall deliver to Contracting Authority (to the extent such items have not already been delivered to Contracting Authority) one complete set of all Project Data and Intellectual Property relating to the design, construction and completion of the Works and the Facility;
  - (iii) in so far as title shall not have already passed to Contracting Authority pursuant to Section 44.1 or Section 38.4(a)(i), Project Co shall hand over to, and there shall vest in, Contracting Authority, free from all Encumbrances (other than the Title Encumbrances and any Encumbrances caused or consented to by Contracting Authority), the Facility together with all other assets and rights capable of being transferred that are necessary for the performance of the Project and the Works and all facilities and equipment, including the FF&E, and to the extent that any such assets or rights are not capable of being transferred by Project Co to Contracting Authority, Project Co shall enter into agreements or make other arrangements in order to permit the use of the assets or rights by Contracting Authority in order to enable it, or its designated agents or subcontractors, to continue to perform the activities which would have otherwise been performed by Project Co if this Project Agreement had not been terminated;
  - (iv) if Contracting Authority so elects, Project Co shall ensure that any of the Subcontracts between Project Co and a Subcontractor (including the Design and Construction Contract), any other instrument entered into between any such Subcontractor and Project Co for securing the performance by such Subcontractor of its obligations in respect of the Works or to protect the interests of Project Co, shall be novated or assigned to Contracting Authority or its nominee, provided that where termination occurs other than as a result of a Project Co Event of Default, the consent of the relevant Subcontractor shall

be required, and further provided that any such novation or assignment of the Design and Construction Contract with the Construction Contractor shall be made by Contracting Authority pursuant to, and subject to, the terms of the Construction Contractor's Direct Agreement;

- (v) Project Co shall, or shall ensure that any Project Co Party shall, offer to sell (and if Contracting Authority so elects, execute such sale) to Contracting Authority at a fair value (determined as between a willing vendor and willing purchaser, with any Disputes as to such fair value being resolved in accordance with Schedule 27 – Dispute Resolution Procedure), free from all Encumbrances (other than the Title Encumbrances and any Encumbrances caused or consented to by Contracting Authority), all or any part of the stocks of material and other assets, road vehicles, spare parts and other moveable property owned by Project Co or any Project Co Parties and dedicated to or predominantly used in respect of the Facility, and reasonably required by Contracting Authority in connection with the operation of the Facility;
- (vi) Project Co shall use commercially reasonable efforts to assign, or otherwise transfer, to Contracting Authority, free from all Encumbrances (other than the Title Encumbrances and any Encumbrances caused or consented to by Contracting Authority), the benefit of all manufacturers' warranties, including all documentation in respect thereof, in respect of mechanical and electrical plant and equipment used or made available by Project Co under this Project Agreement and included in the Facility; and
- (vii) Project Co shall deliver to Contracting Authority all information, reports, documents, records and the like referred to in Section 27, including as referred to in Schedule 26 – Record Provisions, except where such are required by Applicable Law to be retained by Project Co or the Project Co Parties (in which case complete copies shall be delivered to Contracting Authority).

### **38.5 Ownership of Information**

- (a) Subject to Section 40, all information obtained by Project Co, including the As Built Drawings and other technical drawings and data, supplier agreements and contracts, utilities consumption information, environmental and technical reports, static building information, lease, licence and subletting data and contracts, asset condition data, standard operating procedures, processes and manuals and all other information directly related to the Works accumulated over the course of the Project Term shall be the property of Contracting Authority and upon termination of this Project Agreement shall be provided or returned to Contracting Authority, as applicable, in electronic format acceptable to Contracting Authority, acting reasonably, where it exists in electronic format, and in its original format, when not in electronic format.

**38.6 Provision in Subcontracts**

- (a) Project Co shall make provision in all Subcontracts to which it is a party (including requiring the relevant Project Co Parties to make such provision and to require other Project Co Parties to make such provision) to ensure that Contracting Authority shall be in a position to exercise its rights, and Project Co shall be in a position to perform its obligations, under this Section 38.

**38.7 Transitional Arrangements**

- (a) On the termination of this Project Agreement for any reason, for a reasonable period both before and after any such termination, Project Co shall:
- (i) as soon as practicable remove from the Site all property belonging to Project Co or any Project Co Party that is not acquired by Contracting Authority pursuant to Section 38.4 or otherwise, and, if Project Co has not done so within 60 days after any Notice from Contracting Authority requiring it to do so, Contracting Authority may, without being responsible for any loss, damage, costs or expenses, remove and sell any such property and shall hold any proceeds, less all costs incurred to the credit of Project Co;
  - (ii) forthwith deliver to the Contracting Authority Representative:
    - (A) all keys to, and any pass cards and other devices used to gain access to any part of the Facility; and
    - (B) to the extent transferable and without prejudice to Contracting Authority's rights pursuant to Section 40, any copyright licences for any computer programs, or licences to use the same, used in connection with the operation of the Facility; and
  - (iii) as soon as practicable vacate the Site and shall leave the Site and the Facility in a safe, clean and orderly condition.

**38.8 Termination upon Aforesaid Transfer**

- (a) On completion of Project Co's obligations pursuant to this Section 38, this Project Agreement shall terminate and, except as provided in Section 38.9, all rights and obligations of Contracting Authority and Project Co under this Project Agreement shall cease and be of no further force and effect.

**38.9 Survival**

- (a) Except as otherwise provided in this Project Agreement, termination of this Project Agreement shall be without prejudice to, and shall not affect:

- (i) all representations, warranties and indemnities under this Project Agreement; and
- (ii) Sections 1.2, 1.3, 4, 6, 7, 8, 11.16, 11.17, 17.2, 18.1, 18.2(a), 18.3(a), 23.6, 24.16, 27, 35.5, 36.3, 37.4, 38, 39, 40 (with the exception of 40.4(b)), 41, 42, 43.3, 44, 45, 46, 46A, 49.3, 50.1, 53.4, 53.8, 53.9, 53.10, 53.11 and 53.12 of this Project Agreement, Schedule 14 – Outline Commissioning Program, Schedule 21 – Construction Period Failures, Schedule 23 – Compensation on Termination, Schedule 24 – [REDACTED], Sections 1.2 to 1.8 of Schedule 26 – Record Provisions, Schedule 27 – Dispute Resolution Procedure and any other provisions of this Project 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,

all of which shall survive the termination of this Project Agreement, including for termination on the Expiry Date pursuant to Section 37.4. For clarity, any termination of this Project Agreement shall be without prejudice to, and shall not affect, the Performance Guarantee of Construction Guarantor, which shall survive the termination of this Project Agreement, including termination on the Expiry Date pursuant to Section 37.4, in respect of any and all of such surviving provisions of the Project Agreement.

## **39. COMPENSATION ON TERMINATION**

### **39.1 Compensation on Termination**

- (a) If this Project Agreement is terminated in accordance with the terms hereof, then Schedule 23 – Compensation on Termination shall apply and Contracting Authority shall pay Project Co any applicable compensation on termination.

### **39.2 Full and Final Settlement**

- (a) Except as otherwise provided in Section 39.2(b), any compensation paid pursuant to this Section 39, including pursuant to Schedule 23 - Compensation on Termination in the total amount owing thereunder, shall be in full and final settlement of any claims, demands and proceedings of Project Co and Contracting Authority, and each shall be released from all liability to the other in relation to any breaches or other events leading to such termination of this Project Agreement, and the circumstances leading to such breach or termination, and Project Co and Contracting Authority shall be precluded from exercising all other rights and remedies in respect of any such breach or termination whether in contract, tort, restitution, statute, at common law or otherwise.
- (b) Section 39.2(a) shall be without prejudice to:
  - (i) any liability of either Party to the other, including under the indemnities contained in this Project Agreement, that arose prior to the Termination Date



(but not from the termination itself or the events leading to such termination) to the extent such liability has not already been set off pursuant to Section 4.11 or taken into account pursuant to Schedule 23 - Compensation on Termination in determining or agreeing upon the Contracting Authority Default Termination Sum, Non-Default Termination Sum, Project Co Default Termination Sum or any other termination sum, as the case may be; and

- (ii) any liabilities arising under or in respect of any breach by either Party of their obligations under Section 38.9 of this Project Agreement, or the Sections referred to therein, which did not lead to such termination and which arises or continues after the Termination Date.

## **40. INTELLECTUAL PROPERTY**

### **40.1 Representation and Warranty**

- (a) Project Co represents, warrants and covenants to Contracting Authority and agrees that:
  - (i) Project Co is and shall be the sole and exclusive owner of the Project Data and the Intellectual Property Rights or has and shall have the right to provide the licences granted to Contracting Authority herein;
  - (ii) Project Co has and shall have the right to provide the assignments granted to Contracting Authority herein; and
  - (iii) the Project Data and the Intellectual Property Rights and their use by Contracting Authority and the Province Persons do not and shall not infringe, and are not and shall not be a misappropriation of, any third party Intellectual Property Rights, and, as of the date of this Project Agreement, Project Co has not received any alleged infringement or misappropriation Notices from third parties regarding the Project Data or the Intellectual Property Rights.

### **40.2 Delivery of Project Data and Intellectual Property Rights**

- (a) Project Co shall make all Project Data and Intellectual Property Rights available to, and upon request shall deliver to, Contracting Authority free of charge all Project Data, and shall obtain all necessary licences, permissions and consents to ensure that Project Co shall make the Project Data and Intellectual Property Rights available to and deliver the Project Data to Contracting Authority on the aforesaid terms of this Section 40.2(a), for any and all of the Approved Purposes.

### **40.3 Licence of Project Data and Intellectual Property Rights**

- (a) Project Co:
  - (i) hereby grants to Contracting Authority an irrevocable, worldwide, royalty free, perpetual, non-exclusive and transferable licence, including the right to grant

sub-licences, to use the Project Data and the Intellectual Property Rights for any and all of the Approved Purposes;

- (ii) shall, at Project Co's cost, where any Intellectual Property Rights are or become vested in the Construction Contractor, obtain the grant of an equivalent licence to that referred to in Section 40.3(a)(i), provided that such licence may, in respect of the Construction Contractor's Intellectual Property Rights that are proprietary and subject to trademark or copyright, be limited to the term of the Design and Construction Contract; and
  - (iii) shall, at Project Co's cost, where any Intellectual Property Rights are or become vested in a third party (other than the Construction Contractor), obtain the grant of an equivalent licence to that referred to in Section 40.3(a)(i), provided that Project Co is able to obtain such licence from such third party on reasonable commercial terms and conditions.
- (b) In this Section 40.3 and 40.5(a), "use" includes any and all acts of copying, modifying, adapting, translating, incorporating with other materials, creating derivative works and otherwise using the Project Data and Intellectual Property Rights.

#### **40.4 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 Project Co and Contracting Authority pursuant to this Project Agreement or in relation to the Facility, the Site or Works (the "**Jointly Developed Materials**"), then the Parties hereby acknowledge and agree that Contracting Authority shall be the sole and exclusive owner of all right, title and interest in and to the Jointly Developed Materials, any Intellectual Property associated therewith and any and all improvements, modifications and enhancements thereto. Project Co shall, at the request of Contracting Authority, execute such further agreements and cause the Project 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) Contracting Authority hereby grants Project Co a royalty free, non-exclusive and non-transferable licence, with a right to grant sub-licences to each Subcontractor, to use the Jointly Developed Materials during the Project Term for the sole purposes of Project Co or any Subcontractor performing its obligations under this Project Agreement or its Subcontract, as applicable.
- (c) Upon termination of this Project Agreement, all rights and licences whatsoever granted to Project Co in the Jointly Developed Materials shall automatically terminate, and Project Co shall return any and all Jointly Developed Materials in the custody or possession of Project Co to Contracting Authority.

#### **40.5 Maintenance of Data**

- (a) To the extent that any of the data, materials and documents referred to in this Section 40 are generated by, or maintained on, a computer or similar system, Project Co shall procure for the benefit of 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 Contracting Authority or its nominee to access and otherwise use (as such term is defined in Section 40.3(b), subject to the payment by Contracting Authority of any relevant fee) such data, materials and documents for the Approved Purposes.
- (b) Without limiting the obligations of Project Co under Section 40.5(a), Project Co shall ensure the back up and storage in safe custody of the data, materials and documents referred to in this Section 40 in accordance with Good Industry Practice. Project Co shall submit to the Contracting Authority Representative Project Co's proposals for the back up and storage in safe custody of such data, materials and documents and Contracting Authority shall be entitled to object if the same is not in accordance with Good Industry Practice. Project Co shall comply, and shall cause all Project Co Parties to comply, with all procedures to which the Contracting Authority Representative has not objected. Project Co may vary its procedures for such back up and storage subject to submitting its proposals for change to the Contracting Authority Representative, who shall be entitled to object on the basis set out above. Any Disputes in connection with the provisions of this Section 40.5(b) may be referred for resolution in accordance with Schedule 27 – Dispute Resolution Procedure with reference to Good Industry Practice.

#### **40.6 Claims**

- (a) Where a demand, claim, action or proceeding is made or brought against Contracting Authority or any Province Person which arises out of the alleged infringement or misappropriation of any rights in or to any Project Data or Intellectual Property Rights or the use thereof by Contracting Authority or any Province Person or because the use of any materials, machinery or equipment in connection with the Works infringes any rights in or to any Intellectual Property of a third party then, unless such infringement has arisen out of the use of any Project Data or Intellectual Property Rights by Contracting Authority or any Province Person otherwise than in accordance with the terms of this Project Agreement, Project Co shall indemnify, defend and hold harmless Contracting Authority and such Province Person from and against all such demands, claims, actions and proceedings and Section 45.3 shall apply.

#### **40.7 Contracting Authority Trade-Marks**

- (a) Project Co shall not:
- (i) use any Contracting Authority Trade-Marks without obtaining a trade-mark licence on terms and conditions mutually satisfactory to Contracting Authority and Project Co, each acting reasonably; or

- (ii) use the names or any identifying logos or otherwise of Contracting Authority or the Contracting Authority Representative in any advertising or permit them so to be used except with the prior written consent of Contracting Authority.

#### **40.8 Confidential Information**

- (a) It is expressly acknowledged and agreed that nothing in this Section 40 shall be deemed to create or convey to a Party any right, title, or interest in and/or to the Confidential Information of the other Party.

#### **40.9 Government Use of Documents**

- (a) Project Co hereby disclaims any right, title or interest of any nature whatsoever it may have in or to this Project Agreement that might prohibit or otherwise interfere with Contracting Authority's ability to use this Project Agreement in any manner desired by Contracting Authority.
- (b) Project Co hereby consents to the use by Contracting Authority of this Project Agreement, and any portion thereof, subject to compliance with FIPPA and to the removal by Contracting Authority (in consultation with Project Co) of any information supplied in confidence to Contracting Authority by Project Co in circumstances where disclosure may be refused under section 17(1) of FIPPA.

#### **40.10 Restrictions**

- (a) The Parties hereby agree that either Party may use the Project Know-How for any purpose, provided, however, that neither Project Co nor any Project Co Party shall use the Project Know-How to the extent that such Project Know-How incorporates, references or is otherwise based on the Project Data, the Intellectual Property Rights, the Jointly Developed Material, the Intellectual Property of Contracting Authority or the Confidential Information of Contracting Authority, including the Output Specifications unless such use is otherwise permitted pursuant to this Project Agreement in order to enable Project Co and the Project Co Parties to meet Project Co's obligations under this Project Agreement.
- (b) Project Co hereby covenants and agrees that it will not make any commercial use, including use in any other request for proposal or similar procurement process, of the Project Data, the Intellectual Property Rights, the Jointly Developed Material, the Intellectual Property of Contracting Authority or the Confidential Information of 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 Project Data, the Intellectual Property Rights, the Jointly Developed Material, the Intellectual Property of Contracting Authority or the Confidential Information of Contracting Authority, including the Output Specifications.

## **41. CONFIDENTIALITY**

### **41.1 Disclosure**

- (a) Subject to Sections 41.1(b), 41.1(c) and 41.2, but notwithstanding anything else in this Project Agreement to the contrary, Project Co acknowledges and agrees that, in accordance with the transparency and accountability principles of the IPFP Framework, Contracting Authority has a right to disclose or publish (including on websites) this Project Agreement, any or all terms hereof, including any or all contractual submissions and other records kept in accordance with this Project Agreement, any information related to the performance of Project Co (or any Project Co Party) or any information derived from this Project Agreement or the information related to the performance of Project Co (or any Project Co Party) as Contracting Authority, in its sole discretion, may consider appropriate. In exercising its discretion, Contracting Authority will be guided by the principles set out in Sections 41.1(b) and 41.1(c).
- (b) Contracting Authority will not disclose portions of this Project Agreement, any terms hereof, including any contractual submissions or other records kept in accordance with this Project Agreement, any information related to the performance of Project Co (or any Project Co Party) or any information derived from this Project Agreement or the information related to the performance of Project Co (or any Project Co Party) which would be exempt from disclosure under section 17(1) of FIPPA.
- (c) Notwithstanding Section 41.1(b), but subject to Section 41.2, where a compelling public interest in the disclosure of the information clearly outweighs the public interest in limiting the disclosure of the information supplied by Project Co (or any Project Co Party), Contracting Authority may disclose such information.
- (d) Notwithstanding anything else in this Project Agreement to the contrary, Project Co acknowledges and agrees that this Project Agreement and any or all terms thereof are subject to the Open Data Directive and that the Ontario ministries and agencies are required to disclose or publish certain data in accordance with the Open Data Directive.

### **41.2 Redaction**

- (a) Prior to disclosing or publishing this Project Agreement, any terms hereof, including any contractual submissions or other records kept in accordance with this Project Agreement, any information related to the performance of Project Co (or any Project Co Party) or any information derived from this Project Agreement or the information related to the performance of Project Co (or any Project Co Party), Contracting Authority shall provide to Project Co a redacted version of this Project Agreement or other documents or information to be disclosed or published, on the basis that the information so redacted constitutes information which should not be disclosed pursuant to Section 41.1(b). The Parties acknowledge and agree that the Guaranteed Price, but not any breakdown thereof, may be disclosed.

- (b) If Project Co, acting in good faith, contends that any of the information not redacted constitutes information that falls within the scope of Section 41.1(b) and, accordingly, would be exempt from disclosure under FIPPA, the dispute may be referred for resolution in accordance with Schedule 27 – Dispute Resolution Procedure, and Contracting Authority shall not disclose any information in dispute until a determination is made. Any such determination shall be made with reference to the text and principles of FIPPA.

### **41.3 Disclosure to Government**

- (a) Project Co acknowledges and agrees that, subject to compliance with FIPPA, Contracting Authority will be free to use, disclose or publish (including on websites) any information, including Confidential Information on such terms and in such manner as Contracting Authority sees fit.
- (b) For greater certainty, Project Co acknowledges and agrees that, subject only to the removal of any information which Project Co is (or would be) entitled to refuse to disclose pursuant to section 17(1) of FIPPA, this Project Agreement, any contractual submissions or other records kept in accordance with this Project Agreement, any information related to the performance of Project Co (or any Project Co Party) or any information derived from this Project Agreement or the information related to the performance of Project Co (or any Project Co Party) are public documents and information and, as such, may be disclosed by Contracting Authority.

### **41.4 Freedom of Information**

- (a) The Parties acknowledge and agree that FIPPA applies to Contracting Authority, and that Contracting Authority is required to fully comply with FIPPA.
- (b) Contracting Authority shall, within the time periods provided in FIPPA for a party to exercise rights to prevent disclosure of information, advise Project Co of any request for Confidential Information that relates to Project Co (or any Project Co Party) or of Contracting Authority's intention to voluntarily release any information or documents which contain Confidential Information that relates to Project Co (or any Project Co Party).

### **41.5 Use and Disclosure of Confidential Information**

- (a) Except as authorized hereunder, each Party shall hold in confidence, not disclose and not permit any person any manner of access to, whether directly or indirectly, any Confidential Information of the other Party, provided that this Section 41 shall not restrict either Party from disclosing such Confidential Information to its professional advisors, to the extent necessary, to enable that Party to perform, to cause to be performed, or to enforce, its rights or obligations under this Project Agreement.

- (b) Project Co may:
- (i) disclose in confidence to the Lenders and prospective Lenders, including any trustee or agent of the Lenders and the Lenders' Agent, and their respective professional advisors such Confidential Information as is reasonably required by the Lenders in connection with the raising or syndication of the financing or any sub-participation in the financing of the Works or which Project Co is obliged to supply by the terms of the Lending Agreements; and
  - (ii) disclose in confidence to any Project Co Party and their professional advisors, such Confidential Information as is necessary for the performance by that Project Co Party of that Project Co Party's obligations under this Project Agreement.
- (c) Project Co acknowledges that Contracting Authority may use the Confidential Information of Project Co for purposes not specific to the Project, but for other general governmental purposes, such as development of the Contracting Authority's alternate procurement and financing policies and framework. Contracting Authority will advise Project Co prior to using any Confidential Information of Project Co for non-Project purposes.
- (d) Subject to the foregoing, neither Party shall use, or directly or indirectly cause, authorize or permit any other person to use, any Confidential Information of the other Party except for the purposes of this Project Agreement, as permitted by this Project Agreement or as authorized by the disclosing Party in writing.
- (e) Each Party shall protect all Confidential Information of the disclosing Party with the same degree of care as it uses to prevent the unauthorized use, disclosure, publication, or dissemination of its own confidential information of a similar nature or character, but in no event less than a reasonable degree of care.
- (f) Without limiting the generality of Section 41.5, Project Co shall comply with the document control and security protocol submitted by Project Co in accordance with Schedule 10 – Review Procedure; such protocol shall prescribe limitations on the use, disclosure and storage of the Project Agreement and any other Confidential Information specified by Contracting Authority (the “**Document Control and Security Protocol**”). The Document Control and Security Protocol shall be the first document submitted by Project Co pursuant to Schedule 10 – Review Procedure and, in any event, shall be submitted within five (5) Business Days following Financial Close.

#### **41.6 Exceptions**

- (a) Information of a Party (the “**Proprietor**”), other than Government Sensitive Information and other than Personal Information will not be considered to be Confidential Information in the following circumstances:

- (i) the Proprietor advises the other Party to whom the information has been disclosed (the “**Confidant**”) that the information is not required to be treated as Confidential Information;
- (ii) the information is as of the date of this Project Agreement, or becomes at any time thereafter, generally available to or accessible by the public through no fault or wrongdoing of the Confidant;
- (iii) the information is a matter of public record or in the public domain;
- (iv) the information was in the possession of the Confidant prior to its disclosure and the Confidant came into possession of such information without being in breach of this Project Agreement;
- (v) the information is received by the Confidant on a non-confidential basis from a source other than the Proprietor, provided that to the best of the Confidant’s knowledge such source is not bound by a confidentiality agreement with the Proprietor or otherwise prohibited from disclosing the information to the Confidant by a contractual, legal or fiduciary obligation;
- (vi) the information was independently developed by the Confidant without access to the Confidential Information, as evidenced by written records;
- (vii) the information is required to be disclosed pursuant to Applicable Law, provided that the Confidant provides the Proprietor with reasonable notification and an opportunity to contest such requirement prior to disclosure;
- (viii) the information is disclosed to Contracting Authority upon a termination of this Project Agreement, pursuant to Section 37 or is otherwise required by Contracting Authority for the purposes of performing (or having performed) the Works, including the design or construction of the Facility, or any other operations or services the same as, or similar to, the Works; or
- (ix) the information would not be exempt from disclosure under FIPPA.

#### **41.7 Survival of Confidentiality**

- (a) The obligations in Section 41.1 to Section 41.6 will cease on the date that is three years after the Termination Date and accordingly shall survive the termination of the Project Agreement.

### **42. PERSONAL INFORMATION**

#### **42.1 General**

- (a) Project Co acknowledges the importance of maintaining the confidentiality and privacy of Personal Information.



- (b) Project Co shall, and shall require each Project Co Party to, only collect, hold, process, use, store and disclose Personal Information with the prior consent of Contracting Authority and: (i) shall not collect, hold, process, use or store Personal Information except to the extent necessary to perform Project Co's obligations under this Project Agreement; and (ii) shall not disclose Personal Information or otherwise permit access to or make Personal Information available to any person except as expressly permitted or instructed by Contracting Authority.
- (c) Project Co shall, and shall require each Project Co Party to, at all times treat Personal Information as strictly confidential and shall comply with all applicable requirements of the Output Specifications and the requirements of Applicable Law, including FIPPA, the *Personal Information Protection and Electronic Documents Act* (Canada) and any other Canadian federal or provincial legislation now in force or that may in the future come into force governing the collection, use, disclosure and protection of personal information applicable to Project Co, each Project Co Party or to the Works.
- (d) Project Co shall take all necessary and appropriate action, and shall require each Project Co Party to take all necessary and appropriate action, against any person who fails to comply with this Section 42.
- (e) Project Co shall allow Contracting Authority on reasonable Notice to inspect any Personal Information in the custody or possession of Project Co or a Project Co Party and to audit Project Co and each Project Co Party's compliance with this Section 42 including the measures used by Project Co and each Project Co Party to protect Personal Information, and otherwise promptly and properly respond to all reasonable inquiries of Contracting Authority with respect to Project Co or each Project Co Party's handling of Personal Information.
- (f) Project Co shall not subcontract or delegate to any third party any of the Works that involve or may involve the collection, use, storage, processing or any other handling of Personal Information without the express consent of Contracting Authority and without obtaining written contractual commitments of such third party substantially the same as those of this Section 42.

#### **42.2 Protection of Personal Information**

- (a) Project Co shall implement and use, and shall require each Project Co Party to implement and use, appropriate technical, organizational and physical security measures to protect Personal Information against loss, theft and unauthorized access, disclosure, copying, use, modification or disposal, and shall otherwise ensure that Project Co, the Project Co Parties, and its and their staff shall protect, secure and keep confidential any Personal Information.
- (b) Project Co shall and shall cause each Project Co Party to restrict access to Personal Information to only those authorized employees that require access to such Personal Information to fulfil their job requirements in connection with the Works and that are

- subject to obligations of confidentiality and Personal Information protection no less stringent than those of this Section 42.
- (c) Upon termination of this Project Agreement or upon request of Contracting Authority, whichever comes first, Project Co shall immediately cease all use of and return to Contracting Authority or, at the direction of Contracting Authority, dispose of, destroy or render permanently anonymous all Personal Information, in each case using appropriate technical, organizational and physical security measures to protect Personal Information against loss, theft and unauthorized access, disclosure, copying, use or modification.
  - (d) To the extent that any of the Works involve or may involve destruction or disposal of Personal Information, including any disposal or destruction pursuant to 42.2(c) above, such activities shall include, at a minimum, irreversible destruction, shredding or pulverizing of all documents, records or media containing Personal Information to a size or state that ensures that the document, record or other medium is permanently destroyed and that no information contained therein can be read, reconstructed or deciphered.
  - (e) Project Co shall immediately inform Contracting Authority of any actual or suspected loss, theft or accidental or unauthorized access, disclosure, copying, use, modification or destruction of Personal Information by Project Co or any Project Co Party or any other breach of this Section 42.
  - (f) Contracting Authority may from time to time require that Project Co and any Project Co Party or member of its or their staff execute and deliver within two Business Days of such request an agreement satisfactory to Contracting Authority, acting reasonably, requiring such person to keep Personal Information confidential.
  - (g) Project Co shall provide, and shall cause each Project Co Party to provide, in a timely manner, all necessary and reasonable information and co-operation to Contracting Authority and to any regulatory or other governmental bodies or authorities with jurisdiction or oversight over Applicable Law governing the collection, use, disclosure and protection of personal information in connection with any investigations, audits or inquiries made by any such bodies or authorities under such legislation.

### **42.3 Conflict and Survival**

- (a) To the extent of any conflict or inconsistency between this Section 42 and any other provision of this Project Agreement, this Section 42 shall prevail.
- (b) The obligations in this Section 42 shall survive the termination of this Project Agreement.

**43. INSURANCE AND PERFORMANCE SECURITY**

**43.1 General Requirements**

- (a) Project Co and Contracting Authority shall comply with the provisions of Schedule 25 – Insurance and Performance Security Requirements.

**43.2 No Relief from Liabilities and Obligations**

- (a) Neither compliance nor failure to comply with the insurance provisions of this Project Agreement shall relieve Project Co or Contracting Authority of their respective liabilities and obligations under this Project Agreement.

**43.3 Performance Guarantee of Construction Guarantor**

- (a) At all times during the Project Term and, in respect of the provisions described in Section 38.9, following the Project Term, Project Co shall ensure that a valid and binding Performance Guarantee of the Construction Guarantor in favour of Contracting Authority from the Construction Guarantor (or a party of comparable financial strength, capacity and stability, as determined by Contracting Authority acting in its sole discretion) and in the form of guarantee attached as Schedule 12 – Performance Guarantee of Construction Guarantor, is in place and enforceable by Contracting Authority.

**44. TITLE**

**44.1 Title**

- (a) Title to each item and part of the Facility and the FF&E, including any materials, supplies, equipment, facilities, parts and any other deliverable or component items, but not the risk of loss or damage or destruction thereto or thereof, shall pass to Contracting Authority (or as Contracting Authority may direct) upon the receipt of such item on the Lands, provided however that title to items of tangible personal property (personal property that can be seen, weighed, measured, felt or touched or that is in any way perceptible to the senses and includes computer programs, natural gas and manufactured gas) that comprise the Facility or are to be affixed or attached to the Facility prior to Substantial Completion shall pass to Contracting Authority (or as Contracting Authority may direct) at the time that such items are included in the Facility or affixed or attached to the Facility.

**45. INDEMNITIES**

**45.1 Project Co Indemnities to Contracting Authority**

- (a) Project Co shall indemnify and save harmless Contracting Authority, the Province Persons 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) a failure to achieve Interim Completion by the Scheduled Interim Completion Date;
- (ii) failure by Project Co to achieve Substantial Completion by the Scheduled Substantial Completion Date;
- (iii) any physical loss of or damage to all or any part of the Site, the Facility and the Existing Facilities, or to any equipment, assets or other property related thereto;
- (iv) the death or personal injury of any person;
- (v) any physical loss of or damage to property or assets of any third party; or
- (vi) 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 Project Agreement by Project Co or any act or omission of Project Co or any Project Co Party, except to the extent caused, or contributed to, by:

- (vii) the breach of this Project Agreement by Contracting Authority; or
  - (viii) in respect of Sections 45.1(a)(i) or 45.1(a)(ii), any deliberate or negligent act or omission of Contracting Authority or any Province Person; or
  - (ix) in respect of Sections 45.1(a)(iii), 45.1(a)(iv) or 45.1(a)(v), any act or omission of Contracting Authority or any Province Person.
- (b) Project Co shall indemnify and save harmless Contracting Authority, each Province Person 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 breach of a representation or warranty by Project Co herein.
- (c) Project Co shall indemnify and save harmless Contracting Authority, each Province Person 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 following:
- (i) the performance by Project Co of this Project 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 Project Co to obtain all necessary Project Co Permits, Licences, Approvals and Agreements in accordance with this Project Agreement; or

- (ii) any Contamination on, in or under, or migrating to or from, the Site, except for Contamination for which Contracting Authority is responsible pursuant to Section 18.2(a); or
- (iii) the provision of assistance by Contracting Authority to Project Co pursuant to Section 11.14(d),

except to the extent that such Direct Losses are caused, or contributed to, by the breach of this Project Agreement by Contracting Authority or by any act or omission of Contracting Authority or any Contracting Authority Party.

- (d) Without prejudice to Contracting Authority's rights under Section 35 and any other rights under this Project Agreement, if Contracting Authority exercises its step-in rights under the Construction Contractor's Direct Agreement, Project Co shall indemnify Contracting Authority for all obligations of Project Co assumed by Contracting Authority under the Design and Construction Contract, as the case may be, and for all reasonable costs and expenses incurred by Contracting Authority in relation to the exercise of Contracting Authority's rights.
- (e) Project Co shall indemnify Contracting Authority for damages suffered or incurred on account of (i) any payment not duly made by Project Co pursuant to the terms of this Project Agreement on the due date; (ii) any overpayment to or underpayment by Project Co; or (iii) an amount determined as payable by Project Co to Contracting Authority under Schedule 27 – Dispute Resolution Procedure, by payment of an amount equal to the Payment Compensation Amount calculated from day to day at a rate per annum from the day after the date on which payment was due, the day on which overpayment was made by Contracting Authority, or from the date identified (if any) applicable to an amount determined as payable by Project Co to Contracting Authority under Schedule 27 – Dispute Resolution Procedure, up to and including the date of payment.

## **45.2 Contracting Authority Indemnities to Project Co**

- (a) Contracting Authority shall indemnify and save harmless Project Co and the Project 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 Project Agreement by Contracting Authority or any act or omission of Contracting Authority or any Province Person, except to the extent caused, or

contributed to, by the breach of this Project Agreement by Project Co or by any act or omission of Project Co or any Project Co Party;

- (ii) any physical loss of or damage to all or any part of any property or assets of Project Co or any Project Co Party, arising, directly or indirectly, out of, or in consequence of, or involving or relating to, breach of this Project Agreement by Contracting Authority or any deliberate or negligent act or omission of Contracting Authority or any Province Person, except to the extent caused, or contributed to, by the breach of this Project Agreement by Project Co or by any act or omission of Project Co or any Project 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 Project Agreement by Contracting Authority or any deliberate or negligent act or omission of Contracting Authority or any Contracting Authority Party, except to the extent caused, or contributed to, by the breach of this Project Agreement by Project Co or by any act or omission of Project Co or any Project Co Party,

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

- (b) Contracting Authority shall indemnify and save harmless Project 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 Contracting Authority herein.
- (c) Contracting Authority shall indemnify Project Co for damages suffered or incurred on account of (i) any payment not duly made by Contracting Authority pursuant to the terms of this Project Agreement on the due date; (ii) any overpayment to or underpayment by Contracting Authority; or (iii) an amount determined as payable by Contracting Authority to Project Co under Schedule 27 – Dispute Resolution Procedure, by payment of an amount equal to the Payment Compensation Amount calculated from day to day at a rate per annum from the day after the date on which payment was due, the day on which overpayment was made by Project Co, or from the date identified (if any) applicable to an amount determined as payable by Contracting Authority to Project Co under Schedule 27 – Dispute Resolution Procedure, up to and including the date of payment.

**45.3 Conduct of Claims**

- (a) This Section 45.3 shall apply to the conduct of claims, made by a third person against a party having, or claiming to have, the benefit of an indemnity pursuant to this Project Agreement. The party having, or claiming to have, the benefit of the indemnity is referred to as the “**Beneficiary**” and the Party giving the indemnity is referred to as the “**Indemnifier**”.
- (b) If the Beneficiary receives any Notice, demand, letter or other document concerning any claim for which it appears that the Beneficiary is, or may become entitled to, indemnification under this Section 45, the Beneficiary shall give written notice to the Indemnifier as soon as reasonably practicable and in any event within ten Business Days of receipt of the same. Such Notice shall specify with reasonable particularity, to the extent that information is available, the factual basis for the claim and the amount of the claim.
- (c) Subject to Sections 45.3(d), 45.3(e) and 45.3(f), on the giving of such Notice by the Beneficiary, where it appears that the Beneficiary is or may be entitled to indemnification from the Indemnifier in respect of all, but not part only, of the liability arising out of the claim, the Indemnifier shall (subject to providing the Beneficiary with a secured indemnity to the Beneficiary’s reasonable satisfaction against all costs and expenses that the Beneficiary may incur by reason of such action) be entitled to dispute the claim in the name of the Beneficiary at the Indemnifier’s own expense and take conduct of any defence, dispute, compromise, or appeal of the claim and of any incidental negotiations. The Beneficiary shall give the Indemnifier all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim. The Beneficiary shall have the right to employ separate counsel in respect of such claim and the reasonable fees and expenses of such counsel shall be to the account of the Indemnifier only where representation of both the Indemnifier and Beneficiary by common counsel would be inappropriate due to any actual or potential conflicting interests between the Indemnifier and Beneficiary.
- (d) With respect to any claim conducted by the Indemnifier:
- (i) the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;
  - (ii) the Indemnifier shall not bring the name or reputation of the Beneficiary into disrepute;
  - (iii) the Indemnifier shall not pay, compromise or settle such claims without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed;

- (iv) the Indemnifier shall not admit liability or fault to any third party without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed; and
  - (v) the Indemnifier shall use commercially reasonable efforts to have the Beneficiary named as a beneficiary under any release given by the persons bringing the claim to which this Section 45.3 relates.
- (e) The Beneficiary shall be free to pay or settle any such claim on such terms as it thinks fit and without prejudice to its rights and remedies under this Project Agreement if:
- (i) the Indemnifier is not entitled to take conduct of the claim in accordance with Section 45.3(c);
  - (ii) the Indemnifier fails to notify the Beneficiary of its intention to take conduct of the relevant claim as soon as reasonably practicable and in any event within 10 Business Days of the Notice from the Beneficiary under Section 45.3(b) or notifies the Beneficiary that the Indemnifier does not intend to take conduct of the claim; or
  - (iii) the Indemnifier fails to comply in any material respect with Section 45.3(d).
- (f) The Beneficiary shall be free at any time to give Notice to the Indemnifier that the Beneficiary is retaining or taking over, as the case may be, the conduct of any defence, dispute, compromise or appeal of any claim, or of any incidental negotiations, to which Section 45.3(c) applies. For greater certainty, Project Co acknowledges and agrees that where Contracting Authority is the Beneficiary, Contracting Authority may retain or take over such conduct in any matter involving Personal Information or any matter involving public policy. On receipt of such Notice the Indemnifier shall promptly take all steps necessary to transfer the conduct of such claim to the Beneficiary, and shall provide to the Beneficiary all relevant documentation and all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim. If the Beneficiary gives any Notice pursuant to this Section 45.3(f), then the Indemnifier shall be released from any liabilities arising under the applicable indemnity hereunder in respect of the applicable claim.
- (g) If the Indemnifier pays to the Beneficiary an amount in respect of an indemnity and the Beneficiary subsequently recovers, whether by payment, discount, credit, saving, relief or other benefit or otherwise, a sum or anything else of value (the “**Recovery Amount**”) which is directly referable to the fact, matter, event or circumstances giving rise to the claim under the indemnity, the Beneficiary shall forthwith repay to the Indemnifier whichever is the lesser of:
- (i) an amount equal to the Recovery Amount less any out-of-pocket costs and expenses properly incurred by the Beneficiary in recovering the same; and



- (ii) the amount paid to the Beneficiary by the Indemnifier in respect of the claim under the relevant indemnity,

provided that there shall be no obligation on the Beneficiary to pursue any Recovery Amount and that the Indemnifier is repaid only to the extent that the Recovery Amount, aggregated with any sum recovered from the Indemnifier, exceeds the loss sustained by the Beneficiary except, however, that if the Beneficiary elects not to pursue a Recovery Amount, the Indemnifier shall be entitled to require an assignment to it of the right to do so.

- (h) Any person taking any of the steps contemplated by this Section 45.3 shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Project Agreement.

#### **45.4 Mitigation – Indemnity Claims**

- (a) For greater certainty, Section 53.4 applies to any indemnity given under this Project Agreement and any such indemnity shall not extend to Direct Losses which could have been reduced or avoided by the Beneficiary complying with such Section.

### **46. LIMITS ON LIABILITY**

#### **46.1 Indirect Losses**

- (a) Subject to Section 46.1(b) and without prejudice to the Parties' rights in respect of payments provided for herein, the indemnities under this Project Agreement shall not apply and there shall be no right to claim damages for breach of this Project Agreement, in tort or on any other basis whatsoever, to the extent that any loss claimed by either Party is:

- (i) for punitive, exemplary or aggravated damages;
- (ii) for loss of profits, loss of use, loss of production, loss of business or loss of business opportunity; or
- (iii) is a claim for consequential loss or for indirect loss of any nature suffered or allegedly suffered by either Party,

(collectively, "**Indirect Losses**").

- (b) With respect to the indemnity in Sections 45.1(a)(i) and 45.1(a)(ii) only, the exceptions in Sections 46.1(a)(ii) and (iii) shall not apply as a result of, or in relation to, Contracting Authority's loss of use of the Facility and/or the Existing Facilities or a portion thereof, which for the purposes of Section 45.1(a)(i) and 45.1(a)(ii), shall be Direct Losses.

**46.2 No Liability in Tort**

- (a) Subject to the indemnities provided herein, Contracting Authority and the Province Persons shall not be liable in tort to Project Co or any Project Co Party, and neither Project Co nor any Project Co Party shall be liable in tort to Contracting Authority or any Province Person in respect of any negligent act or omission of any such person relating to or in connection with this Project Agreement and no such person shall bring such a claim.

**46.3 Sole Remedy**

- (a) Nothing in this Project Agreement shall prevent or restrict the right of Contracting Authority to seek injunctive relief or a decree of specific performance or other discretionary remedies of a court of competent jurisdiction.
- (b) Notwithstanding any other provision of this Project Agreement, and except to the extent recovered under any of the insurances required pursuant to Schedule 25 – Insurance and Performance Security Requirements, neither Party shall be entitled to recover compensation or make a claim under this Project 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 Project Agreement, or otherwise.
- (c) The following shall apply with respect to the deductions and liquidated damages set out in the Project Agreement:
- (i) the liquidated damages paid by Project Co pursuant to Section 46A of this Project Agreement shall be the sole remedy of Contracting Authority for Administrative Costs that may be claimed by Contracting Authority as a result of Project Co failing to achieve the requirements for the Substantial Completion Certificate and a Substantial Completion Certificate not being issued on or before the LD Commencement Date, but shall not be Contracting Authority's sole remedy with respect to amounts that are not Administrative Costs in connection with Project Co failing to achieve the requirements for the Substantial Completion Certificate and a Substantial Completion Certificate not being issued on or before the LD Commencement Date;
- (ii) the amounts deducted from the Substantial Completion Payment pursuant to Section 3 of Schedule 21 –Construction Period Failures shall not be Contracting Authority's sole remedy in respect of Project Co's failure to perform its obligations in accordance with the Project Agreement.

**46.4 Maximum Liability**

- (a) Subject to Section 46.4(b), the maximum aggregate liability of each Party in respect of all claims under Section 45 shall not exceed \$[REDACTED]. This limit shall be index

- linked and shall be exclusive of any insurance or performance security proceeds received or which will be received pursuant to performance security or policies maintained in accordance with Schedule 25 – Insurance and Performance Security Requirements. This limit shall not apply in cases of wilful misconduct or deliberate acts of wrongdoing.
- (b) Project Co’s maximum aggregate liability in respect of all claims under Sections 45.1(a)(i), 45.1(a)(ii) and 46A shall not exceed \$[REDACTED]. This limit shall be index linked and shall be exclusive of any insurance or performance security proceeds received or which will be received pursuant to performance security or policies maintained in accordance with Schedule 25 – Insurance and Performance Security Requirements. This limit shall not apply in cases of wilful misconduct or deliberate acts of wrongdoing.
- (c) Nothing in this Section 46.4 shall restrict, limit, prejudice or in any other way impair the rights and/or remedies of the Parties under any other provision of this Project Agreement.

**46A SC LIQUIDATED DAMAGES**

- (a) In the event that a Substantial Completion Certificate has not been issued on or before the date which is 30 days following the Scheduled Substantial Completion Date (the “**SC LD Commencement Date**”) Project Co shall pay the SC Liquidated Damages from the SC LD Commencement Date until the earlier of (i) the Substantial Completion Date and (ii) the date on which the termination of the Project Agreement takes effect in accordance with its terms. Contracting Authority and Project Co agree that such SC Liquidated Damages are not a penalty but represent a genuine and reasonable pre-estimate of Administrative Costs which Contracting Authority will incur as a result of Project Co’s failure to achieve Substantial Completion by the Scheduled Substantial Completion Date, and which Administrative Costs Project Co agrees with Contracting Authority it would be difficult or impossible to quantify. Subject and without prejudice to the other remedies of Contracting Authority herein (including remedies for termination for a Project Co Event of Default), such payment shall constitute full and final satisfaction of any and all Administrative Costs that may be claimed by Contracting Authority as a result of Project Co not achieving Substantial Completion by the Scheduled Substantial Completion Date. Project Co agrees with Contracting Authority that such SC Liquidated Damages shall be payable whether or not Contracting Authority incurs or mitigates such Administrative Costs, and that Contracting Authority shall have no obligation to mitigate any such Administrative Costs. Project Co agrees that it is, and shall be, estopped from alleging that such SC Liquidated Damages are a penalty and not liquidated damages, or are otherwise unenforceable for any reason, including that such Administrative Costs were not incurred.
- (b) Notwithstanding Section 46A(a), Project Co’s obligation to indemnify Contracting Authority pursuant to Section 45.1(a)(ii) shall remain unaffected by, and shall apply in

- addition to, any SC Liquidated Damages payable by Project Co pursuant to this Section 46A, provided, however, that any amount for which Project Co is required to indemnify Contracting Authority pursuant to Section 45.1(a)(ii) shall exclude administrative costs and expenses in respect of which SC Liquidated Damages have been paid or are payable.
- (c) Except as expressly provided herein, nothing in this Section 46A shall restrict, limit, prejudice or in any other way impair the rights or remedies of the Parties under any other provision of this Project Agreement.
- (d) Where SC Liquidated Damages are incurred, Project Co shall, without prejudice to Contracting Authority's rights under Section 4.11(a)(i), pay such amounts to Contracting Authority on a quarterly basis, on the last Business Day of each calendar quarter, commencing the first calendar quarter following the SC LD Commencement Date.

**47. DISPUTE RESOLUTION PROCEDURE**

- (a) All Disputes shall be resolved in accordance with, and the Parties shall comply with, Schedule 27 – Dispute Resolution Procedure.

**48. ASSIGNMENT, SUBCONTRACTING AND CHANGES IN CONTROL**

**48.1 Project Co Assignment**

- (a) Project Co shall not sell, assign, transfer, charge, mortgage, encumber, dispose of or otherwise alienate all or any part of any interest, whether legal or beneficial, in this Project Agreement or any Ancillary Document without the prior written consent of Contracting Authority, which consent may be withheld in the sole discretion of Contracting Authority, provided however that no assignment, transfer, charge, disposition or other alienation shall be permitted to a person where that person or its Affiliates is a Restricted Person or a person whose standing or activities: (i) are inconsistent with MAG's role (in its reasonable opinion) generally in the Province or with respect to the Contracting Authority Activities; (ii) may compromise the reputation of Contracting Authority, MAG, MAG Occupants, Non-MAG Occupants and/or the Province; (iii) may compromise the integrity of the Facility; or (iv) are inconsistent with the nature of the Province's justice system, so as to affect public confidence in that system.
- (b) Section 48.1(a) shall not apply to the grant of any security for any loan made to Project Co under the Lending Agreements provided that any grantee of such security shall enter

into the Lenders' Direct Agreement in relation to the exercise of its rights, if Contracting Authority so requires.

#### **48.2 Contracting Authority Assignment**

- (a) Contracting Authority may assign, transfer, dispose of or otherwise alienate any interest in this Project Agreement or any agreement in connection with this Project Agreement to which Project Co and Contracting Authority are parties:
- (i) to the Province;
  - (ii) as may be required to comply with Applicable Law;
  - (iii) to any minister of the Crown;
  - (iv) an agency of the Province having the legal capacity, power, authority and ability to become a party to and to perform the obligations of Contracting Authority under this Project Agreement provided that such person confirms in writing to Project Co that it will perform all of Contracting Authority's obligations hereunder and under the other Project Documents to which Contracting Authority is a party in respect of the period from and after the assignment; and
  - (v) in circumstances other than those described in Sections 48.2(a)(i) to 48.2(a)(iv), with the prior written consent of Project Co; provided that the person to whom any such assignment, transfer, disposition or other alienation is made has the capacity to perform, and confirms in writing to Project Co that it will perform all the obligations of Contracting Authority hereunder and under any agreement in connection with this Project Agreement to which Project Co and Contracting Authority are parties in respect of the period from and after the assignment.
- (b) Contracting Authority shall not be released of any of its obligations under this Project Agreement except upon an assignment, transfer, disposition or other alienation of its interest in this Project Agreement in accordance with this Section 48.2.

#### **48.3 Subcontracting**

- (a) Project Co shall not subcontract any interest in this Project Agreement or the Design and Construction Contract, and shall not permit the Construction Contractor to subcontract any interest in the Design and Construction Contract, to a Restricted Person, or any Affiliate thereof, or a person whose standing or activities; (i) are inconsistent with MAG's role (in its reasonable opinion) generally in the Province or with respect to the Contracting Authority Activities; (ii) may compromise the reputation of Contracting Authority, MAG, MAG Occupants, Non-MAG Occupants and/or the Province; (iii) may compromise the integrity of the Province or the Facility; or (iv) are inconsistent with the nature of the Province's justice system, so as to affect public confidence in that system.

- (b) Project Co shall not terminate, agree to the termination of or replace the Construction Contractor unless Project Co has complied with Sections 8.2(a), 48.3(c) and 48.3(d) or received the prior written consent of Contracting Authority.
- (c) Subject to Section 48.3(d), if the Design and Construction Contract shall at any time lapse, terminate or otherwise cease to be in full force and effect, whether by reason of expiry, default or otherwise, with the effect that the Construction Contractor shall cease to act in relation to the Project, Project Co shall forthwith appoint a replacement, subject to Contracting Authority's prior written consent, acting reasonably, as to the suitability of the replacement.
- (d) It is a condition of replacement of the Construction Contractor, and Project Co shall require, that any replacement enter into a contract upon the same or substantially similar terms as the Design and Construction Contract so replaced, including the provision of replacement Security and an agreement on the same or substantially similar terms as the Construction Contractor's Direct Agreement unless any material variations are approved by Contracting Authority, acting reasonably.

#### **48.4 Changes in Ownership and Control**

- (a) No Restricted Person or a person whose standing or activities are inconsistent with the Province's reputation or integrity shall be permitted to have at any time or acquire, Direct or Indirect Power or Control over any member of the Project Co Group in relation to the decisions, management, actions or policies of Project Co or in relation to the operation, management and ownership of the Project.
- (b) No Change in Ownership of Project Co or of any Control Party shall be permitted:
  - (i) where the person acquiring the ownership interest is a Restricted Person or a person whose standing or activities: (i) are inconsistent with MAG's role (in its reasonable opinion) generally in the Province or with respect to the Contracting Authority Activities; (ii) may compromise the reputation of Contracting Authority, MAG, MAG Occupants, Non-MAG Occupants and/or the Province; (iii) may compromise the integrity of the Province or the Facility; or (iv) are inconsistent with the nature of the Province's justice system, so as to affect public confidence in that system; or
  - (ii) if such Change in Ownership would have a material adverse effect on the performance of the Works.
- (c) In the event that a person having Direct or Indirect Power or Control over any member of the Project Co Group in relation to the decisions, management, actions or policies of Project Co or in relation to the operation, management and ownership of the Project becomes a Restricted Person, Contracting Authority may:

- (i) in the case of an individual who becomes a Restricted Person, require that such Restricted Person be divested of his or her Direct or Indirect Power or Control; or
  - (ii) in any other circumstance, require a Change in Ownership so that such Restricted Person shall be divested of its Direct or Indirect Power or Control,

in each case, on such terms as are satisfactory to Contracting Authority, in its discretion.
- (d) Project Co shall provide Notice to Contracting Authority of any Change in Ownership of Project Co or of any Control Party, as the case may be, that is not a Change in Control within 5 Business Days after such Change in Ownership, and such Notice shall include a statement identifying all persons with an ownership interest in Project Co or the relevant Control Party, as the case may be and their respective holdings of such ownership interests, in each case prior to and following such Change in Ownership.
- (e) Subject to Section 48.4(a), (b), (c) and (d), no Change in Control of Project Co, or of any Control Party shall be permitted without the prior written consent of Contracting Authority, not to be unreasonably withheld or delayed.
- (f) Project Co shall provide Notice to Contracting Authority of any proposed Change in Control of Project Co or of any Control Party, as the case may be, not less than 20 Business Days prior to such proposed Change in Control and such Notice shall include:
  - (i) a statement identifying all persons with an ownership interest in Project Co or the relevant Control Party, as the case may be, and their respective holdings of such ownership interests, in each case prior to and following any such proposed Change in Control; and
  - (ii) as applicable, the legal name, registered address, directors and officers of, and nature of the business and activities carried on by, the person who would acquire control over Project Co or the relevant Control Party pursuant to such Change in Control.

Following the delivery to Contracting Authority of the Notice referred to in this Section 48.4(f), Project Co shall provide Contracting Authority with such other information pertaining to the proposed Change in Control as Contracting Authority may reasonably request.

- (g) Upon request by Project Co and delivery of the information required by Contracting Authority, Contracting Authority shall advise Project Co whether the person described in such particulars is a Restricted Person or a person whose standing or activities: (A) are inconsistent the Contracting Authority's role (in Contracting Authority's reasonable opinion) as a courthouse; (B) may compromise Contracting Authority's reputation or integrity; or (C) are inconsistent with the nature of the Province's justice system, so as to affect public perception of that system.

- (h) This Section 48.4 shall not apply to a Change in Ownership or Change in Control of persons whose equity securities, units evidencing ownership or any other ownership interests are listed on a recognized stock exchange.
- (i) Section 48.4(d) shall not apply to a Change in Ownership of a Control Party that arises from a change in the shareholdings of such Control Party or an Affiliate of such Control Party (the “**Relevant Entity**”) owned by an employee of such Relevant Entity, unless such changes individually or in the aggregate determined since the date of this Project Agreement, would result in a Change of Control of Project Co, in which case Section 48.4(f) shall apply.

#### **48.5 Contracting Authority Due Diligence**

- (a) Project Co shall promptly reimburse Contracting Authority for Contracting Authority’s reasonable due diligence costs (including fees of professional advisors) in connection with any consent required of Contracting Authority pursuant to, or Contracting Authority’s determination of Project Co’s compliance with Section 48.1, 48.3 or 48.4 whether or not such consent is granted.

### **49. PROHIBITED ACTS**

#### **49.1 Definition**

- (a) The term “**Prohibited Act**” means:
  - (i) offering, giving or agreeing to give to Contracting Authority or any public body (or anyone employed by or acting on their behalf), or to any family member of such person, any gift or consideration of any kind as an inducement or reward:
    - (A) for doing or not doing, or for having done or not having done, any act in relation to the obtaining or performance of this Project Agreement or any other agreement with Contracting Authority or any public body in connection with the Project; or
    - (B) for showing or not showing favour or disfavour to any person in relation to this Project Agreement or any other agreement with Contracting Authority or any public body in connection with the Project,

provided that this Section 49.1(a)(i) shall not apply to Project Co or any Project Co Party (or anyone employed by or acting on their behalf) providing consideration to Contracting Authority or any public body in the ordinary course, or as reasonably necessary, to fulfill or comply with the obligations and liabilities of Project Co under this Project Agreement or any other agreement with Contracting Authority or any public body in connection with the Project;

- (ii) entering into this Project Agreement or any other agreement with Contracting Authority or any public body in connection with the Project if a commission or



a fee has been paid or has been agreed to be paid by Project Co, or on its behalf or to its knowledge, Contracting Authority or any public body (or anyone employed by or acting on their behalf), or to any family member of such person, unless, before the relevant agreement is entered into, particulars of any such commission or fee have been disclosed in writing to Contracting Authority, provided that this Section 49.1(a)(ii) shall not apply to a fee or commission paid by Project Co or any Project Co Party (or anyone employed by or acting on their behalf) to Contracting Authority or any public body pursuant to an agreement where such fee or commission is paid in the ordinary course, or as reasonably necessary, to fulfill or comply with the obligations and liabilities of Project Co under this Project Agreement or any other agreement with Contracting Authority or any public body in connection with the Project without contravening the intent of this Section 49;

- (iii) breaching or committing any offence under Applicable Law in respect of corrupt or fraudulent acts in relation to this Project Agreement or any other agreement with Contracting Authority or any public body in connection with the Project; or
- (iv) defrauding or attempting to defraud or conspiring to defraud Contracting Authority or any other public body.

## **49.2 Remedies**

- (a) If Project Co or any Project Co Party (or anyone employed by or acting on their behalf) commits any Prohibited Act, then Contracting Authority shall be entitled to act in accordance with the following:
  - (i) if the Prohibited Act is committed by Project Co or by an employee acting under the direction of a director or officer of Project Co, then Contracting Authority may give written Notice to Project Co and Section 35 shall apply;
  - (ii) if the Prohibited Act is committed by an employee of Project Co acting independently of a direction of a director or officer of Project Co, then Contracting Authority may give written Notice to Project Co and Section 35 shall apply, unless, within 30 days of receipt of such Notice, Project Co terminates the employee's employment and ensures that the relevant part of the Works shall be performed by another person;
  - (iii) if a Prohibited Act is committed by a Project Co Party or by an employee of that Project Co Party not acting independently of a direction of a director or officer of that Project Co Party, then Contracting Authority may give written Notice to Project Co and Section 35 shall apply, unless, within 30 days of receipt of such Notice, Project Co terminates the relevant Subcontract and ensures that the relevant part of the Works shall be performed by another person, where relevant, in accordance with Section 48.3;

- (iv) if the Prohibited Act is committed by an employee of a Project Co Party acting independently of a direction of a director or officer of that Project Co Party, then Contracting Authority may give Notice to Project Co and Section 35 shall apply, unless, within 30 days of receipt of such Notice, Project Co causes the termination of the employee's employment and ensures that the relevant part of the Works shall be performed by another person; and
  - (v) if the Prohibited Act is committed on behalf of Project Co or a Project Co Party by a person not specified in Sections 49.2(a)(i) to 49.2(a)(iv), then Contracting Authority may give Notice to Project Co and Section 35 shall apply, unless, within 30 days of receipt of such Notice, Project Co causes the termination of such person's employment or the appointment of their employer and, if necessary, ensures that the relevant part of the Works shall be performed by another person.
- (b) Any Notice of termination under this Section 49.2 shall specify:
- (i) the nature of the Prohibited Act;
  - (ii) the identity of the person whom Contracting Authority believes has committed the Prohibited Act; and
  - (iii) the date of termination in accordance with the applicable provisions of this Project Agreement.
- (c) Without prejudice to its other rights or remedies under this Section 49.2, Contracting Authority shall be entitled to recover from Project Co any Direct Loss sustained in consequence of any breach of this Section 49.

### **49.3 Permitted Payments**

- (a) Nothing contained in this Section 49 shall prevent Project Co or any other person from paying any proper commission, fee or bonus whether to its employees within the agreed terms of their employment or otherwise, and such commission fee or bonus shall not constitute a Prohibited Act.

### **49.4 Notification**

- (a) Project Co shall notify Contracting Authority of the occurrence and details of any Prohibited Act promptly on Project Co becoming aware of its occurrence.

### **49.5 Replacement of Project Co Party**

- (a) Where Project Co is required to replace any Project Co Party pursuant to this Section 49, the party replacing such Project Co Party shall from the time of the replacement be deemed to be a Project Co Party and the provisions of this Project Agreement shall be construed accordingly.

**50. NOTICES**

**50.1 Notices to Parties**

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

If to Project Co:                                   **[REDACTED]**  
Email: **[REDACTED]**

With a copy to **[REDACTED]**  
Email: **[REDACTED]**

If to Contracting Authority:                   Infrastructure Ontario  
1 Dundas Street West, Suite 1000  
Toronto, Ontario  
M5G 1Z3  
Attn: **[REDACTED]**  
Email: **[REDACTED]**

**50.2 Notices to Representatives**

- (a) In addition to the Notice requirements set out in Section 50.1, where any Notice is to be provided or submitted to the Contracting Authority Representative or the Project 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 Contracting Authority Representative), or by electronic submission as follows:

If to Project Co Representative:               **[REDACTED]**  
Email: **[REDACTED]**  
With a copy to **[REDACTED]**  
Email: **[REDACTED]**  
With a copy to **[REDACTED]**  
Email: **[REDACTED]**

If to the Contracting Authority               **[REDACTED]**  
Representative:                                  1 Dundas Street West, Suite 2000  
Toronto ON M5G 1Z3

Attn: [REDACTED]  
Email: [REDACTED]

**50.3 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 Section 50.3.

**50.4 Change of Address**

- (a) Either Party to this Project Agreement may, from time to time, change any of its contact information set forth in Sections 50.1 or 50.2 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.

**50.5 Deemed Receipt of Notices**

- (a) Subject to Sections 50.5(b), 50.5(c) and 50.5(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 Section 50.
- (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 4:00 p.m. (recipient's local time), then such Notice shall be deemed to have been received by such recipient on the next Business Day.
- (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.

**50.6 Service on Contracting Authority**

- (a) Where any Notice is required to be served on Contracting Authority, the obligation to serve such Notice shall be fulfilled by serving it on Contracting Authority in accordance with the provisions of this Section 50.

**51. EMERGENCY AND SECURITY MATTERS**

**51.1 Emergency**

- (a) From Financial Close until completion of the Works, upon the occurrence of an Emergency, Project Co shall comply with the Contractor Site Specific Safety Manual.
- (b) Intentionally Deleted.
- (c) If, in respect of any Emergency, Contracting Authority notifies Project Co that it requires compliance with any additional or overriding procedures as may be determined by Contracting Authority or any other statutory body, then Project Co shall, subject to Schedule 22 – Variation Procedure (if compliance with such procedures constitutes a Variation), comply with such procedures (whether such procedures are specific to the particular Emergency or of general application and on the basis that such procedures shall take precedence to the extent that they overlap with the procedures mentioned in Section 51.1(a)).

**51.2 Unauthorized Entry**

- (a) Except in relation to any of the Project Co Parties, Project Co shall take the steps required by the Contracting Authority Representative (to the extent same is not the responsibility of the Police Services at the Facility) in compliance with Applicable Law which Project Co is lawfully able to take to prevent unauthorized persons (other than Project Co Parties) being admitted to the Facility or to enter secure areas at the Facility, being judicial corridors and holding cell areas (the “**Secure Courthouse Areas**”). If the Contracting Authority Representative gives Project Co notice that any particular person (other than emergency services personnel such as the Police Services fire and ambulance services) is not to be admitted to the Facility or a Secured Courthouse Area, Project Co shall (insofar as it is lawfully able to do so) without any compensation being paid to Project Co:
- (i) take all steps to prevent that person being admitted to the Facility and/or the Secure Courthouse Areas, as the case may be; and
  - (ii) shall remove such person if such person has been admitted to the Facility and/or the Secure Courthouse Areas, as the case may be,
  - (iii) provided that, in the case of (a) and (b) above, such functions are not otherwise the responsibility of the Police Services at the Facility.

### **51.3 Photographs/Visual Records**

- (a) Subject to Sections 5.1(a)(ix) and 5.1(b) of Schedule 18 – Communications, Project Co shall:
- (i) not, other than for design or construction purposes or otherwise in connection with the proper carrying out of the Works, take or permit to be taken by any Project Co Party any photographs, videos or other visual records of the Existing Facilities and/or the Facility or the Site or any part thereof unless Project Co has obtained the prior written consent of the Contracting Authority Representative;
  - (ii) take all steps necessary to ensure that no such photographs or other visual records taken pursuant to Section 51.3(a)(i) be published or otherwise circulated by any person employed or engaged by it, unless Project Co has obtained the prior written consent of the Contracting Authority Representative; and
  - (iii) not use the names or any identifying logos or otherwise of Contracting Authority or MAG or the Contracting Authority Representative in any advertising or permit them so to be used except with the prior written consent of Contracting Authority.

## **52. CONTRACTING AUTHORITY DESIGNATE**

### **52.1 Right to Designate**

- (a) At any time and from time to time, the Province may designate any ministry, branch, agency, division, department or office of the Government of Ontario to carry out administrative responsibility for the rights and obligations of Contracting Authority under this Project Agreement (including review of all documentation submitted by Project Co, a Project Co Representative or a Project Co Party to Contracting Authority for review, approval, comment, evaluation or otherwise as described in this Project Agreement, engagement in discussions, consultations and meetings with Project Co, submission of notices and documentation to Contracting Authority, issuances of notices, documentation, Variation Confirmations and related matters) and Project Co may deal exclusively with the designated person in respect of all such matters and is entitled to rely on the actions, directions, requests, notices, consents, approvals, waivers, and comments relating to the review of documentation and other administrative matters and decisions determined by such designated person from time to time, until the Province has notified Project Co in writing that such designated person is no longer the person designated by the Province hereunder and such notice shall have effect on the later of the date of delivery of such notice and the date specified in the written notice). The Province shall advise Project Co in writing of any designation hereunder. The rights and obligations of the parties to this Project Agreement shall be in no way affected by reason of any such designation. Project Co acknowledges the

right of the Province to delegate administrative responsibilities hereunder as set forth in this Section 52.1.

**53. GENERAL**

**53.1 Amendments**

- (a) This Project 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 Project Agreement.

**53.2 Waiver**

- (a) No waiver made or given by a Party under or in connection with this Project 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. No further waiver in writing is required in order to give effect to the waivers provided for in accordance with the terms of Sections 23A.4(j), 24.4(k) and 24.12(g).
- (b) Failure by either 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.

**53.3 Relationship Between the Parties**

- (a) The Parties are independent contractors. This Project Agreement is not intended to and does not create or establish between the Parties, or between Contracting Authority and any Project Co Party, any relationship as partners, joint venturers, employer and employee, master and servant, or (except as provided in this Project Agreement), of principal and agent, and does not create or establish any relationship whatsoever between Contracting Authority and any representative or employee of Project Co or the Project Co Parties.
- (b) The Parties further agree that:
- (i) except as expressly provided in this Project 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 Project 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 Project Agreement; and
- (iv) any person which a Party may engage as an agent, employee, subcontractor or otherwise, to perform such Party's obligations under this Project Agreement, as permitted hereby, 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.

#### **53.4 General Duty to Mitigate**

- (a) Contracting Authority and Project 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 Project Agreement.

#### **53.5 Actual Knowledge**

- (a) Without limitation to its actual knowledge and/or such knowledge which it, at law, may from time to time, be deemed to have, Project Co and Contracting Authority shall, for all purposes of this Project Agreement, be deemed to have such knowledge in respect of the Project as is actually held (or ought reasonably to be held) by their respective directors, officers, senior management and the Project Co Representative and the Contracting Authority Representative, respectively. For clarity, except as expressly set out to the contrary, a reference in this Project Agreement to the "knowledge of" Project Co or Contracting Authority, shall be construed in a manner consistent with the foregoing sentence.

#### **53.6 Entire Agreement**

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



**53.7 No Reliance**

- (a) Each of the Parties acknowledges that:
- (i) it has not entered into this Project 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 Project Agreement or not, except those expressly made, given or repeated in this Project 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 Project Agreement; and
  - (ii) this Section 53.7 shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Project Agreement which was induced by fraud, for which the remedies available shall be all those available under the law governing this Project Agreement.

**53.8 Severability**

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

**53.9 Enurement**

- (a) This Project Agreement and any other agreement entered into in connection with the Project to which both Contracting Authority and Project Co are parties shall enure to the benefit of, and be binding on, Contracting Authority and Project Co and their respective successors and permitted transferees and assigns.

**53.10 Governing Law and Jurisdiction**

- (a) This Project Agreement, and each of the documents contemplated by or delivered under or in connection with this Project 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 Schedule 27 – 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 Project Agreement affects the rights, protections and immunities of the Crown under the *Proceedings Against the Crown Act* (Ontario).

**53.11 Cumulative Remedies**

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

**53.12 Further Assurance**

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

**53.13 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 Project Agreement.

**53.14 Language of Agreement**

- (a) Each of the parties acknowledges having requested and being satisfied that this Project Agreement and related documents be drawn in English. Chacune des parties reconnaît avoir demandé que ce document et ses annexes soient rédigés en anglais et s'en declare satisfaite.
- (b) For greater certainty, all correspondence, Notices, drawings, test reports, certificates, specifications, information, operation 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 Project Agreement shall be in English

**53.15 Proof of Authority**

- (a) Contracting Authority and Project Co each reserve the right to require any person executing this Project Agreement on behalf of the other Party to provide proof, in a form acceptable to Contracting Authority or Project Co, as applicable, that they have the requisite authority to execute this Project Agreement on behalf of and to bind Contracting Authority or Project Co, as applicable.

**53.16 Counterparts**

- (a) This Project 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.

**53.17 Government Entities as Third Party Beneficiaries**

- (a) The provisions of Sections 2.4, 5.1(b), 7.1, 7.2(a), 7.3(a), 9.1(c) 11.12(a), 40.6, 40.7, 40.9, 41, 45.1, 46.2, and 53.3 and each other provision of this Project Agreement which is expressed to be for the benefit of a Province Person or a Contracting Authority Party, as applicable, (collectively, the “**Third Party Beneficiary Provisions**”):
- (i) intended for the benefit of each Province Person, or Contracting Authority Party, as applicable and, if so set out in the relevant Section, each Province Person’s or Contracting Authority Party’s, as applicable, 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, in respect of each Province Person, the “**Province Person Third Party Beneficiaries**”, and in respect of each Contracting Authority Party, the “**Contracting Authority Third Party Beneficiaries**”); and
  - (ii) are in addition to, and not in substitution for, any other rights that the Province Person Third Party Beneficiaries may have by contract or otherwise.
- (b) Contracting Authority shall hold the rights and benefits of each of the Third Party Beneficiary Provisions in trust for and on behalf of the Province Person Third Party Beneficiaries or Contracting Authority Third Party Beneficiaries, as applicable, and Contracting Authority hereby accepts such trust and agrees to hold the benefit of and enforce performance of such covenants on behalf of the Province Person Third Party Beneficiaries or Contracting Authority Third Party Beneficiaries, as applicable.

**53.18 Time is of the Essence**

- (a) Time is of the essence in this Project Agreement.

**53.19 Copyright Notice**

- (a) The Parties acknowledge that the Queen’s Printer for Ontario is the exclusive owner of the copyright in the Project Agreement.

*[SIGNATURE PAGES IMMEDIATELY FOLLOW]*

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

**HER MAJESTY THE QUEEN IN RIGHT OF  
ONTARIO AS REPRESENTED BY THE  
MINISTER OF GOVERNMENT AND  
CONSUMER SERVICES, AS  
REPRESENTED BY ONTARIO  
INFRASTRUCTURE AND LANDS  
CORPORATION**

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

I have authority to bind the corporation.

**TRANS/FORM BY POMERLEAU INC.**

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

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

I/We have authority to bind the corporation.

**SCHEDULE 1**

**DEFINITIONS AND INTERPRETATION**

**PART A**

**PROVISIONS (RE MULTIPLE SITES)**

<b>SECTION/ PROVISION</b>	<b>FACILITY OR SITE, AS APPLICABLE</b>	<b>SPECIAL PROVISION</b>
<b>PROJECT AGREEMENT</b>		
<b>SCHEDULE 1 – DEFINITIONS AND INTERPRETATION</b>		
<b>“Environmental Reports”</b>	<b>BCA Site</b>	means: <ul style="list-style-type: none"> <li>• Phase One Environmental Site Assessment Brampton (A. Grenville &amp; William Davis) Courthouse Parking Garage Addition II.</li> <li>• Phase Two Environmental Site Assessment Brampton (A. Grenville &amp; William Davis) Courthouse Parking Garage Addition II.</li> </ul>
	<b>TRBC Site</b>	means: <ul style="list-style-type: none"> <li>• None.</li> </ul>
<b>“Geotechnical Reports”</b>	<b>BCA Site</b>	means: <ul style="list-style-type: none"> <li>• Preliminary Geotechnical Investigation Brampton (A. Grenville &amp; William Davis) Courthouse Parking Garage Addition II.</li> <li>• Supplemental Geotechnical Investigation Brampton (A. Grenville &amp; William Davis) Courthouse Parking Garage Addition II.</li> <li>• Preliminary Hydrogeological Assessment Brampton (A. Grenville &amp; William Davis) Courthouse Parking Garage Addition II.</li> <li>• Supplemental Hydrogeological Assessment Brampton (A. Grenville &amp; William Davis) Courthouse Parking Garage Addition II.</li> <li>• Soil Analytical Results Summary (Soil Management) Brampton (A. Grenville &amp;</li> </ul>

<b>SECTION/ PROVISION</b>	<b>FACILITY OR SITE, AS APPLICABLE</b>	<b>SPECIAL PROVISION</b>
		William Davis) Courthouse Parking Garage Addition II. <ul style="list-style-type: none"> <li>Supplemental Geophysical Investigation Brampton (A. Grenville &amp; William Davis) Courthouse Parking Garage Addition II.</li> </ul>
	<b>TRBC Site</b>	means: None.
<b>“Hazardous Substance Reports”</b>	<b>BCA Site</b>	means: Designated Substance and Hazardous Building Materials Assessment Report, Interior Renovations Project Brampton Courthouse dated September 3, 2020.
	<b>TRBC Site</b>	means: Designated Substance and Hazardous Building Materials Assessment Report, Interior Renovations Project Toronto Region Bail Centre & Unit 29 dated September 2, 2020.
<b>“Warranty Period”</b>	<b>BCA Facility</b>	means, the period beginning on the Substantial Completion Date and expiring on the date which is one year following the Substantial Completion Date.
	<b>TRBC Facility</b>	means, the period beginning on the Interim Completion Date and expiring on the date which is one year following the Interim Completion Date.

**PART B  
DEFINITIONS AND INTERPRETATION**

1. **Definitions.** In the Project Agreement, unless the context otherwise requires:
  - 1.1 “**10-Day Notice**” has the meaning given in Section 24.4(a) of the Project Agreement.
  - 1.2 “**Account Trustee**” has the meaning given in Schedule 30 - Insurance Trust Agreement.
  - 1.3 “**Additional Contractor**” means any independent contractor (not being, for the avoidance of doubt, the Construction Contractor or Project Co) or Contracting Authority’s own forces, engaged by Contracting Authority to carry out the Additional Works.
  - 1.4 “**Additional Works**” means those works in relation to the Facility which are not Works and which are to be carried out by an Additional Contractor, including works or services to be performed either before or after Substantial Completion.
  - 1.5 “**Adjudication**” has the meaning given in Schedule 27 – Dispute Resolution Procedure.
  - 1.6 “**Adjudication Dispute**” has the meaning given in Schedule 27 – Dispute Resolution Procedure.
  - 1.7 “**Adjudicator**” has the meaning given in Schedule 27 – Dispute Resolution Procedure.
  - 1.8 “**Adjusted Finishing Holdback Amount**” has the meaning given in Section 5.2(e) of Schedule 20 – Payment Procedures.
  - 1.9 “**Adjusted Legislative Holdback Amount**” has the meaning given in Section 5.1(e) of Schedule 20 – Payment Procedures.
  - 1.10 “**Administrative Costs**” means, for the purposes of Section 46A of the Project Agreement, only those costs and expenses incurred by Contracting Authority in the ordinary course in relation to staffing, the Design Compliance Consultant, and the Independent Certifier, in each case assuming normal utilization.
  - 1.11 “**Affiliate**” means an “**affiliate**” as that term is used in the *Business Corporations Act* (Ontario) and any successor legislation thereto, and, in the case of Project Co, shall include each of the unitholders, shareholders, partners or owners of Project Co, as applicable, and any person or entity controlling, controlled by or under common control with Project Co where “control” of any person or entity shall mean the ownership, directly or indirectly, of securities of such person or entity having the power to elect a majority of directors or similar authority or to otherwise control the decisions made on behalf of such person or entity.
  - 1.12 “**Ancillary Documents**” means the Design and Construction Contract, and the Bonds.



- 1.13 “**Anticipated COVID-19 Impact End Date**” means [REDACTED].
- 1.14 “**Anticipated Final Completion Date**” has the meaning given in Section 24.11(a) of the Project Agreement.
- 1.15 “**Anticipated Interim Completion Date**” has the meaning given in Section 23A.7(a).
- 1.16 “**Anticipated Substantial Completion Date**” has the meaning given in Section 24.7(a) of the Project Agreement.
- 1.17 “**Applicable Law**” means:
- (a) any statute or proclamation or any delegated or subordinate legislation including regulations and by-laws;
  - (b) any Authority Requirement; and
  - (c) any judgment of a relevant court of law, board, arbitrator or administrative agency which is a binding precedent in the Province of Ontario,
- in each case, in force in the Province of Ontario, or otherwise binding on Project Co, any Project Co Party, Contracting Authority, any Contracting Authority Party or any Province Person.
- 1.18 “**Appointed Representative**” has the meaning given in Schedule 4 – Lenders' Direct Agreement.
- 1.19 “**Appointed Representative Notice**” has the meaning given in Schedule 4 – Lenders' Direct Agreement.
- 1.20 “**Apprenticeship Plan**” has the meaning given in Section 11.23(a) of the Project Agreement.
- 1.21 “**Approved Purposes**” means:
- (a) Contracting Authority and the Province Persons performing the Contracting Authority Activities (and their operations relating to the performance of the Contracting Authority Activities), their obligations under the Project Agreement and/or any other activities in connection with the Facility, the Existing Facilities, and/or the Site;
  - (b) following termination of the Project Agreement, the design, construction and/or maintenance of the Facility, and/or the performance of any other operations the same as, or similar to, the Works; and
  - (c) the development by MAG and/or the Province of best practices for courthouse facilities in Ontario.

- 1.22 “**Arbitration Act, 1991**” has the meaning given in Schedule 27 – Dispute Resolution Procedure.
- 1.23 “**Arbitration Referral Period**” has the meaning given in Schedule 27 – Dispute Resolution Procedure.
- 1.24 “**As Built Drawings**” means drawings prepared by Project Co in a format and with content and details that Contracting Authority, acting reasonably, considers appropriate.
- 1.25 “**As-built Works Schedule**” has the meaning given in Schedule 19 – Works Scheduling Requirements.
- 1.26 “**Associated Liabilities**” has the meaning given in Section 4.20(b) of the Project Agreement.
- 1.27 “**ATI**” means the *Access to Information Act* (Canada).
- 1.28 “**Authority Requirements**” means any order, direction, directive, request for information, policy, administrative interpretation, guideline or rule of or by any Governmental Authority.
- 1.29 “**Background Check Requirements**” means the security and background check requirements set forth in Schedule 32 – Background Check Requirements.
- 1.30 “**Background Information**” means any and all drawings, reports (including the Environmental Reports and Designated Substance Reports and the Geotechnical Reports), studies, data, documents, or other information, given or made available to Project Co or any Project Co Party by Contracting Authority or any Contracting Authority Party, or which was obtained from or through any other sources prior to the date of the Project Agreement.
- 1.31 “**Bank**” has the meaning given in Schedule 30 – Insurance Trust Agreement.
- 1.32 “**BCA Site**” has the meaning given in Schedule 34 – Site and Lands.
- 1.33 “**BCA Existing Facilities**” means all existing buildings and structures located at 7755 and 7765 Hurontario Street, Brampton, including the following:
- (a) A. Grenville and William Davis Courthouse at 7755 Hurontario Street; and
  - (b) Former Land Registry Office building at 7765 Hurontario Street.
- 1.34 “**BCA Facility**” means the Facility to be constructed on the BCA Site in Brampton, Ontario, in accordance with the Project Agreement.
- 1.35 “**Beneficiary**” has the meaning given in Section 45.3(a) of the Project Agreement.

- 1.36 “**Bonds**” means any one or more of the Performance Bond and the Labour and Material Payment Bond described in Section 17 of Schedule 25 – Insurance and Performance Security Requirements, and, collectively, means all of them.
- 1.37 “**Building**” means a building as defined in the Building Code.
- 1.38 “**Building Code**” means the regulations made under Section 34 of the *Building Code Act, 1992* (Ontario).
- 1.39 “**Building Commissioning Record**” has the meaning given in Section 5.12 of Schedule 14 – Outline Commissioning Program.
- 1.40 “**Building Systems**” has the meaning given to it in Schedule 15 – Output Specifications.
- 1.41 “**Business Day**” means any day other than a Saturday, a Sunday, a statutory holiday in the Province of Ontario or any day on which banks are not open for business in the City of Toronto, Ontario.
- 1.42 “**Business Hours**” means the hours between 8:00 a.m. and 5:00 p.m. on any Business Day.
- 1.43 “**CaGBC**” means the Canada Green Building Council.
- 1.44 “**Canadian and Industry Standards**” means, at the applicable time, those standards, practices, methods and procedures applicable to Good Industry Practice.
- 1.45 “**Canadian GAAP**” shall be deemed to be the generally accepted accounting principles from time to time approved by the Canadian Institute of Chartered Accountants, or any successor institute, applicable as at the date on which such calculation is made or required to be made in accordance with generally accepted accounting principles, as such principles may be amended or varied by International Financial Reporting Standards then in effect in Canada, in any case consistently applied from one period to the next.
- 1.46 “**Capital Expenditure**” means capital expenditure as interpreted in accordance with Canadian GAAP.
- 1.47 “**Cash Allowance Account**” means [REDACTED].
- 1.48 “**Cash Allowance Amount**” means the Security Escort Services Cash Allowance Amount.
- 1.49 “**Cash Allowance Item**” means the Security Escort Services Cash Allowance Item.
- 1.50 “**Category 1 FF&E**” means all items of fixtures, fittings, furnishings, chattels and equipment located from time to time at the Facility or the Site which Project Co procures on behalf of MAG and monitors and coordinates the installation thereof into the Facility pursuant to Section 21 of the Project Agreement and includes the categories and types of items identified in Part 1 of Schedule 28 – FF&E List, and excludes, for certainty, Category 2 FF&E, Category 3 FF&E, Category 4 FF&E, Category 5 FF&E and Transferred Existing Facilities Items.

- 1.51 “**Category 2 FF&E**” or “**Existing FF&E**” means any item of fixtures, fittings, furnishings, chattels and equipment identified in the final Existing FF&E Inventory Report and which has been accepted and approved by the FF&E Steering Committee as items for refurbishment (where required) and/or relocation from the Existing Facilities to the Facility, and which may include the categories and types of items identified in Part 2 of Schedule 28 – FF&E List.
- 1.52 “**Category 3 FF&E**” means all new furniture, fixtures, fittings, chattels and equipment located from time to time at the Facility or the Site and which are procured and installed at the Facility by Non-MAG Occupants (or their contractors, employees, the vendors of such equipment or such other person designated by the Non-MAG Occupants) and which includes types of furniture, fixtures, fittings, chattels and equipment identified in Part 3 of Schedule 28 – FF&E List and located in the elements or components of the Facility identified in Schedule 28 – FF&E List, and which excludes, for certainty, Category 1 FF&E, Category 2 FF&E, Category 4 FF&E, Category 5 FF&E and Transferred Existing Facilities Items.
- 1.53 “**Category 4 FF&E**” means all new items of furniture, fixtures, fittings, chattels and equipment located from time to time at the Facility or the Site which MAG or MAG Occupants are the owner or lessee and includes the categories and types of items identified in Part 4 of Schedule 28 – FF&E List, and which excludes, for certainty, Category 1 FF&E, Category 2 FF&E, Category 3 FF&E, Category 5 FF&E and Transferred Existing Facilities Items.
- 1.54 “**Category 5 FF&E**” means all new items of furniture, fixtures, fittings, chattels and equipment located from time to time at the Facility or Site which are procured and installed at the Facility by Non-MAG Occupants (or their contractors, employees, the vendors of such equipment or such other person designated by the Non-MAG Occupants) and which includes the types of furniture, fixtures, fittings, chattels and equipment identified in Part 5 of Schedule 28 – FF&E List and located in the elements or components of the Facility identified in Schedule 28 – FF&E List, and which excludes, for certainty, Category 1 FF&E, Category 2 FF&E, Category 3 FF&E, Category 4 FF&E and Transferred Existing Facilities Items.
- 1.55 “**CDB**” has the meaning given in Schedule 27 – Dispute Resolution Procedure.
- 1.56 “**CDB Expiry Date**” has the meaning given in Schedule 27 – Dispute Resolution Procedure.
- 1.57 “**CDB Member Agreement**” has the meaning given in Schedule 27 – Dispute Resolution Procedure.
- 1.58 “**CDB Member Statement**” has the meaning given in Schedule 27 – Dispute Resolution Procedure.

- 1.59 “**Certificate of Recognition**” means the certification issued by IHSA to a person confirming that the health and safety management systems of such person comply with the terms, provisions and conditions of the COR Program.
- 1.60 “**Certification Services**” has the meaning given in Schedule 6 – Independent Certifier Agreement.
- 1.61 “**Certification Services Variation**” has the meaning given in Schedule 6 – Independent Certifier Agreement.
- 1.62 “**Certified H&S Inspector**” means an individual who is an employee or contractor of the IHSA and has the necessary credentials recognized by the COR Program for the purpose of such individual performing any inspections as may be required to be performed in accordance with Section 15.1(h) of the Project Agreement.
- 1.63 “**Change in Control**” means, with respect to a person:
- (a) any Change in Ownership, where the effect of such change is to result in control of the decisions made by or on behalf of such person subsequently being with a different entity or entities than prior to such change;
  - (b) any other change in respect of the power to elect a majority of the directors of the person or otherwise control the decisions made on behalf of such person; or
  - (c) any other change of direct or indirect power or authority through any contractual right or other power or interest with or over a person to influence, direct, cause to change or prevent from changing the approval of a decision, direction of the management, actions or policies of such person.
- 1.64 “**Change in Law**” means the coming into effect or repeal (without re-enactment or consolidation) in Ontario of any Applicable Law, or any amendment or variation of any Applicable Law, including any judgment of a relevant court of law which changes binding precedent in Ontario in each case after the date of the Project Agreement.
- 1.65 “**Change in Ownership**” means, with respect to a person, any change in ownership, whether beneficial or otherwise, of any of the shares or units of ownership of such person, or in the direct or indirect power to vote or transfer any of the shares or units of ownership of such person.
- 1.66 “**Claimant**” has the meaning given in Schedule 27 – Dispute Resolution Procedure.
- 1.67 “**Commercial Close**” means the date of the Project Agreement.
- 1.68 “**Commissioning Plan**” has the meaning given in Schedule 14 – Outline Commissioning Program.
- 1.69 “**Commissioning Team**” has the meaning given in Schedule 14 – Outline Commissioning Program.

- 1.70 “**Commissioning Tests**” means all commissioning tests:
- (a) described in Schedule 14 - Outline Commissioning Program;
  - (b) required by Applicable Law, Canadian and Industry Standards or CSA Standards;
  - (c) recommended by the manufacturer of any part of the Plant or equipment;
  - (d) required to be included in the Interim Completion Commissioning Program by the Independent Certifier, the Contracting Authority Commissioning Consultant or the Contracting Authority Representative during its development pursuant to Section 23A.2 of the Project Agreement; and
  - (e) required to be included in the Final Commissioning Program by the Independent Certifier, the Contracting Authority Commissioning Consultant or the Contracting Authority Representative during its development pursuant to Section 24.2 of the Project Agreement.
- 1.71 “**Compensation Event**” has the meaning given in Section 32.1(a) of the Project Agreement.
- 1.72 “**Compensation Payment**” means the Contracting Authority Default Termination Sum, the Project Co Default Termination Sum or the Non-Default Termination Sum.
- 1.73 “**Completion Holdback**” has the meaning given in Section 24.8(a) of the Project Agreement.
- 1.74 “**Complex Structure**” means any post-tensioned or pre-tensioned structure that has undergone significant structural alteration making it difficult for personnel at the Site to predict the direction of forces or likely collapse mechanism to be experienced by such structure in connection with any Demolition of all or any part of such structure.
- 1.75 “**Complex Structure Demolition**” means any Demolition:
- (a) where significant structural elements, such as girders, columns, shearwalls or slabs, or Complex Structures are being removed, de-stressed or altered;
  - (b) where large penetrations are being created through slabs;
  - (c) which may cause the collapse of any building or structure (or any portion thereof) and such collapse may directly impact adjacent occupied areas of a building or structure and potentially jeopardize the safety of workers, staff or the general public using such building or structure;
  - (d) where the Demolition of any building or structure (or any portion thereof) has the potential to result in any materials collapsing onto or interfering with any pedestrian right-of-way or into an occupied part of any building or structure; or

- (e) where any apparent or inferable risk associated with the Demolition poses a significant risk to workers, the public or adjacent property.
- 1.76 “**Confidant**” has the meaning given in Section 41.6(a)(i) of the Project Agreement.
- 1.77 “**Confidential Information**” means all confidential and proprietary information which is supplied by or on behalf of a Party, whether before or after the date of the Project Agreement.
- 1.78 “**Construction Act**” means the Construction Act, R.S.O. 1990, c.C.30 and regulations enacted thereunder all as amended from time to time and subject to the application of the transition provisions in s. 87.3 of the Construction Act, as amended from time to time.
- 1.79 “**Construction Certificate**” means a certificate with contents described in Attachment 2 to Appendix A of Schedule 10 – Review Procedure.
- 1.80 “**Construction Contractor**” means [REDACTED], engaged by Project Co to perform the Works and any substitute construction contractor engaged by Project Co as may be permitted by the Project Agreement.
- 1.81 “**Construction Contractor’s Direct Agreement**” means the agreement between Contracting Authority, Project Co and the Construction Contractor and the Construction Guarantor in the form set out in Schedule 5 – Construction Contractor’s Direct Agreement.
- 1.82 “**Construction Defect**” has the meaning given to it in Section 11.15(a) of the Project Agreement.
- 1.83 “**Construction Document Submittals**” has the meaning given in Section 11.1(c)(ii) of the Project Agreement.
- 1.84 “**Construction Guarantor**” means [REDACTED].
- 1.85 “**Construction Latent Defect**” has the meaning given in Section 11.16(c).
- 1.86 “**Construction Period**” has the meaning given in Schedule 21 –Construction Period Failures.
- 1.87 “**Construction Period Deduction**” has the meaning given in Schedule 21 –Construction Period Failures.
- 1.88 “**Construction Period Quality Failure**” has the meaning given in Schedule 21 – Construction Period Failures.
- 1.89 “**Construction Quality Plan**” means the construction quality plan included in Schedule 11 - Design Quality Plan and Construction Quality Plan.
- 1.90 “**Construction Safety Plan**” means the construction safety plan included in Schedule 13 – Project Co Proposal Extracts.

- 1.91 **“Contamination”** means the presence of any Hazardous Substance in the environment, except Hazardous Substances present in the environment in concentrations below applicable standards as set by Applicable Laws. If Contamination is present in soil, surface water or groundwater, then the soil, surface water or groundwater, as applicable, containing the Contamination shall also be deemed to be Contamination for the purposes of the Project Agreement.
- 1.92 **“Contents and Information Technology”** has the meaning given in Section 21.5(e)(i)(B).
- 1.93 **“Contracting Authority”** means Her Majesty The Queen in Right of Ontario as represented by the Minister of Government and Consumer Services as represented by Ontario Infrastructure and Lands Corporation.
- 1.94 **“Contracting Authority Activities”** includes the provision of all governmental services and the conduct of all activities provided in or associated with courts and bail centres in Ontario, including the adjudication of all cases, hearings before statutory tribunals, mediations, the conduct of appeals, the performance of all bail operations, the provision of management and administration services together with the provision of supporting services which includes real property, title registry and search services, personal property security and registration services and other services of a similar nature to be provided to the public.
- 1.95 **“Contracting Authority Commissioning”** means the commissioning activities to be carried out by any one or more of Contracting Authority, MAG, MAG Occupants and/or Non-MAG Occupants in accordance with the Final Commissioning Program.
- 1.96 **“Contracting Authority Commissioning Consultant”** means the representative of the Design Compliance Consultant appointed by Contracting Authority as its commissioning consultant.
- 1.97 **“Contracting Authority Commissioning Period”** means the period during which any one or more of Contracting Authority, MAG, MAG Occupants and/or Non-MAG Occupants, are performing the Contracting Authority Commissioning.
- 1.98 **“Contracting Authority Commissioning Tests”** means all commissioning tests required to be performed by any one or more of Contracting Authority, MAG, MAG Occupants and/or Non-MAG Occupants, pursuant to the Final Commissioning Program.
- 1.99 **“Contracting Authority Contamination”** has the meaning given in Section 18.2(a) of the Project Agreement.
- 1.100 **“Contracting Authority Default Termination Sum”** has the meaning given in Schedule 23 – Compensation on Termination.
- 1.101 **“Contracting Authority Design Team”** means any of Contracting Authority, MAG, their agents, contractors and subcontractors of any tier and its or their directors, officers and employees, and other persons engaged in respect of design reviews, design evaluation, or design consultation processes with respect to the Site, the Facility, and/or the Contracting



Authority Activities on behalf of Contracting Authority and MAG, which, for greater certainty, includes the Design Compliance Consultant but excludes Project Co and any Project Co Party.

- 1.102 “**Contracting Authority Event of Default**” has the meaning given in Section 36.1(a) of the Project Agreement.
- 1.103 “**Contracting Authority Party**” means MAG and any of Contracting Authority’s and MAG’s respective agents, contractors and subcontractors of any tier and its or their directors, officers and employees, and other persons engaged by any of the foregoing in respect of the Contracting Authority Activities, but excluding Project Co and any Project Co Party, and the “**Contracting Authority Parties**” shall be construed accordingly.
- 1.104 “**Contracting Authority Permits, Licences, Approvals and Agreements**” means only those Contracting Authority permits, licences, approvals and agreements which are the responsibility of Contracting Authority to obtain as set out in Appendix A – Contracting Authority Permits, Licences, Approvals and Agreements to this Schedule 1 - Definitions and Interpretation, but for greater certainty shall not include any permission, consent, approval, certificate, permit, licence, agreement or authorization not set out in Appendix A to this Schedule 1 - Permits, Licences, Approvals and Agreements but required by the terms of any such item set out in such Appendix.
- 1.105 “**Contracting Authority Representative**” means the person designated as such by Contracting Authority on or prior to the date of Financial Close and any permitted replacement.
- 1.106 “**Contracting Authority Review Period**” has the meaning given in Schedule 19 – Works Scheduling Requirements.
- 1.107 “**Contracting Authority Security Deposits**” means any and all letters of credit, securities, prepaid fees, deposits and similar instruments paid or posted by, or on behalf of, Contracting Authority in connection with the Works including, but not limited to, those instruments listed in Appendix B – Contracting Authority Security Deposits of this Schedule 1 – Definitions and Interpretation.
- 1.108 “**Contracting Authority Taxes**” means taxes, or payments in lieu of taxes, imposed on Contracting Authority and HST and property taxes for which Contracting Authority is responsible pursuant to Section 4.15 of the Project Agreement.
- 1.109 “**Contracting Authority Third Party Beneficiaries**” has the meaning given in Section 53.17(a)(i) of the Project Agreement.
- 1.110 “**Contracting Authority Trade-Marks**” means any and all Trade-Marks used by Contracting Authority in any manner whatsoever.
- 1.111 “**Contractor Site Specific Safety Manual**” means the document describing the Construction Contractor’s health and safety management program for the Project and the

Lands, all in accordance with the minimum requirements set out in Schedule 36 – Contractor Site Specific Safety Manual Requirements.

- 1.112 “**Control Party**” means any person with any form of direct ownership interest in Project Co.
- 1.113 “**COR Certification**” means, in respect of a person, (a) receipt by such person of its Certificate of Recognition and Letter of Good Standing or (b) receipt by another person within a group of persons where such other person’s Certificate of Recognition and Letter of Good Standing extends and applies to such person.
- 1.114 “**COR-Certified Construction Project Co Party**” has the meaning given in Section 11.25(a)(ii) of the Project Agreement.
- 1.115 “**COR Program**” means the national safety program known as “The Certificate of Recognition (COR™)”, being a safety program that enables persons to assess their health and safety management systems to manage risks, establish controls, and minimize the incidence of injury and illness to their workers, and being nationally trademarked and endorsed by participating members of the Canadian Federation of Construction Safety Associations, or such other national safety program approved by Contracting Authority.
- 1.116 “**COR-Qualified Construction Project Co Party**” means one of the following:
- (a) where the Construction Contractor is a single legal entity, the Construction Contractor; or
  - (b) where the Construction Contractor is a joint venture, each member of the joint venture; or
  - (c) where the Construction Contractor is a partnership, each partner of the partnership, provided that each such person has current OHSAS 18001 Accreditation in good standing.
- 1.117 “**Corporations Act**” means the *Corporations Act*, R.S.O. 1990, c. C.38, as amended.
- 1.118 “**Cost of the Financing**” means all costs and expenses incurred in connection with the Financing pursuant to the Lending Agreements, including all interest, fees, expense reimbursements, pre-payment and breakage costs and all other costs and expenses, as set out in Schedule 24 –[REDACTED].
- 1.119 “**Cost of the Works**” means the cost to Project Co of performing the Works as set out in Schedule 24 –[REDACTED] and shall include all amounts to be included in the Cost of the Works set out in the Project Agreement.
- 1.120 “**Countdown Notice**” has the meaning given in Section 24.7(a) of the Project Agreement.

- 1.121 “**Courthouse Security Systems**” means the security systems required pursuant to Part 3 of the Output Specifications.
- 1.122 “**Courthouse Service User**” means a person (other than a Province Person) present at the Facility in order to make use of the Contracting Authority Activities (whether voluntarily or involuntarily) and/or Facility or any other services and activities provided or performed at the Facility by Province Persons, from time to time.
- 1.123 “**Courthouse Specific Change in Law**” means any Change in Law which principally affects or principally relates only to the provision or operation of courthouse and bail centre premises.
- 1.124 “**COVID-19 Change in Law Reference Date**” means the date that is [REDACTED] days prior to the Technical Submission Deadline.
- 1.125 “**COVID-19 Emergency Public Health Physical Distancing Requirements**” means the requirements under Section 2 of Schedule 1 of O. Reg. 82/20. Rules for Areas in Stage 1, under the Reopening Ontario (A Flexible Response to COVID-19) Act, 2020, S.O. 2020, c.17 in effect as of the COVID-19 Change in Law Reference Date or any substantially similar Applicable Law with respect to COVID-19 that requires compliance with the Chief Medical Officer of Ontario’s instructions on physical distancing of at least two meters.
- 1.126 “**CPI**” means, as at the date of the Project Agreement, CPI XFET and, thereafter, the latest available Consumer Price Index Canada (all items) as published by Statistics Canada from time to time (whether preliminary or final), or failing such publication, such other index as the Parties may agree, or as may be determined in accordance with Schedule 27 - Dispute Resolution Procedure, most closely resembles such index.
- 1.127 “**CPI XFET**” means the Consumer Price Index excluding food, energy and the effect of changes in indirect taxes.
- 1.128 “**CPIC**” has the meaning given in Schedule 32 – Background Check Requirements.
- 1.129 “**CPIn**” is the value of CPI on April 1 of the relevant year, to be determined by reference to the relevant index in the month of February most recently preceding the indexation date.
- 1.130 “**CPIo**” is the value of CPI at Financial Close, to be determined by reference to the relevant index in the month immediately preceding Financial Close.
- 1.131 “**Critical Non-Conformance**” means any Non-Conformance, or combination of Major Non-Conformances, that:
- (a) in the reasonable opinion of Contracting Authority, demonstrates that Project Co is performing the Works in a manner that may result in Project Co becoming unable to satisfy the requirements for Substantial Completion;
  - (b) is persistent, ongoing or repeated; or

- (c) in the reasonable opinion of Contracting Authority, by its continued existence or through the process of rectification, would:
  - (i) result or is reasonably expected to result in material disruption to the public or a materially adverse disruption to the availability of the Facility to the Courthouse Service Users;
  - (ii) prejudice or is reasonably expected to materially prejudice the performance of any Contracting Authority Activities;
  - (iii) create or is reasonably expected to create a serious threat to the health, safety or security of any person, including any user of any part of or the whole of the Facility and/or the Existing Facilities, including employees, volunteers and visitors to the Facility and/or the Existing Facilities, and member of the public;
  - (iv) materially increase Contracting Authority's risk or transfer risk to Contracting Authority or any Contracting Authority Party;
  - (v) materially adversely affect the ability of any Contracting Authority Party to perform their activities as permitted or contemplated by the Project Agreement;
  - (vi) materially adversely affect or change the critical path of the Project as defined in the current Works Schedule, adversely affect Project Co's ability to achieve Interim Completion by the Scheduled Interim Completion Date, Substantial Completion by the Scheduled Substantial Completion Date, require a material resequencing of the Works, or cause any delay in achieving Substantial Completion; or
  - (vii) potentially compromise the reputation or integrity of Contracting Authority and/or any Province Person or the nature of the Province's judicial system so as to negatively affect public perception of that system or undertaking.

1.132 "**Crown**" means Her Majesty The Queen in Right of Ontario.

1.133 "**Crown Agency Act (Ontario)**" means the Crown Agency Act, R.S.O. 1990, c. 48.

1.134 "**CSIS**" means the Canadian Security Intelligence Service.

1.135 "**CSA Standards**" means, at the applicable time, the Canadian Standards Association standards.

1.136 "**Current Progress Works Schedule**" has the meaning given in Schedule 19 – Works Scheduling Requirements.

1.137 "**Date of Commencement**" has the meaning given in Schedule 27 – Dispute Resolution Procedure.

- 1.138 “**Delay Event**” has the meaning given in Section 31.1(a) of the Project Agreement.
- 1.139 “**Demolition**” means the removal of a building or structure, as the case may be, or of any material part of a building or structure.
- 1.140 “**Demolition Default Event**” has the meaning given in Section 11.26(b)(ii) of the Project Agreement.
- 1.141 “**Demolition Guidelines**” means those guidelines set forth in the document entitled “Professional Engineers Providing Services for Demolition of Buildings and other Structures” published by the Professional Standards Committee established by the Professional Engineers of Ontario and having a publication date of April, 2011.
- 1.142 “**Demolition Plan**” means a plan or other document prepared by a Professional Engineer, limited licence holder or provisional licence holder in accordance with subsection (3) of the Performance Standards Regulation with respect to the demolition of a building or structure, and includes any changes to the plan or other document that are made by a Professional Engineer, limited licence holder or provisional licence holder.
- 1.143 “**Demolition Requirements**” has the meaning given in Section 11.26(a) of the Project Agreement.
- 1.144 “**Demolition Specifications**” means those specifications relating to any Demolition prepared by Project Co in accordance with Section 11.26(a)(iv)(A) of the Project Agreement.
- 1.145 “**Demolition Supervisor**” has the meaning given in Section 11.26(a)(ii) of the Project Agreement.
- 1.146 “**Design Acceptability**” means that the design of the Facility enables Contracting Authority, MAG, MAG Staff, MAG Occupants, Courthouse Service Users and Non-MAG Occupants to carry out all Contracting Authority Activities in a dignified, secure and efficient manner, specifically achieving a balance between public space, circulation, appropriate adjacencies and security in accordance with the requirements of the Output Specifications. Design Acceptability shall be a salient evaluation factor of importance to Contracting Authority and MAG at all stages of development of the Facility.
- 1.147 “**Design Acceptability Report**” has the meaning given in Section 11.4(b) of the Project Agreement.
- 1.148 “**Design Compliance Consultant**” means a consultant to Contracting Authority to act as an advocate for Contracting Authority and MAG throughout the design and construction stage of the Project, being, as of the date of the Project Agreement, [REDACTED].
- 1.149 “**Design Certificate**” means a certificate with contents described in Attachment 1 to Schedule 10 – Review Procedure.

- 1.150 “**Design and Construction Contract**” means the design and construction contract between Project Co and the Construction Contractor dated on or about the date of Financial Close.
- 1.151 “**Design Data**” means all drawings, reports, documents, plans, software, formulae, calculations, and other data prepared by Project Co relating to the design, construction or testing of the Facility, but excluding Intellectual Property Rights of third parties, such as CAD software, that is used only in the process of design and construction.
- 1.152 “**Design Development Submittals**” has the meaning given in Section 11.1(c)(i) of the Project Agreement.
- 1.153 “**Design Quality Plan**” means the design quality plan included in Schedule 11 - Design Quality Plan and Construction Quality Plan.
- 1.154 “**Design Review Meetings**” has the meaning given in Section 11.3(a) of the Project Agreement.
- 1.155 “**Design Team**” means [REDACTED], engaged by Project Co to design the Facility and any substitute design team engaged by Project Co or a Project Co Party as may be permitted by the Project Agreement.
- 1.156 “**Design Workshops**” has the meaning given in Section 11.3(a) of the Project Agreement.
- 1.157 “**Designated Project Co Employees**” has the meaning given in Schedule 32 – Background Check Requirements.
- 1.158 “**Development Approvals**” means development permits, building permits, zoning approvals and any other planning or development permit, consent or applicable Permits, Licences, Approvals and Agreements required from time to time for construction of the Facility.
- 1.159 “**Direct Cost**” has the meaning given in Schedule 22 -Variation Procedure.
- 1.160 “**Direct Losses**” means all damage, losses, liabilities, penalties, fines, assessments, claims, actions, costs, expenses (including the cost of legal or professional services, legal costs being on a substantial indemnity basis), proceedings, demands and charges whether arising under statute, contract or at common law, except Indirect Losses.
- 1.161 “**Direct or Indirect Power or Control**” means the direct or indirect power or control over the decisions, management, actions or policies of a person, including through the direct or indirect power or control over the decisions, management, actions or policies of any persons having direct or indirect power or control over the decisions, management, actions or policies of any other person, whether through:
- (a) ownership, beneficial or otherwise, of greater than [REDACTED] percent of any of the shares, units or equity interests of a person;

- (b) the direct or indirect power to vote any of the shares, units or equity interests of a person where an individual's ownership, beneficial or otherwise, is equal to or exceeds [REDACTED] percent of the voting securities, units or equity interests of such person; or
- (c) the direct or indirect power or authority to influence or direct the approval of a decision, the management, actions or policies of a person or to prevent the approval of a decision, the management, actions or policies of a person through any contractual right or other power or interest with or over a person.

1.162 **“Discriminatory Change in Law”** means any Change in Law which applies expressly to:

- (a) courthouses whose design, construction, financing and facilities management are procured by a contract similar to the Project Agreement and not to other similar courthouses;
- (b) the Facility and not to other courthouses;
- (c) Project Co and not to other persons; or
- (d) persons undertaking projects for design, construction and financing that are procured by a contract similar to the Project Agreement and not to other persons undertaking similar projects procured on a different basis,

except that such Change in Law shall not be a Discriminatory Change in Law:

- (e) where it is in response to any act or omission on the part of Project Co which contravenes Applicable Law (other than an act or omission rendered illegal by virtue of the Discriminatory Change in Law itself);
- (f) solely on the basis that its effect on Project Co is greater than its effect on other companies; or
- (g) where such Change in Law affects companies generally.

1.163 **“Dispute”** has the meaning given in Schedule 27 - Dispute Resolution Procedure.

1.164 **“Dispute Notice Supporting Documents”** has the meaning given in Schedule 27 – Dispute Resolution Procedure.

1.165 **“Dispute Resolution Procedure”** means the procedure set out in Schedule 27 – Dispute Resolution Procedure.

1.166 **“Document Control and Security Protocol”** has the meaning given in Section 41.5(f) of the Project Agreement.

1.167 **“Draft Works Schedule”** has the meaning given in Schedule 19 – Works Scheduling Requirements.

- 1.168 “**Economic Interest**” means any right to receive, directly or indirectly and whether in cash or in kind, a payment, repayment, fee, interest, dividend, distribution, redemption or any other consideration of benefit or value to the recipient of any nature whatsoever, but excluding wages, salaries or other employment-related benefits.
- 1.169 “**Emergency**” means any situation, event, occurrence, multiple occurrences or circumstances:
- (a) that:
    - (i) constitutes or may constitute a hazard to or jeopardizes or may jeopardize or pose a threat to health and/or safety of any persons (including MAG Occupants, Non-MAG Occupants and Courthouse Service Users) or the safety of any part or the whole of the Existing Facilities or the Facility;
    - (ii) causes or may cause damage or harm to property, buildings and/or equipment; or
    - (iii) constitutes a hostage situation or state of emergency declared as such by the Contracting Authority Representative or MAG (acting reasonably);
    - (iv) materially interferes with or prejudices or may materially interfere with or prejudice the safe operation of the Facility, the Existing Facilities, any part of the Site, the conduct of the Works or the conduct of Contracting Authority Activities; or
    - (v) constitutes a period of transition to or from war;and which, in the opinion of Contracting Authority, requires immediate action to prevent and/or mitigate the occurrence (or risk of the occurrence) of the foregoing, or
  - (b) which gives rise to an emergency, as determined by any statutory body including (notwithstanding the generality of the foregoing) an Emergency Service Provider.
- 1.170 “**Emergency Service Providers**” means any Police Service, firefighting service, ambulance service, armed forces or other authority with emergency service authority pursuant to Applicable Law which may require access to the Expansion Infrastructure from time to time.
- 1.171 “**Encumbrance**” means any mortgage, lien, pledge, judgment, execution, charge, security interest, restriction, claim or encumbrance of any nature whatsoever, including claims of the Workplace Safety and Insurance Board, Canada Revenue Agency, and other Governmental Authorities.
- 1.172 “**Environmental Reports**” has the meaning set out in Part A to this Schedule 1.
- 1.173 “**Estimate**” has the meaning given in Schedule 22 - Variation Procedure.



- 1.174 “**Existing COVID-19 Laws Extension**” means the continuation in force of the COVID-19 Emergency Public Health Physical Distancing Requirements beyond the Anticipated COVID-19 Impact End Date.
- 1.175 “**Existing Facilities**” means any of the BCA Existing Facilities or the TRBC Existing Facilities.
- 1.176 “**Existing Facilities Inventory Report**” means the FF&E inventory report in respect of the Existing Facilities prepared by Project Co in accordance with Section 21 of the Project Agreement.
- 1.177 “**Expiry Date**” means the first anniversary of the Final Completion Date.
- 1.178 “**Facility**” any one of the BCA Facility or the TRBC Facility being comprised of the following:
- (a) all buildings, facilities and other structures;
  - (b) the Plant;
  - (c) all site services, utilities, roadways and parking area required to support such buildings, facilities and structures;
  - (d) all supporting systems, infrastructure and improvements; and
  - (e) all other works, improvements and Demolition to occur on the Site,
- in each case required to meet the Output Specifications and the requirements under the Permits, Licences, Approvals and Agreements and whether or not in the course of design, construction, installation or completion, and “**Facilities**” shall have the corresponding meaning.
- 1.179 “**FF&E**” means, collectively, the Category 1 FF&E, the Category 2 FF&E, the Category 3 FF&E, the Category 4 FF&E, the Category 5 FF&E and the Transferred Existing Facilities Items.
- 1.180 “**FF&E Procurement Documentation**” has the meaning given in Section 21.6(a)(vi) of the Project Agreement.
- 1.181 “**FF&E Services**” means those furniture and office equipment services to be carried out pursuant to the Section 3.1 of Part III of Schedule 15 – Output Specifications.
- 1.182 “**FF&E Steering Committee**” has the meaning given in Section 21.1(a) of the Project Agreement.
- 1.183 “**Final Commissioning Program**” means the program to be jointly developed and agreed by Contracting Authority, MAG and Project Co in accordance with Section 24.2 of the Project Agreement.

- 1.184 “**Final Completion**” means, in respect of each Facility, the completion of the Works in respect of the Facility in accordance with the Project Agreement, including completion of all Minor Deficiencies.
- 1.185 “**Final Completion Certificate**” means the certificate to be issued by the Independent Certifier in accordance with Section 24.15 of the Project Agreement.
- 1.186 “**Final Completion Countdown Notice**” has the meaning given in Section 24.11(a) of the Project Agreement.
- 1.187 “**Final Completion Date**” means the date on which Final Completion is achieved as evidenced by the Final Completion Certificate, as such date shall be stated therein.
- 1.188 “**Final Completion Notice**” has the meaning given in Section 24.12(b) of the Project Agreement.
- 1.189 “*Financial Administration Act (Ontario)*” means the Financial Administration Act, R.S.O. 1990, c. F.12.
- 1.190 “**Financial Close**” means the first date that funding is available under the Lending Agreements.
- 1.191 “**Financial Close Target Date**” means April 16, 2021, as such date may be extended in accordance with the provisions of the Project Agreement.
- 1.192 “**Financial Model**” means, at any time, the computer spreadsheet model included in Schedule 24 –[REDACTED] for the Project incorporating statements of Project Co’s cashflows including all expenditure, revenues, financing and taxation of the Works together with, if applicable, the profit and loss accounts and balance sheets for Project Co throughout the Project Term accompanied by details of all assumptions, calculations and methodology used in their compilation and any other documentation necessary or desirable to operate the model, as at Financial Close as attached to the Project Agreement as Schedule 24 –[REDACTED] as amended to such time with approval of Contracting Authority in accordance with Section 2.4 of Schedule 29 – Refinancing with respect to any Refinancing. If “Financial Model” is used without any reference to a particular time, it means the Financial Model at or as at the time the applicable calculation is being made.
- 1.193 “**Financial Obligations**” means the obligation to pay any application fees, third party fees, costs or charges (including all applicable Taxes thereon), the provision of any letters of credit, instruments of guarantee, bonds or security deposits, or any other financial security obligations.
- 1.194 “**Financing**” means the financing with the Lenders, that is consistent in all material respects with Schedule 24 –[REDACTED] and the Project Agreement, to finance the Project.

- 1.195 “**Finishing Holdback**” means the finishing construction lien holdback to be retained pursuant to section 22(2) of the Construction Act.
- 1.196 “**Finishing Holdback Payment Certificate**” has the meaning given in Section 5.2(e) of Schedule 20 – Payment Procedures.
- 1.197 “**Finishing Holdback Payment Date**” means the date for payment of the Finishing Holdback pursuant to Section 5.2 of Schedule 20 – Payment Procedures.
- 1.198 “**FIPPA**” means the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (Ontario).
- 1.199 “**Force Majeure**” has the meaning given in Section 34.1(a) of the Project Agreement.
- 1.200 “**Geotechnical Reports**” has the meaning set out in Part A to this Schedule 1.
- 1.201 “**Good Industry Practice**” means using standards, practices, methods and procedures to a good commercial standard, conforming to Applicable Law and exercising that degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a qualified, skilled and experienced person engaged in a similar type of undertaking under the same or similar circumstances.
- 1.202 “**Government Entity**” means any one or more of the Province and MOI.
- 1.203 “**Government Sensitive Information**” means any information which is designated as such by the Province from time to time, or which a reasonable person, having regard to the circumstances, would regard as sensitive, including (i) all confidential information that is designated as such by Applicable Law, (ii) all information that relates to the security systems of the Facility and of courthouses in Ontario generally, (iii) any record, the disclosure of which could be injurious to the interests of the Province; and (iv) any information that discloses the identity or whereabouts of a police informant or undercover officer.
- 1.204 “**Governmental Authority**” means any federal, provincial, territorial, regional, municipal or local governmental authority, quasi-governmental authority, court, government or self-regulatory organization, commission, board, tribunal, organization, or any regulatory, administrative or other agency, or any political or other subdivision, department, or branch of any of the foregoing, having legal jurisdiction in any way over Contracting Authority, any aspect of the performance of the Project Agreement or the operation of the Facility, the Existing Facilities or the Contracting Authority Activities, in each case to the extent it has or performs legislative, judicial, regulatory, administrative or other functions within its jurisdiction.
- 1.205 “**Guaranteed Price**” is the amount referred to in Section 3.1(a) of the Project Agreement.
- 1.206 “**H&S Certification Default Event**” has the meaning given in Section 11.25(b) of the Project Agreement.

- 1.207 “**H&S Certification Maintenance Plan**” has the meaning given in Section 11.25(b)(vii)(B) of the Project Agreement.
- 1.208 “**H&S Certification Reinstatement Plan**” has the meaning given in Section 11.25(b)(vi)(B) of the Project Agreement.
- 1.209 “**H&S Construction Inspection**” has the meaning given in Section 15.1(h) of the Project Agreement.
- 1.210 “**H&S Construction Inspection Report**” has the meaning given in Section 15.1(j) of the Project Agreement.
- 1.211 “**H&S Construction Re-Inspection**” has the meaning given in Section 15.1(k)(ii) of the Project Agreement.
- 1.212 “**H&S Construction Re-Inspection Report**” has the meaning given in Section 15.1(k)(iii) of the Project Agreement.
- 1.213 “**Hazardous Substances**” means any contaminant, pollutant, mould, dangerous substance, toxic substance, liquid waste, industrial waste, gaseous waste, hauled liquid waste, hazardous material, or hazardous substance as defined in or identified pursuant to any Applicable Law.
- 1.214 “**Hazardous Substance Reports**” has the meaning set out in Part A to this Schedule 1.
- 1.215 “**Hedge Provider**” means a person that has entered into a Hedging Agreement with Project Co pursuant to the Lending Agreements, together with their successors and permitted assigns.
- 1.216 “**Hedging Agreement**” means an agreement relating to the hedging of interest rate risk entered into by Project Co and the Hedge Provider(s) pursuant to the Lending Agreements.
- 1.217 “**Heritage Guidelines and Protocols**” means those heritage guidelines and protocols established by Applicable Laws.
- 1.218 “**HST**” means the value-added tax imposed pursuant to Part IX of the *Excise Tax Act* (Canada), and any successor legislation thereto.
- 1.219 “**IC Interim Completion Deliverables Confirmation**” has the meaning given in Section 23A.4(c)(i) of the Project Agreement.
- 1.220 “**IC Interim Completion Deliverables Deficiencies List**” has the meaning given in Section 23A.4(c)(ii) of the Project Agreement.
- 1.221 “**IC Substantial Completion Deliverables Confirmation**” has the meaning given in Section 24.4(c)(i) of the Project Agreement.

- 1.222 “**IC Substantial Completion Deliverables Deficiencies List**” has the meaning given in Section 24.4(c)(ii) of the Project Agreement.
- 1.223 “**ICT**” means information and communications technology;
- 1.224 “**IHSA**” means Infrastructure Health and Safety Association, a not-for-profit occupational safety organization formed on January 1, 2010 that provides health and safety training material and services to Ontario construction, electrical utilities and transportation industries, and is accredited in Ontario to issue and grant Certificates of Recognition and Letters of Good Standing, or such other person so accredited in Ontario to issue and grant Certificates of Recognition and Letters of Good Standing.
- 1.225 “**Improvements**” means structures, buildings, installations, fixtures, services and other such improvements.
- 1.226 “**Indemnifiable Taxes**” has the meaning given in Section 4.20(b) of the Project Agreement.
- 1.227 “**Indemnifier**” has the meaning given in Section 45.3(a) of the Project Agreement.
- 1.228 “**Independent Certifier**” means the person appointed as the Independent Certifier pursuant to the Independent Certifier Agreement and as may be permitted pursuant to the Project Agreement.
- 1.229 “**Independent Certifier Agreement**” means the contract entered into between Project Co, Contracting Authority and the Independent Certifier in substantially the form attached hereto as Schedule 6 – Independent Certifier Agreement.
- 1.230 “**Indirect Losses**” has the meaning given in Section 46.1(a) of the Project Agreement.
- 1.231 “**Innovation Proposal**” has the meaning given in Section 30.2(b) of the Project Agreement.
- 1.232 “**Insurance**” means the insurance contemplated in Schedule 25 – Insurance and Performance Security Requirements.
- 1.233 “**Insurance Trust Agreement**” means the insurance trust agreement to be entered into between Contracting Authority, the Lenders’ Agent, Project Co and the Account Trustee in the form set out in Schedule 30 - Insurance Trust Agreement.
- 1.234 “**Intellectual Property**” means in connection with a specified subject matter, on a worldwide basis, all registered or unregistered Trade-Marks, trade names, patents, copyrights, trade secrets, designs, rights of publicity, mask work rights, utility models and other industrial or intangible property rights of a similar nature, all grants and registrations worldwide in connection with the foregoing and all other rights with respect thereto existing other than pursuant to grant or registration; all applications for any such grant or registration, all rights of priority under international conventions to make such applications and the right to control their prosecution, and all amendments, continuations, divisions and

continuations-in-part of such applications; and all corrections, reissues, patents of addition, extensions and renewals of any such grant, registration or right.

- 1.235 **“Intellectual Property Rights”** means all Intellectual Property in or associated with the Project Data and all Intellectual Property which, or the subject matter of which, is at any time before or after the date of the Project Agreement created, brought into existence, acquired, used or intended to be used by Project Co, any Project Co Party or by other third parties (for such third parties’ use by or on behalf of or for the benefit of Project Co) for any or all of the purposes of:
- (a) the Works, including the design and construction of the Facility (excluding Intellectual Property Rights of third parties, such as CAD software, that is used only in the process of design and construction); or
  - (b) the Project Agreement.
- 1.236 **“Interest Reference Rate”** means the reference benchmark rate of interest identified in the Financial Model and used in the calculation of the Project Debt Interest Cost, and for greater clarity, is the base rate of interest exclusive of any stated or imbedded spread, (including credit, swap or other types of spread) or fees.
- 1.237 **“Interim Completion”** means the point at which (i) the TRBC Facility has been completed in accordance with the Project Agreement; (ii) the Interim Work Occupancy Permit has been issued; and (iii) all requirements for Interim Completion described in the Interim Completion Commissioning Program, other than in respect of Interim Completion Minor Deficiencies, have been satisfied.
- 1.238 **“Interim Completion Certificate”** means the certificate to be issued by the Independent Certifier in accordance with Section 23A.4(d) of the Project Agreement.
- 1.239 **“Interim Completion Commissioning Program”** means the program to be jointly developed and agreed to by Contracting Authority and Project Co in accordance with Section 23A.2 of the Project Agreement.
- 1.240 **“Interim Completion Contracting Authority Commissioning”** means the commissioning activities to be carried out by Contracting Authority in accordance with the Interim Completion Commissioning Program.
- 1.241 **“Interim Completion Contracting Authority Commissioning Period”** means the period during which Contracting Authority is performing the Interim Completion Contracting Authority Commissioning.
- 1.242 **“Interim Completion Contracting Authority Commissioning Tests”** means all commissioning tests required to be performed by Contracting Authority pursuant to the Interim Completion Commissioning Program.

- 1.243 “**Interim Completion Countdown Notice**” has the meaning given in Section 23A.7(a) of the Project Agreement.
- 1.244 “**Interim Completion Date**” means the date on which Interim Completion is achieved as evidenced by the Interim Completion Certificate, as such date shall be stated therein.
- 1.245 “**Interim Completion Deliverables**” has the meaning given in Section 23A.7(d) of the Project Agreement.
- 1.246 “**Interim Completion Deliverables List**” has the meaning given in Section 23A.7(d) of the Project Agreement.
- 1.247 “**Interim Completion Holdback**” has the meaning given in Section 23A.8(b) of the Project Agreement.
- 1.248 “**Interim Completion Minor Deficiencies**” means any defects, deficiencies and items of outstanding work (including in relation to seasonal work) arising from or related to the work required to achieve Interim Completion.
- 1.249 “**Interim Completion Minor Deficiencies Completion Date**” has the meaning given in Section 23A.10(b) of the Project Agreement.
- 1.250 “**Interim Completion Minor Deficiencies List**” has the meaning given in Section 23A.8(a) of the Project Agreement.
- 1.251 “**Interim Completion Notice**” has the meaning given in Section 23A.4(b) of the Project Agreement.
- 1.252 “**Interim Completion Payment**” means \$[REDACTED].
- 1.253 “**Interim Completion Payment Date**” means the date that is 2 Business Days after the Interim Completion Date.
- 1.254 “**Interim Completion Project Co Commissioning**” means the commissioning activities to be carried out by Project Co prior to the issuance of the Interim Completion Certificate in accordance with the Interim Completion Commissioning Program.
- 1.255 “**Interim Completion Project Co Commissioning Tests**” means all commissioning tests required to be performed by Project Co pursuant to the Interim Completion Commissioning Program.
- 1.256 “**Interim Completion Works**” means the portion of the Works in respect of the design, construction, installation, testing, commissioning and completion of the TRBC Facility and rectification of any Interim Completion Minor Deficiencies.
- 1.257 “**Interim Work Occupancy Permit**” means all Permits, Licences, Approvals and Agreements required for the occupancy of the TRBC Facility in compliance with Applicable Law.

- 1.258 “**Interim Works Schedule**” has the meaning given in Schedule 19 – Works Scheduling Requirements.
- 1.259 “**IO**” or “**Infrastructure Ontario**” means Ontario Infrastructure and Lands Corporation, 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 includes any successors thereto.
- 1.260 “**IPFP Framework**” has the meaning given in the recitals to the Project Agreement.
- 1.261 “**Irrecoverable Tax**” has the meaning given in Section 4.16(b) of the Project Agreement.
- 1.262 “**Jointly Developed Materials**” has the meaning given in Section 40.4(a) of the Project Agreement.
- 1.263 “**Junior Debt Amount**” means, at any time, the then outstanding principal amount of debt funded under the terms of the Lending Agreements by the Junior Lenders to Project Co, together with all interest accrued thereon at that time, all to the extent set out in the Financial Model at such time, and to the extent applied for the purposes of the Project and excluding the Junior Debt Makewhole, which has a fixed return without equity participation, step-up rights or rights to share in Project Co’s excess cash flow and a coupon equal to or less than [REDACTED]% of the coupon payable to the Senior Lenders and a right to a makewhole amount equal to or less than a market makewhole amount. For clarity, amounts that do not meet such criteria will not be included in Junior Debt Amount.
- 1.264 “**Junior Debt Makewhole**” means, at any time, any amount (other than the Junior Debt Amount) then due and payable to the Junior Lenders under the Lending Agreements, including any “makewhole” payments, breakage fees (less any breakage benefits) and all other fees, costs and expenses reasonably and properly incurred which Project Co is obligated to pay to the Junior Lenders pursuant to the Lending Agreements.
- 1.265 “**Junior Debt Service Amount**” means, for any period, the principal and interest payable by Project Co or any Project Co Party to the Junior Lenders in the normal course under the Lending Agreements.
- 1.266 “**Junior Lenders**” means, at any time, any additional lenders financing any Refinancing. For greater clarity, Junior Lenders excludes:
- (a) the Hedge Provider(s) or any other hedge providers and their respective permitted successors and assigns; and
  - (b) any Affiliate of Project Co, any Project Co Party or any Affiliate of a Project Co Party.
- 1.267 “**Key Individuals**” means those Project Co Parties listed in Schedule 9 – Key Individuals.



- 1.268 “**Labour and Material Payment Bond**” means, collectively, the Labour and Material Payment Bond and riders thereto in the form attached as Appendix C to Schedule 25 – Insurance and Performance Security Requirements.
- 1.269 “**Lands**” has the meaning given in Schedule 34 – Site and Lands.
- 1.270 “**Lease Agreements**” means [REDACTED].
- 1.271 “**Legislative Holdback**” means the basic holdback retained pursuant to section 22(1) of the Construction Act. For greater certainty, the amount of the holdback required by Part IV of the Construction Act may be reduced by the amount of the holdback which has been paid by Project Co or the Construction Contractor in respect of Subcontracts certified complete under section 33 of the Construction Act in accordance with section 25 of the Construction Act.
- 1.272 “**Legislative Holdback Payment Certificate**” has the meaning given in Section 5.1(e) of Schedule 20 – Payment Procedures.
- 1.273 “**Legislative Holdback Payment Date**” means the date for payment of the Legislative Holdback pursuant to Section 5.1 of Schedule 20 – Payment Procedures.
- 1.274 “**Lenders**” means any or all of the persons acting arm’s length to Project Co and each Project Co Party who provide the Financing, and for greater clarity, excludes the Hedge Provider(s) or any other hedge providers and their respective permitted successors and assigns and any Affiliate of Project Co or a Project Co Party.
- 1.275 “**Lenders’ Agent**” has the meaning given in Schedule 4 - Lenders’ Direct Agreement.
- 1.276 “**Lenders’ Consultant**” means any consultant appointed from time to time by the Lenders (including, without limitation, the Lenders’ technical advisor). Nothing contained in the Project Documents and no action taken by the Lenders’ Consultant in connection with the Works or the Project Documents shall constitute direction and/or control by Contracting Authority, Project Co or the Lenders.
- 1.277 “**Lenders’ Direct Agreement**” means the direct agreement to be entered into between Contracting Authority, the Lenders’ Agent and Project Co in the form set out in Schedule 4 - Lenders’ Direct Agreement.
- 1.278 “**Lending Agreements**” means any or all of the agreements or instruments to be entered into by Project Co or any of its Affiliates with Senior Lenders or Junior Lenders relating to the Financing, including, for greater certainty, the Security Documents and the Hedging Agreements. Without limitation, Lending Agreements includes any agreements or instruments described above with any of the Lenders and includes those related to any Refinancing.
- 1.279 “**Letter of Credit Provider**” has the meaning given in the Request for Proposals.

- 1.280 “**Letter of Good Standing**” means the document issued by IHSA to a person confirming that the internal maintenance audit performed by such person regarding its health and safety management systems has been approved by IHSA, and that such person has successfully completed such internal audit pursuant to the terms and conditions of the COR Program.
- 1.281 “**Load-Path Diagram**” means a graphically illustrated diagram that indicates in all relevant detail (including by use of colour-coded arrows indicating the directions of forces caused by dead loads, live loads, vertical loads and lateral loads) how the structural loads are transferred throughout a building or structure that is to be the subject of a Demolition.
- 1.282 “**Longstop Date**” has the meaning given in Section 35.1(a)(ii) of the Project Agreement.
- 1.283 “**Look-ahead Schedule**” has the meaning given in Schedule 19 – Works Scheduling Requirements.
- 1.284 “**MAG**” means the Ministry of the Attorney General of Ontario, and includes any successors thereto or persons exercising delegated power and the Minister’s authority.
- 1.285 “**MAG Occupants**” means any of the following persons:
- (a) the judiciary, including all judges and justices of the peace of the Ontario Court of Justice;
  - (b) all MAG Staff; and
  - (c) contractors to MAG, including fee-for-service or agency court interpreters and court reporters, per diem Crown attorneys and any person providing services for a service provider under a Mental Health Fitness Assessment program under the Criminal Code (Canada),
- while attending at the Facility or the Site in their official capacity.
- 1.286 “**MAG Staff**” means all persons who are employed or engaged by the Crown in connection with the conduct of Contracting Authority Activities by MAG at or in connection with the Existing Facilities and for greater certainty includes:
- (a) all Court services staff (office and in-court);
  - (b) Crown attorneys and assistant Crown attorneys; and
  - (c) victims/witness assistance program staff,
- while attending at the Facility or the Site in their official capacity.
- 1.287 “**Major Non-Conformance**” means any Non-Conformance, or combination of Minor Non-Conformances, that:

- (a) contains significant deficiencies or does not generally conform with the requirements of this Project Agreement; or
  - (b) the continued existence of which is reasonably expected to result in Project Co becoming unable to satisfy the requirements for Substantial Completion.
- 1.288 “**Make Good**”, “**Made Good**”, “**Making Good**” and derivatives thereof, means, as applicable, repairing, restoring, refurbishing, rehabilitating, removing and replacing or performing filling operation on: (a) the Works as required under the Project Agreement; or (b) any existing components disturbed due to the Works, to at least the condition existing at the commencement of the Works, in terms of construction integrity, finishes, alignment with existing adjoining surfaces, compatibility of materials, sound attenuation criteria, exfiltration/infiltration requirements, air/vapour barrier and thermal continuity.
- 1.289 “**Member**” has the meaning given in Schedule 27 – Dispute Resolution Procedure.
- 1.290 “**MGCS**” means Her Majesty The Queen in Right of Ontario as represented by the Minister of Government and Consumer Services, and includes any successors thereto or persons exercising delegated power under the Minister’s authority.
- 1.291 “**Minor Deficiencies**” means any defects, deficiencies and items of outstanding work (including any Interim Completion Minor Deficiencies and any Seasonal Minor Deficiencies) arising from or related to the work required to achieve Substantial Completion and that would not materially impair:
- (a) Contracting Authority’s use and enjoyment of the Facility (including the Interim Completion Contracting Authority Commissioning and the Contracting Authority Commissioning); or
  - (b) the performance of the Contracting Authority Activities.
- 1.292 “**Minor Deficiencies Completion Date**” has the meaning given in Section 24.10(b) of the Project Agreement.
- 1.293 “**Minor Deficiencies List**” has the meaning given in Section 24.8(a) of the Project Agreement.
- 1.294 “**Minor Non-Conformance**” means any Non-Conformance that:
- (a) generally conforms to the requirements of the Project Agreement, but in which immaterial deficiencies have been found; or
  - (b) the continued existence of which is not reasonably expected to result in Project Co becoming unable to satisfy the requirements for Substantial Completion but may result in a Minor Deficiency.

- 1.295 “**MOI**” means Her Majesty The Queen in Right of Ontario as represented by the Minister of Infrastructure, and includes any successors thereto or persons exercising delegated power under the Minister’s authority.
- 1.296 “**New Toronto Courthouse Transition Schedule**” means the document titled New Toronto Courthouse: Transition Schedule, dated August 17, 2020 and provided as Background Information.
- 1.297 “**No Default Payment Compensation Amount**” means, [REDACTED].
- 1.298 “**Non-Conformance**” means any failure by Project Co to perform any of its obligations under the Project Agreement in respect of any aspect of the Works and which failure is not rectified by Project Co within the applicable time period, if any, stipulated in this Project Agreement.
- 1.299 “**Non-Default Termination Sum**” has the meaning given in Schedule 23 - Compensation on Termination.
- 1.300 “**Non-MAG Occupants**” means an occupant of the Facility other than MAG Occupants and Project Co Parties, including, without limitation:
- (a) a member of Police Services;
  - (b) a private member of the Law Society of Upper Canada;
  - (c) a Crown employee or contractor of the Crown, or person employed by such contractors who is engaged in work for Ministry of Community Safety and Correctional Services or the Ministry of Children and Youth Services, and all other agencies with temporary or permanent offices in the Facility, which include, without limitation, mental health workers, drug treatment program workers, indigenous persons court workers and legal services, bail programs, etc.;
  - (d) a Crown employee or person performing services under any contract with the Crown for or on behalf of any Ministry of the Province of Ontario other than the Ministry of the Attorney General;
  - (e) an officer or employee of Legal Aid Ontario;
  - (f) a federal prosecutor or a contractor to or any employee or office holder of Her Majesty in right of Canada,
- and in each case, while attending at the Facility or the Site in their official capacity.
- 1.301 “**Non-Resident**” means a person that is, at the relevant time, a non-resident of Canada for the purposes of the *Income Tax Act* (Canada).
- 1.302 “**Notice of Adjudication**” has the meaning given in Schedule 27 – Dispute Resolution Procedure.

- 1.303 “**Notice of Arbitration**” has the meaning given in Schedule 27 – Dispute Resolution Procedure.
- 1.304 “**Notice of Dispute**” has the meaning given in Schedule 27 – Dispute Resolution Procedure.
- 1.305 “**Notice of Non-Payment of Finishing Holdback**” has the meaning given in Section 5.2(c) of Schedule 20 – Payment Procedures.
- 1.306 “**Notice of Non-Payment of Legislative Holdback**” has the meaning given in Section 5.1(c) of Schedule 20 – Payment Procedures.
- 1.307 “**Notice**” has the meaning given in Section 50.1(a) of the Project Agreement.
- 1.308 “**Notice of Project**” means a notice of project filed with the Ministry of Labour in compliance with O. Reg 213/91 under the *Occupational Health and Safety Act* (Ontario).
- 1.309 “**Notice of Request to Arbitrate**” has the meaning given in Schedule 27 – Dispute Resolution Procedure.
- 1.310 “**Occupancy Permit**” means all Permits, Licences, Approvals and Agreements required for the occupancy of the Facility as a courthouse facility in compliance with Applicable Law.
- 1.311 “**OCPM**” has the meaning given in Section 13.6(b) of the Project Agreement.
- 1.312 “**OHSAS 18001**” means the international standard for occupational health and safety management systems developed by the Occupational Health and Safety Advisory Services Project Group, a British body formed to develop the standard.
- 1.313 “**OHSAS 18001 Accreditation**” means, in respect of a person, such person having received certification in respect of its health and safety management systems that such systems comply with the requirements of OHSAS 18001.
- 1.314 “**Open Data Directive**” means the Management Board of Cabinet’s Open Data Directive dated April 29, 2016, as may be amended from time to time.
- 1.315 “**Order**” has the meaning given in Schedule 30 - Insurance Trust Agreement.
- 1.316 “**Outline Commissioning Program**” means the schedule setting out the standards, specifications, procedures and other requirements for the performance and completion of the commissioning activities of the Parties outlined in Schedule 14 - Outline Commissioning Program.
- 1.317 “**Output Specifications**” means Project Agreement, Schedule 15 – Output Specifications.
- 1.318 “**Pandemic and Epidemic Change in Law**” means any Change in Law that:

- (a) came into effect after the COVID-19 Change in Law Reference Date, including any changes to the COVID-19 Emergency Public Health Physical Distancing Requirements;
- (b) is directly the result of and is directly related to the occurrence, increase or decrease in severity, or ending of a pandemic (including COVID-19) or epidemic;
- (c) directly affects (i) the performance of the Works, or (ii) the cost to Project Co of performing the Works; and
- (d) is not a Works Change in Law or a Relevant Change in Law.

For the purposes of this Project Agreement, this definition shall:

- (i) include:
  - A. any new, amendment or other modification to or repeal or replacement of any Applicable Law that satisfies the foregoing requirements of Sections (a) to (d) (inclusive); and
  - B. any Existing COVID-19 Laws Extension from and after the Anticipated COVID-19 Impact End Date;
- (ii) apply only to a Change in Law in respect of the laws of Ontario and the laws of Canada applicable therein that satisfies such requirements.

1.319 “**Pandemic and Epidemic Change in Law Compensation**” has the meaning given in Section 29.4(a) of the Project Agreement.

1.320 “**Pandemic and Epidemic Response and Mitigation Plan**” has the meaning given in Section 11.27(a) of the Project Agreement.

1.321 “**Pandemic and Epidemic Supply Chain Delay**” means a delay in the performance of the Works directly arising from a delay in the delivery of material or supplies in support of the Works, to the extent such delay in delivery:

- (a) directly results from the occurrence of:
  - (i) a pandemic or epidemic other than the COVID-19 pandemic; or
  - (ii) a material increase in the spread of COVID-19 after the COVID-19 Change in Law Reference Date,

which directly and adversely affects the delivery of such materials or supplies by a Supplier or Subcontractor; and

- (b) prevents, delays or otherwise interferes with the performance of the Works.

- 1.322 “**Party**” means either Contracting Authority or Project Co, and “**Parties**” means both Contracting Authority and Project Co, but, for greater certainty, such definitions do not include MAG or MGCS.
- 1.323 “**Party Executive**” has the meaning given in Schedule 27 – Dispute Resolution Procedure.
- 1.324 “**Party Representative**” has the meaning given in Schedule 27 – Dispute Resolution Procedure.
- 1.325 “**Payment Certifier**” means the professional architect of record or the engineer of record for the Project.
- 1.326 “**Payment Compensation Amount**” means, [REDACTED].
- 1.327 “**Performance Bond**” means any of the Performance Bonds described in Section 17.4 of Schedule 25 – Insurance and Performance Security Requirements.
- 1.328 “**Performance Guarantee of Construction Guarantor**” means a performance guarantee given by the Construction Guarantor in the form set out in Schedule 12 – Performance Guarantee of Construction Guarantor.
- 1.329 “**Performance Security**” means collectively, the Bonds and the Performance Guarantee of Construction Guarantor.
- 1.330 “**Performance Standards Regulation**” means Ontario Regulation 260/08 made under the *Professional Engineers Act* (Ontario).
- 1.331 “**Permits, Licences, Approvals and Agreements**” means the Contracting Authority Permits, Licences, Approvals and Agreements and the Project Co Permits, Licences, Approvals and Agreements.
- 1.332 “**Permitted Borrowing**” means:
- (a) any advance to Project Co under the Lending Agreements;
  - (b) any additional financing approved by Contracting Authority in accordance with Section 1.9 of Schedule 22 - Variation Procedure to the Project Agreement; and
  - (c) any amendment, waiver or exercise of a right under the Lending Agreements made during the Step-In Period that does not increase Contracting Authority’s liabilities under the Project Agreement whether actual or contingent, present or future, known or unknown.
- 1.333 “**Personal Information**” means all personal information (as the term “personal information” is defined in the *Personal Information Protection and Electronic Documents Act* (Canada)) in the custody or control of Project Co or any Project Co Party other than personal information of the employees of Project Co or the Project Co Parties and other

than personal information that is wholly unrelated to the Works and not derived directly or indirectly from Contracting Authority in respect of the Project.

- 1.334 “**Phasing Requirements**” means the requirements for the phasing and sequencing of the Works set out in Part IV, 1.1.3 of Schedule 15 - Output Specifications.
- 1.335 “**Plant**” means all buildings, building services, and infrastructure, Building Systems including but not limited to building fabric, and mechanical and electrical services, which are required to meet the operational needs of the Contracting Authority as required under Schedule 15 - Output Specifications.
- 1.336 “**Police Service**” means the Royal Canadian Mounted Police, the Ontario Provincial Police, the Peel Regional Police, Toronto Police Service and any other law enforcement agency with jurisdiction pursuant to Applicable Law, as applicable.
- 1.337 “**Prequalification Submission**” means Project Co’s response to the request for qualifications issued in respect of the Project on January 14, 2020.
- 1.338 “**Prequalified Subcontractor**” means any Subcontractor that was identified in the list of subcontractors submitted as part of Project Co’s Prequalification Submission, as amended pursuant to the process set out in the Request for Proposals.
- 1.339 “**Primary Subcontractor**” means any Project Co Party that is performing any part of the Works.
- 1.340 “**Proceeding at Risk**” means that Project Co is proceeding with the Works in a manner determined by the Independent Certifier to constitute a valid Proceeding at Risk Matter in the Independent Certifier’s opinion, based on the Independent Certifier’s analysis of Critical Non-Conformance criteria, its review and analysis of Contracting Authority’s reasoning set out in the Proceeding at Risk Notice, Project Co’s response provided pursuant to Section 14.6(c) of the Project Agreement, and the additional information disclosed pursuant to the process set out in Section 14.6 of the Project Agreement.
- 1.341 “**Proceeding at Risk Matter**” has the meaning given in Section 14.6(a)(ii) of the Project Agreement.
- 1.342 “**Proceeding at Risk Notice**” has the meaning given in Section 14.6(a) of the Project Agreement.
- 1.343 “**Proceedings Against the Crown Act (Ontario)**” means the Proceedings Against the Crown Act, R.S.O. 1990, c. P.27.
- 1.344 “**Product**” means or “**Products**” mean material, machinery, equipment and fixtures forming the Works but does not include FF&E or machinery and equipment used to prepare, fabricate, convey or erect the Works, which is referred to as construction machinery and equipment.



- 1.345 “**Professional Engineer**” means a professional engineer licensed by Professional Engineers Ontario to practice in the Province of Ontario.
- 1.346 “**Progress Works Schedule**” has the meaning given in Schedule 19 – Works Scheduling Requirements.
- 1.347 “**Prohibited Act**” has the meaning given in Section 49.1(a) of the Project Agreement.
- 1.348 “**Project**” has the meaning given in the recitals to the Project Agreement.
- 1.349 “**Project Agreement**” has the meaning given in the recitals to the Project Agreement.
- 1.350 “**Project Agreement Arbitration**” has the meaning given in Schedule 27 – Dispute Resolution Procedure.
- 1.351 “**Project Co**” means Trans/FORM by Pomerleau Inc.
- 1.352 “**Project Co Amount**” has the meaning given in Schedule 23 – Compensation on Termination.
- 1.353 “**Project Co Commissioning**” means the commissioning activities to be carried out by Project Co in accordance with the Final Commissioning Program.
- 1.354 “**Project Co Commissioning Authority**” has the meaning given in Schedule 14 – Outline Commissioning Program.
- 1.355 “**Project Co Commissioning Tests**” means all Commissioning Tests required to be performed by Project Co pursuant to the Final Commissioning Program.
- 1.356 “**Project Co Construction Event of Default**” means a Project Co Event of Default relating to a failure or breach by Project Co to perform, observe or comply with any covenants, agreements, obligations or liabilities with respect to the Works, excluding a default by the Construction Guarantor under the Performance Guarantee of Construction Guarantor.
- 1.357 “**Project Co Default Termination Sum**” has the meaning given in Schedule 23 – Compensation on Termination.
- 1.358 “**Project Co Event of Default**” has the meaning given in Section 35.1(a) of the Project Agreement.
- 1.359 “**Project Co Group**” means Project Co together with any person or group of persons, who, either individually or collectively, have Direct or Indirect Power or Control of Project Co.
- 1.360 “**Project Co Party**” means:
- (a) the Construction Contractor;

- (b) any person engaged by Project Co and/or the Construction Contractor from time to time as may be permitted by the Project Agreement to procure or manage the provision of the Works (or any of them); and
- (c) in respect of each of the above, their subcontractors of any tier, agents, employees, officers and directors,

and “**Project Co Parties**” shall be construed accordingly.

- 1.361 “**Project Co Permits, Licences, Approvals and Agreements**” means all permissions, consents, approvals, certificates, permits, licences, agreements and authorizations to be obtained by Project Co in accordance with the Project Agreement and as required by Applicable Law, and all necessary consents and agreements from any third parties (including all Development Approvals and the approval of the Fire Marshal of Ontario), needed to perform the Works in accordance with the Project Agreement, and including those permits, licenses, approvals and agreements which are the responsibility of Project Co to obtain as set out in Appendix “A” to this Schedule 1 –Definitions and Interpretation and those permits, licenses, approvals and agreements which are the responsibility of Project Co to obtain as set out in the Output Specifications, but other than any Contracting Authority Permits, Licences, Approvals and Agreements.
- 1.362 “**Project Co Phasing Plan**” means the phasing plan prepared by Project Co in accordance with the Phasing Requirements and the requirements set out in Schedule 33 - Facility Construction Requirements, and approved by the Contracting Authority in accordance with the Contracting Authority’s review and approval of the Draft Works Schedule.
- 1.363 “**Project Co Proposal Extracts**” has the meaning given in Schedule 13 - Project Co Proposal Extracts.
- 1.364 “**Project Co Representative**” means the person designated as such by Project Co on or prior to Commercial Close and any permitted replacement.
- 1.365 “**Project Co Staff**” means any and all persons who are employed or engaged by Project Co or any Project Co Party to work at or in relation to the Facility during the Project Term.
- 1.366 “**Project Co Variation Notice**” has the meaning given in Schedule 22 - Variation Procedure.
- 1.367 “**Project Data**” means:
- (a) all Design Data; and
  - (b) any other materials, documents and or data acquired, brought into existence or used in relation to the Works or the Project Agreement,

other than the Jointly Developed Materials and Background Information and other than Intellectual Property Rights of third parties, such as CAD software, that is used only in the process of design and construction.

- 1.368 “**Project Debt Interest Cost**” means the budgeted amount of aggregate interest charges in respect of the Junior Debt Amount and Senior Debt Amount used to calculate the Cost of the Financing portion of the Guaranteed Price.
- 1.369 “**Project Documents**” means the Ancillary Documents and the Lending Agreements.
- 1.370 “**Project Know-How**” means all ideas, concepts, alternatives, methodologies, processes, recommendations and suggestions developed by or through Project Co or any Project Co Party and revealed to or discovered by Contracting Authority, whether before or after Commercial Close, which may be connected in any way to:
- (a) the Works; or
  - (b) the Project Agreement.
- 1.371 “**Project Schedule**” has the meaning given in Schedule 19 – Works Scheduling Requirements.
- 1.372 “**Project Term**” means the period commencing on the date of the Project Agreement and expiring at midnight on the Termination Date.
- 1.373 “**Proposal Fee**” has the meaning given in the Request for Proposals.
- 1.374 “**Proposal Part**” means a part of Project Co’s proposal submitted in response to the RFP, including any revisions to such part of the submission agreed upon by Contracting Authority and Project Co as part of the RFP process.
- 1.375 “**Proposed Works Schedule**” has the meaning given in Schedule 19 – Works Scheduling Requirements.
- 1.376 “**Proprietor**” has the meaning given in Section 41.6(a) of the Project Agreement.
- 1.377 “**Protest Action**” means any civil disobedience, protest action, riot, civil commotion or demonstration, including any action taken or threatened to be taken by any person or persons protesting or demonstrating against the carrying out of any part of the Works, or against the construction or operation of courthouses in general, occurring after Financial Close, but excluding any labour dispute or any other strike, lockout or industrial relations dispute or job action by, of or against workers carrying out any part of the Works.
- 1.378 “**Protesters**” has the meaning given in Section 11.14(a) of the Project Agreement.
- 1.379 “**Province**” means Her Majesty The Queen in Right of Ontario.
- 1.380 “**Province Person Third Party Beneficiaries**” has the meaning given in Section 53.17(a)(i) of the Project Agreement.

- 1.381 “**Province Persons**” means the Contracting Authority Parties, MAG Occupants, Non-MAG Occupants, IO, MGCS and, while attending in their official capacity at the Facility or the Site, the following:
- (a) any entity to which authority is designated pursuant to Section 52.1 and any agents and employees of any such entity;
  - (b) any office holder of the Crown while sitting as a member of an administrative or other tribunal conducting a hearing at the Facility or the Site; and
  - (c) contractors of Contracting Authority or of any entity to which authority is delegated pursuant to Section 52.1 and subcontractors of any tier and its or their directors, officers and employees;
- but excluding Project Co and any Project Co Party.
- 1.382 “**Public Safety Dispute**” has the meaning given in Schedule 27 – Dispute Resolution Procedure.
- 1.383 “**Quality Plans**” has the meaning given in Section 15.1(a) of the Project Agreement.
- 1.384 “**Record Drawings**” means signed and sealed drawings prepared by the inspecting Professional Engineer, using as-built information, after verifying in detail the actual conditions of the completed project or applicable components as they are constructed, including any changes that were initiated due to site conditions or other causes and where all such changes are clearly identified through redlines or by means of any other format agreed by Contracting Authority.
- 1.385 “**Recoverable Tax**” has the meaning given in Section 4.16(c) of the Project Agreement.
- 1.386 “**Recovery Amount**” has the meaning given in Section 45.3(g) of the Project Agreement.
- 1.387 “**Recovery Schedule**” has the meaning given in Section 13.4(a)(iv)(A) of the Project Agreement.
- 1.388 “**Recovery Schedule Report**” has the meaning given in Section 13.4(a)(iv)(C) of the Project Agreement.
- 1.389 “**Refinancing**” has the meaning given in Schedule 29 – Refinancing.
- 1.390 “**Reimbursement Event**” has the meaning given in Section 26.5(a) of the Project Agreement.
- 1.391 “**Relevant Change in Law**” means a Discriminatory Change in Law or a Courthouse Specific Change in Law.
- 1.392 “**Relevant Conviction**” has the meaning given in Schedule 32 – Background Check Requirements.

- 1.393 “**Relevant Entity**” has the meaning given in Section 48.4(i) of the Project Agreement.
- 1.394 “**Relief Event**” has the meaning given in Section 33.1(a) of the Project Agreement.
- 1.395 “**Reply**” has the meaning given in Schedule 27 – Dispute Resolution Procedure.
- 1.396 “**Request for Payment Approval**” has the meaning given in Section 3.2(d) of the Project Agreement.
- 1.397 “**Request for Proposals**” or “**RFP**” means the request for proposals issued in respect of the Project on August 17, 2020.
- 1.398 “**Required Amount**” has the meaning given in Section 11.18(a) of the Project Agreement.
- 1.399 “**Restricted Person**” means any person who, or any member of a group of persons acting together, any one of which:
- (a) has, directly or indirectly, its principal or controlling office in a country that is subject to any economic or political sanctions imposed by Canada or Ontario;
  - (b) has as its primary business the illegal manufacture, sale, distribution or promotion of narcotics substances or arms, or is or has been involved in terrorism;
  - (c) in the case of an individual, (i) has been convicted of any indictable offence less than five years prior to the date at which the consideration of whether such individual is a “Restricted Person” is made hereunder, whether or not such person received a custodial sentence; or (ii) has been sentenced to a custodial sentence, other than a suspended sentence, for any regulatory offence other than under the *Highway Traffic Act* (Ontario) or corresponding legislation in any other jurisdiction less than five years prior to the date at which the consideration of whether such individual is a “Restricted Person” is made hereunder;
  - (d) in the case of a person other than an individual, (i) it or any of the members of its (or its general partner’s) board of directors or its senior executive managers has been convicted of any indictable offence less than five years prior to the date at which the consideration of whether such person is a “Restricted Person” is made hereunder, whether or not such person received a custodial sentence; or (ii) any of the members of its (or its general partner’s) board of directors or its senior executive managers has been sentenced to a custodial sentence, other than a suspended sentence, for any regulatory offence other than under the *Highway Traffic Act* (Ontario) or corresponding legislation in any other jurisdiction less than five years prior to the date at which the consideration of whether such person is a “Restricted Person” is made hereunder;
  - (e) has as its primary business the acquisition of distressed assets or investments in companies or organizations which are or are believed to be insolvent or in a financial standstill situation or potentially insolvent;

- (f) is subject to a material claim of Contracting Authority under any proceedings (including regulatory proceedings) which have been concluded or are pending at the time at which the consideration of whether such person is a “Restricted Person” is made hereunder, and which (in respect of any such pending claim, if it were to be successful) would, in Contracting Authority’s view, in either case, be reasonably likely materially to affect the ability of Project Co to perform its obligations under the Project Agreement; or
- (g) has a material interest in the production of tobacco products.
- 1.400 **“Review Procedure”** means the procedure set out in Schedule 10 - Review Procedure.
- 1.401 **“Review Procedure Activities”** has the meaning given in Schedule 12 – Works Scheduling Requirements.
- 1.402 **“Review Procedure Activities Register”** has the meaning given in Schedule 12 – Works Scheduling Requirements.
- 1.403 **“RFP Submission Deadline”** means January 15, 2021.
- 1.404 **“Rules of Civil Procedure”** has the meaning given in Schedule 27 – Dispute Resolution Procedure.
- 1.405 **“Scheduled Final Completion Date”** means the date that is 12 months following Substantial Completion.
- 1.406 **“Scheduled Substantial Completion Date”** means [REDACTED], as such date may be extended pursuant to Section 31 of the Project Agreement.
- 1.407 **“Scheduled Interim Completion Date”** means [REDACTED], as such date may be extended pursuant to Section 31 of the Project Agreement.
- 1.408 **“SC LD Commencement Date”** has the meaning given in Section 46A(a) of the Project Agreement.
- 1.409 **“SC Liquidated Damages”** means the liquidated damages to be paid pursuant to Section 46A of the Project Agreement which shall be in the amount of \$[REDACTED] per Business Day.
- 1.410 **“Seasonal Minor Deficiencies”** has the meaning given in Section 24.8(b) of the Project Agreement.
- 1.411 **“Seasonal Works Holdback”** has the meaning given in Section 24.10(b) of the Project Agreement.
- 1.412 **“Secure Courthouse Areas”** has the meaning given in Section 51.2(a) of the Project Agreement.

- 1.413 “**Security**” means the Bonds, the Insurance and any other security interests and hypothecs granted by Project Co to the Lenders’ Agent pursuant to the Security Documents.
- 1.414 “**Security Documents**” has the meaning given in Schedule 4 – Lenders’ Direct Agreement.
- 1.415 “**Security Escort Services Cash Allowance Amount**” means \$[REDACTED].
- 1.416 “**Security Escort Services Cash Allowance Item**” means all charges and fees for security commissionaires retained by Project Co in accordance with the requirements set out in Section 1.2 of Schedule 33 – Facility Construction Requirements.
- 1.417 “**Senior Debt Amount**” means, at any time, the then outstanding principal amount of debt funded under the terms of the Lending Agreements by the Senior Lenders to Project Co, together with all interest accrued thereon at that time, all to the extent set out in the Financial Model at such time, provided that at any time where any portion of the interest payable to the Senior Lenders is subject to the Hedging Agreement(s), accrued interest in respect of such portion of the interest payable to the Senior Lenders shall be calculated based on the fixed rate payable by Project Co under the Hedging Agreement(s) without regard to whether such fixed rate is payable directly to a Senior Lender or to the Hedge Provider(s) under the Hedging Agreement(s) and all references to interest payable to the Senior Lenders under this Project Agreement shall be construed accordingly. For greater certainty, the Senior Debt Amount is only to the extent applied for the purposes of the Project and excludes the Senior Debt Makewhole.
- 1.418 “**Senior Debt Makewhole**” means, (i) at any time, any amount (other than the Senior Debt Amount) then due and payable to the Senior Lenders under the Lending Agreements with respect to the Senior Debt Amount, including any “makewhole” payments, breakage costs (less any breakage benefits) and all other fees, costs and expenses reasonably and properly incurred which Project Co is obligated to then pay to the Senior Lenders pursuant to the Lending Agreements with respect to the Senior Debt Amount; and (ii) any swap breakage costs (less breakage benefits), if any, then due and payable to the Hedge Provider(s) under the Hedging Agreement(s) entered into with respect to the Senior Debt Amount.
- 1.419 “**Senior Debt Service Amount**” means, for any period, the principal, interest and commitment fees payable by Project Co or any Project Co Party to the Senior Lenders in the normal course under the Lending Agreements, provided that at any time where any portion of the interest payable to the Senior Lenders is subject to a Hedging Agreement between Project Co and a Hedge Provider, interest payable on account of such portion of interest payable to the Senior Lenders shall be calculated based on the fixed rate payable by Project Co under such Hedging Agreement without regard to whether such fixed rate is payable directly to a Senior Lender or to the Hedge Provider under the relevant Hedging Agreement and all references to interest payable to the Senior Lenders under this Project Agreement shall be construed accordingly.
- 1.420 “**Senior Lenders**” means, at any time, [REDACTED] and any additional lenders financing any Refinancing. For greater clarity, Senior Lenders excludes:

- (a) the Hedge Provider(s) or any other hedge providers and their respective permitted successors and assigns; and
  - (b) any Affiliate of Project Co, any Project Co Party or any Affiliate of a Project Co Party.
- 1.421 “**Sensitive Information**” means financial or commercial information which would, if disclosed to a competitor of Project Co or any Project Co Party, give that competitor a competitive advantage over Project Co or such Project Co Party and thereby prejudice the business of Project Co or such Project Co Party.
- 1.422 “**Separate FF&E and Transition Services Fee**” means \$[REDACTED].
- 1.423 “**Severe Market Disruption**” means any occurrence of exceptional circumstances in financial markets in Europe, the United States of America and/or Canada which:
- (a) results in the suspension or cessation of all or substantially all lending activity in national or relevant international capital or interbank markets; and
  - (b) adversely affects access by Project Co to such markets.
- 1.424 “**Shop Drawings**” means drawings, diagrams, illustrations, schedules, performance charts, brochures and other data which are to be provided by Project Co to illustrate details of a portion of the Works, indicating materials, methods of construction and attachment or anchorage, erection diagrams, connections, explanatory notes and other information necessary for completion of the Works.
- 1.425 “**Site**” means any one of the BCA Site or the TRBC Site, being the lands on which each of the Facilities are required to be constructed (including all fixtures and improvements constructed thereon) and “**Sites**” shall have the corresponding meaning.
- 1.426 “**Site Conditions**” means the condition of the Site, including the physical, geophysical, climatic, ecological, environmental, geotechnical and archaeological conditions.
- 1.427 “**Stakeholders**” means, collectively, the community organization(s) and other persons identified in writing by Contracting Authority from time to time as “**Stakeholders**” to Project Co; and “**Stakeholder**” means any of them individually.
- 1.428 “**Standby Letter of Credit**” means the letter of credit delivered in accordance with Section 9.1(2) of the Request for Proposals.
- 1.429 “**Start-Up Meeting**” has the meaning given in Section 11.2(a) of the Project Agreement.
- 1.430 “**Statement of Case**” has the meaning given in Schedule 27 – Dispute Resolution Procedure.
- 1.431 “**Statement of Reply**” has the meaning given in Schedule 27 – Dispute Resolution Procedure.



- 1.432 “**Step-in Period**” has the meaning given in Schedule 4 – Lenders' Direct Agreement.
- 1.433 “**Structure**” means any permanent structure other than a building, including a bridge, dam or lock.
- 1.434 “**Subcontractor**” means any subcontractor of Project Co engaged by or through Project Co to perform any of the Works, including the Construction Contractor, any Supplier or consultant, and any subcontractor of any other subcontractor at any tier.
- 1.435 “**Subcontractor’s Direct Agreement**” means the agreement to be entered into among Contracting Authority, Project Co, the Construction Contractor and certain Subcontractors determined in accordance with the terms of the Project Agreement in the form set out in Schedule 3 – Subcontractor’s Direct Agreement.
- 1.436 “**Subcontracts**” means the contracts entered into by or between Project Co and any Subcontractor or between any Subcontractor at any tier, including the Construction Contractor, and any other Subcontractor at any tier in relation to any aspect of the Works.
- 1.437 “**Substantial Completion**” means, the point at which (i) the Facility has been completed in accordance with the Project Agreement; (ii) the Occupancy Permit has been issued; (iii) the Payment Certifier appointed pursuant to Section 17.3(g) of the Project Agreement has certified the substantial performance of the Design and Construction Contract and the related certificate of substantial performance has been published, each in accordance with the Construction Act; and (iv) all requirements for Substantial Completion described in the Final Commissioning Program, other than in respect of Minor Deficiencies, have been satisfied.
- 1.438 “**Substantial Completion Certificate**” means the certificate to be issued by the Independent Certifier in accordance with Section 24.4(e) of the Project Agreement.
- 1.439 “**Substantial Completion Date**” means the date on which Substantial Completion is achieved as evidenced by the Substantial Completion Certificate, as such date shall be stated therein.
- 1.440 “**Substantial Completion Deliverables**” has the meaning given in Section 24.7(e) of the Project Agreement.
- 1.441 “**Substantial Completion Deliverables List**” has the meaning given in Section 24.7(e) of the Project Agreement.
- 1.442 “**Substantial Completion Notice**” has the meaning given in Section 24.4(b) of the Project Agreement.
- 1.443 “**Substantial Completion Payment**” means the amount determined by subtracting from the amount of the Guaranteed Price, as adjusted in accordance with the terms of the Project Agreement as at the end of the last day of the agreed monthly payment period ending

immediately prior to the Substantial Completion Payment Date, the following amounts (without duplication):

- (a) the Completion Holdback as at the Substantial Completion Payment Date;
- (b) any Legislative Holdback required to be maintained by Contracting Authority as at the Substantial Completion Payment Date;
- (c) the Separate FF&E and Transition Services Fee, if applicable; and
- (d) the Interim Completion Payment.

1.444 “**Substantial Completion Payment Date**” means the date that is 2 Business Days after the Substantial Completion Date.

1.445 “**Supplier**” means a person who supplies to Project Co, or to any Subcontractor, any equipment, materials, supplies or services as part of, or for, the Works.

1.446 “**Surety**” means the person issuing the Bonds.

1.447 “**Tax**” or “**Taxes**” means any and all taxes, levies, imposts, duties, fees, withholdings, assessments, deductions or charges whatsoever, imposed, assessed, levied or collected by any Governmental Authority, together with interest thereon and penalties with respect thereto, and includes all HST except where stated to the contrary, provided however that “**Taxes**” shall not include the Contracting Authority Taxes.

1.448 “**Technical Reports**” means the Environmental Reports, the Geotechnical Reports and the Hazardous Substances Reports.

1.449 “**Technical Submission Deadline**” means December 18, 2020.

1.450 “**Termination Date**” means the earlier of the Expiry Date and such earlier date, if any, on which termination of the Project Agreement takes effect in accordance with its terms.

1.451 “**Third Party Arbitration**” has the meaning given in Schedule 27 – Dispute Resolution Procedure.

1.452 “**Third Party Beneficiary Provisions**” has the meaning given in Section 53.17(a) of the Project Agreement.

1.453 “**Third Party Litigation**” has the meaning given in Schedule 27 – Dispute Resolution Procedure.

1.454 “**Title Encumbrances**” means the Encumbrances listed in Schedule 16 - Title Encumbrances and any other Encumbrance consented to by Contracting Authority and reasonably required in connection with the development of the Facility and the Works.

- 1.455 “**Total Capital Costs**” is equal to the sum of the Cost of the Works and the Cost of the Financing, less the Legislative Holdback amount.
- 1.456 “**Trade-Marks**” means any registered or unregistered mark, trade-mark, service mark, distinguishing guise, logo, insignia, seal, design or symbol.
- 1.457 “**Transferred Existing Facilities Item**” has the meaning given in Section 21.5(e)(i)(B) of the Project Agreement.
- 1.458 “**Transition**” and “**Transitions**” have the meanings respectively given in Section 24.14(a) of the Project Agreement.
- 1.459 “**Transition Advisor**” has the meaning given in Section 24.14(c) of the Project Agreement.
- 1.460 “**Transition Advisor Candidate**” has the meaning given in Section 24.14(c) of the Project Agreement.
- 1.461 “**Transition Management Sub-Plan**” means the plan referenced in Schedule 13 – Project Co Proposal Extracts.
- 1.462 “**Transition Subcommittee**” has the meaning given in Section 24.15(a) of the Project Agreement.
- 1.463 “**TRBC Site**” has the meaning given in Schedule 34 – Site and Lands.
- 1.464 “**TRBC Existing Facilities**” means all existing buildings and structures located at 2201 Finch Avenue West, including the following:
- (a) OCJ Courthouse at 2201 Finch Avenue West; and
  - (b) Unit 29 at 2201 Finch Avenue West.
- 1.465 “**TRBC Facility**” means the Facility to be constructed on the TRBC Site in Toronto, Ontario, in accordance with the Project Agreement.
- 1.466 “**TRBC Inventory Report**” means the FF&E inventory report in respect of the Existing Facilities at 2201 Finch Avenue West prepared by The Readiness Group Inc. for the New Toronto Courthouse Project and provided in the Background Information.
- 1.467 “**Trespassers**” has the meaning given in Section 11.14(a) of the Project Agreement.
- 1.468 “**Unknown Condition**” means, with respect to any of the Existing Facilities, any defect or deficient condition (including, for clarity, any hidden or concealed defect or deficient condition), including any failure, fault, inadequacy, weakness, imperfection, error in Background Information provided by the Contracting Authority, or shortcoming in required functionality or capacity to accommodate the Works, whether caused by inappropriate or inadequate design, construction, installation, affixation or material, lack of or improper maintenance, negligence or wilful damage, and “Unknown Conditions”

shall be construed accordingly. For greater certainty, the term Unknown Condition shall be deemed to include any such defect or hidden condition that would have been discovered had the Contracting Authority authorized prior to the Technical Submission Deadline Project Co or Project Co Parties to perform destructive inspections at the Existing Facilities.

- 1.469 “**Utilities**” means Energy, lighting and water supplies, communications, data transmission and waste recovery, including electricity, natural gas, fuel oil, renewable energy, sustainable energy, water, sanitary waste, storm water, heat, steam, bulk medical gas compounds, wireless and other similar commodities and substances which serve the public directly or indirectly.
- 1.470 “**Utility Company**” means any company or companies designated by Project Co to provide Utilities.
- 1.471 “**Variation**” has the meaning given in Schedule 22 - Variation Procedure.
- 1.472 “**Variation Confirmation**” has the meaning given in Schedule 22 - Variation Procedure.
- 1.473 “**Variation Directive**” has the meaning given in Schedule 22 - Variation Procedure.
- 1.474 “**Variation Enquiry**” has the meaning given in Schedule 22 - Variation Procedure.
- 1.475 “**Variation Procedure**” means the procedure set out in Schedule 22 - Variation Procedure.
- 1.476 “**VOR**” has the meaning given in Section 21.6(a)(v) of the Project Agreement.
- 1.477 “**Warranty Cash Amount**” has the meaning given in Section 11.18(b) of the Project Agreement.
- 1.478 “**Warranty Letter of Credit**” has the meaning given in Section 11.18(a) of the Project Agreement.
- 1.479 “**Warranty Period**” has the meaning set out in Part A to this Schedule 1.
- 1.480 “**Warranty Security Return Date**” means the date that is five Business Days following the date that is one year following the Substantial Completion Date.
- 1.481 “**Works**” means the design, construction, installation, testing, commissioning and completion of the Facility, completion and rectification of any Minor Deficiencies and the performance of all other obligations of Project Co under the Project Agreement.
- 1.482 “**Works Area Micro-Schedule**” has the meaning given in Schedule 19 – Works Scheduling Requirements.
- 1.483 “**Works Change in Law**” means any Change in Law that:
- (a) is not a Relevant Change in Law;

- (b) occurs after the date of the Project Agreement;
  - (c) requires Project Co to perform any work of alteration, addition, Demolition, extension or variation in the quality or function of the Facility which is not Works or capital replacement work which Project Co would otherwise be required to perform in order to comply with its obligations under the Project Agreement; and
  - (d) was not reasonably foreseeable at the date of the Project Agreement by an experienced contractor carrying out activities and/or performing design and/or other operations similar to those to be carried out and/or performed by any Project Co Party in relation to the Project.
- 1.484 “**Works Committee**” has the meaning given in Section 14.1(a) of the Project Agreement.
- 1.485 “**Works Milestone**” has the meaning given in Schedule 19 – Works Scheduling Requirements.
- 1.486 “**Works Report**” has the meaning given in Section 13.6(a) of the Project Agreement.
- 1.487 “**Works Schedule**” has the meaning given in Schedule 19 – Works Scheduling Requirements.
- 1.488 “**Works Schedule Assumptions Report**” has the meaning given in Schedule 19 – Works Scheduling Requirements.
- 1.489 “**Works Schedule Progress Report**” has the meaning given in Schedule 17 – Works Report Requirements.
- 1.490 “**Works Submittals**” has the meaning given in Section 1.1 of Schedule 10 - Review Procedure.
- 1.491 “**WSIB**” means the Ontario Workplace Safety and Insurance Board that is responsible for administering the *Workplace Safety and Insurance Act, 1997* (Ontario).
2. **Interpretation.** The Project Agreement shall be interpreted according to the following provisions, unless the context requires a different meaning:
- 2.1 The tables of contents, headings, marginal notes and references to them in the Project Agreement are for convenience of reference only, shall not constitute a part of the Project Agreement, and shall not be taken into consideration in the interpretation of, or affect the meaning of, the Project Agreement.
  - 2.2 Except where the context requires otherwise (irrespective of whether some, but not all, references in a Schedule specifically refer to that Schedule or to other portions of the Project Agreement) references to specific Sections, Articles, Clauses, Paragraphs, Subparagraphs, Schedules, and other divisions of the Project Agreement are references to such Sections, Articles, Clauses, Paragraphs, or Subparagraphs of, Schedules to, or

divisions of the Project Agreement and the terms “Section”, “Article” and “Clause” are used interchangeably and are synonymous.

- 2.3 Except where the context requires otherwise, references to specific Sections, Articles, Clauses, Paragraphs, Subparagraphs, Schedules, and other divisions of the Project Agreement followed by a number are references to the whole of the Section, Article, Clause, Paragraph, Subparagraphs, Schedule or other division of the Project Agreement as applicable, bearing that number, including all subsidiary provisions containing that same number as a prefix.
- 2.4 Except where the context requires otherwise, references in the Output Specifications to specific Parts, Sections, Articles, Clauses, Paragraphs, Subparagraphs, Schedules, and other divisions of the Output Specifications shall be construed such that each such reference on a page of the Output Specifications will be read to be preceded by and to include the prefix Section number or other reference at the top of the applicable page, and all cross-references to any Section in Schedule 15 - Output Specifications shall be interpreted to include the applicable prefix Section number or other reference.
- 2.5 The Schedules to the Project Agreement are an integral part of the Project Agreement and a reference to the Project Agreement includes a reference to the Schedules.
- 2.6 All references in the Project Agreement to a Schedule shall be to a Schedule of the Project Agreement.
- 2.7 All capitalized terms used in a Schedule shall have the meanings given to such terms in Schedule 1, unless stated otherwise in a particular Schedule in which case such definition shall have the meaning given to it in that Schedule solely for the purposes of that Schedule.
- 2.8 The language of the Output Specifications and other documents comprising the Project Agreement is in many cases written in the imperative for brevity. Clauses containing instructions, directions or obligations are directed to Project Co and shall be construed and interpreted as if the words “Project Co shall” immediately preceded the instructions, directions or obligations.
- 2.9 Words importing persons or parties are to be broadly interpreted and include an individual, corporation, limited liability company, joint stock company, 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.
- 2.10 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.

- 2.11 Unless otherwise provided in the Project Agreement, all accounting and financial terms used in the Project Agreement shall be interpreted and applied in accordance with Canadian GAAP.
- 2.12 References to any standard, principle, agreement or document include (subject to all relevant approvals and any other provisions of the Project Agreement concerning amendments) a reference to that standard, principle, agreement or document as amended, supplemented, restated, substituted, replaced, novated or assigned.
- 2.13 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.
- 2.14 References to a statute shall include all regulations, by-laws, ordinances and orders made under or pursuant to the statute.
- 2.15 References to persons shall include their successors and assigns. References to a public organization shall include their successors and assigns, and if a public organization ceases to exist or ceases to perform its functions without a successor or assign, references to such public organization shall be deemed to include a reference to any public organization or any organization or entity which has taken over either or both the functions and responsibilities of such public organization.
- 2.16 A reference in the Project Agreement or in any Project Document to any right, power, obligation or responsibility of any Governmental Authority shall be deemed to be a reference to the Governmental Authority that, pursuant to Applicable Laws has such right, power, obligation or responsibility at the relevant time.
- 2.17 References to a deliberate act or omission or deliberate or negligent act or omission of any Province Person shall be construed having regard to the interactive nature of the activities of the Province Person and Project Co and further having regard to:
- (a) acts contemplated by the Output Specifications; or
  - (b) acts otherwise provided for in the Project Agreement.
- 2.18 The words in the Project Agreement shall bear their natural meaning.
- 2.19 Each of Project Co's and Contracting Authority's respective obligations shall be construed as separate obligations owed to the other.
- 2.20 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 the Project Agreement taken as a whole; and

- (b) “includes” and “including”, whether or not used with the words “without limitation” or “but not limited to”, shall not be deemed limited by the specific enumeration of items but shall, in all cases, be deemed to be without limitation and construed and interpreted to mean “includes without limitation” and “including without limitation”.
- 2.21 In construing the Project Agreement, the rule known as the *ejusdem generis* rule shall not apply nor shall any similar rule or approach apply to the construction of the Project 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.
- 2.22 Where the Project 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.
- 2.23 Where the Project Agreement states that an obligation shall be performed “no later than” or “by” a prescribed number of days before a stipulated date or event or “by” a date which is a prescribed number of days before 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.
- 2.24 Where the Project 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.
- 2.25 Any reference to time of day or date means the local time or date in Toronto, Ontario.
- 2.26 Unless otherwise indicated, time periods will be strictly construed.
- 2.27 Whenever the terms “will” or “shall” are used in the Project Agreement in relation to Project Co or Contracting Authority they shall be construed and interpreted as synonymous and to read “Project Co shall” or “Contracting Authority shall” as the case may be.
- 2.28 Any reference to currency is to Canadian currency and any amount advanced, paid or calculated is to be advanced, paid or calculated in Canadian currency.
- 2.29 Unless otherwise identified in the Project Agreement, all units of measurement in any documents submitted by Project Co to Contracting Authority shall be in accordance with the SI system of units.
- 2.30 Terms not defined herein and used in the Project Agreement which have a technical meaning commonly understood by the courthouse facilities sector in Ontario will be construed as having that meaning unless the context otherwise requires.



- 2.31 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:

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

- 2.32 The terms “properly inferable”, “readily apparent” and “readily discoverable” as used in this Project Agreement, shall be interpreted by taking into consideration Project Co’s and any Project Co Party’s experience and the investigations, inspections and examinations of the Background Information and of the Lands, including the Existing Facilities, carried out by Project Co or by any Project Co Party during the Request for Proposals process or other due diligence; and by taking into consideration reasonable, normal course and industry standard investigations, inspections or other due diligence; in each case in accordance with Good Industry Practice.

**APPENDIX A**

**PERMITS, LICENCES, APPROVALS AND AGREEMENTS (“PLAA”)**

**CONTRACTING AUTHORITY AND PROJECT CO PLAA RESPONSIBILITY TABLE**

- Please see attached document –

**APPENDIX B**

**CONTRACTING AUTHORITY SECURITY DEPOSITS**

-None-

**SCHEDULE 2**

**COMPLETION DOCUMENTS**

**1. DOCUMENTS TO BE DELIVERED BY PROJECT CO**

Unless an original document is specifically required, a copy of each of the following documents (in each case, executed by the parties to such agreement other than Contracting Authority and in form and substance satisfactory to Contracting Authority, acting reasonably) is to be delivered by Project Co to Contracting Authority on or prior to the date hereof:

- 1.1 this Project Agreement;
- 1.2 the Lenders' Direct Agreement;
- 1.3 the Independent Certifier Agreement;
- 1.4 the Insurance Trust Agreement;
- 1.5 a notice of appointment of the Project Co Representative;
- 1.6 the Lending Agreements;
- 1.7 the Design and Construction Contract;
- 1.8 the Performance Guarantee of Construction Guarantor;
- 1.9 the Construction Contractor's Direct Agreement;
- 1.10 the CDB Member Statement and the CDB Member Agreement for the CDB;
- 1.11 a certificate of insurance and draft policies of insurance for the insurances required to be taken out by Project Co in accordance with this Project Agreement;
- 1.12 the Financial Model in electronic form;
- 1.13 an original of the Bonds required in accordance with this Project Agreement or as Contracting Authority may direct in accordance with the Insurance Trust Agreement;
- 1.14 the acknowledgement and undertaking in the form attached as Appendix A to this Schedule 2;
- 1.15 a certificate of an officer of Project Co substantially in the form attached as Appendix B to this Schedule 2;
- 1.16 a certificate of an officer of the Construction Contractor substantially in the form attached as Appendix B to this Schedule 2;

- 1.17 a certificate of an officer of the Construction Guarantor substantially in the form attached as Appendix B to this Schedule 2;
- 1.18 the opinion from counsel to Project Co, the Construction Contractor, the Construction Guarantor, and such other Project Co Parties as Contracting Authority may reasonably require substantially in the form attached as Appendix C to this Schedule 2 and otherwise acceptable to Contracting Authority and its counsel;
- 1.19 the Proposed Works Schedule and the Interim Works Schedule, both in form and substance satisfactory to Contracting Authority;
- 1.20 evidence that the COR-Certified Construction Project Co Party has its COR Certification in good standing (or to the extent that the COR-Qualified Construction Project Co Party does not have its COR Certification by Financial Close, evidence that the COR-Qualified Construction Project Co Party has its current OHSAS 18001 Accreditation in good standing and has made an application to IHSA for its COR Certification);
- 1.21 in respect of the Construction Contractor (and where the Construction Contractor is a partnership or joint venture, in respect of each partner of the partnership or member of the joint venture, as applicable), a WSIB clearance certificate, or if a WSIB clearance certificate is not available, equivalent documentation from another jurisdiction, current to the date of Commercial Close;
- 1.22 in respect of the Construction Contractor (and where the Construction Contractor is a partnership or joint venture, in respect of each partner of the partnership or member of the joint venture, as applicable), a CAD-7, or, if a CAD-7 is not available, equivalent documentation from another jurisdiction, current to the date of Commercial Close;
- 1.23 in respect of the Construction Contractor (and where the Construction Contractor is a partnership or joint venture, in respect of each partner of the partnership or member of the joint venture, as applicable), a Workplace Injury Summary Report (WISR) or, if a WISR is not available, equivalent documentation from another jurisdiction, current to the date of Commercial Close; and
- 1.24 such other documents as the parties may agree, each acting reasonably.

## **2. DOCUMENTS TO BE DELIVERED BY CONTRACTING AUTHORITY**

A copy of each of the following documents (in each case, where Contracting Authority is a party to such document, executed by Contracting Authority and, if applicable, any Contracting Authority Party or Governmental Authority) is to be delivered by Contracting Authority to Project Co on or prior to the date hereof:

- 2.1 this Project Agreement;
- 2.2 the Lenders' Direct Agreement;

- 2.3 the Construction Contractor’s Direct Agreement;
- 2.4 the Independent Certifier Agreement;
- 2.5 the Insurance Trust Agreement;
- 2.6 a notice of appointment of the Contracting Authority Representative;
- 2.7 the CDB Member Statement and the CDB Member Agreement for the CDB;
- 2.8 a certificate of an officer of IO and a declaration of management signed by an officer of IO substantially in the forms attached as Appendix D and Appendix E respectively to this Schedule 2; and
- 2.9 such other documents as the parties may agree, each acting reasonably.

**3. POST FINANCIAL CLOSE PROJECT CO DELIVERABLES**

Project Co shall deliver to Contracting Authority each of the following items:

- 3.1 within 5 Business Days following Financial Close, (a) one printed copy of the Financial Model, and (b) two electronic copies of the Financial Model, each on a USB key; and
- 3.2 within 15 Business Days following Financial Close, two USB keys, each containing electronic copies of all of the documents described in Sections 1 and 2 of this Schedule 2.

**APPENDIX A**

**FORM OF UNDERTAKING AND ACKNOWLEDGEMENT**

**TO:** **HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO** as represented by the Minister of Government and Consumer Services, as represented by Ontario Infrastructure and Lands Corporation (“**Contracting Authority**”)

**RE:** Project agreement (as amended, supplemented or modified from time to time, the “**Project Agreement**”) dated the [●] day of [●], 2021 between Contracting Authority, as represented by the Minister, as represented by IO and Trans/FORM by Pomerleau Inc. (“**Project Co**”)

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1. The undersigned acknowledges that:
  - (a) The Project will proceed as a public-private partnership project under the MOI’s *ReNew Ontario* infrastructure investment plan, and complies with the principles set out in the IPFP Framework.
  - (b) The IPFP Framework establishes 5 fundamental principles which guide the financing and procurement of public infrastructure projects in Ontario:
    - (i) The public interest is paramount.
    - (ii) Value for money must be demonstrable.
    - (iii) Appropriate public control/ownership must be preserved.
    - (iv) Accountability must be maintained.
    - (v) All processes must be fair, transparent and efficient.
  - (c) The IPFP Framework states that, consistent with the principle of appropriate public ownership/control, public ownership of assets will be preserved in the public sector.
2. The undersigned undertakes to comply with all Applicable Law in any direction or order issued by Contracting Authority or IO to the extent that the direction or order affects the Works.
3. Capitalized terms used but not defined herein have the respective meanings ascribed thereto in the Project Agreement.

*[SIGNATURE PAGE IMMEDIATELY FOLLOWS]*

**TRANS/FORM BY POMERLEAU INC.**

Per: \_\_\_\_\_

Name: **[REDACTED]**

Title: **[REDACTED]**

Per: \_\_\_\_\_

Name: **[REDACTED]**

Title: **[REDACTED]**

I/We have authority to bind the corporation.



**APPENDIX B**

**FORM OF PROJECT CO/PROJECT CO PARTY OFFICER’S CERTIFICATE**

**Certificate of an Officer of**

**Trans/FORM by Pomerleau Inc.**

**(the “Corporation”)**

**TO: HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO** as represented by the Minister of Government and Consumer Services, as represented by Ontario Infrastructure and Lands Corporation (“**Contracting Authority**”)

**AND TO: MINISTRY OF THE ATTORNEY GENERAL**

**AND TO: ONTARIO INFRASTRUCTURE AND LANDS CORPORATION**

**AND TO: GOWLING WLG (CANADA) LLP**

**AND TO: [REDACTED]**

**AND TO: [REDACTED]**

**AND TO: [REDACTED]**

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I, [●], being the [●] of the Corporation and an authorized signatory of the Corporation and being duly authorized by the Corporation to deliver this certificate, hereby make the following certifications and confirmations for and on behalf of the Corporation and without incurring personal liability and that the same may be relied upon by you without further inquiry:

1. Constatng Documents
  - (a) The Corporation is a subsisting corporation duly incorporated under the laws of the [REDACTED].
  - (b) Attached hereto as **Schedule “A”** are true and complete copies of the articles, together with all amendments thereto, of the Corporation (the “**Articles**”). The Articles are in full force and effect on the date hereof and no other articles have been issued and no proceeding has been taken or is contemplated to the date hereof to authorize the Corporation to amend, surrender or cancel the Articles.
  - (c) Attached hereto as **Schedule “B”** are true and complete copies of the by-laws of the Corporation (the “**By-laws**”) enacted on or before the date hereof. The By-laws have been in full force and effect from and after the date thereof as set out therein and are in full force and effect, unamended as of the date hereof. No proceeding has been

taken to the date hereof to authorize the Corporation to amend the By-laws and neither the directors nor the shareholders of the Corporation have passed, confirmed or consented to any resolutions amending or varying the By-laws.

- (d) Attached hereto as **Schedule “C”** is a true and complete copy of a unanimous shareholders’ agreement between the shareholders of the Corporation and the Corporation (the “**Unanimous Shareholders’ Agreement**”) executed on or before the date hereof. The Unanimous Shareholders’ Agreement has been in full force and effect from and after the date thereof as set out therein and is in full force and effect, unamended as of the date hereof.
- (e) The minute books and corporate records of the Corporation made available to [●] are the original minute books and corporate records of the Corporation and contain all minutes of meetings, resolutions and proceedings of the shareholders and directors of the Corporation to the date hereof and there have been no meetings, resolutions or proceedings authorized or passed by the shareholders or directors of the Corporation to the date hereof not reflected in such minute books and corporate records. Such minute books and corporate records are true, complete and correct in all material respects and there are no changes, additions or alterations necessary to be made thereto to make such minute books and corporate records true, complete and correct in all material respects.
- (f) At the date hereof, no winding-up, liquidation, dissolution, insolvency, bankruptcy, amalgamation, arrangement, reorganization or continuation proceedings in respect of the Corporation have been commenced or are being contemplated by the Corporation, and the Corporation has no knowledge of any such proceedings having been commenced or contemplated in respect of the Corporation by any other party.
- (g) At the date hereof, the Corporation is up-to-date in the filing of all returns and other documents required to be filed by it by governmental authorities, including under corporate, securities and tax legislation, and no notice of any proceedings to cancel its certificate of incorporation or otherwise to terminate its existence has been received by the Corporation.
- (h) Pursuant to the Unanimous Shareholders’ Agreement, the powers of the directors of the Corporation to manage the business and affairs of the Corporation, whether such powers arise from the [**Business Corporations Act (Ontario) (the “Act”)**], the Articles or the By-laws of the Corporation, or otherwise, are restricted to the fullest extent permitted by law, and, in accordance with the Act and the Unanimous Shareholders’ Agreement, the shareholders of the Corporation have and enjoy and may exercise and perform all the rights, powers, and duties of the directors of the Corporation to manage the business and affairs of the Corporation.
- (i) There are no provisions in the Articles, By-laws, Unanimous Shareholders’ Agreement or in any other agreement binding on the Corporation which:

- (i) restrict or limit the powers of the Corporation to enter into:
  - (1) a certain project agreement with Contracting Authority made as of [•], 2020 (as the same may be amended, supplemented, restated or otherwise modified from time to time, the “**Project Agreement**”) pursuant to which the Corporation will design, build and finance the Facility;
  - (2) a lenders’ direct agreement between the Corporation, Contracting Authority and the Lenders’ Agent;
  - (3) a design and construction contract between the Corporation and [**Construction Contractor**] (the “**Construction Contractor**”);
  - (4) an insurance trust agreement between the Corporation, Contracting Authority, the Lenders’ Agent and [**REDACTED**];
  - (5) [*NTD: List other documents delivered at Financial Close.*],  
  
(collectively, the “**Documents**”); or
- (ii) restrict or limit the authority of the directors or shareholders of the Corporation by resolution to delegate the powers set out in subparagraph (i) to a director or an officer of the Corporation.

## 2. Resolutions

- (a) Annexed hereto, forming part hereof and marked as **Schedule “D”** are true and complete copies of the resolutions of the [**directors/shareholders**] of the Corporation (the “**Resolutions**”), which have been duly and validly passed in accordance with applicable law, constituting authority and approval for the Corporation, *inter alia*, to enter into the Documents. The Resolutions are the only resolutions of the Corporation pertaining to the subject matter thereof and the same are in full force and effect, unamended as of the date hereof.
- (b) The authorization, execution and delivery of each Document contemplated in the Resolutions, and the performance by the Corporation of its obligations thereunder, do not constitute or result in a violation or breach or default under:
  - (i) the Articles, By-laws or the Unanimous Shareholders’ Agreement;
  - (ii) to the best of my knowledge and belief after due diligence, any order of any Canadian or Ontario governmental body by which it is bound;
  - (iii) to the best of my knowledge and belief after due diligence, the terms of any agreement or instrument under which any of its property or assets is bound;  
or

- (iv) to the best of my knowledge and belief after due diligence, any writ, judgment, injunction, determination or award which is binding on the Corporation or any of its properties.
- (c) To the best of my knowledge and belief after due diligence, there is no claim, action, suit, proceedings, arbitration, investigation or inquiry before any governmental agency, court or tribunal, foreign or domestic, or before any private arbitration tribunal, pending or threatened against the Corporation, or involving its properties or business. To the best of my knowledge and belief after due diligence, no administrative or court decree is outstanding in respect of the Corporation or its assets.
- (d) To the best of my knowledge and belief after due diligence, no consent, approval or other order of any Canadian or Ontario governmental authority which has not been obtained is required to permit the Corporation to execute and deliver the Documents.

**3. No Breach or Default**

Neither the execution and delivery by the Corporation of the Documents nor the consummation of the transactions therein contemplated nor the fulfilment or compliance with the terms thereof will contravene or result in a breach of any of the terms, conditions or provisions of, or constitute a default under the Articles, By-laws, Unanimous Shareholders' Agreement or under any other agreement binding on the Corporation.

**4. Specimen Signatures**

The persons whose names are set forth below are, at the date hereof, officers and/or directors of the Corporation, duly elected or appointed to the office or offices set forth opposite their respective names and authorized to execute the Documents on behalf of the Corporation. The signatures set forth opposite their respective names are the true signatures of those persons:

<u>NAME</u>	<u>POSITION</u>	<u>SIGNATURE</u>
[●]		_____
[●]		_____
[●]		_____
[●]		_____

**5. Capital**

Listed below are all of the issued and outstanding shares in the capital of the Corporation and the registered owner of such shares:

<u>ISSUED SHARES</u>	<u>REGISTERED OWNER</u>
----------------------	-------------------------

Attached hereto as **Schedule “E”** are true copies of all certificates in respect of such issued and outstanding shares. The Corporation has issued no securities, including (without limitation) securities convertible or exchangeable into shares and/or securities in respect of debt, other than such issued and outstanding shares as are listed above.

DATED this \_\_\_\_ day of \_\_\_\_\_, 202\_\_.

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Name: **[REDACTED]**

Title: **[REDACTED]**

**APPENDIX C**

**FORM OF PROJECT CO/PROJECT CO PARTY/CONSTRUCTION GUARANTOR  
OPINION**

[INSERT DATE]

**Ontario Infrastructure and Lands  
Corporation**  
Infrastructure Ontario  
Suite 2000, 1 Dundas St. West  
Toronto, Ontario M5G 1Z3

**Ministry of the Attorney General**  
720 Bay Street  
5<sup>th</sup> Floor  
Toronto, Ontario  
M5G 2K1

**Gowling WLG (Canada) LLP**  
1 First Canadian Place  
100 King Street West, Suite 1600  
Toronto, Ontario  
M5X 1G5

Dear Sirs/Mesdames:

**Re: Brampton Courthouse Addition Phase 2 & Toronto Region Bail Centre Project**

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We have acted as counsel to Trans/FORM by Pomerleau Inc. (“**Project Co**”) and [REDACTED] (the “**Construction Contractor**”) in connection with the public-private partnership transaction whereby Project Co has agreed to enter into a design, build and finance agreement for the Brampton Courthouse Addition Phase 2 & Toronto Region Bail Centre Project. *[Note to Proponents: Additional parties to be added depending on consortium structure and/or the financing package.]*

This opinion is being delivered to Her Majesty the Queen in Right of Ontario as represented by the Minister of Government and Consumer Services, as represented by Ontario Infrastructure and Lands Corporation (“**Contracting Authority**”), the Ministry of the Attorney General and their counsel pursuant to 1.18 of Schedule 2 to the project agreement made as of [●], 2021 between Contracting Authority and Project Co (as the same may be amended, supplemented, restated or otherwise modified from time to time, the “**Project Agreement**”).

All capitalized terms used but not otherwise defined in this opinion shall have the respective meanings ascribed thereto in the Project Agreement.

In our capacity as counsel to Project Co and the Construction Contractor, we have participated in the preparation and negotiation, and have examined an executed copy, of each of the following documents (unless otherwise indicated, all documents are dated as of [●], 2021]):

1. the Project Agreement; and
2. the following project documents (collectively, the “**Implementation Documents**”):
  - (a) the Design and Construction Contract;
  - (b) the Insurance Trust Agreement;
  - (c) the Lenders’ Direct Agreement;
  - (d) the Independent Certifier Agreement;
  - (e) the Construction Contractor’s Direct Agreement;
  - (f) the Lending Agreements;
  - (g) the Performance Bond;
  - (h) the Multiple Obligee Rider to the Performance Bond;
  - (i) the Labour and Material Payment Bond;
  - (j) the Multiple Obligee Rider to the Labour and Material Payment Bond; and
  - (k) the Performance Guarantee of Construction Guarantor.
  - (l) *[NTD: List other documents delivered at the date of the Project Agreement.]*

The Project Agreement and the Implementation Documents are hereinafter collectively referred to as the “**Documents**”, and each is individually referred to as a “**Document**”. *[NTD: Additional documents to be added depending on consortium structure and/or the financing package.]*

We are qualified to practise law in the Province of Ontario. We have made no investigation of the laws of any jurisdiction other than Ontario, and the opinions expressed below are confined to the laws of Ontario and the federal laws of Canada applicable therein as at the date hereof.

We do not act as corporate counsel to **[Project Co or the Construction Contractor]**, nor have we participated in the general maintenance of their corporate records and corporate proceedings. Therefore, in expressing certain of the opinions below, we have, where indicated, relied exclusively, and without any independent investigation or enquiry, on certificates of public officials and a certificate of an officer of each of Project Co and the Construction Contractor dated as of the date hereof (the “**Officer’s Certificates**”) as to certain factual matters.

### **Searches and Reliance**

We have conducted, or have caused to be conducted, the searches identified in Schedule “A” (the “**Searches**”) for filings or registrations made in those offices of public record listed in Schedule “A”. The Searches were conducted against the current name and all former names of Project Co and the Construction Contractor (including, in each case, both the English and French versions, if any). The results of the Searches are set out in Schedule “A”.

We have also made such investigations and examined originals or copies, certified or otherwise identified to our satisfaction, of such certificates of public officials and of such other certificates, documents and records as we have considered necessary or relevant for purposes of the opinions expressed below, including, without limitation, the Officer’s Certificates.

We have relied exclusively, and without any independent investigation or enquiry, on the Officer’s Certificates and the certificates of public officials with respect to certain factual matters.

In connection with the opinions set forth in paragraphs [1 and 2] below, we have relied exclusively on Certificates of Status issued by the [**Ministry of Government Services (Ontario)**] of even date, copies of which are attached as Schedule “B”.

In connection with the opinions set forth in paragraphs [6, 8, 10, 12 and 14] below, we have relied exclusively, and without any independent investigation or enquiry, upon the opinion of [●] dated [●], 20[●] (the “**CC Opinion**”), a copy of which has been delivered to you. To the extent that the CC Opinion contains assumptions, qualifications, limitations or definitions, or is expressed as relying on any certificate(s) or other documents identified therein, the opinions herein expressed in reliance on the CC Opinion should be read as incorporating the identical assumptions, qualifications, limitations, definitions and reliances.

### **Assumptions**

For the purposes of the opinions expressed herein, we have assumed:

1. The genuineness of all signatures, the authenticity of all documents submitted to us as originals, the conformity to originals of all documents submitted to us as certified, true, conformed, photostatic or notarial copies or facsimiles thereof and the authenticity of the originals of such certified, true, conformed, photostatic or notarial copies or facsimiles.
2. Each of the parties (other than Project Co and the Construction Contractor) to each of the Documents is and was, at all relevant times, a subsisting corporation, partnership, limited partnership, limited liability company or trust, as applicable, under the laws of its jurisdiction of formation.
3. Each of the parties (other than Project Co and the Construction Contractor) has (and had) the corporate power, authority and capacity to own its property and assets and to carry on its business as such business is now (or as was then) being carried on by it, has (or had) all requisite corporate power, authority and capacity to execute and deliver each Document to



which it is party and to perform its obligations thereunder, has taken all necessary corporate action, as applicable, to authorize the execution and delivery of each Document to which it is a party and the performance of its obligations thereunder, and has duly executed and delivered each Document to which it is a party and each Document to which it is a party is a legal, valid and binding obligation of such party enforceable against it in accordance with its terms.

4. The completeness, truth and accuracy of all facts set forth in the Officer's Certificates.
5. The completeness, truth and accuracy of all facts set forth in official public records and certificates and other documents supplied by public officials.
6. Value has been given by each of the parties (other than Project Co and the Construction Contractor) to Project Co and the Construction Contractor.

### **Opinions**

Based upon and subject to the foregoing, and to the qualifications, exceptions and limitations hereinafter expressed, we are of the opinion that, as of the date hereof:

#### *Incorporation and Existence*

7. Project Co is a corporation incorporated under the laws of **[the Province of Ontario]** and has not been dissolved.
8. The Construction Contractor is a corporation incorporated under the laws of **[the Province of Ontario]** and has not been dissolved.

#### *Corporate Power and Capacity*

9. Project Co has the corporate power and capacity to own or lease its properties and assets, to carry on its business as it is currently being conducted and as it is contemplated to be conducted under the Project Agreement, and to enter into and perform its obligations under each of the Documents to which it is a party.
10. The Construction Contractor has the corporate power and capacity to own or lease its properties and assets, to carry on its business as it is currently being conducted and as it is contemplated to be conducted under the Documents, and to enter into and perform its obligations under each of the Documents to which it is a party.

#### *Corporate Authorization*

11. Project Co has taken all necessary corporate action to authorize the execution and delivery of, and the performance of its obligations under, each of the Documents to which it is a party.

12. The Construction Contractor has taken all necessary corporate action to authorize the execution and delivery of, and the performance of its obligations under, each of the Documents to which it is a party.

*Execution and Delivery*

13. Project Co has duly executed and delivered each of the Documents to which it is a party.
14. The Construction Contractor has duly executed and delivered each of the Documents to which it is a party.

*Enforceability*

15. Each of the Documents to which Project Co is a party constitutes a legal, valid and binding obligation of Project Co, enforceable against it in accordance with its terms.
16. Each of the Documents to which the Construction Contractor is a party constitutes a legal, valid and binding obligation of the Construction Contractor, enforceable against it in accordance with its terms.

*No Breach or Default*

17. The execution and delivery by Project Co of the Documents to which it is a party does not, and the performance by Project Co of its obligations under each such Document in accordance with its terms will not, breach or constitute a default under (i) its articles, by-laws or unanimous shareholders' agreement, or (ii) the provisions of any law, statute, rule or regulation to which Project Co is subject.
18. The execution and delivery by the Construction Contractor of the Documents to which it is a party does not, and the performance by the Construction Contractor of its obligations under each such Document in accordance with its terms will not, breach or constitute a default under (i) its articles, by-laws or unanimous shareholders' agreement, or (ii) the provisions of any law, statute, rule or regulation to which the Construction Contractor is subject.

*Regulatory Approvals*

19. No authorization, consent, permit or approval of, or other action by, or filing with or notice to, any governmental agency or authority, regulatory body, court, tribunal or other similar entity having jurisdiction is required in connection with the execution and delivery by Project Co of the Documents to which it is a party and the performance of its obligations thereunder.
20. No authorization, consent, permit or approval of, or other action by, or filing with or notice to, any governmental agency or authority, regulatory body, court, tribunal or other similar entity having jurisdiction is required in connection with the execution and delivery by the Construction Contractor of the Documents to which it is a party and the performance of its obligations thereunder.

### **Qualifications**

Our opinions herein are subject to the following qualifications and reservations, namely:

1. The enforceability of any Document and the rights and remedies set out therein or any judgment arising out of or in connection therewith is subject to and may be limited by any applicable bankruptcy, reorganization, winding-up, insolvency, moratorium or other laws of general application affecting creditors' rights from time to time in effect.
2. The enforceability of each of the Documents and the rights and remedies set out therein is subject to and may be limited by general principles of equity, and no opinion is given as to any specific remedy that may be granted, imposed or rendered, including equitable remedies such as those of specific performance and injunction, or the availability of equitable defences.
3. The enforceability of any Document will be subject to the limitations contained in the *Limitations Act, 2002* (Ontario), and we express no opinion as to whether a court may find any provision of any Document to be unenforceable as an attempt to vary or exclude a limitation period under that Act.
4. Pursuant to the *Currency Act* (Canada), a judgment in money rendered by a Court in the Province of Ontario must be awarded in Canadian currency and such judgment may be based on a rate of exchange in effect other than the day of payment of the judgment.
5. To the extent that a particular contractual provision is characterized by a Court as a penalty and not as a genuine pre-estimate of damages, it will not be enforceable.
6. A Court may not treat as conclusive those certificates and determinations which the Documents state are to be so treated.
7. A receiver or receiver and manager appointed pursuant to the provisions of any Document, for certain purposes, may not be treated by a Court as being solely the agent of Project Co notwithstanding any agreement to the contrary.
8. The ability to recover or claim for certain costs or expenses may be subject to judicial discretion.
9. With respect to any provisions of the Documents pursuant to which the parties to such Documents are permitted or required to submit a dispute arising out of such Documents to arbitration, we express no opinion as to the enforceability of such arbitration provisions in all circumstances since under the *Arbitration Act, 1991* (Ontario) a court of competent jurisdiction in Ontario may, in its discretion and upon certain grounds, refuse to stay judicial proceedings in which event an arbitration under such arbitration provisions may not be commenced or continued. In addition, the *Arbitration Act, 1991* (Ontario) provides that a court may hear an appeal of an arbitration award on a question of law, or set aside an arbitration award or declare it invalid, in each case on certain prescribed grounds.

10. Any requirement in any of the Documents that interest be paid at a higher rate after than before default may not be enforceable.
11. The effectiveness of provisions which purport to relieve a person from a liability or duty otherwise owed may be limited by law, and provisions requiring indemnification or reimbursement may not be enforced by a Court, to the extent that they relate to the failure of such person to perform such duty or liability.
12. No opinion is expressed as to the enforceability of any provision contained in any Document which purports to sever from the Document any provision therein which is prohibited or unenforceable under applicable law without affecting the enforceability or validity of the remainder of the document.
13. No opinion is expressed regarding any waiver of service of process, presentment, demand, protest or notice of dishonour which may be contained in any of the Documents.
14. Any award of costs is in the discretion of a Court of competent jurisdiction.
15. The enforceability of rights of indemnity set out in the Documents may be limited under applicable law to the extent that they directly or indirectly relate to liabilities imposed by law on Contracting Authority for which it would be contrary to public policy to require Project Co to indemnify Contracting Authority or to the extent that they constitute the indirect enforcement of a foreign revenue or penal law.
16. We express no opinion as to the enforceability by any person who is not a party to the Documents of any provision therein that purports to bind or affect or confer a benefit on such person.

This opinion is being delivered solely in connection with the transaction addressed herein and may not be relied upon by any person other than the addressees, and their successors and permitted assigns, or for any purpose other than the transaction addressed herein.

Yours very truly,

**[INSERT NAME OF LAW FIRM]**

APPENDIX D

FORM OF  
CERTIFICATE OF AN OFFICER OF  
ONTARIO INFRASTRUCTURE AND LANDS CORPORATION  
(the “Corporation”)

**TO:** TRANS/FORM BY POMERLEAU INC. (“Project Co”)

**AND TO:** [REDACTED]

**AND TO:** [REDACTED]

**AND TO:** [REDACTED]

**RE:** Project Agreement (as amended, supplemented or modified from time to time, the “**Project Agreement**”) dated the [●] day of [●], 2021 between Her Majesty the Queen in Right of Ontario as represented by the Minister of Government and Consumer Services, as represented by Ontario Infrastructure and Lands Corporation and Project Co

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I, [REDACTED], the [REDACTED] of the Corporation and an authorized signatory of the Corporation and being duly authorized by the Corporation to deliver this certificate, hereby make the following certifications and confirmations for and on behalf of the Corporation and without incurring personal liability and that the same may be relied upon by you without further inquiry:

1. Attached hereto as **Schedule ”A”** is a true and complete copy of (i) the resolutions of the directors of the Corporation regarding the execution of public works projects undertaken by the Corporation and certain other matters set forth therein; and (ii) an excerpt of the resolutions of the directors of the Corporation relating to delegation of signing authority (collectively, the “**Execution Resolutions**”), which have been duly and validly passed in accordance with applicable law. The Execution Resolutions are the only resolutions of the Corporation pertaining to the subject matter thereof and the same are in full force and effect, unamended as of the date hereof.
2. Attached hereto as **Schedule ”B”** is a true and complete copy of the resolutions of the directors of the Corporation approving the selection of Project Co as the successful bidder for the Brampton Courthouse Addition Phase 2 & Toronto Region Bail Centre Project (the “**Project Resolutions**”). The Project Resolutions are the only resolutions of the Corporation pertaining to the subject matter thereof and the same are in full force and effect, unamended as of the date hereof.
3. To the knowledge of the undersigned, after due inquiry as of the date hereof, the Minister of Infrastructure (the “**Minister**”) has not given a direction pursuant to Subsection 4(3) of the *Ontario Infrastructure and Lands Corporation Act*, 2011, S.O. 2011, c.9, Schedule 32, as amended (the “**Act**”) that limits the scope of the objects of the Corporation as they are set out in Subsection 4(1) of the Act.

4. The following named persons, on or as of the date hereof, are duly elected or appointed officers of the Corporation, as evidenced by the holding of the office or offices set forth opposite their names, are proper signing officers of the Corporation and are authorized to execute and deliver Project Documents (as such a term is defined in the declaration of management of the Corporation of even date herewith) relating to the Brampton Courthouse Addition Phase 2 & Toronto Region Bail Centre Project on behalf of the Corporation. The signatures set forth opposite their respective names are the true signatures of those persons.

<u>NAME</u>	<u>POSITION</u>	<u>SIGNATURE</u>
[REDACTED]	[REDACTED]	

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2021.

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

**APPENDIX E  
DECLARATION OF MANAGEMENT**

**ONTARIO INFRASTRUCTURE AND LANDS CORPORATION**

**(the “Corporation”)**

**DECLARATION OF MANAGEMENT**

**WHEREAS** Her Majesty The Queen in Right of Ontario, as represented by the Minister of Government and Consumer Services, as represented by the Corporation and Trans/FORM by Pomerleau Inc. propose to enter into a Project Agreement relating to the Brampton Courthouse Addition Phase 2 and Toronto Region Bail Centre Project (the “**Project**”);

**AND WHEREAS** the Corporation will from time to time enter into agreements for the design, construction and/or facilities management of the Project assigned to the Corporation by the Minister of Infrastructure and as well as ancillary agreements, instruments, certificates and other documents required to give effect to, or contemplated to be delivered in accordance with the Project (collectively, “**Project Documents**”);

**NOW THEREFORE THE CORPORATION’S MANAGEMENT HEREBY  
DECLARES THAT:**

1. by resolution of the board of directors of the Corporation passed on [●], 2021, the board of directors of the Corporation has authorized the Corporation’s management (for and in the name of and on behalf of the Corporation) to execute and deliver the Project Documents and do all such other acts and things as the Corporation’s management may determine to be necessary or advisable to carry out the transactions contemplated by the applicable Project Documents;
2. the Corporation’s management may execute and deliver the Project Documents to which the Corporation may become a party and any other documents, instruments or agreements delivered in connection with the Project Documents from time to time (collectively, together with the Project Documents, the “**Documents**”) all in such form and on such terms as the management of the Corporation executing such Documents in accordance with this declaration may approve, such approval to be evidenced conclusively by the execution of such Documents by the Corporation’s management; and
3. the Project Documents to be executed and delivered by the Corporation in connection with the Project and the transactions and obligations contemplated thereunder are for the purpose of carrying out the objects of the Corporation and the Corporation shall not and will not assert the contrary against any person dealing with the Corporation or any person who has acquired an interest in the Project from the Corporation.

*[Signature page follows]*

**THIS DECLARATION** may be signed in counterparts, and all such counterparts, when taken together, shall constitute one and the same declaration, effective on this date.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2021.

---

Name: [REDACTED]

Title: [REDACTED]



**SCHEDULE 3**

**SUBCONTRACTOR’S DIRECT AGREEMENT**

**THIS AGREEMENT** is made as of [●] day of [●], 20[●]

**BETWEEN:**

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**, as represented by the Minister of Government and Consumer Services, as represented by Ontario Infrastructure and Lands Corporation, 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

(“**Contracting Authority**”)

– AND –

**TRANS/FORM BY POMERLEAU INC.**, a corporation incorporated under the laws of [REDACTED]

(“**Project Co**”)

– AND –

[REDACTED], a corporation incorporated under the laws of the Province of [REDACTED]

(the “**Construction Contractor**”)

– AND –

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

(the “**Subcontractor**”)

**WHEREAS:**

- A. Contracting Authority and Project Co have entered into the Project Agreement, which requires Project Co to enter into, and to cause the Construction Contractor and the Subcontractor to enter into, this Subcontractor’s Direct Agreement with Contracting Authority.
- B. Project Co and the Construction Contractor have entered into the Design and Construction Contract, which requires the Construction Contractor to enter into, and cause the

Subcontractor to enter into, this Subcontractor's Direct Agreement with Contracting Authority.

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

**1. DEFINITIONS**

In this Subcontractor's Direct Agreement, unless the context otherwise requires:

- 1.1 **"Approved Purposes"** has the meaning given in the Project Agreement.
- 1.2 **"Business Day"** has the meaning given in the Project Agreement.
- 1.3 **"Construction Contractor"** has the meaning given in the preamble.
- 1.4 **"Construction Contractor's Direct Agreement"** has the meaning given in the Project Agreement.
- 1.5 **"Contracting Authority"** has the meaning given in the preamble.
- 1.6 **"Default Notice"** has the meaning given in Section 5.1.
- 1.7 **"Design and Construction Contract"** has the meaning given in the Project Agreement.
- 1.8 **"Governmental Authority"** has the meaning given in the Project Agreement.
- 1.9 **"Lenders"** has the meaning given in the Project Agreement.
- 1.10 **"Lenders' Direct Agreement"** has the meaning given in the Project Agreement.
- 1.11 **"Party"** means Contracting Authority, the Construction Contractor, the Subcontractor or Project Co, and **"Parties"** means Contracting Authority, the Construction Contractor, the Subcontractor and Project Co.
- 1.12 **"Project"** has the meaning given in the Project Agreement.
- 1.13 **"Project Agreement"** means the project agreement made on or about June 1, 2021 between Contracting Authority and Project Co.
- 1.14 **"Project Co"** has the meaning given in the preamble.
- 1.15 **"Step-In-Notice"** has the meaning given in Section 6(a).

- 1.16 “Subcontract” means the subcontract [●] *[NTD: Describe applicable subcontract.]*.
- 1.17 “Subcontractor” has the meaning given in the preamble.
- 1.18 “Substitute” has the meaning given in Section 6(b).
- 1.19 “Works” has the meaning given in the Project Agreement.

## **2. INTERPRETATION**

This Subcontractor’s Direct Agreement shall be interpreted according to the following provisions, unless the context requires a different meaning:

- 2.1 The headings in this Subcontractor’s Direct Agreement are for convenience of reference only, shall not constitute a part of this Subcontractor’s Direct Agreement, and shall not be taken into consideration in the interpretation of, or affect the meaning of, this Subcontractor’s Direct Agreement.
- 2.2 Unless the context otherwise requires, references to specific Sections, Clauses, Paragraphs, Subparagraphs, and other divisions are references to such Sections, Clauses, Paragraphs, Subparagraphs, or divisions of this Subcontractor’s Direct Agreement and the terms “Section” and “Clause” are used interchangeably and are synonymous.
- 2.3 Words importing persons or parties are to be broadly interpreted and include an individual, corporation, limited liability company, joint stock company, 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.
- 2.4 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.
- 2.5 References to any standard, principle, agreement or document include (subject to all relevant approvals and any other provisions of this Subcontractor’s Direct Agreement concerning amendments) a reference to that standard, principle, agreement or document as amended, supplemented, restated, substituted, replaced, novated or assigned.
- 2.6 The words in this Subcontractor’s Direct Agreement shall bear their natural meaning.
- 2.7 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 Subcontractor’s Direct Agreement taken as a whole; and
- (b) “includes” and “including”, whether or not used with the words “without limitation” or “but not limited to”, shall not be deemed limited by the specific enumeration of items but shall, in all cases, be deemed to be without limitation and construed and interpreted to mean “includes without limitation” and “including without limitation”.

**2.8** In construing this Subcontractor’s Direct Agreement, the rule known as the *ejusdem generis rule* shall not apply nor shall any similar rule or approach to the construction of this Subcontractor’s Direct 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.

**2.9** Where this Subcontractor’s Direct 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.

**2.10** Where this Subcontractor’s Direct 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.

**2.11** Any reference to time of day or date means the local time or date in Toronto, Ontario.

**2.12** Unless otherwise indicated, time periods will be strictly construed.

**2.13** Whenever the terms “will” or “shall” are used in this Subcontractor’s Direct Agreement they shall be construed and interpreted as synonymous and to read “shall”.

### **3. CONFLICT IN DOCUMENTS**

**3.1** In the event of ambiguities, conflicts or inconsistencies between or among this Subcontractor’s Direct Agreement, the Construction Contractor’s Direct

Agreement, the Project Agreement and the Design and Construction Contract, this Subcontractor's Direct Agreement shall prevail.

- 3.2 In the event of ambiguities, conflicts or inconsistencies between or among this Subcontractor's Direct Agreement and the Lenders' Direct Agreement, the Lenders' Direct Agreement shall prevail.

#### **4. AGREEMENTS**

- 4.1 If the Subcontractor gives the Construction Contractor any notice of any default(s) under the Subcontract that may give the Subcontractor a right to terminate the Subcontract or to treat it as having been repudiated by the Construction Contractor or to discontinue the Subcontractor's performance thereunder, then the Subcontractor shall concurrently provide Project Co and Contracting Authority with a copy of such notice, an executed copy of the Subcontract and set out in reasonable detail the default(s).

#### **5. NO TERMINATION BY SUBCONTRACTOR WITHOUT DEFAULT NOTICE**

The Subcontractor shall not exercise any right it may have to terminate the Subcontract or to treat it as having been repudiated by the Construction Contractor or to discontinue the Subcontractor's performance thereunder unless:

- 5.1 the Subcontractor first delivers an executed copy of the Subcontract and a written notice (a "**Default Notice**") to Contracting Authority setting out in reasonable detail the default(s) on which the Subcontractor intends to rely in terminating the Subcontract or to treat it as having been repudiated by the Construction Contractor or to discontinue the Subcontractor's performance thereunder; and
- 5.2 within a period of 5 Business Days of Contracting Authority receiving the Default Notice the default(s) on which the Subcontractor intends to rely in terminating the Subcontract or to treat it as having been repudiated by the Construction Contractor or to discontinue the Subcontractor's performance thereunder have not been remedied; and provided that if, within such period of 5 Business Days, Contracting Authority agrees to pay the Subcontractor's reasonable costs of continued performance, such period of 5 Business Days shall be extended to 45 days.

#### **6. NOVATION OF THE SUBCONTRACT**

- 6.1 The Subcontractor acknowledges and agrees that where the Design and Construction Contract has been terminated:
- (a) by Project Co; or
  - (b) as a result of the termination of the Project Agreement; or

(c) due to the insolvency of the Construction Contractor,

the Subcontract shall not terminate solely by reason of the termination of the Design and Construction Contract unless Contracting Authority shall have failed to request a novation of the Subcontract pursuant to Section 6.2 within 20 days of the date of such termination.

**6.2** Contracting Authority may at any time if:

- (a) the Project Agreement and the Design and Construction Contract have been terminated; or
- (b) Contracting Authority's right to terminate the Project Agreement has arisen and is continuing and as a result of such termination of the Project Agreement, the Design and Construction Contract would be terminated,

deliver a notice (a "**Novation Notice**") electing to novate the Subcontract either to Contracting Authority or a third party designated by Contracting Authority in the Novation Notice (the "**Substitute**"), provided that Contracting Authority can demonstrate to the Subcontractor, acting reasonably, that the Substitute shall have sufficient financial resources, or shall be supported by a satisfactory guarantee, to carry out the obligations of the Substitute under the Subcontract.

**6.3** Subject to Section 6.5, upon receipt by the Subcontractor of a Novation Notice:

- (a) the Construction Contractor and the Subcontractor will be deemed to be released from their existing and future obligations under the Subcontract to each other (except with respect to any and all indemnities from the Construction Contractor or the Subcontractor to the other in respect of the period prior to the receipt of the Novation Notice), and Contracting Authority or the Substitute, as applicable, and the Subcontractor will be deemed to assume those same existing and future obligations towards each other (except in respect of the aforesaid indemnities);
- (b) the existing and future rights of the Construction Contractor against the Subcontractor under the Subcontract and vice versa will be deemed to be cancelled (except with respect to any and all indemnities from the Construction Contractor or the Subcontractor to the other in respect of the period prior to the receipt of the Novation Notice), and Contracting Authority or the Substitute, as applicable, and the Subcontractor will be deemed to acquire those same existing and future rights against each other (except in respect of the aforesaid indemnities), subject to any applicable credit from the Subcontractor to Contracting Authority if Contracting Authority pays for the Subcontractor's reasonable costs of continued performance pursuant to Section 5;

- (c) any guarantee, bond or covenant in favour of the Construction Contractor from any third party in respect of any term, provision, condition, obligation, undertaking or agreement on the part of the Subcontractor to be performed, observed or carried out by the Subcontractor as contained in, referred to, or inferred from the Subcontract shall be assigned, novated or granted, as required by Contracting Authority or the Substitute, as applicable, each acting reasonably, to Contracting Authority or the Substitute, as applicable, and the Subcontractor shall cause such assignment, novation or grant on substantially the same terms and conditions as the original guarantee, bond or covenant, provided, however, that where Construction Contractor shall continue to hold, or shall continue to be entitled to or have rights under, such guarantee, bond or covenant as security for any obligations of the Subcontractor, the assignment, novation or grant of the guarantee, bond or covenant to the extent of any such obligations to Construction Contractor shall be conditional on the satisfaction of those obligations to Construction Contractor; and
- (d) at Contracting Authority's request, the Subcontractor shall enter into, and shall cause any guarantor, covenantor or surety under any guarantee, bond or covenant referred to in Section 6(c)(iii) to enter into, and Contracting Authority shall or shall cause the Substitute to enter into, as applicable, all such agreements or other documents as reasonably necessary to give effect to the foregoing, including, without limitation, an agreement between Contracting Authority or the Substitute, as applicable, and the Subcontractor, acceptable to Contracting Authority and the Subcontractor, each acting reasonably, on substantially the same terms as the Subcontract.

**6.4** The Construction Contractor shall, at its own cost, cooperate fully with Contracting Authority and the Substitute in order to achieve a smooth transfer of the Subcontract to Contracting Authority or the Substitute, as applicable, and to avoid or mitigate in so far as reasonably practicable any inconvenience, including the administration of the Subcontract, ongoing supervisory activities and scheduling.

**6.5** The rights granted by Sections 6.3 and 6.4 shall be of no force or effect if, at any time the Subcontractor receives a Novation Notice, the Subcontractor has already received notice in writing from another entity entitled to the benefit of step-in rights relating to the Subcontract that it is or has validly exercised those step-in rights. If the Subcontractor receives any such notice on the same day as a Novation Notice, the Novation Notice shall be effective, except where the other notice is given by the Lenders, in which case such other notice and not the Novation Notice shall be effective.

**6.6** If Contracting Authority gives a Novation Notice within the time provided hereunder at any time after the Subcontractor has terminated the Subcontract or treated it as having been repudiated by Construction Contractor or discontinued the

Subcontractor's performance thereunder in accordance with the terms of this Subcontractor's Direct Agreement, the Subcontractor agrees that the Subcontract shall be reinstated and deemed to have continued despite any termination or treatment as having been repudiated, and Contracting Authority shall pay the Subcontractor's reasonable costs for re-commencing the obligations it has under the Subcontract and the Subcontractor shall be entitled to reasonable compensation and/or relief for re-commencing such obligations, having regard to the additional costs and delays incurred as a result of having terminated the Subcontract or having treated it as being repudiated by Construction Contractor or having discontinued its performance thereunder.

- 6.7** The Subcontractor acknowledges that if Contracting Authority novates the Subcontract to itself pursuant to Section 6.2, Contracting Authority shall have the right to further novate the Subcontract to a Substitute in accordance with and otherwise on, and subject to, the terms and conditions of this Subcontractor's Direct Agreement.

## **7. SUBCONTRACTOR LIABILITY**

- 7.1** The liability of the Subcontractor hereunder shall not be modified, released, diminished or in any way affected by:
- (a) any independent inspection, investigation or enquiry into any matter which may be made or carried out by or for Contracting Authority, or by any failure or omission to carry out any such inspection, investigation or enquiry; or
  - (b) the appointment by Contracting Authority of any other person to review the progress of or otherwise report to Contracting Authority in respect of the Project, or by any action or omission of such person whether or not such action or omission might give rise to any independent liability of such person to Contracting Authority,

provided always that nothing in this Section 7 shall modify or affect any rights which the Subcontractor might have otherwise had to claim contribution from any other person whether under statute or common law.

- 7.2** In the event Contracting Authority delivers a Novation Notice, the Subcontractor shall have no greater liability to Contracting Authority or any Substitute than it would have had to Construction Contractor under the Subcontract, and the Subcontractor shall be entitled in any proceedings by Contracting Authority or any Substitute to rely on any liability limitations in the Subcontract.



**8. PROJECT CO AND CONSTRUCTION CONTRACTOR AS PARTY**

- 8.1** Project Co acknowledges and agrees that the Construction Contractor shall not be in breach of the Design and Construction Contract by complying with its obligations hereunder.
- 8.2** Construction Contractor acknowledges and agrees that the Subcontractor shall not be in breach of the Subcontract by complying with its obligations hereunder.

**9. ASSIGNMENT**

- 9.1** Project Co shall not, without the prior written consent of Contracting Authority, assign, transfer, charge, subcontract, subparticipate or otherwise dispose of any interest in this Subcontractor's Direct Agreement except to the extent entitled to do so under the Project Agreement.
- 9.2** Contracting Authority may assign or otherwise dispose of the benefit of the whole or part of this Subcontractor's Direct Agreement to any person to whom Contracting Authority may assign or otherwise dispose of its interest in the Project Agreement pursuant to Section 48.2 of the Project Agreement but only in conjunction therewith, and shall provide written notice to Project Co, the Construction Contractor and the Subcontractor of such assignment or disposition.
- 9.3** The Construction Contractor shall not, without the prior written consent of Contracting Authority and Project Co, assign, transfer, charge, subcontract, subparticipate or otherwise dispose of any interest in this Subcontractor's Direct Agreement except as may be permitted under the Design and Construction Contract.
- 9.4** The Subcontractor shall not, without the prior written consent of Contracting Authority and Project Co, assign, transfer, charge, subcontract, subparticipate or otherwise dispose of any interest in this Subcontractor's Direct Agreement except as may be permitted under the Subcontract.

**10. NOTICES**

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

If to Contracting Authority: Infrastructure Ontario  
1 Dundas Street West, Suite 2000  
Toronto, Ontario  
M5G 1Z3

Attn: [REDACTED]  
Email: [REDACTED]

If to Project Co: [REDACTED]  
Email: [REDACTED]  
With a copy to [REDACTED]  
Email: [REDACTED]

If to the Construction Contractor: [REDACTED]  
Email: [REDACTED]  
With a copy to [REDACTED]  
Email: [REDACTED]

If to the Subcontractor: [Address]  
  
Email: [■]  
Attn.: [■]

**10.2** 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 Section 10.

**10.3** Any Party to this Subcontractor's Direct Agreement may, from time to time, change any of its contact information set forth in Section 10.1 by prior notice to the other Parties, 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.

**10.4** Subject to Sections 10.5, 10.6 and 10.7:

- (a) a notice given by registered mail shall be deemed to have been received on the third Business Day after mailing;
- (b) a notice given by hand delivery shall be deemed to have been received on the day it is delivered; and

(c) a notice given by electronic submission shall be deemed to have been received on the day it is transmitted by electronic submission.

**10.5** 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 Section 10.

**10.6** 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 4:00 p.m. (recipient's local time), then such notice shall be deemed to have been received by such recipient on the next Business Day.

**10.7** 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.

## **11. AMENDMENTS**

This Subcontractor's Direct 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 Subcontractor's Direct Agreement.

## **12. WAIVER**

**12.1** No waiver made or given by a Party under or in connection with this Subcontractor's Direct Agreement shall be binding or effective unless the waiver is in writing, signed by an authorized representative of the Party giving such waiver, and delivered by such Party to the other 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.

**12.2** 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.

## **13. RELATIONSHIP BETWEEN THE PARTIES**

The Parties are independent contractors. This Subcontractor's Direct Agreement is not intended to and does not create or establish between the Parties any relationship as partners, joint

venturers, employer and employee, master and servant, or, except as provided in this Subcontractor's Direct Agreement, of principal and agent.

#### **14. CONTRACTING AUTHORITY DESIGNATE**

At any time and from time to time, the Contracting Authority may designate any ministry, branch, agency, division, department or office of the Government of Ontario to carry out administrative responsibility for the rights and obligations of Contracting Authority under this Subcontractors' Direct Agreement and Project Co, the Construction Contractor and the Subcontractor may deal exclusively with the designated person in respect of all such matters and is entitled to rely on the actions, directions, requests, notices, consents, approvals, waivers, comments relating to the review of documentation and other administrative matters and decisions determined by such designated person from time to time, until the Contracting Authority has notified Project Co, the Construction Contractor and the Subcontractor in writing that such designated person is no longer the person designated by the Contracting Authority hereunder and such notice shall have effect on the later of the date of delivery of such notice and the date specified in the written notice. The Contracting Authority shall advise Project Co, the Construction Contractor and the Subcontractor in writing of any designation hereunder. The rights and obligations of the parties to this Subcontractors' Direct Agreement shall be in no way affected by reason of any such designation. Project Co, the Construction Contractor and the Subcontractor acknowledge the right of the Contracting Authority to delegate administrative responsibilities hereunder as set forth in this Section 14.

#### **15. ENTIRE AGREEMENT**

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

#### **16. SEVERABILITY**

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

**17. ENUREMENT**

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

**18. GOVERNING LAW AND JURISDICTION**

**18.1** This Subcontractor’s Direct 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.

**18.2** The Parties agree that the courts of the Province of Ontario and all courts competent to hear appeals therefrom shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Subcontractor’s Direct Agreement and hereby irrevocably attorn to the exclusive jurisdiction of such courts.

**18.3** Nothing in this Subcontractor’s Direct Agreement affects the rights, protections and immunities of the Crown under the *Proceedings Against the Crown Act* (Ontario).

**19. FURTHER ASSURANCE**

Each Party shall do all things, from time to time, and execute all further documents necessary to give full effect to this Subcontractor’s Direct Agreement.

**20. LANGUAGE OF AGREEMENT**

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

**21. COUNTERPARTS**

This Subcontractor’s Direct Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all 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.

**22. COPYRIGHT NOTICE**

The Parties acknowledge that Queen’s Printer for Ontario is the exclusive owner of copyright in the Project Agreement and this Subcontractors’ Direct Agreement.

*[SIGNATURE PAGES IMMEDIATELY FOLLOW]*



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

**HER MAJESTY THE QUEEN IN RIGHT OF  
ONTARIO** as represented by the Minister of  
Government and Consumer Services, as represented  
by Ontario Infrastructure and Lands Corporation

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

Per: \_\_\_\_\_  
Name:  
Title:

I/We have authority to bind the corporation.

**TRANS/Form BY POMERLEAU INC.**

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

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

I/We have authority to bind the corporation.



**[REDACTED]**

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

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

I/We have authority to bind the corporation.

**[SUBCONTRACTOR]**

Per: \_\_\_\_\_  
Name:  
Title:

Per: \_\_\_\_\_  
Name:  
Title:

I/We have authority to bind the corporation.

**SCHEDULE 4**

**LENDERS' DIRECT AGREEMENT**

**THIS AGREEMENT** is made as of the 1st day of June, 2021

**BETWEEN:**

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**, as represented by the Minister of Government and Consumer Services, as represented by Ontario Infrastructure and Lands Corporation, 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

(**“Contracting Authority”**)

**- AND -**

[REDACTED], acting as agent for and on behalf of the Lenders

(the **“Lenders’ Agent”**)

**- AND -**

**TRANS/FORM BY POMERLEAU INC.**, a corporation incorporated under the laws of [REDACTED]

(**“Project Co”**)

**WHEREAS:**

- A. Contracting Authority and Project Co have entered into the Project Agreement.
- B. The overriding priorities of MAG and Contracting Authority in entering into and implementing the Project Agreement are enabling MAG Staff, MAG Occupants, Non-MAG Occupants and other Province Persons to carry out all Contracting Authority Activities in a secure, dignified and efficient manner.
- C. Under the Lending Agreements, financing is to be provided to Project Co by the Lenders to finance the Works, conditional on, among other things, Project Co granting the Security to the Lenders’ Agent.
- D. The Lenders’ Agent has agreed to enter into this lenders’ direct agreement (the **“Lenders’ Direct Agreement”**) with Contracting Authority in relation to the Security, the exercise of its rights under the Security Documents and the remedying of breaches by Project Co under the Project Agreement.

- E. With a view to ensuring that Contracting Authority is able to properly and effectively discharge its duties, functions and responsibilities under Applicable Law, Project Co, the Lenders' Agent and the Lenders commit to working collaboratively, responsibly and cooperatively with Contracting Authority throughout the Project Term.

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

## **1. DEFINITIONS**

In this Lenders' Direct Agreement, unless the context otherwise requires:

- (a) **"Affiliate"** has the meaning given in the Project Agreement.
- (b) **"Appointed Representative"** means any of the following to the extent so identified in an Appointed Representative Notice:
  - (i) the Lenders' Agent, any Lender or any of their Affiliates;
  - (ii) a receiver or receiver and manager of Project Co appointed under the Security Documents;
  - (iii) a trustee in bankruptcy or court-appointed receiver of Project Co;
  - (iv) an administrator of Project Co;
  - (v) a person directly or indirectly owned or controlled by the Lenders' Agent and/or any of the Lenders; or
  - (vi) any other person approved by Contracting Authority (such approval not to be unreasonably withheld or delayed).
- (c) **"Appointed Representative Notice"** has the meaning given in Section 8(b).
- (d) **"Business Day"** has the meaning given in the Project Agreement.
- (e) **"Construction Contractor"** has the meaning given in the Project Agreement.
- (f) **"Construction Contractor's Direct Agreement"** has the meaning given in the Project Agreement.
- (g) **"Contracting Authority Project Documents"** means the Project Agreement and all other documents to which both Contracting Authority and Project Co are parties pursuant to or in connection with the Project Agreement.

- (h) “**Contracting Authority Activities**” has the meaning given in the Project Agreement.
- (i) “**Default Notice**” has the meaning given in Section 7(b)(i).
- (j) “**Design and Construction Contract**” has the meaning given in the Project Agreement.
- (k) “**Enforcement Action**” means any acceleration of amounts due and owing to the Lenders under any of the Lending Agreements and/or any enforcement proceeding or enforcement action commenced or taken under any of the Security Documents.
- (l) “**Enforcement Event**” means an event of default as defined in the Lending Agreements, or any other event which permits an Enforcement Action.
- (m) “**Exercise Date**” has the meaning given in Section 12(b).
- (n) “**Facility**” has the meaning given in the Project Agreement.
- (o) “**Governmental Authority**” has the meaning given in the Project Agreement.
- (p) “**Indebtedness Notice**” has the meaning given in Section 7(b)(ii).
- (q) “**Lender Representative**” means a representative (which may be the Lenders’ Agent) acting as agent or trustee for and on behalf of all of the lenders lending to a Suitable Substitute.
- (r) “**Lenders**” has the meaning given in the Project Agreement.
- (s) “**Lenders’ Agent**” means [REDACTED], in its capacity as Agent under the Lending Agreements, for and on behalf of the Lenders.
- (t) “**Lenders’ Construction Contractor Direct Agreement**” means the direct agreement among the Lenders’ Agent, the Construction Contractor and Project Co.
- (u) “**Lenders’ Consultant**” has the meaning given in the Project Agreement.
- (v) “**Lenders’ Direct Agreement**” means this lenders’ direct agreement.
- (w) “**Lending Agreements**” has the meaning given in the Project Agreement.
- (x) “**Longstop Date**” has the meaning given in the Project Agreement.
- (y) “**Notice Period**” means the period starting on the date of delivery of a Default Notice and ending 90 days later.

- (z) “**Novation Date**” has the meaning given in Section 10(a).
- (aa) “**Novation Notice**” has the meaning given in Section 10(a).
- (bb) “**Party**” means any of Contracting Authority, Project Co or the Lenders’ Agent, and “**Parties**” means all of Contracting Authority, Project Co and the Lenders’ Agent.
- (cc) “**person**” has the meaning given in the Project Agreement.
- (dd) “**Proceeding At Risk**” has the meaning given in the Project Agreement.
- (ee) “**Project**” has the meaning given in the Project Agreement.
- (ff) “**Project Agreement**” means the project agreement made on or about June 1, 2021 between Contracting Authority and Project Co.
- (gg) “**Project Co**” means Trans/FORM by Pomerleau Inc., a corporation incorporated under the laws of [REDACTED].
- (hh) “**Project Co Event of Default**” has the meaning given in the Project Agreement.
- (ii) “**Project Co Party**” has the meaning given in the Project Agreement.
- (jj) “**Project Documents**” has the meaning given in the Project Agreement.
- (kk) “**Province**” has the meaning given in the Project Agreement.
- (ll) “**Refinancing**” has the meaning given in the Project Agreement.
- (mm) “**Restricted Person**” has the meaning given in the Project Agreement.
- (nn) “**Scheduled Substantial Completion Date**” has the meaning given in the Project Agreement.
- (oo) “**Scheduled Interim Completion Date**” has the meaning given in the Project Agreement.
- (pp) “**Security**” means the security interests and hypothecs granted by Project Co to the Lenders’ Agent pursuant to the Security Documents.
- (qq) “**Security Documents**” means all security granted by Project Co to the Lenders (or any trustee or agent thereof, including the Lenders’ Agent) pursuant to or in connection with the Lending Agreements, including but not limited to:
  - (i) [REDACTED].

- (rr) “**Step-In Date**” means the date on which Contracting Authority receives a Step-In Notice from the Lenders’ Agent.
- (ss) “**Step-In Notice**” means the notice given by the Lenders’ Agent to Contracting Authority pursuant to Section 8(a) stating that the Lenders’ Agent is exercising its step-in rights under this Lenders’ Direct Agreement.
- (tt) “**Step-In Period**” means the period from the Step-In Date up to and including the earlier of:
- (i) the Step-Out Date;
  - (ii) the Termination Date (provided that Contracting Authority has complied with its obligations in Section 7 of this Lenders’ Direct Agreement);
  - (iii) the date that a transfer of Project Co’s rights and obligations under the Contracting Authority Project Documents to a Suitable Substitute pursuant to Section 10 becomes effective; and
  - (iv) if the Step-In Date occurs prior to the Substantial Completion Date, the earlier of:
    - (A) the date falling 120 days after the Longstop Date; or
    - (B) the date falling 2 years after the Step-In Date.
- (uu) “**Step-Out Date**” means the date falling 30 days after the date on which Contracting Authority receives a Step-Out Notice.
- (vv) “**Step-Out Notice**” has the meaning given in Section 9(a).
- (ww) “**Subcontractor’s Direct Agreement**” has the meaning given in the Project Agreement.
- (xx) “**Subsequent Indebtedness Notice**” has the meaning given in Section 7(c).
- (yy) “**Substantial Completion Date**” has the meaning given in the Project Agreement.
- (zz) “**Suitable Substitute**” means a person, approved in writing by Contracting Authority in accordance with Sections 10(b) and 10(c), which:
- (i) has the legal capacity, power and authority to become a party to and perform the obligations of Project Co under the Contracting Authority Project Documents; and
  - (ii) employs individuals having the appropriate qualifications, experience and technical competence, and having the resources available to it (including

committed financial resources and subcontracts) that are sufficient to enable it to perform the obligations of Project Co under the Contracting Authority Project Documents.

- (aaa) “**Termination Date**” has the meaning given in the Project Agreement.
- (bbb) “**Interim Completion Date**” has the meaning given in the Project Agreement.
- (ccc) “**Works**” has the meaning given in the Project Agreement.

## **2. INTERPRETATION**

This Lenders’ Direct Agreement shall be interpreted according to the following provisions, unless the context requires a different meaning:

- (a) The headings in this Lenders’ Direct Agreement are for convenience of reference only, shall not constitute a part of this Lenders’ Direct Agreement, and shall not be taken into consideration in the interpretation of, or affect the meaning of, this Lenders’ Direct Agreement.
- (b) Unless the context otherwise requires, references to specific Sections, Clauses, Paragraphs, Subparagraphs, and other divisions are references to such Sections, Clauses, Paragraphs, Subparagraphs, or divisions of this Lenders’ Direct Agreement and the terms “Section” and “Clause” are used interchangeably and are synonymous.
- (c) Words importing persons or parties are to be broadly interpreted and include an individual, corporation, limited liability company, joint stock company, 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.
- (d) 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.
- (e) References to any standard, principle, agreement or document include (subject to all relevant approvals and any other provisions of this Lenders’ Direct Agreement concerning amendments) a reference to that standard, principle, agreement or document as amended, supplemented, restated, substituted, replaced, novated or assigned.
- (f) The words in this Lenders’ Direct Agreement shall bear their natural meaning.
- (g) References containing terms such as:



- (i) “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 Lenders’ Direct Agreement taken as a whole; and
  - (ii) “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”.
- (h) In construing this Lenders’ Direct Agreement, the rule known as the *ejusdem generis rule* shall not apply nor shall any similar rule or approach to the construction of this Lenders’ Direct 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.
- (i) Where this Lenders’ Direct 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.
- (j) Where this Lenders’ Direct 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.
- (k) Any reference to time of day or date means the local time or date in Toronto, Ontario.
- (l) Unless otherwise indicated, time periods will be strictly construed.
- (m) Whenever the terms “will” or “shall” are used in this Lenders’ Direct Agreement they shall be construed and interpreted as synonymous and to read “shall”.

### **3. CONFLICT OF DOCUMENTS**

In the event of any ambiguity, conflict or inconsistency between the provisions of this Lenders’ Direct Agreement, the Project Agreement and the Construction Contractor’s Direct

Agreement, the provisions of this Lenders' Direct Agreement shall prevail and govern to the extent of such ambiguity, conflict or inconsistency.

#### **4. TERM**

- (a) This Lenders' Direct Agreement shall terminate automatically on the earliest of:
  - (i) the date on which all amounts which may be or become owing to the Lenders under the Lending Agreements have been irrevocably paid in full;
  - (ii) the Termination Date (provided that Contracting Authority has complied with its obligations in Section 7 of this Lenders' Direct Agreement); and
  - (iii) the date that any transfer of Project Co's rights and obligations under the Contracting Authority Project Documents to a Suitable Substitute pursuant to Section 10 becomes effective and the agreements contemplated in Section 10(e)(iii) are executed and delivered by the parties thereto.
- (b) Within 30 days following its occurrence, the Lenders' Agent shall provide notice to Contracting Authority of the date referred to in Section 4(a)(i).

#### **5. AGREEMENTS AND SECURITY**

- (a) Project Co and the Lenders' Agent shall not amend or modify the Lending Agreements, or any of them, except where Project Co is permitted to do so pursuant to Section 8.3 of the Project Agreement.
- (b) Project Co shall not, prior to the Substantial Completion Date, exercise any rights of voluntary prepayment, voluntary redemption, or other voluntary repayment of loan, as applicable, under the Lending Agreements without the prior written consent of Contracting Authority, acting in its sole discretion. In exercising its sole discretion to grant consent, Contracting Authority shall be entitled to request and consider, and Project Co shall be required to provide within 10 Business Days of a request by Contracting Authority, amongst other things and not limited to, the following:
  - (i) written certification by an officer of Project Co of the remaining Project Costs (as defined in the Lending Agreements) accrued and unpaid or expected to be incurred to achieve Substantial Completion and to fund any Project Accounts (as defined in the Lending Agreements) then not funded and required to be funded at or prior to the then anticipated (as approved by the Lenders' Consultant) by the Substantial Completion Date;
  - (ii) written certification by an officer of Project Co that no Funding Shortfall (as defined in the Lending Agreements) would reasonably be expected to arise as a consequence of such prepayment and/or redemption, including

- any related cancellation of unutilized commitments, if applicable, under the Lending Agreements;
- (iii) written confirmation from the Lenders' Consultant, addressed to Contracting Authority, that the Project Co's calculation in (i) above and Project Co's certification in (ii) above is, in the opinion of the Lenders' Consultant, correct;
  - (iv) written confirmation from the Lenders' Consultant, addressed to Contracting Authority, that no incremental delay in achieving the Interim Completion Date (beyond the Scheduled Interim Completion Date) or the Substantial Completion Date (beyond the Scheduled Substantial Completion Date) would reasonably be expected as a consequence of such prepayment and/or redemption and related cancellation of unutilized commitments, if applicable, under the Lending Agreements; and
  - (v) written confirmation from the Lenders' Consultant, addressed to Contracting Authority, that the Substantial Completion Date is likely to occur on or prior to the then Scheduled Substantial Completion Date.
- (c) Project Co acknowledges and consents to the arrangements set out in this Lenders' Direct Agreement, and agrees not to do or omit to do anything that may prevent any other Party from enforcing its rights under this Lenders' Direct Agreement.
  - (d) The Lenders' Agent acknowledges having received a copy of the Project Agreement.
  - (e) Contracting Authority acknowledges having received copies of the Lending Agreements, and confirms that they are in form and substance satisfactory to Contracting Authority as at the date of Financial Close.
  - (f) Contracting Authority acknowledges notice of and consents to the Security, and confirms that it has not received notice of any other security interest granted over Project Co's rights under any of the Contracting Authority Project Documents.
  - (g) Project Co and the Lenders' Agent hereby authorize and instruct Contracting Authority (and Contracting Authority agrees) to pay:
    - (i) the Interim Completion Payment, the Substantial Completion Payment and each other sum payable to Project Co under the Project Agreement to Account No. **[REDACTED]**; and
    - (ii) any payments or portions thereof relating to Separate FF&E and Transition Services Fee or holdbacks made in accordance with the

Construction Act payable to Project Co under the Project Agreement to Account No. [REDACTED],

and Project Co and Contracting Authority agree that upon the occurrence of an Enforcement Event, if so directed in writing by the Lenders' Agent upon giving reasonable notice, Contracting Authority shall pay any sum which it is obliged to pay to Project Co under the Project Agreement to a bank account specified by the Lenders' Agent.

- (h) Prior to the irrevocable payment in full of all amounts owing to the Lenders under the Lending Agreements, Contracting Authority shall not take any action to wind-up, liquidate, dissolve or appoint a receiver or receiver and manager of Project Co or to institute or sanction a voluntary arrangement or any other bankruptcy or insolvency proceedings in relation to Project Co.
- (i) The Lenders' Agent shall appoint the Lenders' Consultant who shall be responsible to advise the Lenders' Agent and the Lenders with respect to the amount of any Legislative Holdback to be maintained in accordance with the Project Agreement. Project Co agrees that it shall, in respect of all payments under the Project Agreement and Design and Construction Contract, comply with the Construction Act, including but not limited to Part IV thereof. The Lenders' Agent shall cause the Lenders' Consultant to provide Contracting Authority with a copy of any written assessment or report prepared by the Lenders' Consultant in relation to the status or progress of the Works under the Design and Construction Contract, including but not limited to, any certificate of payment, concurrently with its delivery to the Lenders' Agent. The Lenders' Agent acknowledges and agrees that this Section 5(i) shall constitute sufficient authority for the Lenders' Consultant to provide, without delay, a copy of any and all of its written assessments and reports to Contracting Authority.

## **6. ENFORCEMENT OF SECURITY BY LENDERS' AGENT**

- (a) The Lenders' Agent shall promptly notify Contracting Authority of any Enforcement Event, any Enforcement Action, any notice from the Lenders to Project Co to accelerate the maturity of any amounts owing by Project Co to the Lenders under the Lending Agreements or any notice from the Lenders to Project Co to demand repayment of any amounts owing by Project Co to the Lenders under the Lending Agreements.
- (b) The Lenders' Agent may assign, transfer or otherwise dispose of any right, title or interest it may have in, or rights or obligations it may have pursuant to, the Security Documents to a successor agent in accordance with the terms of the Lending Agreements except where:
  - (i) such assignment, transfer or other disposition would constitute a Refinancing and the provisions of Schedule 29 - Refinancing to the

Project Agreement have not been complied with in connection therewith;  
or

- (ii) the person to whom such assignment, transfer or other disposition is to be made, or an Affiliate of such person, is a Restricted Person or a person whose standing or activities (i) are inconsistent with MAG's role (in its reasonable opinion) generally in the Province or with respect to the Contracting Authority Activities; (ii) may compromise the reputation of Contracting Authority, MAG, MAG Occupants, Non-MAG Occupants and/or the Province; (iii) may compromise the integrity of the Province or the Facility; or (iv) are inconsistent with the nature of the Province's justice system, so as to affect public confidence in that system.
- (c) Any Lender may assign, transfer or otherwise dispose of any right, title or interest it may have in, or rights or obligations it may have pursuant to, the Lending Agreements in accordance with the terms of the Lending Agreements.

## **7. TERMINATION OF PROJECT AGREEMENT BY CONTRACTING AUTHORITY**

- (a) Subject only to the rights expressly afforded to the Lenders' Agent pursuant to, and the restrictions set forth in, this Section 7, Contracting Authority may, at any time, serve notice terminating the Project Agreement if it is entitled to do so under the terms of the Project Agreement.
- (b) At any time other than during the Step-In Period (with the restriction on termination during the Step-In Period set out in Section 7(d)), Contracting Authority shall not exercise any right it may have to terminate or serve notice terminating the Project Agreement for a Project Co Event of Default unless:
  - (i) Contracting Authority promptly delivers written notice (a "**Default Notice**") to the Lenders' Agent setting out the Project Co Event of Default in reasonable detail;
  - (ii) not later than 30 days after the date of a Default Notice, Contracting Authority delivers written notice (an "**Indebtedness Notice**") to the Lenders' Agent setting out:
    - (A) all amounts owed by Project Co to Contracting Authority and any other existing liabilities and unperformed obligations of Project Co to Contracting Authority of which Contracting Authority is aware (having made reasonable enquiry), in each case, as of the date on which Contracting Authority sent the Default Notice; and
    - (B) all amounts which will become owing by Project Co to Contracting Authority and any other liabilities and obligations of Project Co to

Contracting Authority of which Contracting Authority is aware (having made reasonable enquiry), in each case, on or before the end of the Notice Period; and

- (iii) the Notice Period has expired and the Lenders' Agent has not delivered a Step-In Notice.
- (c) At any time after Contracting Authority sends an Indebtedness Notice but before Contracting Authority receives a Step-In Notice, if Contracting Authority discovers amounts that have become owing by Project Co to Contracting Authority or any other liabilities or obligations of Project Co to Contracting Authority that have come due but which were not included in the Indebtedness Notice, Contracting Authority shall deliver written notice (a "**Subsequent Indebtedness Notice**") to the Lenders' Agent setting out those amounts, liabilities or obligations.
- (d) During the Step-In Period, Contracting Authority shall not terminate the Project Agreement on grounds:
  - (i) that the Lenders' Agent has served a Step-In Notice or enforced any Security Document; or
  - (ii) arising prior to the Step-In Date of which Contracting Authority was aware (having made due inquiry) and whether or not continuing at the Step-In Date unless:
    - (A) the grounds arose prior to the Substantial Completion Date, and the Substantial Completion Date does not occur on or before the date falling 120 days after the Longstop Date; or
    - (B) the grounds (whenever they first arose) did not give rise to any right to terminate the Project Agreement until after the Step-In Date; or
  - (iii) arising solely in relation to Project Co.
- (e) Contracting Authority shall be entitled to terminate the Project Agreement by written notice to Project Co and the Appointed Representative:
  - (i) if any amount referred to in Section 7(b)(ii)(A) has not been paid to Contracting Authority on or before the Step-In Date;
  - (ii) if any amount referred to in Section 7(b)(ii)(B) has not been paid on or before the last day of the Notice Period;

- (iii) if amounts included in a Subsequent Indebtedness Notice have not been paid on or before the date falling 30 days after the date on which the Subsequent Indebtedness Notice is delivered to the Lenders' Agent; or
- (iv) on grounds arising after the Step-In Date in accordance with the terms of the Project Agreement.

## **8. STEP-IN RIGHTS**

- (a) Subject to Section 8(b) and without prejudice to rights of the Lenders' Agent to enforce the Security, the Lenders' Agent may give Contracting Authority a Step-In Notice at any time:
  - (i) during which a Project Co Event of Default is subsisting (whether or not a Default Notice has been served);
  - (ii) during the Notice Period; or
  - (iii) during which an Enforcement Event is subsisting.
- (b) At least 5 Business Days before the Lenders' Agent delivers a Step-In Notice, the Lenders' Agent shall deliver written notice (an "**Appointed Representative Notice**") to Contracting Authority of:
  - (i) its intention to deliver a Step-In Notice; and
  - (ii) the identity of its proposed Appointed Representative.
- (c) Upon issuance of a Step-In Notice, the Appointed Representative shall assume, jointly with Project Co, all of Project Co's rights under the Contracting Authority Project Documents.
- (d) During the Step-In Period, Contracting Authority shall deal with the Appointed Representative instead of Project Co in connection with all matters related to the Contracting Authority Project Documents. Project Co agrees to be bound by all such dealings between Contracting Authority and the Appointed Representative to the same extent as if they had been between Contracting Authority and Project Co.

## **9. STEP-OUT RIGHTS**

- (a) The Appointed Representative may, at any time during the Step-In Period, deliver written notice (a "**Step-Out Notice**") to Contracting Authority to terminate the Step-In Period on the Step-Out Date.
- (b) On expiry of the Step-In Period:

- (i) the rights and obligations of the Appointed Representative in relation to Contracting Authority under the Contracting Authority Project Documents arising prior to the expiry of the Step-In Period will be assumed by Project Co to the exclusion of the Appointed Representative;
  - (ii) Contracting Authority will no longer deal with the Appointed Representative and will deal with Project Co in connection with all matters related to the Contracting Authority Project Documents; and
  - (iii) the Appointed Representative and Contracting Authority shall be and hereby are released from all obligations and liabilities to one another under the Contracting Authority Project Documents.
- (c) There will not be more than one Step-In Period in respect of any one Default Notice.

## **10. NOVATION TO SUITABLE SUBSTITUTE**

- (a) Subject to Section 10(b), at any time:
- (i) after an Enforcement Event has occurred;
  - (ii) during the Notice Period; or
  - (iii) during the Step-In Period,

the Lenders' Agent may deliver to Contracting Authority and any Appointed Representative written notice (a "**Novation Notice**") that it wishes to transfer Project Co's rights and obligations under the Contracting Authority Project Documents to a proposed transferee, together with all information reasonably necessary for Contracting Authority to decide whether the proposed transferee is a Suitable Substitute. The Novation Notice shall specify a Business Day not less than 30 days from the date on which Contracting Authority receives the Novation Notice ("**Novation Date**") for the transfer of Project Co's rights and obligations under the Contracting Authority Project Documents to the proposed transferee in accordance with the provisions of Section 10(e).

- (b) Contracting Authority shall promptly notify the Lenders' Agent of any additional information it requires in order to assess whether the proposed transferee is a Suitable Substitute. Contracting Authority shall notify the Lenders' Agent, in writing, as to whether the person to whom the Lenders' Agent proposes to transfer Project Co's rights and liabilities under the Contracting Authority Project Documents is approved by Contracting Authority as a Suitable Substitute, on or before the date falling 30 days after the later of the date of receipt by Contracting Authority of the Novation Notice and the date of receipt of any additional



information requested by Contracting Authority. For greater certainty, if Contracting Authority fails to respond within such period, Contracting Authority shall be deemed not to have approved the proposed transferee.

- (c) Contracting Authority shall not unreasonably withhold or delay its approval of a proposed transferee as a Suitable Substitute, but it shall, without limitation, be reasonable for Contracting Authority to withhold its approval if:
  - (i) there are unremedied breaches under the Project Agreement which are capable of being remedied by the Appointed Representative or the Suitable Substitute and there is no rectification plan acceptable to Contracting Authority, acting reasonably, in respect of such breaches;
  - (ii) the proposed transferee is a Restricted Person or other person who is not permitted to be a Project Co Party pursuant to the Project Agreement; or
  - (iii) the proposed security interests to be granted by the Suitable Substitute to the Lender Representative are materially different from the Security, materially adversely affect the ability of the Suitable Substitute to perform under the Contracting Authority Project Documents or have the effect of increasing any liability of Contracting Authority, whether actual or potential.
- (d) If Contracting Authority withholds its approval of a proposed transferee as a Suitable Substitute in accordance with Section 10(c), the Lenders' Agent may give one or more subsequent Novation Notices pursuant to the provisions of Section 10(a) containing changed particulars relating to the same proposed transferee or particulars relating to another proposed transferee which the Lenders' Agent has good cause to believe will be acceptable to Contracting Authority, acting reasonably, provided that only one Novation Notice may be outstanding at any one time.
- (e) On the Novation Date:
  - (i) Project Co and Contracting Authority will be released from their obligations under the Contracting Authority Project Documents to each other, and the Suitable Substitute and Contracting Authority will assume those same obligations towards each other;
  - (ii) each of the rights of Project Co against Contracting Authority under the Contracting Authority Project Documents and the rights of Contracting Authority against Project Co under the Contracting Authority Project Documents will be cancelled, and the Suitable Substitute and Contracting Authority will acquire those same rights against each other;

- (iii) the Parties will enter into, and the Lenders' Agent shall cause the Suitable Substitute and the Lender Representative to enter into, all such agreements or other documents as are reasonably necessary to give effect to the foregoing, including:
  - (A) an agreement between Contracting Authority and the Suitable Substitute, on substantially the same terms as the Project Agreement; and
  - (B) an agreement among Contracting Authority, the Suitable Substitute and the Lender Representative on substantially the same terms as this Lenders' Direct Agreement;
- (iv) any subsisting ground for termination by Contracting Authority of the Project Agreement will be deemed to have no effect and any subsisting Default Notice will be automatically revoked.

## **11. TRANSFERS**

Contracting Authority shall, at Project Co's cost and expense, take whatever action the Lenders' Agent, the Appointed Representative or a Suitable Substitute may reasonably require for perfecting any assumption or transfer of or release pursuant to Sections 8, 9 or 10, including the execution of any transfer or assignment, and the giving of any notice, order or direction and the making of any registration which, in each case, the Lenders' Agent, the Appointed Representative or the Suitable Substitute reasonably requires.

## **12. CONSTRUCTION CONTRACTOR'S DIRECT AGREEMENT**

- (a) Notwithstanding any provision in the Construction Contractor's Direct Agreement, Contracting Authority hereby undertakes that it will not exercise any rights it may have under or arising out of any of the Construction Contractor's Direct Agreement, except as provided in Sections 12(b) to 12(f) inclusive.
- (b) Following termination of the Project Agreement (other than as a result of a novation pursuant to this Lenders' Direct Agreement) in accordance with this Lenders' Direct Agreement, Contracting Authority shall from such date (the "**Exercise Date**") be entitled to exercise its rights under the Construction Contractor's Direct Agreement to step in to and/or novate the Design and Construction Contract in accordance with the Construction Contractor's Direct Agreement.
- (c) Following the Exercise Date, Contracting Authority shall not do anything to prejudice the rights which are not transferred to it pursuant to the Construction Contractor's Direct Agreement.

- (d) Where all amounts which may be or become owing by Project Co to the Lenders under the Lending Agreements have been irrevocably paid in full, the Lenders' Agent shall promptly release and discharge all Security in respect of the Design and Construction Contract assumed or novated by Contracting Authority pursuant to the Construction Contractor's Direct Agreement.
- (e) Notwithstanding the terms of the Construction Contractor's Direct Agreement and any other provisions of this Section 12, the Construction Contractor (and any guarantor thereof) shall remain responsible, and be liable, to Project Co in respect of all costs, claims, damages, losses and liabilities which shall have arisen out of or in connection with the Design and Construction Contract in respect of the period prior to the Exercise Date.
- (f) Without prejudice to Sections 12(a) to 12(e) inclusive, Contracting Authority shall not, prior to the date on which this Lenders' Direct Agreement terminates:
  - (i) claim, recover, retain or receive (or seek to claim, recover, retain or receive) any amount under the Construction Contractor's Direct Agreement (and/or the Design and Construction Contract) from the Construction Contractor;
  - (ii) take any action to wind-up, liquidate, dissolve or appoint a receiver or receiver and manager of the Construction Contractor or to institute or sanction a voluntary arrangement or any other bankruptcy or insolvency proceedings in relation to the Construction Contractor; or
  - (iii) compete with the rights of the Lenders' Agent on a winding-up or other insolvency or bankruptcy of the Construction Contractor, nor claim to be subrogated to any rights of the Lenders' Agent or any Lender.

Contracting Authority agrees and undertakes that if it receives any amount in contravention of the provisions of this Section 12(f), it will immediately turn the same over to the Lenders' Agent for the account of the Lenders' Agent and the Lenders and, pending such payment, hold the same in trust for the Lenders' Agent and the Lenders.

## **12A. SUBCONTRACTOR'S DIRECT AGREEMENT**

Notwithstanding any provision in a Subcontractor's Direct Agreement, Contracting Authority hereby undertakes that it will not exercise any rights it may have under or arising out of any Subcontractor's Direct Agreement unless:

- (a) the Project Agreement and the Design and Construction Contract have been terminated;

- (b) Contracting Authority is entitled to terminate the Project Agreement pursuant to the terms thereof and of this Lender's Direct Agreement; or
- (c) Contracting Authority is entitled to exercise its rights under the Construction Contractor's Direct Agreement pursuant to Section 12(b).

#### **12B. PERFORMANCE GUARANTEE OF CONSTRUCTION GUARANTOR**

Notwithstanding any provision in the Performance Guarantee of Construction Guarantor, Contracting Authority hereby undertakes that it will not exercise any rights it may have under or arising out of the Performance Guarantee of Construction Guarantor unless:

- (a) the Project Agreement has been terminated; or
- (b) Contracting Authority is entitled to terminate the Project Agreement pursuant to the terms thereof and of this Lenders' Direct Agreement.

#### **13. NOTICE OF PROJECT CO DELAY OR PROCEEDING AT RISK**

- (a) The Parties acknowledge that Contracting Authority may, in its sole discretion, give notice to the Lenders' Agent that Project Co is Proceeding at Risk, together with a copy of the Proceeding at Risk Notice delivered pursuant to Section 14.6(a) of the Project Agreement.

#### **14. ASSIGNMENT**

- (a) No Party to this Lenders' Direct Agreement may assign, transfer or otherwise dispose of any part of its rights or obligations under this Lenders' Direct Agreement save as provided in this Section 14.
- (b) Project Co may assign, transfer or otherwise dispose of the benefit of this Lenders' Direct Agreement to any person to whom Project Co assigns, transfers or otherwise disposes of its interest in the Project Agreement pursuant to Section 48.1 of the Project Agreement and the provisions of the Lending Agreements, and shall provide written notice to Contracting Authority and the Lenders' Agent of such assignment, transfer or other disposition. Such assignee, as a condition precedent to any such assignment, transfer or other disposition, shall assume the obligations and acquire the rights of Project Co under this Lenders' Direct Agreement pursuant to an assumption agreement with, and in form and substance satisfactory to, Contracting Authority and the Lenders' Agent, each acting reasonably. Contracting Authority and the Lenders' Agent shall, at Project Co's cost and expense, do all things and execute all further documents as may be necessary in connection therewith.
- (c) Contracting Authority may assign, transfer or otherwise dispose of the benefit of this Lenders' Direct Agreement to any person to whom Contracting Authority assigns, transfers or otherwise disposes of its interest in the Project Agreement

pursuant to Section 48.2 of the Project Agreement, and shall provide written notice to Project Co and the Lenders' Agent of such assignment, transfer or other disposition.

- (d) The Lenders' Agent may only assign, transfer or otherwise dispose of any interest in this Lenders' Direct Agreement as permitted by the Lending Agreements, and shall provide written notice to Project Co and Contracting Authority of such assignment, transfer or other disposition; provided that, notwithstanding any provision to the contrary in the Lending Agreements, the Lenders' Agent may not assign, transfer or otherwise dispose of any interest in this Lenders' Direct Agreement to a Restricted Person. The Lenders' Agent, as a condition precedent to any such assignment, transfer or other disposition, shall cause the assignee to enter into a new agreement with Project Co and Contracting Authority on substantially the same terms as this Lenders' Direct Agreement and Project Co and Contracting Authority shall enter into such new agreement with the assignee. Project Co and Contracting Authority shall, at the Lenders' Agent's cost and expense, do all things and execute all further documents as may be necessary in connection therewith.

## **15. NOTICES**

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

If to Contracting Authority:      Infrastructure Ontario  
1 Dundas Street West, Suite 2000  
Toronto, Ontario  
M5G 1Z3

Attn: [REDACTED]  
Email: [REDACTED]

If to Lenders' Agent:                [REDACTED]  
Attention: [REDACTED]  
Email: [REDACTED]

If to Project Co:                        [REDACTED]  
Email: [REDACTED]  
With a copy to [REDACTED]  
Email: [REDACTED]

If to the Construction  
Guarantor:

**[REDACTED]**  
Email: **[REDACTED]**  
With a copy to **[REDACTED]**  
Email: **[REDACTED]**

- (b) Any Party to this Lenders' Direct Agreement may, from time to time, change any of its contact information set forth in Section 15(a) by prior notice to the other Parties, 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.
- (c) Subject to Sections 15(d) and 15(e):
  - (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.
- (d) 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 by personal delivery or by electronic submission in accordance with this Section 15.
- (e) If any notice delivered by hand or transmitted by electronic submission is so delivered either on a day that is not a Business Day or on a Business Day after 4:00 p.m. (recipient's local time), then such notice shall be deemed to have been received by such recipient on the next following Business Day.
- (f) 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.

## **16. AMENDMENTS**

This Lenders' Direct 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 Lenders' Direct Agreement.

**17. WAIVER**

- (a) No waiver made or given by a Party under or in connection with this Lenders' Direct Agreement shall be binding or effective unless the waiver is in writing, signed by an authorized representative of the Party giving such waiver, and delivered by such Party to the other 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.

**18. RELATIONSHIP BETWEEN THE PARTIES**

The Parties are independent contractors. This Lenders' Direct Agreement is not intended to and does not create or establish between the Parties any relationship as partners, joint venturers, employer and employee, master and servant, or, except as provided in this Lenders' Direct Agreement, of principal and agent.

**19. CONTRACTING AUTHORITY DESIGNATE**

At any time and from time to time, Contracting Authority may designate any ministry, branch, agency, division, department or office of the Government of Ontario to carry out administrative responsibility for the rights and obligations of Contracting Authority under this Lenders' Direct Agreement and Project Co and the Lenders' Agent may deal exclusively with the designated person in respect of all such matters and is entitled to rely on the actions, directions, requests, notices, consents, approvals, waivers, comments relating to the review of documentation and other administrative matters and decisions determined by such designated person from time to time, until Contracting Authority has notified Project Co and the Lenders' Agent in writing that such designated person is no longer the person designated by Contracting Authority hereunder and such notice shall have effect on the later of the date of delivery of such notice and the date specified in the written notice. Contracting Authority shall advise Project Co and the Lenders' Agent in writing of any designation hereunder. The rights and obligations of the parties to this Lenders' Direct Agreement shall be in no way affected by reason of any such designation. Project Co and the Lenders' Agent acknowledge the right of Contracting Authority to delegate administrative responsibilities hereunder as set forth in this Section 19.

**20. ENTIRE AGREEMENT**

Except where provided otherwise in this Lenders' Direct Agreement, this Lenders' Direct Agreement constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and

understandings, whether oral, written, express or implied, concerning the subject matter of this Lenders' Direct Agreement.

## **21. SEVERABILITY**

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

## **22. ENUREMENT**

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

## **23. GOVERNING LAW AND JURISDICTION**

- (a) This Lenders' Direct Agreement shall be governed by and construed in accordance with the laws of Ontario and the laws of Canada applicable therein and shall be treated in all respects as an Ontario contract, without regard to conflict of laws principles.
- (b) The Parties agree that the courts of the Province of Ontario and all courts competent to hear appeals therefrom shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Lenders' Direct Agreement and hereby irrevocably attorn to the exclusive jurisdiction of such courts.
- (c) Nothing in this Lenders' Direct Agreement affects the rights, protections and immunities of the Crown under the *Proceedings Against the Crown Act* (Ontario).

## **24. DISPUTE RESOLUTION PROCEDURE**

The Parties agree that the dispute resolution procedure provided for in Schedule 27 - Dispute Resolution Procedure to the Project Agreement shall not apply to any dispute under this Lenders' Direct Agreement.

## **25. FURTHER ASSURANCE**

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



**26. LANGUAGE OF AGREEMENT**

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

**27. COUNTERPARTS**

This Lenders' Direct 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.

**28. CONFIDENTIALITY**

The Lenders' Agent agrees to comply with the obligations imposed on Project Co by the provisions of Section 41 of the Project Agreement, *mutatis mutandis*, provided that the Lenders' Agent will be permitted to disclose to any relevant regulatory authority only such Confidential Information as is necessary for the Lenders' Agent to comply with Applicable Law.

**29. COPYRIGHT NOTICE**

The Parties acknowledge that Queen's Printer for Ontario is the exclusive owner of copyright in the Project Agreement and this Lenders' Direct Agreement.

*[SIGNATURE PAGES IMMEDIATELY FOLLOW]*

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

**HER MAJESTY THE QUEEN IN RIGHT OF  
ONTARIO** as represented by the Minister of  
Government and Consumer Services, as represented  
by Ontario Infrastructure and Lands Corporation

Per: \_\_\_\_\_

Name: **[REDACTED]**

Title: **[REDACTED]**

I have authority to bind the corporation.

**[REDACTED]**

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

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

I/We have authority to bind the corporation.

**TRANS/Form BY POMERLEAU INC.**

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

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

I/We have authority to bind the corporation.

**SCHEDULE 5**

**CONSTRUCTION CONTRACTOR’S DIRECT AGREEMENT**

**THIS AGREEMENT** is made as of the 1<sup>st</sup> day of June, 2021

**BETWEEN:**

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**, as represented by the Minister of Government and Consumer Services, as represented by Ontario Infrastructure and Lands Corporation, 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

(“**Contracting Authority**”)

– AND –

**TRANS/FORM BY POMERLEAU INC.**, a corporation incorporated under the laws of [REDACTED]

(“**Project Co**”)

– AND –

[REDACTED], a corporation incorporated under the laws of [REDACTED]

(the “**Construction Contractor**”)

**WHEREAS:**

- A. Contracting Authority and Project Co have entered into the Project Agreement, which requires Project Co to enter into, and to cause the Construction Contractor to enter into, this Construction Contractor’s Direct Agreement with Contracting Authority.
- B. Project Co and the Construction Contractor have entered into the Design and Construction Contract, which requires the Construction Contractor to enter into this Construction Contractor’s Direct Agreement with Contracting Authority.

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

**1. DEFINITIONS**

In this Construction Contractor’s Direct Agreement, unless the context otherwise requires:

- (a) “**Approved Purposes**” has the meaning given in the Project Agreement.
- (b) “**Business Day**” has the meaning given in the Project Agreement.
- (c) “**Construction Contractor**” has the meaning given in the preamble.
- (d) “**Contracting Authority**” has the meaning given in the preamble.
- (e) “**Default Notice**” has the meaning given in Section 5(a).
- (f) “**Design and Construction Contract**” has the meaning given in the Project Agreement.
- (g) “**Governmental Authority**” has the meaning given in the Project Agreement.
- (h) “**Lenders**” has the meaning given in the Project Agreement.
- (i) “**Lenders’ Direct Agreement**” has the meaning given in the Project Agreement.
- (j) “**Party**” means Contracting Authority, the Construction Contractor or Project Co, and “**Parties**” means Contracting Authority, the Construction Contractor and Project Co.
- (k) “**Project**” has the meaning given in the Project Agreement.
- (l) “**Project Agreement**” means the project agreement made on or about June 1, 2021 between Contracting Authority and Project Co.
- (m) “**Project Co**” means has the meaning given in the preamble.
- (n) “**Step-In Notice**” has the meaning given in Section 6(a).
- (o) “**Substitute**” has the meaning given in Section 6(a).
- (p) “**Works**” has the meaning given in the Project Agreement.

## 2. **INTERPRETATION**

This Construction Contractor’s Direct Agreement shall be interpreted according to the following provisions, unless the context requires a different meaning:

- (a) The headings in this Construction Contractor’s Direct Agreement are for convenience of reference only, shall not constitute a part of this Construction Contractor’s Direct Agreement, and shall not be taken into consideration in the interpretation of, or affect the meaning of, this Construction Contractor’s Direct Agreement.

- (b) Unless the context otherwise requires, references to specific Sections, Clauses, Paragraphs, Subparagraphs, and other divisions are references to such Sections, Clauses, Paragraphs, Subparagraphs, or divisions of this Construction Contractor’s Direct Agreement and the terms “Section” and “Clause” are used interchangeably and are synonymous.
- (c) Words importing persons or parties are to be broadly interpreted and include an individual, corporation, limited liability company, joint stock company, 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.
- (d) 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.
- (e) References to any standard, principle, agreement or document include (subject to all relevant approvals and any other provisions of this Construction Contractor’s Direct Agreement concerning amendments) a reference to that standard, principle, agreement or document as amended, supplemented, restated, substituted, replaced, novated or assigned.
- (f) The words in this Construction Contractor’s Direct Agreement shall bear their natural meaning.
- (g) References containing terms such as:
  - (i) “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 Construction Contractor’s Direct Agreement taken as a whole; and
  - (ii) “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”.
- (h) In construing this Construction Contractor’s Direct Agreement, the rule known as the *ejusdem generis rule* shall not apply nor shall any similar rule or approach to the construction of this Construction Contractor’s Direct 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.

- (i) Where this Construction Contractor’s Direct 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.
- (j) Where this Construction Contractor’s Direct 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.
- (k) Any reference to time of day or date means the local time or date in Toronto, Ontario.
- (l) Unless otherwise indicated, time periods will be strictly construed.
- (m) Whenever the terms “will” or “shall” are used in this Construction Contractor’s Direct Agreement they shall be construed and interpreted as synonymous and to read “shall”.

**3. CONFLICT IN DOCUMENTS**

- (a) In the event of ambiguities, conflicts or inconsistencies between or among this Construction Contractor’s Direct Agreement, the Project Agreement and the Design and Construction Contract, this Construction Contractor’s Direct Agreement shall prevail.
- (b) In the event of ambiguities, conflicts or inconsistencies between or among this Construction Contractor’s Direct Agreement and the Lenders’ Direct Agreement, the Lenders’ Direct Agreement shall prevail.

**4. AGREEMENTS**

- (a) Project Co and the Construction Contractor shall not amend, modify, or depart from the terms of the Design and Construction Contract without the prior written consent of Contracting Authority, acting reasonably, which consent shall not be withheld or delayed where such amendment, modification or departure does not materially and adversely affect the ability of Project Co to perform its obligations under this Construction Contractor’s Direct Agreement and does not have the effect of increasing any liability of Contracting Authority, whether actual or potential. Project Co and the Construction Contractor shall provide to Contracting Authority a written copy of all such amendments, modifications or departures. The Parties acknowledge and agree that this Section 4(a) shall not apply to Variations provided for under the Project Agreement.



- (b) Each of the Parties acknowledges having received a copy of the Project Agreement and the Design and Construction Contract.
- (c) If the Construction Contractor gives Project Co any notice of any default(s) under the Design and Construction Contract that may give the Construction Contractor a right to terminate the Design and Construction Contract or to treat it as having been repudiated by Project Co or to discontinue the Construction Contractor's performance thereunder, then the Construction Contractor shall concurrently provide Contracting Authority with a copy of such notice and set out in reasonable detail the default(s).

**5. NO TERMINATION BY CONSTRUCTION CONTRACTOR WITHOUT DEFAULT NOTICE**

The Construction Contractor shall not exercise any right it may have to terminate the Design and Construction Contract or to treat it as having been repudiated by Project Co or to discontinue the Construction Contractor's performance thereunder unless:

- (a) the Construction Contractor first delivers a written notice (a “**Default Notice**”) to Contracting Authority setting out in reasonable detail the default(s) on which the Construction Contractor intends to rely in terminating the Design and Construction Contract or to treat it as having been repudiated by Project Co or to discontinue the Construction Contractor's performance thereunder; and
- (b) within a period of 5 Business Days of Contracting Authority receiving the Default Notice:
  - (i) the default(s) on which the Construction Contractor intends to rely in terminating the Design and Construction Contract or to treat it as having been repudiated by Project Co or to discontinue the Construction Contractor's performance thereunder have not been remedied; and
  - (ii) the Construction Contractor has not received a Step-In Notice from Contracting Authority,

provided that if, within such period of 5 Business Days, Contracting Authority agrees to pay the Construction Contractor's reasonable costs of continued performance, such period of 5 Business Days shall be extended to 45 days.

**6. STEP-IN RIGHTS**

- (a) Contracting Authority may at any time:
  - (i) within 5 Business Days or, if such period has been extended in accordance with Section 5, 45 days of Contracting Authority receiving a Default Notice; or

- (ii) if Contracting Authority has not received a Default Notice and if Contracting Authority's right to terminate the Project Agreement has arisen and is continuing,

deliver a notice (a "**Step-In Notice**") electing to replace Project Co under the Design and Construction Contract either with Contracting Authority or a third party designated by Contracting Authority in the Step-In Notice (the "**Substitute**"), provided that Contracting Authority can demonstrate to the Construction Contractor, acting reasonably, that the Substitute shall have sufficient financial resources, or shall be supported by a satisfactory guarantee, to carry out the obligations of the Substitute under the Design and Construction Contract.

- (b) Subject to Section 6(d), upon receipt by the Construction Contractor of a Step-In Notice:
  - (i) Project Co and the Construction Contractor will be deemed to be released from their existing and future obligations under the Design and Construction Contract to each other (except with respect to any and all indemnities from Project Co or the Construction Contractor to the other in respect of the period prior to the receipt of the Step-In Notice), and Contracting Authority or the Substitute, as applicable, and the Construction Contractor will be deemed to assume those same existing and future obligations towards each other (except in respect of the aforesaid indemnities);
  - (ii) the existing and future rights of Project Co against the Construction Contractor under the Design and Construction Contract and vice versa will be deemed to be cancelled (except with respect to any and all indemnities from Project Co or the Construction Contractor to the other in respect of the period prior to the receipt of the Step-In Notice), and Contracting Authority or the Substitute, as applicable, and the Construction Contractor will be deemed to acquire those same existing and future rights against each other (except in respect of the aforesaid indemnities), subject to any applicable credit from the Construction Contractor to Contracting Authority if Contracting Authority pays for the Construction Contractor's reasonable costs of continued performance pursuant to Section 5;
  - (iii) any guarantee, bond, covenant, letter of credit or similar performance security in favour of Project Co from any third party in respect of any term, provision, condition, obligation, undertaking or agreement on the part of the Construction Contractor to be performed, observed or carried out by the Construction Contractor as contained in, referred to, or inferred from the Design and Construction Contract shall be assigned, novated or granted, as required by Contracting Authority or the Substitute, as applicable, each acting reasonably, to Contracting Authority or the

Substitute, as applicable, and the Construction Contractor shall cause such assignment, novation or grant on substantially the same terms and conditions as the original guarantee, bond, covenant, letter of credit or similar performance security, provided however that where Project Co shall continue to hold, or shall continue to be entitled to or have rights under, such guarantee, bond, covenant, letter of credit or similar performance security, as security for any obligations of the Construction Contractor, the assignment, novation or grant of the guarantee, bond or covenant, letter of credit or similar performance security to the extent of any such obligations to Project Co shall be conditional on the satisfaction of those obligations to Project Co; and

- (iv) at Contracting Authority's request, the Construction Contractor shall enter into, and shall cause any other guarantor, covenantor or surety under any guarantee, bond or covenant referred to in Section 6(b)(iii) to enter into, and Contracting Authority shall or shall cause the Substitute to enter into, as applicable, all such agreements or other documents as reasonably necessary to give effect to the foregoing, including, without limitation, an agreement between Contracting Authority or the Substitute, as applicable, and the Construction Contractor, acceptable to Contracting Authority and the Construction Contractor, each acting reasonably, on substantially the same terms as the Design and Construction Contract.
- (c) Subject to Section 6(d), Project Co shall, at its own cost, cooperate fully with Contracting Authority and the Substitute in order to achieve a smooth transfer of the Design and Construction Contract to Contracting Authority or the Substitute, as applicable, and to avoid or mitigate in so far as reasonably practicable any inconvenience, including the administration of the Design and Construction Contract, ongoing supervisory activities and scheduling.
- (d) The rights granted by Sections 6(b) and 6(c) shall be of no force or effect if, at any time the Construction Contractor receives a Step-In Notice, the Construction Contractor has already received notice in writing from another entity entitled to the benefit of step-in rights relating to the Design and Construction Contract that it is or has validly exercised those step-in rights. If the Construction Contractor receives any such notice on the same day as a Step-In Notice, the Step-In Notice shall be effective, except where the other notice is given by the Lenders, in which case such other notice and not the Step-In Notice shall be effective.
- (e) If Contracting Authority gives a Step-In Notice within the time provided hereunder at any time after the Construction Contractor has terminated the Design and Construction Contract or treated it as having been repudiated by Project Co or discontinued the Construction Contractor's performance thereunder in accordance with the terms of this Construction Contractor's Direct Agreement, the Construction Contractor agrees that the Design and Construction Contract shall be reinstated and deemed to have continued despite any termination or treatment as

having been repudiated, and Contracting Authority shall pay the Construction Contractor's reasonable costs for re-commencing the obligations it has under the Design and Construction Contract and the Construction Contractor shall be entitled to reasonable compensation and/or relief for re-commencing such obligations, having regard to the additional costs and delays incurred as a result of having terminated the Design and Construction Contract or having treated it as being repudiated by Project Co or having discontinued its performance thereunder.

**7. CONSTRUCTION CONTRACTOR LIABILITY**

- (a) The liability of the Construction Contractor hereunder shall not be modified, released, diminished or in any way affected by:
- (i) any independent inspection, investigation or enquiry into any matter which may be made or carried out by or for Contracting Authority, or by any failure or omission to carry out any such inspection, investigation or enquiry; or
  - (ii) the appointment by Contracting Authority of any other person to review the progress of or otherwise report to Contracting Authority in respect of the Project, or by any action or omission of such person whether or not such action or omission might give rise to any independent liability of such person to Contracting Authority,

provided always that nothing in this Section 7 shall modify or affect any rights which the Construction Contractor might have otherwise had to claim contribution from any other person whether under statute or common law.

- (b) In the event Contracting Authority delivers a Step-In Notice, the Construction Contractor shall have no greater liability to Contracting Authority or any Substitute than it would have had to Project Co under the Design and Construction Contract, and the Construction Contractor shall be entitled in any proceedings by Contracting Authority or any Substitute to rely on any liability limitations in the Design and Construction Contract.

**8. PROJECT CO AS PARTY**

Project Co acknowledges and agrees that the Construction Contractor shall not be in breach of the Design and Construction Contract by complying with its obligations hereunder.

**9. NOT USED**

**10. ASSIGNMENT**

- (a) Project Co shall not, without the prior written consent of Contracting Authority, assign, transfer, charge, subcontract, subparticipate or otherwise dispose of any

interest in this Construction Contractor’s Direct Agreement except to the extent entitled to do so under the Project Agreement.

- (b) Contracting Authority may assign or otherwise dispose of the benefit of the whole or part of this Construction Contractor’s Direct Agreement to any person to whom Contracting Authority may assign or otherwise dispose of its interest in the Project Agreement pursuant to Section 48.2 of the Project Agreement but only in conjunction therewith, and shall provide written notice to Project Co and the Construction Contractor of such assignment or disposition.
- (c) The Construction Contractor shall not, without the prior written consent of Contracting Authority and Project Co, assign, transfer, charge, subcontract, subparticipate or otherwise dispose of any interest in this Construction Contractor’s Direct Agreement except as may be permitted under the Design and Construction Contract.

**11. NOTICES**

- (a) All notices, requests, demands, instructions, certificates, consents and other communications required or permitted under this Construction Contractor’s Direct Agreement shall be in writing (whether or not “written notice” or “notice in writing” is specifically required by the applicable provision of this Construction Contractor’s Direct Agreement) and served by sending the same by registered mail, by hand (in each case with a copy by electronic submission to the Contracting Authority Representative), or by electronic submission as follows:

If to Contracting Authority:      Infrastructure Ontario  
1 Dundas Street West, Suite 2000  
Toronto, Ontario  
M5G 1Z3

Attn: [REDACTED]  
Email: [REDACTED]

If to Project Co:                      [REDACTED]  
Email: [REDACTED]

With a copy to [REDACTED]  
Email: [REDACTED]

If to the Construction              [REDACTED]  
Contractor:                              Email: [REDACTED]

With a copy to [REDACTED]

Email: [REDACTED]

- (b) 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 Section 11(b).
- (c) Any Party to this Construction Contractor's Direct Agreement may, from time to time, change any of its contact information set forth in Section 11(a) by prior notice to the other Parties, 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.
- (d) Subject to Sections **Error! Reference source not found.**, **Error! Reference source not found.** and 11(e):
  - (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.
- (e) 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 Section 11.
- (f) 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 4:00 p.m. (recipient's local time), then such notice shall be deemed to have been received by such recipient on the next Business Day.
- (g) 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.

## 12. AMENDMENTS

This Construction Contractor's Direct 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 Construction Contractor's Direct Agreement.

**13. WAIVER**

- (a) No waiver made or given by a Party under or in connection with this Construction Contractor's Direct Agreement shall be binding or effective unless the waiver is in writing, signed by an authorized representative of the Party giving such waiver, and delivered by such Party to the other 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.

**14. RELATIONSHIP BETWEEN THE PARTIES**

The Parties are independent contractors. This Construction Contractor's Direct Agreement is not intended to and does not create or establish between the Parties any relationship as partners, joint venturers, employer and employee, master and servant, or, except as provided in this Construction Contractor's Direct Agreement, of principal and agent.

**15. CONTRACTING AUTHORITY DESIGNATE**

At any time and from time to time, the Contracting Authority may designate any ministry, branch, agency, division, department or office of the Government of Ontario to carry out administrative responsibility for the rights and obligations of Contracting Authority under this Construction Contractor's Direct Agreement and Project Co and the Construction Contractor may deal exclusively with the designated person in respect of all such matters and is entitled to rely on the actions, directions, requests, notices, consents, approvals, waivers, comments relating to the review of documentation and other administrative matters and decisions determined by such designated person from time to time, until the Crown has notified Project Co and the Construction Contractor in writing that such designated person is no longer the person designated by the Contracting Authority hereunder and such notice shall have effect on the later of the date of delivery of such notice and the date specified in the written notice. The Contracting Authority shall advise Project Co and the Construction Contractor in writing of any designation hereunder. The rights and obligations of the parties to this Construction Contractor's Direct Agreement shall be in no way affected by reason of any such designation. Project Co and the Construction Contractor acknowledge the right of the Contracting Authority to delegate administrative responsibilities hereunder as set forth in this Section 15.

**16. ENTIRE AGREEMENT**

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

**17. SEVERABILITY**

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

**18. ENUREMENT**

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

**19. GOVERNING LAW AND JURISDICTION**

- (a) This Construction Contractor's Direct Agreement shall be governed by and construed in accordance with the laws of Ontario and the laws of Canada applicable therein and shall be treated in all respects as an Ontario contract, without regard to conflict of laws principles.
- (b) The Parties agree that the courts of the Province of Ontario and all courts competent to hear appeals therefrom shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Construction Contractor's Direct Agreement and hereby irrevocably attorn to the exclusive jurisdiction of such courts.
- (c) Nothing in this Construction Contractor's Direct Agreement affects the rights, protections and immunities of the Crown under the *Proceedings Against the Crown Act* (Ontario).

**20. FURTHER ASSURANCE**

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



**21. LANGUAGE OF AGREEMENT**

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

**22. COUNTERPARTS**

This Construction Contractor's Direct Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all 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.

**23. COPYRIGHT NOTICE**

The Parties acknowledge that Queen's Printer for Ontario is the exclusive owner of copyright in the Project Agreement and this Construction Contractor's Direct Agreement.

*[SIGNATURE PAGES IMMEDIATELY FOLLOW]*

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

**HER MAJESTY THE QUEEN IN RIGHT OF  
ONTARIO** as represented by the Minister of  
Government and Consumer Services, as represented  
by Ontario Infrastructure and Lands Corporation

Per: \_\_\_\_\_

Name: **[REDACTED]**

Title: **[REDACTED]**

I have authority to bind the corporation.

**TRANS/Form BY POMERLEAU INC.**

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

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

I/We have authority to bind the corporation.

**[REDACTED]**

Per: \_\_\_\_\_

Name: **[REDACTED]**

Title: **[REDACTED]**

Per: \_\_\_\_\_

Name: **[REDACTED]**

Title: **[REDACTED]**

I/We have authority to bind the corporation.

**SCHEDULE 6**

**INDEPENDENT CERTIFIER AGREEMENT**

**THIS AGREEMENT** is made as of 1<sup>st</sup> day of June, 2021

**BETWEEN:**

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**, as represented by the Minister of Government and Consumer Services, as represented by Ontario Infrastructure and Lands Corporation, 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

(“**Contracting Authority**”)

**AND:**

**TRANS/FORM BY POMERLEAU INC.**, a corporation incorporated under the laws of [REDACTED]

(“**Project Co**”)

**AND:**

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

(the “**Independent Certifier**”)

**WHEREAS:**

- A. Contracting Authority and Project Co (collectively, the “**PA Parties**” and each, a “**PA Party**”) have entered into the Project Agreement.
- B. Pursuant to the terms of the Project Agreement, the PA Parties wish to appoint the Independent Certifier, and the Independent Certifier wishes to accept such appointment, to perform certain services in connection with the Project Agreement.
- C. The PA Parties and the Independent Certifier wish to enter into this Independent Certifier Agreement in order to record the terms by which the Independent Certifier shall perform such services.

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

## **1. DEFINITIONS**

### **1.1 Definitions**

- (a) In this Independent Certifier Agreement, including the recitals and appendices, unless the context indicates a contrary intention, terms which are defined in the Project Agreement (and not otherwise defined in this Independent Certifier Agreement) shall have meanings given to them in the Project Agreement and the following terms shall have the following meanings:
- (i) **“Adjudication Fee”** means the fee payable by Contracting Authority and Project Co to the Independent Certifier for the Independent Certifier conducting Adjudications as such fees are specified and made payable in accordance with Appendix B to this Independent Certifier Agreement.
  - (ii) **“Area ID”** means an area within a construction phase as identified in the Project Co Phasing Plan.
  - (iii) **“Certification Services”** means:
    - (A) all of the functions and obligations described in the Project Agreement as being the responsibility of the Independent Certifier;
    - (B) all of the functions and obligations conferred on the Independent Certifier under this Independent Certifier Agreement, including the functions described in Appendix A to this Independent Certifier Agreement; and
    - (C) all other things or tasks which the Independent Certifier must do to comply with its obligations under this Independent Certifier Agreement.
  - (iv) **“Certification Services Variation”** means any change to the Certification Services.
  - (v) **“Contract Material”** means all material:
    - (A) provided to the Independent Certifier or created or required to be created by either PA Party; and
    - (B) provided by or created or required to be created by the Independent Certifier as part of, or for the purpose of, performing the Certification Services,including documents, equipment, reports, technical information, plans, charts, drawings, calculations, tables, schedules and data (stored and recorded by any means).
  - (vi) **“Fee”** means the fees payable by Contracting Authority and Project Co to the Independent Certifier for the Certification Services, as such fees are specified and

made payable in accordance with Appendix B to this Independent Certifier Agreement.

- (vii) **“Hourly Rate”** means the rate charged by each Independent Certifier Team Member per hour as listed in Appendix B to this Independent Certifier Agreement for Certification Services identified in item (x) of Appendix A to this Independent Certifier Agreement, including any services required to provide additional work.
- (viii) **“Independent Certifier”** has the meaning given in the preamble.
- (ix) **“Intellectual Property”** means any and all intellectual property rights, whether subsisting now or in the future, including rights of any kind in inventions, patents, copyright, trademarks, service marks, industrial designs, integrated circuit topography rights, applications for registration of any of the foregoing, and know-how, trade secrets, confidential information and trade or business names.
- (x) **“PA Parties”** and **“PA Party”** have the meanings given in the recitals to this Independent Certifier Agreement.
- (xi) **“Project Agreement”** means that certain project agreement made on or about the date hereof between Contracting Authority and Project Co with respect to the design, construction and financing of Brampton Courthouse Addition Phase 2 & Toronto Region Bail Centre Project.
- (xii) **“Total Fixed Fee”** means the Fee for all Certification Services other than those identified in item (x) of Appendix A to this Independent Certifier Agreement, which shall not exceed the amount specified in Appendix B to this Independent Certifier Agreement.

## **2. INTERPRETATION**

### **2.1 Interpretation**

- (a) In this Independent Certifier Agreement, unless the context indicates a contrary intention:
  - (i) words denoting the singular number include the plural and vice versa;
  - (ii) words denoting individuals include corporations and vice versa;
  - (iii) headings are for convenience only and do not affect interpretation;
  - (iv) references to Clauses, Sections or Parts are references to Clauses, Sections or Parts of this Independent Certifier Agreement;
  - (v) references to this Independent Certifier Agreement or any contract, agreement or instrument are deemed to include references to this Independent Certifier

Agreement or such other contract, agreement or instrument as amended, novated, supplemented, varied or replaced from time to time;

- (vi) references to any party to this Independent Certifier Agreement includes its successors or permitted assigns;
- (vii) words denoting any gender include all genders;
- (viii) references to any legislation or to any section or provision of any legislation include any statutory modification or re-enactment of any statutory provision substituted for legislation, section or provision, and ordinances, by laws, regulations and other statutory instruments issued under that legislation, section or provision;
- (ix) a reference to “\$” is to Canadian currency;
- (x) the terms “including” and “include” mean “including” or “include” (as applicable) without limitation;
- (xi) if a word or phrase is defined, then other parts of speech and grammatical forms of that word or phrase have a corresponding meaning; and
- (xii) unless otherwise indicated, all time periods will be strictly construed.

## **2.2 Obligations and Exercise of Rights by PA Parties**

- (a) The obligations of the PA Parties under this Independent Certifier Agreement shall be several.
- (b) Except as specifically provided for in this Independent Certifier Agreement or the Project Agreement, the rights of the PA Parties under this Independent Certifier Agreement shall be jointly exercised by the PA Parties.

## **3. ROLE OF THE INDEPENDENT CERTIFIER**

### **3.1 Engagement**

- (a) The PA Parties hereby appoint the Independent Certifier, and the Independent Certifier hereby accepts such appointment, to carry out the Certification Services in accordance with this Independent Certifier Agreement. The Independent Certifier shall perform the Certification Services in accordance with this Independent Certifier Agreement.
- (b) Nothing in this Independent Certifier Agreement will be interpreted as giving the Independent Certifier any responsibility for performance of the design or construction, or for the certifications of the professionals of record.
- (c) Neither PA Party shall, without the prior written consent of the other PA Party, enter into any separate agreement with the Independent Certifier in connection with the Project, and



Project Co shall ensure that no Project Co Party enters into any separate agreement with the Independent Certifier in connection with the Project.

- (d) The Independent Certifier shall make such observations and evaluations of any Works pursuant to a Variation in order to certify any monthly progress payment to Project Co of the value of work performed, provided the Independent Certifier shall be entitled to a Certification Services Variation Order pursuant to Sections 9.4 and 9.5 of this Independent Certifier Agreement.
- (e) The Independent Certifier shall ensure that it maintains at all times sufficient representatives qualified to be adjudicators within the meaning of the Construction Act, such that any Adjudications referred to the Independent Certifier by the PA Parties in accordance with Schedule 27 may be conducted independently and impartially.

### **3.2 Acknowledgement of Independent Certifier**

- (a) The Independent Certifier hereby acknowledges in favour of the PA Parties that it has received a copy of the Project Agreement.

### **3.3 Standard of Care**

- (a) The Independent Certifier must exercise the standard and skill, care and diligence in the performance of the Certification Services that would be expected of an expert professional experienced in providing services in the nature of the Certification Services for projects similar to the Project.
- (b) Representatives of the Independent Certifier who perform Adjudications pursuant to Schedule 27 must exercise the skill, care and diligence in the performance of the Adjudications that would be expected of an expert professional experienced in providing similar services for comparable Projects, and must comply with the Construction Act, including being certified by the Authorized Nominating Authority designated thereunder and complying with any applicable codes of conduct and standards promulgated by the Authorized Nominating Authority.

### **3.4 Duty of Independent Judgment**

- (a) In exercising its Certification Services, the Independent Certifier must:
  - (i) act impartially, honestly and independently in representing the interests of both PA Parties in accordance with the terms of the Project Agreement and this Independent Certifier Agreement;
  - (ii) act reasonably and professionally;
  - (iii) act in a timely manner:

- (A) in accordance with the times prescribed in this Independent Certifier Agreement and the Project Agreement; or
  - (B) where no times are prescribed, within 10 days or such earlier time so as to enable the PA Parties to perform their respective obligations under the Project Agreement; and
- (iv) act in accordance with the joint directions of the PA Parties provided that the directions are not inconsistent with the other terms of this Independent Certifier Agreement or the terms of the Project Agreement and do not vary or prejudice the Independent Certifier’s authority or responsibilities or the exercise by the Independent Certifier of its professional judgment under this Independent Certifier Agreement.
- (b) Although the Independent Certifier may take account of any opinions or representations made by the PA Parties, the Independent Certifier shall not be bound to comply with any opinions or representations made by either of them in connection with any matter on which the Independent Certifier is required to exercise its professional judgment.
- (c) The Independent Certifier acknowledges that the PA Parties may rely on the Certification Services, including determinations, findings and certifications made by the Independent Certifier, and accordingly, the Independent Certifier will use its best skill and judgment in providing the Certification Services.

### **3.5 Authority to Act**

- (a) The Independent Certifier:
- (i) is an independent consultant and is not, and must not purport to be, a partner, joint venturer or agent of either PA Party;
  - (ii) other than as expressly set out in this Independent Certifier Agreement or the Project Agreement, has no authority to give any directions to a PA Party or its officers, directors, members, employees, contractors, consultants or agents; and
  - (iii) has no authority to waive or alter any terms of the Project Agreement, nor to discharge or release a party from any of its obligations under the Project Agreement unless jointly agreed by the PA Parties in writing.

### **3.6 Knowledge of the PA Parties’ Requirements**

- (a) The Independent Certifier warrants that:
- (i) it has informed and will be deemed to have informed itself fully of the requirements of the Project Agreement;

- (ii) it will inform itself fully of the requirements of such other documents and materials as may become relevant from time to time to the performance of the Certification Services;
- (iii) without limiting Sections 3.6(a)(i) or 3.6(a)(ii), it has and will be deemed to have informed itself fully of all time limits and other requirements for any Certification Service which the Independent Certifier carries out under the Project Agreement and this Independent Certifier Agreement;
- (iv) it has and will be deemed to have informed itself completely of the nature of the work necessary for the performance of the Certification Services and the means of access to and facilities at or on the Facility, the Existing Facilities and Site including restrictions on any such access or protocols that are required; and
- (v) it has satisfied itself as to the correctness and sufficiency of its proposal for the Certification Services and that the Fee covers the cost of complying with all of the obligations under this Independent Certifier Agreement and of all matters and things necessary for the due and proper performance and completion of the Certification Services.

### **3.7 Co-ordination and Information by Independent Certifier**

- (a) The Independent Certifier must:
  - (i) fully cooperate with the PA Parties;
  - (ii) carefully co-ordinate the Certification Services with the work and services performed by the PA Parties;
  - (iii) without limiting its obligations under Sections 3.4 and 3.7(a)(ii), perform the Certification Services so as to avoid unreasonably interfering with, disrupting or delaying the work and services performed by the PA Parties; and
  - (iv) provide copies to the PA Parties of all reports, communications, certificates and other documentation that it provides to either PA Party.

### **3.8 Conflict of Interest**

- (a) The Independent Certifier warrants that:
  - (i) at the date of this Independent Certifier Agreement, no conflict of interest exists or is likely to arise in the performance of its obligations under this Independent Certifier Agreement, and the Independent Certifier further warrants that it has not been retained as a technical advisor to the Lenders or as an advisor to either of the PA Parties or any of their respective related entities in respect of the Project Agreement (including, but not limited to, acting as a transaction advisor to either PA Party); and

- (ii) if, during the term of this Independent Certifier Agreement, any such conflict or risk of conflict of interest arises, the Independent Certifier will notify the PA Parties immediately in writing of that conflict or risk of conflict and take such steps as may be required by either of the PA Parties to avoid or mitigate that conflict or risk.

### **3.9 Independent Certifier Personnel**

- (a) The Independent Certifier shall make reasonable efforts to ensure that the individuals listed in Appendix C remain involved in the performance of the Certification Services and, in particular, will not, for the duration of this Independent Certifier Agreement, require or request any such person to be involved in any other project on behalf of the Independent Certifier if, in the reasonable opinion of the PA Parties, such involvement would have a material adverse effect on the performance of the Certification Services.
- (b) The Independent Certifier shall ensure that its personnel providing the Certification Services in respect of the Commissioning Tests, the Outline Commissioning Program, the Interim Completion Commissioning Program and the Final Commissioning Program shall:
  - (i) possess a current professional designation of not less than membership in Professional Engineers Ontario, The Ontario Association of Certified Engineering Technicians and Technologists or such similar professional designation recognized in North America;
  - (ii) have demonstrated competence in the commissioning of comparable facilities and in having completed or monitored the commissioning of a comparable facility of more than 200,000 square feet;
  - (iii) have an understanding of the appropriate CSA standards related to commissioning for courthouse facilities, as well as other applicable standards such as ASHRAE and NACBB; and
  - (iv) have an understanding of the commissioning process and the reports to be provided pursuant to this Independent Certifier Agreement and the Project Agreement, including not only the start-up procedures but the pre-commissioning and post-commissioning activities.
- (c) The Independent Certifier shall furnish Contracting Authority with evidence satisfactory to Contracting Authority of any such personnel's compliance with the foregoing requirements within a reasonable time prior to the proposed commencement of the Certification Services in respect of the Commissioning Tests, the Outline Commissioning Program, the Interim Completion Commissioning Program and the Final Commissioning Program.

### **3.10 Minimize Interference**

- (a) The Independent Certifier shall perform the Certification Services in such a way as to minimize any undue interference with the progress of the Works.

#### **4. ROLE OF THE PA PARTIES**

##### **4.1 Assistance**

- (a) The PA Parties agree to cooperate with and provide reasonable assistance to the Independent Certifier to familiarize the Independent Certifier with all necessary aspects of the Project to enable the Independent Certifier to carry out its obligations under this Independent Certifier Agreement.

##### **4.2 Instructions in Writing**

- (a) Unless otherwise provided in this Independent Certifier Agreement or the Project Agreement, all instructions to the Independent Certifier by the PA Parties shall be given in writing and accepted or endorsed by both of the PA Parties.

##### **4.3 Information and Services**

- (a) The PA Parties shall make available to the Independent Certifier, as soon as practicable from time to time, all information, documents and particulars necessary for the Independent Certifier to carry out the Certification Services, including such information, documents and particulars required in order for the Independent Certifier to determine whether Interim Completion, Substantial Completion and Final Completion have occurred, and shall provide copies of all such information, documents and particulars to the other party hereto.

##### **4.4 Additional Information**

- (a) If any information, documents or particulars are reasonably required to enable the Independent Certifier to perform the Certification Services and have not been provided by the PA Parties, then:
- (i) the Independent Certifier must give notice in writing to the Project Co Representative or the Contracting Authority Representative, as the case may be, of the details of the information, documents or particulars demonstrating the need and the reasons why they are required; and
  - (ii) Project Co or Contracting Authority, as the case may be, must arrange the provision of the required information, documents or particulars.

##### **4.5 Right to Enter and Inspect**

- (a) Upon giving reasonable notice to the Project Co Representative, the Independent Certifier (and any person authorized by it) may enter and inspect the Site, the Facility, the Existing Facilities or Works at any reasonable time in connection with the exercise or proposed exercise of rights under this Independent Certifier Agreement, subject to:

- (i) observance of the reasonable rules of Project Co as to safety and security for the Site, the Facility, the Existing Facility and the Works;
- (ii) not causing unreasonable delay to the carrying out of the Works by reason of its presence at the Site, the Facility, the Existing Facility and the Works; and
- (iii) not causing any damage to the Site, the Facility, the Existing Facility or the Works.

#### **4.6 PA Parties Not Relieved**

- (a) Neither PA Party shall be relieved from performing or observing its obligations, or from any other liabilities, under the Project Agreement as a result of either the appointment of, or any act or omission by, the Independent Certifier.

#### **4.7 PA Parties not Liable**

- (a) On no account will a PA Party be liable to another PA Party for any act or omission by the Independent Certifier whether under or purportedly under a provision of the Project Agreement, this Independent Certifier Agreement or otherwise, provided that any such act or omission shall not extinguish, relieve, limit or qualify the nature or extent of any right or remedy of either PA Party against or any obligation or liability of either PA Party to the other PA Party which would have existed regardless of such act or omission.

### **5. CERTIFICATION QUALITY PLAN**

#### **5.1 Certification Quality Plan**

- (a) The Independent Certifier must:
  - (i) develop and implement a certification quality plan identifying the processes and outcomes of the Certification Services that complies with all requirements of the Independent Certifier's quality assurance accreditation, and is otherwise satisfactory to each of the Contracting Authority Representative and the Project Co Representative;
  - (ii) within 14 days after the date of this Independent Certifier Agreement, provide such certification quality plan to each of the Contracting Authority Representative and the Project Co Representative;
  - (iii) if satisfactory to each of the Contracting Authority Representative and the Project Co Representative, implement such certification quality plan; and
  - (iv) if not satisfactory to each of the Contracting Authority Representative and the Project Co Representative, within 7 days after receiving notice thereof from either PA Party to that effect, revise and resubmit the certification quality plan to each of the Contracting Authority Representative and the Project Co Representative, and

implement it if satisfactory to each of the Contracting Authority Representative and the Project Co Representative.

## **5.2 Certification Quality Plan not to Relieve Independent Certifier**

- (a) The Independent Certifier will not be relieved of any responsibilities or obligations in respect of the performance of the Certification Services and will remain solely responsible for them notwithstanding:
- (i) the obligation of the Independent Certifier to develop and implement a certification quality plan; or
  - (ii) any comment or direction upon, review or acceptance of, approval to proceed with or request to vary any part of the certification quality plan by either the Contracting Authority Representative or the Project Co Representative.

## **6. SUSPENSION**

### **6.1 Notice**

- (a) The Certification Services (or any part) may be suspended at any time by the PA Parties:
- (i) if the Independent Certifier fails to comply with its obligations under this Independent Certifier Agreement, immediately by the PA Parties giving joint notice in writing to the Independent Certifier; or
  - (ii) in any other case, by the PA Parties giving 7 days joint notice in writing to the Independent Certifier.

### **6.2 Costs of Suspension**

- (a) The Independent Certifier will:
- (i) subject to the Independent Certifier complying with Article 9, be entitled to recover the extra costs incurred by the Independent Certifier by reason of a suspension directed under Section 6.1(a)(ii) valued as a Certification Services Variation under Section 9; and
  - (ii) have no entitlement to be paid any costs, expenses, losses or damages arising from a suspension under Section 6.1(a)(i).

### **6.3 Recommencement**

- (a) The Independent Certifier must immediately recommence the carrying out of the Certification Services (or any part) on receipt of a joint written notice from the PA Parties requiring it to do so.

## **7. INSURANCE AND LIABILITY**

### **7.1 Independent Certifier’s Professional Indemnity Insurance**

- (a) The Independent Certifier must have in place at all times during the term of this Independent Certifier Agreement:
- (i) professional liability insurance:
    - (A) in the amount of \$[REDACTED] per claim and \$[REDACTED] in the aggregate, a deductible of not more than \$[REDACTED] per claim and from an insurer and on terms satisfactory to each of the PA Parties; and
    - (B) covering liability which the Independent Certifier might incur as a result of a breach by it of its obligations owed by the Independent Certifier in a professional capacity to the PA Parties, or either of them, under or in connection with this Independent Certifier Agreement or the provision of the Certification Services; and
  - (ii) commercial general liability insurance in the amount of \$[REDACTED] per claim and in the aggregate, no deductible for personal injury or bodily injury, a deductible of not more than \$[REDACTED] per occurrence for property damage and from an insurer and on terms satisfactory to each of the PA Parties.
- (b) The Independent Certifier must provide copies of its insurance policies to each of the PA Parties upon execution of this Independent Certifier Agreement, and, at least 5 Business Days prior to the expiry date of any such insurance policy, the Independent Certifier must provide evidence of the renewal of any such insurance policy satisfactory to the PA Parties, acting reasonably.

### **7.2 Workers’ Compensation Insurance**

- (a) The Independent Certifier must, at its own cost and at all times during the term of this Independent Certifier Agreement, insure its liability (including its common law liability) as required under any applicable workers compensation statute or regulation in relation to its employees engaged in the Certification Services.

## **8. PAYMENT FOR SERVICES**

### **8.1 Payment of Fee and Adjudication Fee**

- (a) In consideration of the Independent Certifier performing the Certification Services in accordance with this Independent Certifier Agreement, each PA Party shall pay [REDACTED] of the Fee to the Independent Certifier in accordance with the invoicing process specified in Section D of Appendix B.



- (b) In consideration of a representative of the Independent Certifier conducting Adjudications pursuant to Schedule 27 if requested by the Parties, and subject to an alternative determination regarding payment of costs being made by the Adjudicator, each PA Party shall pay **[REDACTED]** of the Adjudication Fee for each adjudication conducted based on the rates set out in Appendix B to this Schedule 6.
- (c) The obligation of each PA Party to pay to the Independent Certifier one-half of the Fee, or **[REDACTED]** of the Adjudication Fee (or other portion of the Adjudication Fee as determined by the Adjudicator) is a several obligation, and neither PA Party shall have any liability in respect of the non-payment by the other PA Party of any fees or costs payable by such other PA Party under this Independent Certifier Agreement.
- (d) The Fee and the Adjudication Fee include all taxes (except for HST), overhead and profit, all labour and materials, insurance costs, travel, hospitality, food and incidental expenses, and all other overhead including any fees or other charges required by law to perform the Certification Services and conduct the Adjudication, subject to Appendix B to this Schedule 6.
- (e) The PA Parties acknowledge and agree that if any approved amount due and payable by the PA Parties to the Independent Certifier in excess of \$**[REDACTED]** is outstanding for more than 60 days, the Independent Certifier shall not have any obligation to make any certification under the Project Agreement.
- (f) In consideration of representative of the Independent Certifier conducting adjudications pursuant to Schedule 27, if requested, each PA Party shall pay one half of the Adjudication Fee based on the rates set out in Appendix B to this Schedule 6.

## **9. CERTIFICATION SERVICES VARIATIONS**

### **9.1 Notice of Certification Services Variation**

- (a) If the Independent Certifier believes, other than a “Certification Services Variation Order” under Section 9.4(c), that any direction by the PA Parties constitutes or involves a Certification Services Variation it must:
  - (i) within 7 days after receiving the direction and before commencing work on the subject matter of the direction, give notice to the PA Parties that it considers the direction constitutes or involves a Certification Services Variation; and
  - (ii) within 21 days after giving the notice under Section 9.1(a)(i), submit a written claim to each of the Contracting Authority Representative and the Project Co Representative which includes detailed particulars of the claim, the amount of the claim and how it was calculated.
- (b) Regardless of whether the Independent Certifier considers that such a direction constitutes or involves a Certification Services Variation, the Independent Certifier must continue to

perform the Certification Services in accordance with this Independent Certifier Agreement and all directions, including any direction in respect of which notice has been given under this Section 9.1.

## **9.2 No Adjustment**

- (a) If the Independent Certifier fails to comply with Section 9.1, the Fee will not be adjusted as a result of the relevant direction.

## **9.3 External Services**

- (a) In the event that external personnel or consultants are required for expert opinion with respect to a Certification Services Variation, then, with the prior written approval of the PA Parties, any additional fees relating to such external personnel or consultants will be payable by the PA Parties at the agreed upon amount.

## **9.4 Certification Services Variation Procedure**

- (a) The Contracting Authority Representative and the Project Co Representative may jointly issue a document titled “Certification Services Variation Price Request” to the Independent Certifier which will set out details of a proposed Certification Services Variation which the PA Parties are considering.
- (b) Within 7 days after the receipt of a “Certification Services Variation Price Request”, the Independent Certifier must provide each of the Contracting Authority Representative and the Project Co Representative with a written notice in which the Independent Certifier sets out the effect which the proposed Certification Services Variation will have on the Fee.
- (c) Each of the Contracting Authority Representative and the Project Co Representative may then jointly direct the Independent Certifier to carry out a Certification Services Variation by written document titled “Certification Services Variation Order” which will state either that:
  - (i) the Fee is adjusted as set out in the Independent Certifier’s notice; or
  - (ii) the adjustment (if any) to the Fee will be determined under Section 9.5.

## **9.5 Cost of Certification Services Variation**

- (a) Subject to Section 9.2, the Fee will be adjusted for all Certification Services Variations or suspensions under Section 6.1(a)(ii) carried out by the Independent Certifier by:
  - (i) the amount (if any) stated in the “Certification Services Variation Order” in accordance with Section 9.4(c);
  - (ii) if Section 9.5(a)(i) is not applicable, an amount determined pursuant to the fee schedule in Appendix B; or

- (iii) where such rates or prices are not applicable, a reasonable amount to be agreed between the PA Parties and the Independent Certifier or, failing agreement, determined by the Contracting Authority Representative and the Project Co Representative jointly.
- (b) Any reductions in the Fee shall be calculated on the same basis as any increases.

## **10. TERM AND TERMINATION**

### **10.1 Term**

- (a) Subject to earlier termination, this Independent Certifier Agreement will commence on the date of the Project Agreement and continue in full force until:
  - (i) the Final Completion Date; or
  - (ii) such other date as may be mutually agreed between the PA Parties and the Independent Certifier.

### **10.2 Notice of Breach**

- (a) If the Independent Certifier commits a breach of this Independent Certifier Agreement, the PA Parties may give written notice to the Independent Certifier:
  - (i) specifying the breach; and
  - (ii) directing its rectification in the period specified in the notice being a period not less than 7 days from the date of service of the notice.

### **10.3 Termination for Breach**

- (a) If the Independent Certifier fails to rectify the breach within the period specified in the notice issued under Section 10.2, the PA Parties may, without prejudice to any other rights of the PA Parties or either of them, immediately terminate this Independent Certifier Agreement.

### **10.4 Termination for Financial Difficulty or Change in Control**

- (a) The PA Parties may, without prejudice to any other rights which the PA Parties or either of them may have, terminate this Independent Certifier Agreement immediately if:
  - (i) events have occurred or circumstances exist which, in the opinion of the PA Parties, may result in or have resulted in an insolvency or a Change in Control of the Independent Certifier; or

- (ii) the Independent Certifier has communications with its creditors with a view to entering into, or enters into, any form of compromise, arrangement or moratorium of any debts whether formal or informal, with its creditors.

### **10.5 Termination for Convenience**

- (a) Notwithstanding anything to the contrary in this Independent Certifier Agreement, the PA Parties may, at any time, jointly terminate this Independent Certifier Agreement upon 30 days written notice to the Independent Certifier. The PA Parties and the Independent Certifier agree that, notwithstanding the 30 days' notice of termination, the Independent Certifier shall continue on a day-to-day basis thereafter until a new Independent Certifier is appointed.

### **10.6 Independent Certifier's Rights upon Termination for Convenience**

- (a) Upon a termination under Section 10.5, the Independent Certifier will:
  - (i) be entitled to be reimbursed by the PA Parties for the value of the Certification Services performed by it to the date of termination; and
  - (ii) not be entitled to any damages or other compensation in respect of the termination and (without limitation) any amount in respect of:
    - (A) the lost opportunity to earn a profit in respect of the Certification Services not performed at the date of termination; and
    - (B) any lost opportunity to recover overheads from the turnover which would have been generated under this Independent Certifier Agreement but for it being terminated.

### **10.7 Procedure upon Termination**

- (a) Upon completion of the Independent Certifier's engagement under this Independent Certifier Agreement or earlier termination of this Independent Certifier Agreement (whether under Section 10.3, 10.4 or 10.5 or otherwise), the Independent Certifier must:
  - (i) cooperate with the PA Parties with respect to the transition of the Certification Services to a replacement certifier;
  - (ii) deliver to the PA Parties all Contract Material and all other information concerning the Project held or prepared by the Independent Certifier during the execution of work under this Independent Certifier Agreement; and
  - (iii) as and when required by the PA Parties, meet with them and such other persons nominated by them with a view to providing them with sufficient information to enable the PA Parties to execute the Project or the persons nominated to provide the Certification Services.

## **10.8 Effect of Termination**

- (a) Except as otherwise expressly provided in this Independent Certifier Agreement, termination of this Independent Certifier Agreement shall be without prejudice to any accrued rights and obligations under this Independent Certifier Agreement as at the date of termination (including the right of the PA Parties to recover damages from the Independent Certifier).

## **10.9 Survival**

- (a) Termination of this Independent Certifier Agreement shall not affect the continuing rights and obligations of the PA Parties and the Independent Certifier under Sections 7, 8, 10.6, 10.7, 10.8, 11, 12.7, 12.9 and this Section 10.9 or under any other provision which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

## **11. INDEMNITY**

### **11.1 PA Parties to Save Independent Certifier Harmless**

- (a) The PA Parties hereby indemnify and save the Independent Certifier completely harmless from any actions, causes of action, suits, debts, costs, damages, expenses, claims and demands whatsoever, at law or in equity, arising directly or indirectly in whole or in part out of any action taken by the Independent Certifier within the scope of its duties or authority hereunder.
- (b) The indemnity provided under this Section 11.1 shall not extend:
- (i) to any breach of this Independent Certifier Agreement, or any part or parts hereof, by the Independent Certifier, its employees, servants, agents or persons for whom it is in law responsible, or any negligent or unlawful act or omission or willful misconduct of the Independent Certifier, its employees, servants or persons for whom it is in law responsible (in respect of which the Independent Certifier shall indemnify the PA Parties, as referred to in Section 11.2);
  - (ii) to any action taken by the Independent Certifier outside the scope of authority set forth in this Independent Certifier Agreement, or any part or parts hereof; or
  - (iii) to any debt, cost, expense, claim or demand for which insurance proceeds are recoverable by the Independent Certifier.

- (c) This indemnity shall survive the termination of this Independent Certifier Agreement.

### **11.2 Independent Certifier to Save PA Parties Harmless**

- (a) Subject to the provisions of section 11.2(b), the Independent Certifier hereby indemnifies and saves the PA Parties, and their affiliated entities, subsidiaries and their respective

directors, officers, employees, agents, permitted successors and assigns, completely harmless from any actions, causes of action, suits, debts, costs, damages, expenses, claims and demands whatsoever, at law or in equity, arising directly or indirectly in whole or in part out of any breach of this Independent Certifier Agreement, or any part or parts hereof, by the Independent Certifier, its employees, servants, agents or persons for whom it is in law responsible, or any negligent or unlawful act or omission or willful misconduct of the Independent Certifier, its employees, servants or persons for whom it is in law responsible.

- (b) No action or other proceeding shall be commenced by any PA Party against the Independent Certifier or the Independent Certifier's representative acting as an Adjudicator pursuant to Schedule 27 as requested, for any act done, or any alleged neglect or default in the execution or intended execution of the Adjudicator's duties or powers in connection with such Adjudication, unless the act or omission is shown to have been in bad faith.
- (c) The indemnity provided under this Section 11.2 to a PA Party shall not extend:
  - (i) to any negligent or unlawful act or omission or willful misconduct of such PA Party, its employees, servants or persons for whom it is in law responsible (in respect of which such PA Parties shall indemnify the Independent Certifier, as referred to in Section 11.1); or
  - (ii) to any debt, cost, expense, claim or demand for which insurance proceeds are recoverable by such PA Party.
- (d) This indemnity shall survive the termination of this Independent Certifier Agreement.

### **11.3 Conduct of Claims**

- (a) Claims made by a third person against a party having, or claiming to have, the benefit of an indemnity pursuant to this Independent Certifier Agreement shall be conducted in accordance with the conduct of claims procedure described in Appendix D – Conduct of Claims to this Independent Certifier Agreement.

## **12. GENERAL**

### **12.1 Entire Agreement**

- (a) Except where provided otherwise in this Independent Certifier Agreement, this Independent Certifier Agreement constitutes the entire agreement between the parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings, whether oral, written, express or implied, concerning the subject matter of this Independent Certifier Agreement.

### **12.2 Negation of Employment**

- (a) The Independent Certifier, its officers, directors, members, employees, servants and agents and any other persons engaged by the Independent Certifier in the performance of the Certification Services will not by virtue of this Independent Certifier Agreement or the performance of the Certification Services become in the service or employment of the PA Parties for any purpose.
- (b) The Independent Certifier will be responsible for all matters requisite as employer or otherwise in relation to such officers, directors, members, employees, servants and agents and other persons who are engaged by the Independent Certifier.

**12.3 Waiver**

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

**12.4 Notices**

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

If to Contracting Authority:      Infrastructure Ontario  
1 Dundas Street West, Suite 1000  
Toronto, Ontario  
M5G 1Z3

Attn: [REDACTED]  
Email: [REDACTED]

If to Project Co:                      [REDACTED]  
Email: [REDACTED]  
Tel: [REDACTED]

With a copy to [REDACTED]  
Email: [REDACTED]

If to the Independent  
Certifier:

[REDACTED]  
Email: [REDACTED]  
Attn.: [REDACTED]

- (b) 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 Section 12.4(b).
- (c) Any party to this Independent Certifier Agreement may, from time to time, change any of its contact information set forth in Section 12.4(a) by prior notice to the other Parties, 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.
- (d) Subject to Sections 12.4(e), 12.4(f) and 12.4(g):
  - (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.
- (e) 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 Section 12.4.
- (f) 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 4:00 p.m. (recipient's local time), then such notice shall be deemed to have been received by such recipient on the next Business Day.
- (g) 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.

## **12.5 Transfer and Assignment**



- (a) The Independent Certifier:
  - (i) must not assign, transfer, mortgage, charge or encumber any right or obligation under this Independent Certifier Agreement without the prior written consent of the PA Parties, which each PA Party may give or withhold in its absolute discretion; and
  - (ii) agrees that any assignment, transfer, mortgage, charge or encumbrance will not operate to release or discharge the Independent Certifier from any obligation or liability under this Independent Certifier Agreement.
- (b) For the purposes of this Section 12.5, an assignment will be deemed to have occurred where there is a Change in Control of the Independent Certifier after the date of this Independent Certifier Agreement.
- (c) Each of the PA Parties may assign, transfer, mortgage, charge or encumber any right or obligation under this Independent Certifier Agreement in accordance with the terms of the Project Agreement.

## **12.6 Governing Laws and Jurisdictions**

- (a) This Independent Certifier Agreement shall be governed by and construed in accordance with the laws of Ontario and the laws of Canada applicable therein and shall be treated in all respects as an Ontario contract, without regard to conflict of laws principles.
- (b) The PA Parties and the Independent Certifier agree that the courts of the Province of Ontario and all courts competent to hear appeals therefrom shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Independent Certifier Agreement and hereby irrevocably attorn to the exclusive jurisdiction of such courts.
- (c) Nothing in this Independent Certifier Agreement affects the rights, protections and immunities of the Crown under the Proceedings Against the Crown Act (Ontario).

## **12.7 Contracting Authority Designate**

- (a) At any time and from time to time, Contracting Authority may designate any ministry, branch, agency, division, department or office of the Government of Ontario to carry out administrative responsibility for the rights and obligations of Contracting Authority under this Independent Certifier Agreement and Project Co and the Independent Certifier may deal exclusively with the designated person in respect of all such matters and is entitled to rely on the actions, directions, requests, notices, consents, approvals, waivers, comments relating to the review of documentation and other administrative matters and decisions determined by such designated person from time to time, until Contracting Authority has notified Project Co and the Independent Certifier in writing that such designated person is no longer the person designated by Contracting Authority hereunder

and such notice shall have effect on the later of the date of delivery of such notice and the date specified in the written notice. Contracting Authority shall advise Project Co and the Independent Certifier in writing of any designation hereunder. The rights and obligations of the parties to this Independent Certifier Agreement shall be in no way affected by reason of any such designation. Project Co and the Independent Certifier acknowledge the right of Contracting Authority to delegate administrative responsibilities hereunder as set forth in this Section 12.7.

## **12.8 Confidentiality**

- (a) The Independent Certifier must ensure that:
  - (i) neither it nor any of its officers, directors, members, employees, servants and agents disclose, or otherwise make public, any Contract Material or any other information or material acquired in connection with or during the performance of the Certification Services or the conduct of Adjudications without prior written approval of the PA Parties; and
  - (ii) no Contract Material is used, copied, supplied or reproduced for any purpose other than for the performance of the Certification Services or the conduct of Adjudications under this Independent Certifier Agreement.
- (b) The PA Parties may at any time require the Independent Certifier to give and to arrange for its officers, directors, members, employees, servants and agents engaged in the performance of the Certification Services to give written undertakings, in the form of confidentiality agreements on terms required by the PA Parties, relating to the non disclosure of confidential information, in which case the Independent Certifier must promptly arrange for such agreements to be made.

## **12.9 Contract Material**

- (a) The PA Parties and the Independent Certifier agree that the Independent Certifier does not and will not have any rights, including any Intellectual Property, in any Contract Material provided to the Independent Certifier or created or required to be created by either PA Party.
- (b) As between the PA Parties and the Independent Certifier, all title and ownership, including all Intellectual Property, in and to the Contract Material created or required to be created by the Independent Certifier as part of, or for the purposes of performing the Certification Services, is hereby assigned jointly to the PA Parties on creation, or where such title, ownership and Intellectual Property cannot be assigned before creation of the Contract Material, it will be assigned to the PA Parties on creation. In addition, to the extent that copyright may subsist in such Contract Material so created by the Independent Certifier, the Independent Certifier hereby waives all past, present and future moral rights therein and the Independent Certifier shall ensure that any agent or employee of Independent Certifier shall have waived all such moral rights. The PA Parties acknowledge and agree

that as between the PA Parties, title, ownership and other rights to the foregoing shall be governed by the Project Agreement.

- (c) The Independent Certifier will do all such things and execute all such documents as reasonably requested by either of the PA Parties in order to confirm or perfect the assignment of Intellectual Property in the Contract Material referred to in Section 12.9(b).

#### **12.10 Amendment**

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

#### **12.11 Severability**

- (a) Each provision of this Independent Certifier Agreement shall be valid and enforceable to the fullest extent permitted by law. If the courts of a competent jurisdiction shall declare any provision of this Independent Certifier Agreement invalid, unenforceable or illegal, 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 Independent Certifier Agreement. If any such provision of this Independent Certifier 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 Independent Certifier Agreement as near as possible to its original intent and effect.

#### **12.12 Enurement**

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

#### **12.13 Counterparts**

- (a) This Independent Certifier 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.

#### **12.14 Copyright Notice**

- (a) The Parties acknowledge that Queen's Printer for Ontario is the exclusive owner of the copyright in the Project Agreement and this Independent Certifier Agreement.

*[SIGNATURE PAGES IMMEDIATELY FOLLOW]*

**IN WITNESS WHEREOF** the parties have executed this Independent Certifier Agreement as of the date first above written.

**HER MAJESTY THE QUEEN IN RIGHT OF  
ONTARIO** as represented by the Minister of  
Government and Consumer Services, as represented  
by Ontario Infrastructure and Lands Corporation

Per: \_\_\_\_\_

Name: **[REDACTED]**

Title: **[REDACTED]**

I have authority to bind the corporation.

**TRANS/FORM BY POMERLEAU INC.**

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

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

I/We have authority to bind the corporation.

**[REDACTED]**

Per: \_\_\_\_\_

Name: **[REDACTED]**

Title: **[REDACTED]**

Per: \_\_\_\_\_

Name: **[REDACTED]**

Title: **[REDACTED]**

I/We have authority to bind the corporation.

## **APPENDIX A**

### **CERTIFICATION SERVICES**

Without limiting the other provisions of this Independent Certifier Agreement and the Project Agreement, the Independent Certifier shall do the following:

- (a) Receive and monitor drawings and documents related to the development of the design as necessary for the Independent Certifier to be informed as to the progress of the Works;
- (b) Receive and monitor progress reports as necessary for the Independent Certifier to be informed as to the progress of the Works;
- (c) Review information relating to Delay Events and Compensation Events;
- (d) Review information relating to Variation Enquiries, Project Co Variation Notices, Variations, Estimates, claims for extension of time and compensation and consult with the relevant party;
- (e) Review the draft Interim Completion Commissioning Program and draft Final Commissioning Program and the detailed tests, test methodology and expected test results proposed by Project Co and provide comments, including to report on the effectiveness of the Interim Completion Commissioning Program and the Final Commissioning Program, to identify any errors or omissions, and to report any risks;
- (f) In accordance with Section 14.1(b) of the Project Agreement, attend all meetings of, and participate, as necessary, in the activities of, the Works Committee;
- (g) Monitor the Commissioning Tests (as indicatively described in Schedule 14 - Outline Commissioning Program to the Project Agreement) and other tests, including re-tests, to be performed as set out in the Interim Completion Commissioning Program and Final Commissioning Program or as otherwise required for Project Co to achieve Substantial Completion and Final Completion;
- (h) Prior to any certification, consider the views and comments of both Project Co and Contracting Authority in relation to the satisfaction of the conditions for certification;
- (i) Conduct inspections of the Works as necessary for the Independent Certifier to be satisfied that the Works are proceeding in accordance with the requirements of the Project Agreement;
- (j) Review relevant documentation, including floor area schedules, certificates and approvals, Permits, Licences, Approvals, and Agreements, certifications, test results, quality assurance audits, letters of assurance from professionals, schedules of equipment and staff profile schedules provided to the Independent Certifier pursuant to the Project Agreement;

- (k) Monitor the requirements, progress and results of the Interim Completion Project Co Commissioning, Interim Completion Contracting Authority Commissioning, Project Co Commissioning and Contracting Authority Commissioning;
- (l) Monitor the conduct of the Commissioning Tests during any seasonal performance testing prescribed in the Final Commissioning Program including, without limitation, any re-tests, review of Commissioning Tests and results, copies of any certificates or other Permits, Licences, Approvals, and Agreements received by Project Co in connection with any Commissioning Tests conducted during the seasonal performance testing, review and accepting performance testing forms required to be delivered pursuant to the Final Commissioning Program and to perform such other similar responsibilities (other than performing Commissioning Tests or performance of inspections) with respect to any matter relating to commissioning of the Facility after Substantial Completion, as applicable, as either party may request and to report to each of the parties thereon;
- (m) Identify any errors or omissions made during the conduct of any such Commissioning Tests referenced in item (l) above and to advise Project Co and Contracting Authority with respect to the implications of those errors and omissions, to the extent that the Independent Certifier may reasonably be aware;
- (n) Upon receipt of notice from Project Co requesting the issuance of the Interim Completion Certificate, the Substantial Completion Certificate or the Final Completion Certificate, as applicable, (i) with respect to the Substantial Completion Certificate, perform the activities set out in Section 24.4(c) of the Project Agreement, and (ii) with respect to each of the Substantial Completion and the Final Completion Certificate, consider such request and, within the time period set out in the Project Agreement and in accordance with the Project Agreement, either:
  - (i) issue the applicable certificate; or
  - (ii) issue a report detailing the matters that the Independent Certifier considers are required to be performed prior to issuing the applicable certificate;
- (o) Upon notice from Project Co that the matters required to be performed prior to issuing the applicable certificate have been completed, re-inspect the Works or re-consider the matters specified to be performed, and repeat the procedures in Section (n) of this Appendix A until the issuance of the applicable certificate;
- (p) In consultation with Project Co and Contracting Authority:
  - (i) prepare the Interim Completion Minor Deficiencies List in accordance with Section 23A.8 and the Minor Deficiencies List in accordance with Section 24.8 of the Project Agreement, which will include:
    - (A) estimates of the cost for Contracting Authority to complete and rectify the Interim Completion Minor Deficiencies and the Minor Deficiencies;



- (B) the time for Project Co to complete and rectify the Interim Completion Minor Deficiencies and the Minor Deficiencies; and
  - (C) a schedule for the completion and rectification of the Interim Completion Minor Deficiencies and the Minor Deficiencies; and
- (ii) amend the Minor Deficiencies List in accordance with Sections 24.8(d) and (e) of the Project Agreement, which will specify a rectification time for any newly added Minor Deficiency that is no greater than 10 Business Days.
- (q) Not used;
- (r) Review and observe installation of all equipment, furniture, fixtures, information technology, communication equipment, telephone equipment and anything similar to the foregoing (collectively, the “**Installed Equipment**”) into or onto the Facility by Contracting Authority or any agent or contractor of Contracting Authority either before or after Substantial Completion and provide a report to Contracting Authority and Project Co identifying any damage to the Facility which has been caused as a result of the installation of such Installed Equipment into or onto the Facility by Contracting Authority, its contractors and/or agents;
- (s) Provide any determinations contemplated in the Project Agreement, which determinations may be subject to final resolution between the PA Parties pursuant to Schedule 27 - Dispute Resolution Procedure to the Project Agreement;
- (t) Participate in and give the PA Parties and their counsel reasonable cooperation, access and assistance (including providing or making available documents, information and witnesses for attendance at hearings and other proceedings) in connection with any proceedings between the PA Parties that relate to the Certification Services;
- (u) Provide periodic reports to the PA Parties, copying IO, as follows:
- (i) a progress report within fifteen Business Days after each month’s end or as otherwise agreed by the PA Parties (the “**Monthly Report**”); and
  - (ii) accompanying the Monthly Reports delivered for the months of May, August, November and February, a quarterly report (the “**Quarterly Report**”) for the quarters ending June 30th, September 30th, December 31st and March 31<sup>st</sup> respectively, in substantially the form as that in Appendix E and that contains the following information confirmed to the best of the Independent Certifier’s professional knowledge and judgment:
    - (A) the extent (expressed as a percentage) of completion of the Works as of the date of the Quarterly Report;
    - (B) the value of the Works completed as of the date of the Quarterly Report;

- (C) the forecasted extent (expressed as a percentage) of completion of the Works as of the end of the applicable quarter and for the next four quarters; and
  - (D) the forecasted value of the Works anticipated to be completed as of the end of the applicable quarter and for the next four quarters.
- (v) Provide advice on other matters that may arise that both PA Parties may jointly require;
  - (w) Review the reports and plans prepared by Project Co pursuant to Section 13.6(a) of the Project Agreement and produce a monthly IC progress report for the PA Parties;
  - (x) Issue a certificate for payment of the Legislative Holdback pursuant to Section 5.1(e) of Schedule 20 – Payment Procedures;
  - (y) Issue a certificate for payment of the Finishing Holdback in accordance with Section 4.6(c)(iii) of the Project Agreement; and
  - (z) Prepare the Substantial Completion Deliverables List pursuant to Section 24.8(d) of the Project Agreement and, if applicable, amend such list pursuant to Section 24.8(e) of the Project Agreement.

**APPENDIX B**

**INDEPENDENT CERTIFIER FEE**

**[REDACTED]**

**APPENDIX C**

**INDEPENDENT CERTIFIER PERSONNEL**

**[REDACTED]**

## **APPENDIX D**

### **CONDUCT OF CLAIMS**

This Appendix D shall apply to the conduct of claims, made by a third person against a party having, or claiming to have, the benefit of an indemnity pursuant to this Independent Certifier Agreement. The party having, or claiming to have, the benefit of the indemnity is referred to as the “**Beneficiary**” and a party giving the indemnity is referred to as an “**Indemnifier**”.

- (1) If the Beneficiary receives any notice, demand, letter or other document concerning any claim for which it appears that the Beneficiary is, or may become entitled to, indemnification under Section 11 of the Independent Certifier Agreement, the Beneficiary shall give written notice to each Indemnifier potentially obligated in respect thereof, as soon as reasonably practicable and in any event within 10 Business Days of receipt of the same. Such notice shall specify with reasonable particularity, to the extent that information is available, the factual basis for the claim and the amount of the claim.
- (2) Subject to Sections (3), (4) and (5) of this Appendix D, on the giving of such notice by the Beneficiary, where it appears that the Beneficiary is or may be entitled to indemnification from an Indemnifier in respect of all, but not part only, of the liability arising out of the claim, such Indemnifier shall (subject to providing the Beneficiary with a secured indemnity to the Beneficiary’s reasonable satisfaction against all costs and expenses that the Beneficiary may incur by reason of such action) be entitled to dispute the claim in the name of the Beneficiary at the Indemnifier’s own expense and take conduct of any defence, dispute, compromise, or appeal of the claim and of any incidental negotiations. The Beneficiary shall give such Indemnifier all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim. The Beneficiary shall have the right to employ separate counsel in respect of such claim and the reasonable fees and expenses of such counsel shall be to the account of the Indemnifier only where representation of both the Indemnifier and the Beneficiary by common counsel would be inappropriate due to any actual or potential conflicting interests between the Indemnifier and the Beneficiary. If and to the extent that both Contracting Authority and Project Co are given notice in respect of the same claim, they shall cooperate in the conduct of the claim and give each other such reasonable access and assistance as may be necessary or desirable for purposes of considering, resisting and defending such claim.
- (3) With respect to any claim conducted by an Indemnifier:
  - (i) the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;
  - (ii) the Indemnifier shall not bring the name or reputation of the Beneficiary into disrepute;

- (iii) the Indemnifier shall not pay, compromise or settle such claims without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed;
  - (iv) the Indemnifier shall not admit liability or fault to any third party without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed; and
  - (v) the Indemnifier shall use commercially reasonable efforts to have the Beneficiary named as a beneficiary under any release given by the persons bringing the claim to which this Section (3) relates.
- (4) The Beneficiary shall be free to pay or settle any such claim on such terms as it thinks fit and without prejudice to its rights and remedies under this Independent Certifier Agreement if:
- (i) none of the Indemnifiers is entitled to take conduct of the claim in accordance with Section (2);
  - (ii) none of the Indemnifiers notifies the Beneficiary of its intention to take conduct of the relevant claim as soon as reasonably practicable and in any event within 10 Business Days of the notice from the Beneficiary under Section (1) or each of the Indemnifiers notifies the Beneficiary that it does not intend to take conduct of the claim; or
  - (iii) none of the Indemnifiers complies in any material respect with Section (3).
- (5) The Beneficiary shall be free at any time to give notice to the applicable Indemnifier that the Beneficiary is retaining or taking over, as the case may be, the conduct of any defence, dispute, compromise or appeal of any claim, or of any incidental negotiations, to which Section (2) applies. For greater certainty, the Independent Certifier acknowledges and agrees that where Contracting Authority is the Beneficiary, Contracting Authority may retain or take over such conduct in any matter involving Personal Information (as it is defined in the Project Agreement) or any matter involving public policy. On receipt of such notice the applicable Indemnifier shall promptly take all steps necessary to transfer the conduct of such claim to the Beneficiary, and shall provide to the Beneficiary all relevant documentation and all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim. If the Beneficiary gives any notice pursuant to this Section (5), then the applicable Indemnifier shall be released from any liabilities arising under the applicable indemnity hereunder in respect of the applicable claim.
- (6) If an Indemnifier pays to the Beneficiary an amount in respect of an indemnity and the Beneficiary subsequently recovers, whether by payment, discount, credit, saving, relief or other benefit or otherwise, a sum or anything else of value (the

“**Recovery Amount**”) which is directly referable to the fact, matter, event or circumstances giving rise to the claim under the indemnity, the Beneficiary shall forthwith repay to that Indemnifier whichever is the lesser of:

- (i) an amount equal to the Recovery Amount less any out-of-pocket costs and expenses properly incurred by the Beneficiary in recovering the same; and
- (ii) the amount paid to the Beneficiary by such Indemnifier in respect of the claim under the relevant indemnity,

provided that there shall be no obligation on the Beneficiary to pursue any Recovery Amount and that the Indemnifier shall be repaid only to the extent that the Recovery Amount, aggregated with any sum recovered from the Indemnifier, exceeds the loss sustained by the Beneficiary except, however, that if the Beneficiary elects not to pursue a Recovery Amount, the Indemnifier shall be entitled to require an assignment to it of the right to do so.

- (7) Any person taking any of the steps contemplated by this Appendix D shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Independent Certifier Agreement.

**APPENDIX E**

**FORM OF QUARTERLY REPORT**

**[ON THE INDEPENDENT CERTIFIER’S LETTERHEAD]**

**[date]**

Infrastructure Ontario  
Suite 2000, 1 Dundas St. West  
Toronto, ON M5G 1Z3  
Attention:

and to:

Trans/FORM by Pomerleau Inc.  
**[REDACTED]**

Dear [●] and [●]:

This report, for the quarter ending [●], is delivered to you pursuant to Section (u)(ii) of Appendix A of the Independent Certifier Agreement between Her Majesty the Queen in Right of Ontario, as represented by the Minister of Government and Consumer Services as represented by Ontario Infrastructure and Lands Corporation (“**Contracting Authority**”), Trans/FORM by Pomerleau Inc. and us dated [●] (the “**Agreement**”). Terms not otherwise defined herein have the meaning ascribed to them in the Agreement..

All values stated herein are based on the Cost of the Works and are exclusive of HST. This report has taken into account the following information: **[insert particulars of sources of information (e.g., works reports, site visits) used to prepare the report]**.

Based on our analysis of the foregoing, we confirm the following to the best of our professional knowledge and judgment:

- As of the date hereof, the value of the Works is \$[●] and the Works are [●]% complete.
- At the end of this quarter, the estimated value of the Works will be \$[●] and the Works are forecasted to be % complete.

We estimate that the value of the Works and the extent of their completion will be as follows for the next four quarters (not including the present quarter):



	[quarter end date]	[quarter end date]	[quarter end date]	[quarter end date]
\$				
%				

We have prepared this report for the specific use of Contracting Authority, Trans/FORM by Pomerleau Inc. and the Province, as represented by its agent, the Ontario Infrastructure and Lands Corporation. This letter is not intended for general circulation, publication or reproduction for any other person or purpose without express written permission to each specific instance.

Yours truly,

---

**[Name and Signature of Independent  
Certifier]**

**SCHEDULE 7A**

**STANDBY LETTER OF CREDIT**

**[REDACTED]**

**SCHEDULE 7B**

**WARRANTY LETTER OF CREDIT**

**[REDACTED]**

**SCHEDULE 8**

**PROJECT CO PARTIES**

**[REDACTED]**

**SCHEDULE 9  
KEY INDIVIDUALS  
[REDACTED]**

## **SCHEDULE 10**

### **REVIEW PROCEDURE**

#### **1. WORKS SUBMITTALS**

- 1.1 The provisions of this Schedule 10 shall apply to the Design Development Submittals, the Construction Document Submittals, the Design Data and any and all items, documents and anything else required or specified by the Project Agreement, including all Works Submittals listed in Appendix A to this Schedule 10, in respect of the Works to be submitted to, reviewed or otherwise processed by Contracting Authority in accordance with the Review Procedure prior to Interim Completion and Substantial Completion, or after Interim Completion and Substantial Completion in respect of the completion of the applicable Interim Completion Minor Deficiencies or Minor Deficiencies, and, if directed by Contracting Authority, the correction, rectification and Making Good of any Works, the Facility or any part thereof as required pursuant to Sections 11.15, 11.16 and 11.17 of the Project Agreement, including any and all subsequent revisions, amendments and changes thereto (collectively and individually, “**Works Submittal**” or “**Works Submittals**” as applicable in this Schedule 10).

#### **2. SCHEDULE FOR WORKS SUBMITTALS**

- 2.1 Project Co shall provide for a progressive and orderly flow of Works Submittals from Project Co to the Contracting Authority Representative to allow for a sufficient Contracting Authority Review Period for each Works Submittal taking into account both the resources necessary to be available to the Contracting Authority Representative to conduct such review and whether delay in the review of the subject matter of the Works Submittal shall have a material impact on Project Co’s ability to progress future anticipated Works Submittals and the Works in accordance with the Works Schedule or current Recovery Schedule, as applicable. Project Co may submit major milestone Works Submittals (100% Design Development Submittals, and 100% Construction Document Submittals) in smaller packages, divided to facilitate Contracting Authority’s review within the time periods specified in this Schedule 10 and to accommodate Project Co’s construction staging. The division and scheduling of such Works Submittals shall be included in the Project Schedules and will be reviewed and accepted by Contracting Authority through its review of the Proposed Works Schedule prior to implementation.
- 2.2 In scheduling Review Procedure Activities and in the performance of the Works, Project Co shall allow adequate time prior to performing the Works that are the subject of the Review Procedure Activities, for the Review Procedure Activities and for Project Co to make changes to Works Submittals that may be required if comments are received on the Works Submittals, such review and required changes to be in accordance with this Schedule 10. Project Co shall schedule all Review Procedure Activities to maintain a buffer period between a Contracting Authority Review Period and the subsequent Works Activity.

- 2.3 Project Co shall include in the Project Schedules the Contracting Authority Review Period duration and sequencing logic as defined in the Project Agreement.
- 2.4 Project Co shall allow for a minimum Contracting Authority Review Period of:
- (a) 10 Business Days following receipt thereof for all Design Development Submittals, unless otherwise indicated in this list;
  - (b) 10 Business Days following receipt thereof for all Construction Document Submittals, unless otherwise indicated in this list;
  - (c) 15 Business Days following receipt thereof for the first Draft Works Schedules;
  - (d) 5 Business Days following receipt thereof for any subsequent Draft Works Schedule;
  - (e) 15 Business Days following receipt thereof for any other Project Schedules or related reports; and
  - (f) 15 Business Days following receipt thereof for Quality Plans, and 10 Business Days following receipt thereof for all other Works Submittals,
- or such longer period as the Parties may agree, provided that if Project Co has made major changes to the content, grouping or quantity of Works Submittals, or the Works Submittal was not submitted to Contracting Authority on the date indicated in Current Look-ahead Schedule, such period of time shall be increased by Project Co, acting reasonably, taking into account the factors set forth in this Section 2.
- 2.5 Project Co shall include the relevant activity relationships in the Project Schedules to indicate the Works Activities dependent on the specific Contracting Authority Review Period for a specific Works Submittal.
- 2.6 Project Co shall submit all Works Submittals to Contracting Authority in accordance with the Current Look-ahead Schedule, and the Contracting Authority Representative or the Contracting Authority Design Team, as applicable, shall review and respond to each Works Submittal in accordance with the Contracting Authority review time periods specified on the Current Look-ahead Schedule or as otherwise agreed to between the Parties.
- 2.7 If, at any time, any or all of:
- (a) the Current Look-ahead Schedule is deemed null and void pursuant to Section 11.1 of Schedule 19 – Works Scheduling Requirements;
  - (b) Project Co submits an unusually large number or volume of Works Submittals not contemplated by the Works Schedule and the Current Look-ahead Schedule; or

- (c) a Works Submittal was, or Works Submittals were, received for review later than indicated in the Current Look-ahead Schedule, such that the Contracting Authority Representative or the Contracting Authority Design Team, as applicable, cannot review the Works Submittals or Works Submittals within the time permitted in the Current Look-ahead Schedule;

then the Contracting Authority Representative shall, within 5 Business Days of receipt of such Works Submittal or Works Submittals, provide Project Co with an estimate of the time necessary for processing such Works Submittal or Works Submittals.

### **3. GENERAL REQUIREMENTS FOR WORKS SUBMITTALS**

- 3.1 Unless otherwise specified by the Contracting Authority Representative, Project Co shall issue 3 printed copies of all Works Submittals to Contracting Authority, together with an electronic copy uploaded to the on-line (web-based) project management software system specified by Contracting Authority, in a format agreed by the Parties, acting reasonably, and one printed copy of each Works Submittal to the Independent Certifier.
- 3.2 Project Co shall compile and maintain a register of the date and contents of the submission of all Works Submittals and the date of receipt and content of all returned Works Submittals and comments thereon.
- 3.3 All Works Submittals shall be in English.
- 3.4 All Works Submittals required by this Project Agreement or by Applicable Law to be signed or sealed by persons with professional designations (including, where applicable, by registered professional engineers or architects) shall, where applicable, be so signed and sealed.
- 3.5 All Works Submittals shall include copies of all documents to be reviewed and shall clearly identify the purpose of the Works Submittal and Project Co's proposed course of action relating to the Works Submittal and the Works that are the subject of the Works Submittal.
- 3.6 All Works Submittals shall, where applicable, refer to the relevant provisions of the Output Specifications, and to any Design Data that has previously been subject to review.
- 3.7 When Project Co submits a Design Acceptability Report, Project Co shall specifically identify all elements of Design Acceptability, including where applicable, references to the Output Specifications.
- 3.8 All Works Submittals shall be clearly identified as a Works Submittal and shall be delivered with appropriate covering documentation, which shall include a list of all attached Works Submittals and for each Works Submittal:
  - (a) the document number(s) or drawing number(s);
  - (b) revision numbers (if applicable);



- (c) document or drawing title(s);
  - (d) name of entity that prepared the Works Submittal;
  - (e) the Works Submittal history showing date, delivery information, log number of all previous submissions, previous assigned comments by Contracting Authority and Project Co’s response to such comments to that Works Submittal; and
  - (f) identification of any previous Works Submittal superseded by the current Works Submittal.
- 3.9 No fewer than ten (10) Business Days prior to the scheduled date of submission of each Works Submittal, the Project Co Representative shall meet with the Contracting Authority Representative and the Contracting Authority Design Team to review the progress and validate the content of the Works Submittal scheduled to be submitted. The Contracting Authority Representative, acting reasonably, may adjust the scheduled date of the submission of the Works Submittal if, in the reasonable opinion of the Contracting Authority Representative, such Works Submittal does not or is unlikely to meet the requirements of the Project Agreement by the date it is scheduled to be submitted.
- 3.10 If a Proposal Part corresponds to a Works Submittal, then Project Co shall ensure that its initial submission of such Works Submittal, in accordance with this Schedule 10, is substantially the same content and level of detail as the corresponding Proposal Part. For clarity, this requirement shall not:
- (a) lessen, reduce or otherwise modify or amend Contracting Authority’s rights under the Project Agreement to review each Works Submittal in accordance with this Schedule 10; or
  - (b) constitute acceptance or comment by Contracting Authority of any Proposal Part or any Works Submittal in accordance with this Schedule 10.

#### **4. COMMENTS**

- 4.1 The Contracting Authority Design Team shall review and respond to each Works Submittal in accordance with the time periods specified in Section 2.2 of this Schedule 10. The Contracting Authority Design Team shall return Works Submittals to Project Co with a copy to the Independent Certifier and assign one of the following 4 comments:
- (a) “NO COMMENT”;
  - (b) “MINOR NON-CONFORMANCE”;
  - (c) “MAJOR NON CONFORMANCE”;
  - (d) “CRITICAL NON-CONFORMANCE”.

- 4.2 The comment “NO COMMENT” will be assigned to each Works Submittal that, in the opinion of the Contracting Authority Design Team, generally conforms to the requirements of this Project Agreement. Project Co shall comply with and implement such Works Submittal.
- 4.3 The comment “MINOR NON-CONFORMANCE” will be assigned to each Works Submittal that, in the opinion of the Contracting Authority Design Team, contains any Minor Non-Conformance but does not contain any Major Non-Conformance or Critical Non-Conformance. Project Co shall correct such Works Submittal and shall comply with and implement such Works Submittal after correction, including in accordance with the comments. If the Contracting Authority Design Team assigns to a Works Submittal the additional comment “RE-SUBMIT”, Project Co shall correct and re-submit such Works Submittal to the Contracting Authority Design Team no later than twenty (20) Business Days after the comment has been provided to Project Co, or such longer time period as determined by the Contracting Authority Design Team, acting reasonably and as set out in writing. If at any time it is discovered that Project Co has not corrected the deficiencies on Works Submittals stamped “MINOR NON-CONFORMANCE”, then Project Co will be required to modify the Works Submittals and Works, as required to ensure that the Works comply with the Output Specifications and Project Co may be required, at the Contracting Authority Design Team’s discretion, to resubmit the relevant Works Submittals. In such circumstances the Contracting Authority Design Team shall act promptly in considering whether such deficiencies have been corrected. No extension of time will be given or additional compensation paid in respect of any such modification or re-submittal.
- 4.4 The comment “MAJOR NON-CONFORMANCE” will be assigned to each Works Submittal that, in the opinion of the Contracting Authority Design Team, contains any Major Non-Conformance but does not contain any Critical Non-Conformance. The comment “CRITICAL NON-CONFORMANCE” will be assigned to each Works Submittal that, in the opinion of the Contracting Authority Design Team, contains any Critical Non-Conformance. Project Co shall correct and re-submit such Works Submittal within 10 Business Days after the comment “MAJOR NON-CONFORMANCE” or “CRITICAL NON-CONFORMANCE” has been provided to Project Co, or such longer time period, as determined by the Contracting Authority Design Team, acting reasonably and as set out in writing. The Contracting Authority Design Team will then review such re-submitted Works Submittal and assign a comment to the corrected Works Submittal. The Works Submittal shall be corrected, revised and resubmitted as often as may be required to obtain a comment that permits Project Co to proceed. No extension of time will be given or additional compensation paid in respect of any such modification or re-submittal. In addition to the above, a Works Submittal with a “CRITICAL NON-CONFORMANCE” comment will be a Proceeding at Risk Matter in accordance with Section 14.6(a)(ii) of the Project Agreement.
- 4.5 Where the Contracting Authority Design Team issues the comment “MINOR NON-CONFORMANCE”, “MAJOR NON-CONFORMANCE” or “CRITICAL NON-CONFORMANCE”, the Contracting Authority Design Team shall provide reasons for the

comment, referencing the particulars of the Section(s) of this Project Agreement that the Works Submittal fails to satisfy, and, if requested by the Project Co Representative, the Contracting Authority Design Team shall meet with the Project Co Representative to discuss the reasons for the comment.

- 4.6 If, at any time after assigning any comment to a Works Submittal, the Contracting Authority Design Team or Project Co discovers any significant deficiencies or any failure to conform to the requirements of this Project Agreement, the Contracting Authority Design Team may revise the comment assigned to any Works Submittal. If the Parties agree or it is determined in accordance with Section 5 of this Schedule 10 that the revised comment is correct, Project Co shall make all such corrections to the Works Submittals and the Works. No extension of time will be given or additional compensation paid in respect of any such modification or re-submittal.
- 4.7 For the purpose of facilitating and expediting the review and correction of Works Submittals, the Contracting Authority Design Team and the Project Co Representative shall meet as may be mutually agreed to discuss and review any outstanding Works Submittals and any comments thereon.
- 4.8 Where a Works Submittal is voluminous, the Contracting Authority Representative at his or her discretion may elect to stamp only the cover page or first sheet of the Works Submittal with the appropriate comment, if any, and return to Project Co the cover page or first page together with individual pages or sheets on which comments are made, together with an explanation of the status of all pages not returned to Project Co. Any pages returned without such an explanation as to their status shall be deemed to be “NO COMMENT” by Contracting Authority.
- 4.9 In lieu of returning a Works Submittal, the Contracting Authority Representative may by letter notify Project Co of the comment assigned to the Works Submittal and if such comment is “MINOR NON-CONFORMANCE”, “MAJOR NON-CONFORMANCE” or “CRITICAL NON-CONFORMANCE” the letter shall contain comments in sufficient detail for Project Co to identify the correction sought.

## **5. DISPUTES**

- 5.1 If Project Co disputes any comment assigned by the Contracting Authority Design Team to a Works Submittal under this Schedule 10, Project Co shall promptly notify the Contracting Authority Representative and the Independent Certifier of the details of such Dispute and shall submit the reasons why Project Co believes a different comment should be assigned, together with appropriate supporting documentation. The Contracting Authority Design Team shall review the Works Submittal, the reasons and supporting documentation and within 5 Business Days after receipt thereof shall either confirm the original comment or notify Project Co of a revised comment. If the Contracting Authority Design Team confirms the original comment, Project Co may refer the matter for determination in accordance with Schedule 27 - Dispute Resolution Procedure.

5.2 Notwithstanding the provisions of Section 5.1 of this Schedule 10, the Contracting Authority Design Team may direct that Project Co revise the Works Submittal in accordance with the comment of the Contracting Authority Design Team and proceed to perform and complete the Works on the basis of such revised Works Submittal. For clarity, Project Co may refer such direction for resolution as a Dispute in accordance with Schedule 27 - Dispute Resolution Procedure of the Project Agreement.

## **6. EFFECT OF REVIEW**

6.1 Subject to Section 11.4 of this Project Agreement, any review and comment by Contracting Authority or the Contracting Authority Design Team of any Works Submittals is for general conformity to the obligations and requirements of this Project Agreement, and any such review and comment shall not relieve Project Co of the risk and responsibility for the Works and for meeting all of its obligations under and requirements of this Project Agreement, and shall not create any new or additional obligations or liabilities for Contracting Authority. Without limiting the generality of the foregoing any and all errors or omissions in Works Submittals or of any review and comment shall not exclude or limit Project Co's obligations or liabilities in respect of the Works under this Project Agreement or exclude or limit Contracting Authority's rights in respect of the Works under this Project Agreement.

## **7. WORKS SUBMITTAL EXPLANATION**

7.1 At any time, the Contracting Authority Design Team may, acting reasonably, require Project Co, the Project Co Parties and any other relevant personnel, at no additional cost to Contracting Authority, to explain to the Contracting Authority Design Team and its other advisors the intent of Project Co's Works Submittals, including in relation to any design and any associated documentation and as to its satisfaction of the Output Specifications. Project Co shall provide the explanation to the Contracting Authority Design Team within 5 Business Days (or such longer period as the Parties may agree) from the date of receipt of the request from the Contracting Authority Design Team.

## **8. REVISIONS**

8.1 Project Co shall ensure that Works Submittals keep the same, unique reference number throughout the review process, and that subsequent revisions of the same Works Submittal are identified by a sequential revision number. Correspondence related to such Works Submittal shall reference the reference number and revision number.

8.2 Re-submittals shall clearly show all revisions from the previous Works Submittal. Bound documents, including reports and manuals, shall contain a preface that clearly states how revisions are marked and the previous revision number against which the revisions have been marked. A consistent format for mark-ups of documents shall be used (e.g. deletions struck out and additions underscored). Revised portions of drawings shall be clearly marked (with appropriate means to visually distinguish between the parts of the drawing

that are revised and the parts that are not revised) and the revision number and description of the revision shall be included on the drawing.

- 8.3 All revisions on print media shall be initialled by hand by the individual designer, design checker and, where applicable, by the drafter and the drafting checker and shall identify the persons who initialled the Works Submittal. Electronic versions of the Works Submittal shall identify the persons who initialled the revisions to the printed version of the Works Submittal. All such revisions must be able to be integrated into the As Built Drawings.
- 8.4 Project Co shall keep all Design Data current, including a complete set of the most recently issued submittal documents available on site in the construction office for use by Contracting Authority and Contracting Authority representatives. If any Design Data is revised as part of a Works Submittal, all other Design Data relying on or based on that Design Data shall also be revised accordingly. All such revised Design Data shall also be submitted with the Works Submittal to which it relates.

## **9. AUDIT OF WORKS SUBMITTAL IMPLEMENTATION**

- 9.1 Without limiting any other right under this Project Agreement, the Contracting Authority Representative shall have the right to audit all Works Submittals, including comparing all Works Submittals to previous Works Submittals.
- 9.2 If during an audit or at any other time it is discovered by Contracting Authority or Project Co (or resolved pursuant to Section 9.3 of this Schedule 10) that any Works Submittals were not correctly implemented, Project Co shall at its sole cost immediately take all necessary steps to correct and modify the applicable Works Submittals and the Works to which they relate and shall advise the Contracting Authority Design Team of all such corrections and modifications.
- 9.3 Any Dispute concerning the implementation of a Works Submittal, subject to Section 5.1 of this Schedule 10, shall be referred to Schedule 27 – Dispute Resolution Procedure for resolution

## **10. VARIATIONS**

- 10.1 No alteration or modification to the design, quality and quantity of the Works arising from the development of detailed design or from the co-ordination of the design in connection with any Works Submittal shall be construed or regarded as a Variation.
- 10.2 If, having received comments from the Contracting Authority Design Team on any Works Submittal, Project Co considers that compliance with those comments would amount to a Variation, Project Co shall, within 10 Business Days of receipt of and before complying with the comments, provide written Notice to Contracting Authority of the same and, if it is agreed by the Parties that a Variation would arise if the comments were complied with, Contracting Authority may, at its election, (a) issue a Variation Enquiry and it shall be dealt with in accordance with Schedule 22 - Variation Procedure or (b) amend its comment on

the Works Submittal. If the Parties do not agree that a Variation would arise if the comments were complied with, either party may proceed to resolve the matter in accordance with Section 5 of this Schedule 10 including for clarity, the exercise by Contracting Authority of its rights under Section 5.2 of this Schedule 10. Subject to the foregoing sentence, any failure by Project Co to notify Contracting Authority in accordance with this Section 10.2 that Project Co considers compliance with any comments of the Contracting Authority Design Team would amount to a Variation shall constitute an irrevocable acceptance by Project Co that any compliance with the Contracting Authority Design Team's comments shall be without cost to Contracting Authority and without any extension of time.

**APPENDIX A**

**MINIMUM DESIGN AND CONSTRUCTION SUBMITTAL REQUIREMENTS**

**[REDACTED]**

**SCHEDULE 11**

**DESIGN QUALITY PLAN AND CONSTRUCTION QUALITY PLAN**

**[REDACTED]**



**SCHEDULE 12**

**FORM OF PERFORMANCE GUARANTEE OF CONSTRUCTION GUARANTOR**

**THIS GUARANTEE** is made as of the 1<sup>st</sup> day of June, 2021

**BETWEEN:**

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**, as represented by the Minister of Government and Consumer Services, as represented by Ontario Infrastructure and Lands Corporation, 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

(“**Contracting Authority**”)

**AND:**

[REDACTED]

(“**Construction Guarantor**”)

**WHEREAS:**

- A. Contracting Authority and Trans/FORM by Pomerleau Inc., a corporation formed under the laws of [REDACTED] (“**Project Co**”) have entered into a project agreement dated as of the 1<sup>st</sup> day of June, 2021 (which agreement, including the schedules thereto, as the same may be amended, modified, restated, supplemented or replaced, from time to time, is hereinafter called the “**Project Agreement**”).
- B. As an inducement to Contracting Authority to enter the Project Agreement with Project Co, Construction Guarantor has agreed to absolutely, unconditionally and irrevocably guarantee to Contracting Authority, as a direct obligation, the full and prompt performance and observance by Project Co of each and every covenant, agreement, undertaking and obligation of Project Co contained in the Project Agreement with respect to the Design and Construction Work (as such term is defined in Section 1.1(c) of this Guarantee), and in furtherance thereof has agreed to enter into this Guarantee.

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

## **1. DEFINITIONS AND INTERPRETATION**

### **1.1 Definitions**

- (a) Unless otherwise defined herein, all capitalized terms will have the meanings ascribed to them in the Project Agreement.
- (b) Unless otherwise expressly provided herein, this Guarantee shall be interpreted in accordance with Schedule 1 – Definitions and Interpretation of the Project Agreement.
- (c) For the purpose of this Guarantee, the term “**Design and Construction Work**” means:
  - (i) subject to Section 1.1(c)(ii) below, all of Project Co’s covenants, obligations and activities with respect to the Works pursuant to the Project Agreement, and including, for certainty:
    - (A) all of Project Co’s covenants, obligations and activities pursuant to Sections 11.15 (Defective Works), 11.16 (Warranty Obligations), and 11.17 (Prompt Repair of Warranty Work) of the Project Agreement; and
    - (B) Project Co’s representations and warranties contained in Article 6 of the Project Agreement, except for:
      - (1) Section 6.1(a), which for the purposes of this Guarantee shall be amended by replacing “Project Co Event of Default” with “Project Co Construction Event of Default” as such term is defined in Schedule 1 to the Project Agreement, and
      - (2) Section 6.1(a)(xx), which for the purposes of this Guarantee shall be excluded from the definition of “Design and Construction Work” in accordance with Section 1.1(c)(ii)(5) below;
  - (ii) for the purpose of this Section 1.1(c), the term “Design and Construction Work” shall be deemed not to include any of the following covenants, obligations or activities of Project Co under the Project Agreement (including the delivery of any executed originals of the documents referred to below):
    - (1) any covenant, agreement, undertaking or obligation related to the Financing or the Cost of the Financing;
    - (2) the recitals to the Project Agreement;

- (3) Article 2;
- (4) Sections 4.2, 4.3, 4.4 and 4.9;
- (5) Section 6.1(a)(xxii);
- (6) Sections 8.3 and 8.4;
- (7) Section 35.1(a)(iv);
- (8) Sections 48.3(c) and (d);
- (9) Article 50;
- (10) Schedule 2 – Completion Documents;
- (11) Schedule 4 – Lenders’ Direct Agreement;
- (12) any of Project Co’s obligations under Schedule 5 – Construction Contractor’s Direct Agreement;
- (13) Schedule 3 – Subcontractor’s Direct Agreement;
- (14) Schedule 12 – Performance Guarantee of Construction Guarantor;
- (15) Schedule 23 – Compensation on Termination;
- (16) Schedule 24 – [REDACTED]; or
- (17) Schedule 31 – Project Co Information.

## **1.2 Survival**

This Guarantee shall survive the termination or other expiry of the Project Agreement.

## **2. GUARANTEE**

### **2.1 Guarantee**

- (a) Construction Guarantor does hereby absolutely, unconditionally and irrevocably guarantee to Contracting Authority, as a direct obligation, the full and prompt performance and observance by Project Co of each and every covenant, agreement, undertaking and obligation of Project Co contained in the Project Agreement with respect to the Design and Construction Work (collectively, the “**Guaranteed Obligations**”), and for greater certainty the Guaranteed Obligations do not include

any covenants, agreements, undertakings and obligations of Project Co under the Project Agreement which are not expressly defined in this Section 2.1(a).

- (b) Notwithstanding any other provision of this Guarantee:
  - (i) **[REDACTED]**; and
  - (ii) in no event shall the aggregate liability of the Construction Guarantor under this Guarantee and the Construction Contractor under the Design and Construction Contract exceed the maximum liability of the Construction Contractor under the Design and Construction Contract, but this limit of liability shall not extend to interest and enforcement costs payable under this Guarantee.

## **2.2 General Provisions Relating to the Guarantee**

- (a) Each and every default in performance or observance of any of the Guaranteed Obligations by Project Co shall give rise to a separate claim and cause of action hereunder, and separate claims or suits may be made and brought, as the case may be, hereunder as each such default occurs.
- (b) The Guarantee herein provided for shall be a continuing, absolute and unconditional guarantee of performance and observance of the Guaranteed Obligations and shall remain in full force and effect until each and all of the Guaranteed Obligations shall have been fully and satisfactorily discharged in accordance with the terms and provisions of the Project Agreement and Construction Guarantor shall have fully and satisfactorily discharged all of its obligations under this Guarantee.
- (c) The liability of Construction Guarantor hereunder shall remain in full force and effect irrespective of and shall in no way be affected or impaired by (and no notice to Construction Guarantor shall be required in respect of):
  - (i) any compromise, waiver, renewal, extension, indulgence, amendment, addition, deletion, change in, modification of, or release of any security (including any other guarantee, letter of credit or bond) for or in respect of any of the Guaranteed Obligations;
  - (ii) any amalgamation, merger or consolidation of Project Co or Construction Guarantor or any sale, lease or transfer of any of the assets of Project Co or Construction Guarantor;
  - (iii) any Change in Ownership of Project Co or Construction Guarantor;
  - (iv) the termination or other expiry of the Project Agreement;

- (v) any Delay Event (it being acknowledged, however, that the performance of the Guaranteed Obligations shall be extended accordingly);
  - (vi) any change in the financial condition of Project Co or Construction Guarantor;
  - (vii) any Project Co Event of Default described in Section 35.1(a)(i) of the Project Agreement, or any resulting release, stay or discharge of any Guaranteed Obligation;
  - (viii) any lack or limitation of power, incapacity or disability on the part of Project Co or any other irregularity, defect or informality on the part of Project Co with respect to the Guaranteed Obligations;
  - (ix) any provision of any laws, statutes, rules or regulations of general application in relation to suretyship or any other circumstance that might constitute, under law generally applicable to suretyship, a defence available to, or a discharge of, Construction Guarantor in respect of the Guaranteed Obligations or this Guarantee;
  - (x) the exercise of any rights under the Lending Agreements, including the right of Lenders to cure any Project Co Event of Default by or on behalf of Project Co hereunder and/or to assume the obligations of Project Co and complete the Design and Construction Work in the manner provided in the Project Agreement;
  - (xi) the assignment by Contracting Authority in accordance with the provisions of Section 48.2 of the Project Agreement; or
  - (xii) any other occurrence or circumstance whatsoever, whether similar or dissimilar to the foregoing that, under law generally applicable to suretyship, might otherwise constitute a legal or equitable defence or discharge of the liabilities of a guarantor or surety that might otherwise limit recourse against Construction Guarantor.
- (d) The obligations and liabilities of Construction Guarantor hereunder shall not be impaired, diminished, abated or otherwise affected by the commencement by or against Project Co or Construction Guarantor of any proceedings under any bankruptcy or insolvency law or laws relating to the relief of debtors, readjustment of indebtedness, reorganizations, arrangements, compositions or extension or other similar laws.
- (e) Contracting Authority shall not be bound to exhaust its recourse against Project Co or others or any securities (including the Security described in Schedule 25 of the Project Agreement) or other guarantees it may at any time hold before being entitled

to performance of the Guaranteed Obligations by the Construction Guarantor and Construction Guarantor renounces all benefits of discussion and division.

- (f) It is the intent and purpose hereof that Construction Guarantor shall not be entitled to and does hereby waive any and all defences which are, under law generally applicable to suretyship, available to a guarantor, sureties and other secondary parties at law or in equity. Without limiting the generality of the foregoing, Construction Guarantor hereby waives notice of acceptance of this Guarantee and of the non-performance by Project Co, diligence, presentment, protest, dishonour, demand for performance from Contracting Authority and notice of non-performance or failure to perform on the part of Project Co and all other notices whatsoever. The Guarantee hereunder is a guarantee of performance and compliance. In order to hold Construction Guarantor liable hereunder, there shall be no obligation on the part of Contracting Authority at any time to demand or resort for performance to Project Co, its properties or assets or to any security, property or other rights or remedies whatsoever, nor shall there be any requirement that Project Co be joined as a party to any proceeding for the enforcement of any provision of this Guarantee and Contracting Authority shall have the right to enforce the provisions of this Guarantee irrespective of whether or not legal proceedings or other enforcement efforts against Project Co are pending, seeking resort to or realization upon or from any of the foregoing. Without limiting the foregoing, it is understood that repeated and successive demands may be made and recoveries may be had hereunder as and when from time to time, Project Co shall default under or with respect to any of the Guaranteed Obligations, and that, notwithstanding recovery hereunder for or in respect of any such default, the Guarantee herein shall remain in full force and effect unamended and shall apply to each and every subsequent default.
- (g) Without prejudice to and without releasing, discharging, limiting or otherwise affecting in whole or in part the obligations and liabilities of Construction Guarantor under this Guarantee and without in any way requiring the consent of or giving notice to Construction Guarantor, Contracting Authority may grant time, renewals, extensions, indulgences, releases and discharges to and accept compositions from or otherwise deal with Project Co and/or Construction Guarantor or others, including any other guarantor, as Contracting Authority may see fit and Contracting Authority may take, abstain from taking or perfecting, vary, exchange, renew, discharge, give up, realize on or otherwise deal with security and guarantees in such manner as Contracting Authority may see fit.
- (h) Neither an action or proceeding brought under this Guarantee regarding the Guaranteed Obligations nor any judgment or recovery in consequence of that action or proceeding operates as a bar or defence action or defence to any further action that may be brought under this Guarantee. Construction Guarantor acknowledges that, if judgment is granted on an action or proceeding commenced under this

Guarantee, the obligations of Construction Guarantor to Contracting Authority do not merge with or end Construction Guarantor's obligations hereunder.

- (i) The liability of Construction Guarantor under this Guarantee shall arise forthwith after demand has been made in writing on Construction Guarantor.
- (j) Construction Guarantor agrees to pay to Contracting Authority any and all reasonable and direct out-of-pocket costs and expenses, including reasonable legal fees (on a substantial indemnity basis) incurred by it in connection with enforcing any of its rights hereunder.

### **3. REPRESENTATIONS AND WARRANTIES**

#### **3.1 Construction Guarantor Representations and Warranties**

- (a) Construction Guarantor represents and warrants to Contracting Authority that as of the date of this Guarantee:
  - (i) Construction Guarantor is a corporation incorporated and validly existing under the laws of the jurisdiction of its organization, duly registered to carry on business as an extra-provincial corporation in the Province of Ontario, is in good standing with the Registre des entreprises du Quebec with respect to the filing of annual returns, and has all the requisite corporate power and authority to own, lease and operate its properties and assets, to carry on its business as it is currently being conducted, to enter into this Guarantee and the Ancillary Documents to which it is a party and to perform its obligations hereunder and thereunder;
  - (ii) Construction Guarantor has the requisite power, authority and capacity to execute and deliver and perform this Guarantee and the Ancillary Documents to which it is a party, and to do all acts and things, and execute, deliver and perform all other agreements, instruments, undertakings and documents as are required by this Guarantee and the Ancillary Documents to which it is a party to be done, executed, delivered or performed;
  - (iii) no steps or proceedings have been taken or are pending to supersede, repeal or amend its constating documents, articles or by-laws or any shareholders agreement in a manner that would materially impair or limit its ability to perform its obligations under this Guarantee or any of the Ancillary Documents to which it is party and such documents and agreements are in full force and effect as of the date hereof;
  - (iv) this Guarantee and the Ancillary Documents (when executed and delivered) to which Construction Guarantor is a party, have been duly authorized, executed, and delivered by Construction Guarantor and constitute legal, valid, and binding obligations of Construction Guarantor, enforceable

against Construction Guarantor in accordance with their respective 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 authorization, execution, delivery and performance by Construction Guarantor of this Guarantee and the Ancillary Documents to which it is a party do not violate or conflict with, or constitute a default under:
- (A) its constating or organizational documents or any unanimous shareholders agreement or similar rights agreement binding on Construction Guarantor;
  - (B) any Applicable Law; or
  - (C) any covenant, contract, instrument, 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) **[REDACTED]**;
- (vii) there are, to the knowledge of its senior management, no actions, suits, proceedings, or investigations pending or threatened against Construction Guarantor, 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 Construction Guarantor or in any impairment of its ability to perform its obligations under this Guarantee or any Ancillary Documents to which it is a party, and Construction Guarantor 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 would result in any such material adverse effect or impairment; and
- (viii) Construction Guarantor is able to meet its obligations as they generally become due.

#### **4. NOTICES**





- (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 Article 4.
- (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 4:00 p.m. (recipient's local time), then such Notice shall be deemed to have been received by such recipient on the next Business Day.
- (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.

#### **4.5 Service on Contracting Authority**

Where any Notice is required to be served on Contracting Authority, the obligation to serve such Notice shall be fulfilled by serving it on Contracting Authority in accordance with the provisions of this Article 4.

### **5. GENERAL**

#### **5.1 Amendments**

This Guarantee 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 Guarantee.

#### **5.2 Waiver**

- (a) No waiver made or given by a party under or in connection with this Guarantee shall be binding or effective unless the waiver is in writing, signed by an authorized representative of the party giving such waiver, and delivered by such party to the other party. No waiver made with respect to any 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 either 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.

#### **5.3 Contracting Authority Designate**

At any time and from time to time, the Contracting Authority may designate any ministry, branch, agency, division, department or office of the Government of Ontario to carry out administrative responsibility for the rights and obligations of Contracting Authority under this Guarantee and the Construction Guarantor may deal exclusively with the designated person in respect of all such matters and is entitled to rely on the actions, directions, requests, notices, consents, approvals, waivers, comments relating to the review of documentation and other administrative matters and decisions determined by such designated person from time to time, until the Contracting Authority has notified the Construction Guarantor in writing that such designated person is no longer the person designated by the Contracting Authority hereunder and such notice shall have effect on the later of the date of delivery of such notice and the date specified in the written notice. The Contracting Authority shall advise the Construction Guarantor in writing of any designation hereunder. The rights and obligations of the parties to this Guarantee shall be in no way affected by reason of any such designation. The Construction Guarantor acknowledge the right of the Contracting Authority to delegate administrative responsibilities hereunder as set forth in this Section 5.3.

#### **5.4 Entire Agreement**

Except where provided otherwise in this Guarantee, this Guarantee, together with the Project Agreement and the Ancillary Documents, constitute the entire agreement between the parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings, whether oral, written, express or implied, concerning the subject matter of this Guarantee, including the Request for Proposals.

#### **5.5 Severability**

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

#### **5.6 Enurement**

This Guarantee shall enure to the benefit of, and be binding on, Contracting Authority and Construction Guarantor and their respective permitted successors and assigns. This Guarantee may not be assigned by the Construction Guarantor.

#### **5.7 Governing Law and Jurisdiction**

- (a) This Guarantee 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) 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 Guarantee affects the rights, protections and immunities of the *Crown under the Proceedings Against the Crown Act (Ontario)*.

### **5.8 Cumulative Remedies**

Except as otherwise set forth in this Guarantee, the rights, powers and remedies of each party set forth in this Guarantee 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 Guarantee or the Project Agreement or Ancillary Documents.

### **5.9 Further Assurance**

Each party shall do all reasonable things, from time to time, and execute all reasonable further documents necessary to give full effect to this Guarantee.

### **5.10 Costs**

Each party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution and delivery of this Guarantee.

### **5.11 Language of Agreement**

- (a) Each of the parties acknowledges having requested and being satisfied that this Guarantee and related documents be drawn in English. Chacune des parties reconnaît avoir demandé que ce document et ses annexes soient rédigés en anglais et s'en declare 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 Guarantee shall be in English.

### **5.12 Proof of Authority**

Contracting Authority and Construction Guarantor each reserve the right to require any person executing this Guarantee on behalf of the other party to provide proof, in a form acceptable to Contracting Authority or Construction Guarantor, as applicable, that they have the requisite authority to execute this Guarantee on behalf of and to bind Contracting Authority or Construction Guarantor, as applicable.

**5.13 Counterparts**

This Guarantee may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full, original and binding agreement for all purposes. 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.

**5.14 Joint and Several**

If Construction Guarantor is comprised of more than one person, then each such person shall be jointly and severally liable for the obligations and liabilities of Construction Guarantor hereunder.

**5.15 Copyright Notice**

The parties acknowledge that the Queen’s Printer for Ontario is the exclusive owner of the copyright in the Project Agreement and this Guarantee.

*[SIGNATURE PAGES IMMEDIATELY FOLLOW]*

IN WITNESS WHEREOF the Parties have executed this Guarantee as of the date first above written.

**HER MAJESTY THE QUEEN IN RIGHT OF  
ONTARIO** as represented by the Minister of  
Government and Consumer Services, as represented  
by Ontario Infrastructure and Lands Corporation

Per: \_\_\_\_\_

Name: [REDACTED]

Title: [REDACTED]

I have authority to bind the corporation.

**[REDACTED]**

Per: \_\_\_\_\_

Name: **[REDACTED]**

Title: **[REDACTED]**

Per: \_\_\_\_\_

Name: **[REDACTED]**

Title: **[REDACTED]**

I/We have authority to bind the corporation.

**SCHEDULE 13**

**PROJECT CO PROPOSAL EXTRACTS**

**[REDACTED]**



**SCHEDULE 14**

**OUTLINE COMMISSIONING PROGRAM**

**[REDACTED]**

**SCHEDULE 15**

**OUTPUT SPECIFICATIONS**

**[REDACTED]**

**SCHEDULE 16**

**TITLE ENCUMBRANCES**

The Title Encumbrances for the Project are, collectively, the following “**Specific Title Encumbrances**” and “**General Title Encumbrances**”:

**I. SPECIFIC TITLE ENCUMBRANCES**

With regard to the specific Title Encumbrances registered against title to and affecting the Lands:

1. for the BCA Site:
  - a) Instrument No. TT65156 being a transfer of easement registered November 3, 1951;
  - b) Instrument No. VS26325 being a transfer of easement registered November 24, 1966;
  - c) Instrument No. RO983797 being a notice of claim registered September 20, 1991;
  - d) Instrument No. LT1803896 being a notice of agreement registered February 3, 1998;
  - e) Instrument No. LT1811152 being a transfer of easement registered March 2, 1998;
  - f) Instrument No. LT2057426 being a notice of airport zoning regulation registered March 27, 2000;
  - g) Instrument No. PR137238 being a notice of agreement registered September 12, 2001;
  - h) Instrument No. PR3113380 being a notice of site plan agreement registered April 20, 2017, and
2. for the TRBC Site:
  - a) the Lease Agreements.

**II. GENERAL TITLE ENCUMBRANCES**

1. Liens, charges or prior claims for taxes (which term includes charges, rates and assessments) or utilities (including levies or imposts for sewers and other municipal utility services) not yet due or if due, the validity of which is being contested in good faith, and liens or charges for the excess of the amount of any past due taxes or utilities

- charges for which a final assessment or account has not been received over the amount of such taxes or utilities charges as estimated and paid by Contracting Authority.
2. Inchoate liens incidental to construction, renovations or current operations, a claim for which shall not at the time have been registered against the Lands or of which notice in writing shall not at the time have been given to Contracting Authority pursuant to the Construction Act or otherwise or any lien or charge, a claim for which, although registered, or notice of which, although given, relates to obligations not overdue or delinquent and in respect of any of the foregoing cases, Contracting Authority has, where applicable, complied with the holdback or other similar provisions or requirements of the relevant construction contracts.
  3. The rights reserved to or vested in the public or any municipality or governmental or other public authority by any statutory provision.
  4. Any subsisting reservations, limitations, provisions and conditions contained in any grants from the Crown of any land or interests therein, including without limitation, reservations of under-surface rights to mines and minerals of any kind including rights to enter, prospect and remove the same.
  5. Zoning (including, without limitation, airport zoning regulations), use and building by-laws and ordinances, and federal, provincial or municipal by-laws and regulations.
  6. Any encroachments, easements, rights of way, rights to use or similar interests revealed by any survey of the Lands or which would be revealed by an up-to-date survey of the Lands.
  7. Servitudes, easements, rights-of-way, or other similar rights in land for sewers, electric lines, telegraphs and telephone lines and other utilities and services which do not materially impair the value of the Lands or materially interfere with the use of the Lands for the purposes of the Project.
  8. Minor encroachments onto or from neighbouring lands which are permitted under agreements with the owners of such lands and which do not materially impair the value of the Lands or materially interfere with the use of the Lands for the purpose of the Project.
  9. Registered subdivision, site-plan, development or other municipal agreements, if any, provided such are complied with and which do not materially impair the value of the Lands or materially interfere with the use of the Lands for the purposes of the Project.
  10. The exceptions and qualifications contained in subsection 44(1) of the *Land Titles Act* (Ontario) except for paragraphs 11 and 14, Provincial Succession Duties and Escheats or Forfeiture to the Crown and the rights of any person who would, but for the Land Titles Act (Ontario), be entitled to the land or any part of it through length of adverse possession, prescription, misdescription, or boundaries settled by convention.

11. Any lease to which the subsection 70(2) of the *Registry Act* applies.

## **SCHEDULE 17**

### **WORKS REPORT REQUIREMENTS**

1. The Works Report shall include the following:
  - (a) a cover page including the title “Works Report”, the Project title, date of the report, issuance date, version date, and the version number of the relevant Works Schedule, an applicable Recovery Schedule or Progress Works Schedule;
  - (b) an executive summary;
  - (c) design status;
  - (d) Works Schedule Progress Report:
    - (i) Project Co shall submit a report with each Progress Works Schedule (except for the Works Area Micro-Schedule) for review by Contracting Authority in accordance with Schedule 10 – Review Procedure (each a “**Works Schedule Progress Report**”).
    - (ii) The Works Schedule Progress Report shall include the following content:
      - (1) a cover page including the title “Works Schedule Progress Report”, the Project title, date of the report, issuance date, version date, and the version number of the relevant Works Schedule, Recovery Schedule or Progress Works Schedule, and the Project Co Representative signature approving the report;
      - (2) “Section 1. Overview”, including a narrated executive summary on progress, any noteworthy milestones achieved or schedule variances, and issues or risks that has or may impact the schedule;
      - (3) “Section 2. Schedule analysis”, including at least:
        - (a) the forecasted Interim Completion Date, the forecasted Scheduled Substantial Completion Date and Key Works Milestones;
        - (b) the overall progress expressed as a percentage of the physical work completed;
        - (c) “Critical path risk”, including a narrative in tabular form describing the risks to completing the critical path activities to achieve Substantial Completion, and Project Co’s strategy to mitigate or avoid these risks;

- (4) “Section 3 – Critical Path Analysis” that includes the following information:
- (a) overall project critical path and Near Critical Path Activities that includes a Gantt Chart schedule that shows the critical path of the Project as well as Near Critical Path Activities;
  - (b) actual progress against baseline target dates for each critical path or Near Critical Path Activity
  - (c) any activities that were deemed critical or Near Critical Path Activities in the previous submission of a Proposed Works Schedule, Works Schedule, or Progress Works Schedule, as applicable, and have consumed a minimum of five Working Days float since then;
  - (d) any critical path or Near Critical Path Activities and/or milestones that are more than 20 Working Days behind schedule, relative to the Baseline Works Schedule;
  - (e) any critical path or Near Critical Path Activities and/or milestones that are more than 5 Working Days behind schedule relative to the immediate previous Progress Works Schedule;
  - (f) a narrative that describes the changes in the critical path or Near Critical Path Activities from the previous month;
  - (g) a list of all Works Activities that have become Near Critical Path Activities during the last reporting period;
  - (h) a list of all Works Activities that are Near Critical Path Activities that were forecasted in the immediately previous Progress Works Schedule, to start or finish in the current reporting period. Provide the reason for any of those activities that have not started or finished; and
  - (i) provisions for addressing the behind-schedule critical path or Near Critical Path Activities such that Substantial Completion will occur on the Scheduled Substantial Completion Date;
  - (j) a table entitled “Milestone and Critical Path Variances” listing all Works Milestones and all critical path activities and, for each Works Milestone and critical path activity where the variance exceeds five Working Days from the

immediately previous Progress Works Schedule, the following information:

- (i) the Activity ID or milestone identification number and name;
  - (ii) the “baseline Start and Finish Dates” in accordance with the Works Schedule, the Revised Works Schedule or each Recovery Works Schedule, as applicable;
  - (iii) the “planned Start and Finish Dates” set out in the immediately previous Progress Works Schedule;
  - (iv) the “forecast Start and Finish Dates”, or, if applicable, the “Actual Start and Finish Dates”, as set out in the associated Progress Works Schedule and a clear identification of any Works Milestones to be achieved by Project Co in the next 12 week period;
  - (v) the physical percentage completion, or status;
  - (vi) “Total Variance” expressed in Working Days, calculated as a difference of forecast Finish Date from the current Working Schedule and the Finish Date from the Works Schedule, the Revised Works Schedule, as applicable;
  - (vii) the “Reporting Period Variance” calculated as the forecast Finish date from the current Progress Schedule minus the Finish date from the immediately previous Progress Works Schedule, expressed in Working Days; and
- (k) Longest path – provide programme layouts for the longest path, extracted from the current Progress Schedule
- (5) “Section 4.Variances” including:
- (a) a narrative explaining the basis for any required changes to the sequencing of the Works, the Project Co Phasing Plan, interdependencies, or original activity durations as set out in the Works Schedule or current Recovery Schedule, as applicable, which changes, for clarity, shall be incorporated into the Progress Works Schedule;



- (b) a table “Schedule logic changes” listing any:
  - (i) Addition, deletion or changes to activity relationships;
  - (ii) Addition or deletion of activities;
  - (iii) Changes or release of schedule constraints, and if so, what constraints were removed;
  - (iv) Changes to activity durations;
  - (v) changes to activity calendar;
  - (vi) changes to the calendar default, and
  - (vii) Changes to milestones, and any other changes;

For clarity, for each schedule change Project Co shall provide a discrete explanation for circumstances and reasons leading to the change. Project Co shall not provide a general blanket explanation, for example similar to “change in strategy” or “according to recent market conditions,” but shall diligently explain in detail the strategy change or the specific conditions that led to that change

- (6) “Section 5. Potential Delay Events” including a register of all potential Delay Events pursuant to Section 31.1(a) of the Project Agreement and for each a short description, the date on which the notice required pursuant to Section 31.2(b) and 31.2(d) of the Project Agreement was provided to Contracting Authority, the mitigation strategy implemented by Project Co, and the current status;
  - (7) “Section 6. Contracting Authority Submittal Review”, including an updated Review Procedure Activities Register;
  - (8) “Section 7 Progress photos”. Photos are to be taken from different views to indicate the progress of the Work in digital format, indicating the date and location of the photograph; and
  - (9) any other information specifically requested by Contracting Authority on the progress of the Works;
- (e) Progress Works Schedule with version number;
  - (f) Look-Ahead Schedule with version number;
  - (g) Works Submittals register pursuant to Schedule 10 – Review Procedure;

- (h) Request for Information (RFI) Log;
- (i) Variation Log;
- (j) health and safety, including:
  - (i) the total number of hours worked for all persons on Site;
  - (ii) the total number of critical injuries or fatalities;
  - (iii) the total number of injuries to any member of the public;
  - (iv) the total number of incidents involving medical aid or health care (as defined by the *Workplace Safety and Insurance Act* (Ontario));
  - (v) the total number of incidents involving first aid (as defined by the *Workplace Safety and Insurance Act* (Ontario));
  - (vi) the total number of near misses (no damage to property or persons);
  - (vii) the total number of incidents resulting in lost time;
  - (viii) the total number of incidents with no lost time; and
  - (ix) details of enquiries from the Ontario Ministry of Labour and the Ontario Ministry of the Environment, Conservation and Parks;
- (k) contractual outstanding decisions;
- (l) quality assurance and quality control, including:
  - (i) an update on all quality assurance and control processes;
  - (ii) quality control process prior to any closing in of any walls or ceilings or of any building envelope;
  - (iii) an update on street cleaning;
  - (iv) an update on site dust control;
  - (v) an update on adherence to noise and vibration by-laws, as applicable;
  - (vi) an update on adherence to noise and vibration site limits, as applicable;
  - (vii) an update on site dewatering and discharge;
  - (viii) an update on traffic control;

- (ix) an update on neighbourhood interactions; and
- (x) status of corrective actions previously identified.
- (m) organization/staffing changes and additions for Project Co and Construction Contractor;
- (n) Subcontract status, including:
  - (i) consultants;
  - (ii) Subcontracts awarded;
  - (iii) tenders;
  - (iv) Shop Drawings submittals status and also shown on the Current Progress Works Schedule; and
  - (v) labour report (average workforce);
- (o) financial status, including:
  - (i) intentionally deleted;
  - (ii) progress and Variations;
  - (iii) insurance summary;
  - (iv) Construction Contractor default status; and
  - (v) cash flow projection (capital cost components): and updated cash flow report and projections in conjunction with the Current Progress Works Schedule including a cash flow graph that depicts actual cash flow against projected cash flow;
- (p) risk management, including:
  - (i) permits and regulatory approvals;
  - (ii) claims;
  - (iii) liens;
  - (iv) environmental issues;
  - (v) labour;
  - (vi) market conditions;

- (vii) outstanding disputes;
- (viii) operational risks; and
- (ix) other risks;
- (q) commissioning, occupancy and completion, including:
  - (i) commissioning status;
  - (ii) training status;
  - (iii) a detailed description and update on the process for turning over the relevant portion of the Facility to Contracting Authority upon Substantial Completion and, in respect of Final Completion, which shall include, but not be limited to, a description of any and all matters related to each turn-over that may impact or otherwise be relevant to the commencement of Contracting Authority's operations at such portion of the Facility, such as all relevant anticipated or actual Minor Deficiencies and the timing and process for Project Co providing to Contracting Authority all keys and pass-cards to such portion of the Facility;
  - (iv) occupancy status;
  - (v) deficiency review/rectification status; and
  - (vi) completion status;
- (r) Status of Testing and Inspections, including:
  - (i) Factory Testing and Inspections; and
  - (ii) Project Co Testing and Inspections;
- (s) FF&E and Transferred Existing Facilities Items status, including:
  - (i) planning and design;
  - (ii) progress of inventory activities in relation to Transferred Existing Facilities Items;
  - (iii) procurement progress of FF&E;
  - (iv) diminishing, refurbishment, storage, relocation and coordination of relocation; and
  - (v) delivery, installation and commissioning progress; and

- (t) Transition status, including a Transition schedule update.

## **SCHEDULE 18**

### **COMMUNICATIONS**

#### **1 DEFINITIONS**

##### **1.1 In this Schedule 18, unless the context otherwise requires:**

- (a) **“Communications Protocol”** has the meaning given in Section 3.1(e);
- (b) **“Communications and Stakeholder Relations Plan”** has the meaning given in Section 4.2(a); and
- (c) **“Crisis Communications Plan”** has the meaning given in Section 4.2(b).

#### **2 GENERAL**

##### **2.1 Communications Principles**

- (a) During the Project Term, Contracting Authority and Project Co shall, in accordance with the provisions of this Schedule 18, work together to deliver communications and public engagement activities in respect of the Project that will:
  - (i) enhance opportunities for open, transparent, effective and proactive communications with the public;
  - (ii) recognize the contributions of the Parties; and
  - (iii) be accountable to the Project’s stakeholders (including Contracting Authority’s community) for the effective implementation of the Communications Protocol, the Communications and Stakeholder Relations Plan and the Crisis Communications Plan.
- (b) The Project represents an important infrastructure commitment by the Province. Accordingly, a comprehensive Communications Protocol, Communications and Stakeholder Relations Plan and Crisis Communications Plan are required to allow the Parties to ensure the public is informed and engaged in respect of the Project where necessary, to meet Contracting Authority’s and MAG’s communications requirements, and to support effective communications between Project Co and Contracting Authority and with Contracting Authority’s stakeholders.

### **3 COMMUNICATIONS PROTOCOL**

#### **3.1 Project Co's Communications Protocol**

- (a) No later than 45 days following Financial Close and in collaboration with Contracting Authority and IO, Project Co shall prepare and submit to Contracting Authority a comprehensive and detailed draft communications protocol for the Project in accordance with this Section 3.1.
- (b) The draft communications protocol shall:
  - (i) be in compliance with Project Co's obligations under the Project Agreement, including this Schedule 18;
  - (ii) outline communication roles and responsibilities for the Project; and
  - (iii) assist Contracting Authority in the development and implementation of the Communications and Stakeholder Relations Plan.
- (c) Within the draft communications protocol, Project Co shall submit a description of Project Co's approach to all communications with respect to the Project, which shall include:
  - (i) a description of Project Co's communications team, including the roles and responsibilities of each team member and each Project Co Party who shall implement any aspect of the Communications Protocol;
  - (ii) the identification of proposed communications tools to be used by Project Co and each applicable Project Co Party to coordinate with and report to Contracting Authority and MAG during the Project Term; and
  - (iii) the other matters described in Appendix "A" – Communications Protocol Template to this Schedule 18.
- (d) The draft communications protocol shall be (i) based on the template attached as Appendix "A" – Communications Protocol Template to this Schedule 18 and (ii) consistent with the outline of the communications protocol attached hereto as Appendix "B" – Outline Communications Protocol to this Schedule 18.
- (e) The draft communications protocol shall be subject to the review and approval of Contracting Authority (in consultation with MAG) and, once approved by Contracting Authority, the draft communications protocol shall, for the purposes of this Project Agreement, be the "**Communications Protocol**".
- (f) The Communications Protocol shall apply to all print and electronic communications related to the Project, including, but not limited to, with respect to the Project's

planning, design, construction, milestones, tenders, community and other stakeholder relations, media relations, website information, branded products and social media updates and responses.

- (g) In the event of any ambiguity, conflict or inconsistency between the provisions of this Schedule 18 and the Communications Protocol, the provisions of this Schedule 18 shall prevail and govern to the extent of such ambiguity, conflict or inconsistency.

## **4 CONTRACTING AUTHORITY RESPONSIBILITIES**

### **4.1 Lead Communications Role**

Contracting Authority shall assume the lead communications role and shall be responsible for:

- (a) providing identified, dedicated lead communications contacts with reasonable applicable skills and experience with 24/7 availability on applicable aspects of communications and issues management;
- (b) providing an identified, dedicated media-trained lead media spokesperson, with back-up media-trained personnel, as required with 24/7 availability on applicable aspects of communications;
- (c) acting as primary media contact for the Project and designating Project Co to be spokesperson on any given issue, to be determined by and as set out in the Communications Protocol;
- (d) providing final review and approval of all public communications materials;
- (e) communicating promptly with all relevant parties on crisis issues and communicating within 24 hours on general issues;
- (f) maintaining and updating the Project website, as required; and
- (g) providing coordinated updates to internal/ external stakeholders, as required.

### **4.2 Contracting Authority Communications Responsibilities**

Contracting Authority shall be responsible for the following matters:

- (a) Communications: To develop and implement, in cooperation with Project Co and MAG, a comprehensive communications and stakeholder relations plan (the “**Communications and Stakeholder Relations Plan**”) that includes Contracting Authority’s approach to community relations, media relations, marketing, special events, employee communications and government relations regarding issues related to the Project. The Communications and Stakeholder Relations Plan shall be developed by Contracting Authority, following consultation with Project Co, by the



later of (i) the date that is 90 days following Financial Close, and (ii) 15 Business Days following the date of the finalization of the Communications Protocol pursuant to Section 3.1(e).

- (b) **Crisis Communications:** To undertake, in cooperation with Project Co, required planning for potential crisis issues related to the Project. A crisis communications plan (the “**Crisis Communications Plan**”) shall be developed by Contracting Authority within 30 days following Financial Close outlining the roles and responsibilities of both Contracting Authority and Project Co during a crisis situation.
- (c) **Issues Management:** To collaborate with Project Co in identifying issues and issues trends as they emerge and develop strategies for addressing or minimizing issues, including developing messages and strategies to address issues and providing accurate and timely information to affected stakeholders.
- (d) **Website and Social Media:** Working with Project Co to:
  - (i) lead the planning, development and maintenance of a Project-related website or Project-specific web pages on Contracting Authority’s website; and
  - (ii) lead the planning, development and execution of a social media strategy for the Project, which may include timely responses to public inquiries, notification of public meetings and/or responses to issues and crisis situations.
- (e) **Government Relations:** To liaise with affected Governmental Authorities to provide information about the Project’s status, upcoming milestones and events and issues that may affect the Project.
- (f) **Special Events:** To work with Project Co to develop, plan, coordinate and implement special events, such as construction tours and milestone celebrations.
- (g) **Courthouse Related Communication:** To provide all communications related to the provision of the Contracting Authority Activities.
- (h) **Performance Review:** To review, on a periodic basis, Project Co’s performance in providing communications support as outlined in Section 5 of this Schedule 18.

## **5 PROJECT CO RESPONSIBILITIES**

### **5.1 Support Communications Role**

- (a) Project Co shall assume an active role with respect to communications related to the Project, providing support to Contracting Authority in the creation and delivery of a successful communications program. Project Co shall, from time to time, be responsible for:

- (i) providing an identified, dedicated media-trained lead media spokesperson (with back-up media-trained personnel, as required) with 24/7 availability on applicable aspects of communications;
- (ii) responding to communications issues in accordance with the Communications Protocol and with the agreed timeframes set out in the Communications Protocol;
- (iii) reviewing and/ or providing communications and/ or technical materials reasonably requested by Contracting Authority for website content;
- (iv) updating, in collaboration with Contracting Authority, internal/ external stakeholders, as required, including involvement and participation in community events;
- (v) providing Contracting Authority and MAG access to the Site for milestone events, including making persons available to lead media tours and/or tours for government or Contracting Authority officials, as required;
- (vi) directing all media enquiries and interview requests to Contracting Authority's lead communications contact and working with Contracting Authority to identify which party shall respond to the media enquiries as identified in the Communications Protocol;
- (vii) maintaining a written record of all material public enquiries, complaints and communications and providing copies to Contracting Authority's lead communications contact on a weekly basis (or immediately if urgently requested by Contracting Authority);
- (viii) reporting to Contracting Authority on communications matters on an agreed upon basis;
- (ix) providing support for the Project's websites, web pages and social media by providing written and multimedia content, including:
  - A. up-to-date professional quality (high resolution) photos and videos, including pursuant to Section 5.1(b);
  - B. information about the project design, project features, benefits and construction activities; and
  - C. statistics about local workers/companies, training and local investments;
- (x) participating in regular communications committee meetings, as required by Contracting Authority; and

- (xi) during a crisis situation, ensuring and making available sufficient resources to work effectively with Contracting Authority and proactively manage and perform its communications responsibilities.

## **5.2 Project Co Communications Responsibilities**

Project Co shall:

- (a) implement and maintain the Communications Protocol, provided that Project Co shall coordinate with Contracting Authority in respect of such implementation;
- (b) update, in coordination with Contracting Authority, the Communications Protocol on an annual basis or as otherwise reasonably requested by Contracting Authority;
- (c) collaborate with Contracting Authority on the development and implementation of the Communications and Stakeholder Relations Plan and the Crisis Communications Plan;
- (d) attend regular meetings with Contracting Authority to discuss communication issues and developments;
- (e) produce monthly progress reports, which shall include information on activities, public and media enquiries, any emerging issues, and actions taken in response to issues;
- (f) through Contracting Authority, provide regular updates to any affected property owners and neighbourhoods on Works related issues with particular attention to communicating the scope, schedule and status of the Works. This shall include processes to proactively address any Works related enquiries and issues (e.g., public enquiries and complaints in respect of noise, hours of work, dust, traffic etc.);
- (g) collaborate with Contracting Authority to identify issues and issues trends as they emerge and develop strategies for addressing or minimizing issues, including developing messages and strategies to address issues and providing accurate and timely information to affected stakeholders;
- (h) seek and identify opportunities for Project recognition through industry award programs;
- (i) develop content for review and approval by Contracting Authority as required for Project award submissions;
- (j) provide support for Contracting Authority on the development of a crisis communication plan outlining roles and responsibilities for a list of potential crisis issues that could develop during the Works; and
- (k) follow any guidelines provided by Contracting Authority related to signage or advertising at the Site.

## **6 PUBLIC DISCLOSURE AND MEDIA RELEASES**

### **6.1 Public Disclosure and Media Releases**

- (a) Project Co shall not, and shall ensure that no Project Co Party shall, issue or disseminate any media release, public announcement or public disclosure (whether for publication in the press, on the radio, television, internet or any other medium) relating to the Project, this Project Agreement, the Contracting Authority Activities or any matters related thereto, without the prior written consent of Contracting Authority, in its sole discretion, or, in the case of any media release, public announcement or public disclosure required by Applicable Law, without the prior written consent of Contracting Authority.
- (b) Unless otherwise required by Applicable Law (but only to that extent), neither Party shall use the other Party's name or refer to the other Party, directly or indirectly, in any media release, public announcement or public disclosure (whether for publication in the press, on the radio, television, internet or any other medium) relating to the Project, this Project Agreement, the Contracting Authority Activities or any matter related thereto, without the prior written consent of the other Party.
- (c) Project Co shall, and shall ensure that all Project Co Parties and its and their subcontractors, agents, employees, officers and directors, in each case, comply, at all times, with the Communications Protocol.

## **7 CONSTRUCTION SIGNAGE**

### **7.1 Construction Signage Guidelines**

With respect to any signage that may be erected and maintained at or on the Site or Project, Project Co, the Project Co Parties and the Lenders, as applicable, shall:

- (a) include the MAG logo and IO's logo on the sign;
- (b) ensure that the signage is no larger than the larger of: (i) an existing government project sign on the Site; or (ii) 16 feet by 8 feet;
- (c) comply with Applicable Law, including by-laws regarding the placement and size of signage;
- (d) consider signage material suitable for long-term outdoor exposure;
- (e) provide a mock-up of the signage to the Contracting Authority Representative for written approval prior to printing; and
- (f) be responsible for installation, maintenance and removal of the signage.

## **7.2 Contracting Authority and MAG Signage**

- (a) Without prejudice to Section 7.1, at the request of Contracting Authority, Project Co shall, from time to time, install and maintain signage provided by Contracting Authority or MAG in a prominent location on the fencing or hoarding or at some other location, as requested by Contracting Authority or MAG, on the Site.

## **8 ACCESSIBILITY**

### **8.1 Accessibility**

Project Co shall ensure that all communications materials with respect to the Project comply with the *Accessibility for Ontarians with Disabilities Act, 2005* (Ontario) and all regulations thereunder, and for the purposes thereof shall, as between Project Co and Contracting Authority, Project Co shall be deemed to be a “designated public sector organization” under such Act and regulations.

## **9 FAILURE TO PERFORM**

Without limiting any other right of Contracting Authority or obligation of Project Co in the Project Agreement, if Project Co at any time fails to perform or comply with any of its obligations under this Schedule 18 (including, for greater certainty, under the Communications Protocol), Contracting Authority may itself, to the extent possible, perform or cause compliance with or engage others to perform or cause compliance with such obligation, at the risk and cost of Project Co, and Contracting Authority may deduct the cost of such activities from any amounts otherwise due to Project Co pursuant to the terms of this Project Agreement, provided that, except in the event that Contracting Authority is of the reasonable opinion that such activities must be performed immediately, at least 5 Business Days prior written notice setting out the precise failure of Project Co is delivered by Contracting Authority to Project Co and, following the receipt of such notice, Project Co fails to commence to diligently and expeditiously perform or comply with its obligations under this Schedule 18 to the reasonable satisfaction of Contracting Authority.

**APPENDIX “A”**

**COMMUNICATIONS PROTOCOL TEMPLATE**

**I. Project Co’s Communications Team**

<b>No.</b>	<b>Name of Project Co or Project Co Party</b>	<b>Project Co Team Member Name and Contact Information</b>	<b>Role and Responsibility of Team Member</b>
1.			
2.			
3.			
4.			
5.			
6.			
7.			

**II. Proposed Communications Tools**

<b>No.</b>	<b>Proposed Communications Tool</b>	<b>Description</b>	<b>Timing/Frequency</b>
1.			
2.			
3.			
4.			
5.			
6.			
7.			

**III. Roles and Responsibilities**

To delineate the roles and responsibilities of IO, Contracting Authority and Project Co, the following chart outlines general communications activities and expectations:

<b>Area/Task</b>	<b>MAG</b>	<b>Contracting Authority</b>	<b>Project Co</b>
<b>Issues tracking and management</b>	<p>Track and monitor issues related to the overall Project scope and program to ensure partners are informed.</p> <p>Where necessary, develop issues notes, key messages and questions and answers lists and share with partners.</p>	<p>Track and monitor issues related to procurement, public-private partnerships, cost and ensure partners are informed.</p> <p>Where necessary, develop issues notes, key messages and questions and answers lists and share with partners.</p>	<p>Identify issues as they emerge and forward to Contracting Authority for response.</p> <p>Work with Contracting Authority and MAG to develop messages and implement strategies. Respond to issues identified by Contracting Authority and MAG as required.</p>
<b>Government Relations, inclusive of City, Province and Federal</b>	<p>Supports Contracting Authority, as requested.</p>	<p>Responsible for liaising with affected local governments, boards and executives, and federal elected officials, providing whatever information is required/requested about the Project</p>	<p>Provides support to Contracting Authority as requested, including but not limited to: providing collateral (renderings, maps, images) and updates (construction and maintenance schedule, community</p>

			benefits, issue overview, attendance at meetings).
<b>Media Relations</b>	Completes media contact report and forward to Ministries.	<p>Will lead and support questions about the procurement, public-private partnerships, cost and overall contract.</p> <p>Will be overall communications lead distributing inquiries to applicable parties as noted. Will lead in answering questions about the project, community benefits, transit benefits, operations, etc. Completes media contact report and forwards to Ministries.</p>	<p>Will lead and support questions about its team members, Project schedule, labour, etc.</p> <p>For all media inquiries received, forward to Contracting Authority who will determine appropriate party to respond. Work with Contracting Authority to develop messaging and support.</p>
<b>Community Relations/Stakeholder Relations</b>	Oversees/directs/leads stakeholder relations.	<p>Oversees/directs/leads community relations.</p> <p>Provides messaging related local knowledge initiatives as well as to fact check information about public-private partnerships.</p>	Support Contracting Authority and MAG to carry out community and stakeholder relations as required, including but not limited to, providing collateral (renderings, maps, images) and updates (construction/maintenance schedule, community benefits, issue



			overview, attendance at meetings).
<b>Crisis Communication</b>	Provide input to Contracting Authority and templates, if required, for development of Crisis Communications Plan.	Lead the development of the Crisis Communications Plan in collaboration with Project Co within 30 days of Financial Close.	Provide support for Contracting Authority in development of Crisis Communications Plan to outline roles and responsibilities in the event of a crisis, as well as key contact individuals on the Site.
<b>Other</b>  <i>[Additional Requirements to be developed by MAG, Contracting Authority and Project Co based on Project Co's RFP Submission, as applicable.]</i>			

**APPENDIX “B”**

**OUTLINE COMMUNICATIONS PROTOCOL**

**[REDACTED]**

**SCHEDULE 19  
WORKS SCHEDULING REQUIREMENTS**

**[REDACTED]**

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## **SCHEDULE 20**

### **PAYMENT PROCEDURES**

#### **1 DEFINITIONS**

##### **1.1 Definitions**

The following terms shall have the following meanings:

- (a) **"Notice of Non-Payment"** has the meaning given to it in the *Construction Act*.
- (b) **"Proper Invoice"** has the meaning given to it in the *Construction Act*, and must also comply with the requirements set forth in Sections of this Schedule 20.

#### **2 GENERAL**

##### **2.1 Electronic Payment**

- (a) Notwithstanding any other provision of the Project Agreement, for the purpose of this Project Agreement, payments made by electronic transfer shall be deemed to have been made on the day and at the time the electronic transfer is initiated, as confirmed by the initiating bank by a confirmation setting out the transfer number and the other details of the transfer.

#### **3 PAYMENT OF PROPER INVOICE**

##### **3.1 Proper Invoice**

- (a) A Proper Invoice shall mean a written bill or other request for payment issued by Project Co for services or materials in respect of the Works performed under this Agreement and must contain the following:
  - (i) the information set out in section 6.1 of the *Construction Act*;
  - (ii) the amounts certified for payment by the Independent Certifier and allocation of holdback;
  - (iii) the direction of Project Co regarding payment pursuant to section 4.4(a) of the Project Agreement, including any electronic payment information, and any consent of the Lender's Agent for redirection pursuant to s. 4.4 of the Project Agreement if applicable;
  - (iv) evidence of compliance with workers' compensation insurance requirements for Works performed, including a WSIB clearance certificate;

- (v) a CCDC-9A statutory declaration as of the date of the Proper Invoice declaring that payments in connection with the Works have been made;
  - (vi) where the Proper Invoice includes final payment under any Subcontract for which lien rights or rights in respect of the holdback may be claimed under the Construction Act, a certificate of completion and statutory declarations or other assurances from the relevant Subcontractor confirming that all those engaged by the Subcontractor have been paid in accordance with Applicable Law.
- (b) A Request for Payment Approval submitted pursuant to section 3.2(d) of the Project Agreement does not constitute submission of a Proper Invoice.

### **3.2 Delivery of a Proper Invoice**

- (a) The earliest date that a given Proper Invoice is eligible to be delivered to the Contracting Authority (the "**Proper Invoice Delivery Date**") is set out below, and any invoice submitted earlier than permitted below shall be the basis of a notice of non-payment, at Contracting Authority's election:
- (i) for payment of the Interim Completion Holdback, no earlier than the Interim Completion Minor Deficiencies Completion Date, and such Proper Invoice must list and subtract any applicable deductions taken pursuant to the Project Agreement.
  - (ii) for payment of the Completion Holdback, no earlier than the Minor Deficiencies Completion Date where Seasonal Minor Deficiencies remain to be resolved and Seasonal Holdback is maintained by Contracting Authority, or the Final Completion Date if no Seasonal Holdback is taken, and such Proper Invoice must list and subtract any applicable deductions taken pursuant to the Project Agreement.
  - (iii) for payment of the Seasonal Works Holdback, no earlier than the Final Completion Date, and any invoice submitted earlier shall be deemed to have been submitted on the Final Completion Date. Such Proper Invoice must list and subtract any applicable deductions taken pursuant to the Project Agreement.
- (b) A Proper Invoice may be revised by Project Co after delivery to Contracting Authority if Contracting Authority agrees in advance to the revision; the date of the Proper Invoice is not changed; and the Proper Invoice continues to meet the applicable requirements of a Proper Invoice.

### **3.3 Review of a Proper Invoice**

- (a) Prior to delivery of each Proper Invoice, the following process shall be followed:
- (i) No later than thirty (30) days prior to the anticipated Proper Invoice Delivery Date, Project Co shall submit a draft payment application to the Independent Certifier and Contracting Authority containing the breakdown of amounts intended to be

included in the Proper Invoice, holdback accounting, Cash Allowance Account reconciliation, tax information and all supporting documentation required by the Project Agreement or reasonably required by the Independent Certifier or Contracting Authority.

- (ii) From the fifteenth (15) day to the fifth (5) day prior to the Proper Invoice Delivery Date, Project Co shall meet with the Contracting Authority and Independent Certifier in order to review the information and documentation provided, and any additional information or documentation reasonably requested by the Independent Certifier or Contracting Authority, in order to assist Project Co with the preparation of the Proper Invoice.
  - (iii) At least three (3) days prior to the Proper Invoice Delivery Date, if the documents and information submitted are satisfactory, the Independent Certifier shall issue a certificate for payment in the amount applied for or in such other amount determined by the Independent Certifier to be properly due.
- (b) Project Co shall not make material changes to the information to be submitted by way of the resulting Proper Invoice on or after the fourth (4) day prior to the Proper Invoice Delivery Date.

### **3.4 Compliance with Prompt Payment Requirements**

- (a) Subject to the giving of a Notice of Non-Payment and to any requirement or entitlement to retain a holdback pursuant to the *Construction Act*, Contracting Authority shall pay the amount payable under a Proper Invoice to the Lenders' Agent or as the Lenders' Agent may direct no later than 28 days after receiving the Proper Invoice from Project Co.
- (b) Project Co shall comply with, and shall cause the Project Co Parties to comply with any applicable timelines for prompt payment contained in the Project Agreement or required by the *Construction Act*, and shall indemnify Contracting Authority for any costs incurred by Contracting Authority (including legal and consulting costs) as a result of Project Co's failure or the failure of those for whom Project Co is responsible to comply with such timelines, except to the extent caused by Contracting Authority.

## **4 NOTICE OF NON-PAYMENT**

### **4.1 Notice of Non-Payment**

- (a) If Contracting Authority disputes a Proper Invoice or payment of a Proper Invoice in whole or in part, Contracting Authority may refuse to pay all or any portion of the Proper Invoice if Contracting Authority delivers a Notice of Non-Payment no later than 14 days after receiving the Proper Invoice from Project Co, subject to the separate requirements governing Delivery of a Notice of Non-Payment of Legislative Holdback or a Notice of Non-Payment of Finishing Holdback.

- (b) Reasons for non-payment of a Proper Invoice may include, but are in no way limited to:
- (i) failure by Project Co to complete the review process as specified in section 3.3 of this Schedule 20.
  - (ii) the retention of amounts under section 12 (set-off by trustee) or under subsection 17 (3) (lien set-off) of the *Construction Act*;
  - (iii) Contracting Authority's withholding of Completion Holdback pursuant to section 24.8(a) of the Project Agreement;
  - (iv) Contracting Authority's withholding of Interim Completion Seasonal Works Holdback pursuant to section 23B.10(b) and Seasonal Works Holdback pursuant to section 24.10(b) of the Project Agreement;
  - (v) Contracting Authority's application of Construction Period Deductions pursuant to Schedule 21;
  - (vi) Contracting Authority's application of deductions for Construction Defects pursuant to section 11.15(c) of the Project Agreement;
  - (vii) Construction Authority's withholding of the Warranty Cash Amount in accordance with section 11.18(b) of the Project Agreement;
  - (viii) Contracting Authority's withholding or deduction in accordance with section 4.20 of the Project Agreement;
  - (ix) Contracting Authority's exercise of set-off pursuant to section 4.11 of the Project Agreement; or
  - (x) any other right to set off, deduct from, hold back or withhold payment which Contracting Authority may have under the Project Agreement or the Construction Act.

## **5 PAYMENT OF LEGISLATIVE HOLDBACK**

### **5.1 Payment of Legislative Holdback**

- (a) Contracting Authority covenants and agrees with Project Co to pay to Project Co, or pay to such party as otherwise directed by Project Co, the Legislative Holdback in accordance with this Section 5.1 and the *Construction Act* and shall not accept any redirection without the consent of the person to whom payment is directed. Project Co acknowledges and agrees that payment by Contracting Authority of the Legislative Holdback in accordance with this Section 5.1 as Project Co may direct, constitutes payment by Contracting Authority to Project Co in satisfaction of Contracting Authority's obligation to pay the Legislative Holdback to Project Co under this Project Agreement and in satisfaction of any

trust obligation of Contracting Authority with respect to such payments under the *Construction Act*.

- (b) Prior to release of the Legislative Holdback, Project Co shall:
- (i) submit a written request for release of the Legislative Holdback;
  - (ii) submit a CCDC 9A (2018) Statutory Declaration;
  - (iii) submit a declaration that there are no liens registered or written notices of lien given pursuant to the *Construction Act*, or provide proof that all liens and written notices of lien have been satisfied, vacated, discharged, withdrawn or otherwise provided for in accordance with Sections 17.2 and 17.3 of the Project Agreement; and
  - (iv) submit an original WSIB Clearance Certificate.
- (c) If Contracting Authority determines that Project Co is not entitled to some or all of the Legislative Holdback, then no later than forty (40) days after the publication of the applicable certification or declaration of substantial performance or if no certification or declaration is published, the date the Project Agreement is completed, abandoned or terminated, Contracting Authority shall publish in the form and manner prescribed, a notice specifying the amount of the Legislative Holdback that the Contracting Authority will not pay (the “**Notice of Non-Payment of Legislative Holdback**”).
- (d) No later than three (3) days following the publication of the Notice of Non-Payment of Legislative Holdback, Contracting Authority shall notify Project Co of the publication of the Notice of Non-Payment of Legislative Holdback.
- (e) Within forty (40) days from the date of publication of the certificate of substantial performance pursuant to the *Construction Act*, the Independent Certifier shall issue a certificate for payment of the Legislative Holdback (the “**Legislative Holdback Payment Certificate**”) in an amount equal to the Legislative Holdback less the amount specified in the Notice of Non-Payment of Legislative Holdback, if any (the “**Adjusted Legislative Holdback Amount**”).
- (f) Subject to any liens registered or written notices of lien being addressed, the Adjusted Holdback Amount set out in the Legislative Holdback Payment Certificate is due and payable within sixty (60) days from the date of publication of the certificate of substantial performance pursuant to the *Construction Act*, or such other time required or permitted by the *Construction Act*.
- (g) If Project Co disagrees with Contracting Authority regarding Project Co’s entitlement to Legislative Holdback or any or all of the amount specified in the Notice of Non-Payment



of Legislative Holdback it may refer the matter for resolution in accordance with Schedule 27 – Dispute Resolution Procedure.

- (h) Prior to the date of the release of the Adjusted Legislative Holdback Amount, Project Co shall have removed from the Project Site all supplies, waste materials, rubbish and temporary facilities and all personnel except as required to achieve Final Completion or to correct any remaining Minor Deficiencies.

## **5.2 Payment of Finishing Holdback**

- (a) Contracting Authority covenants and agrees with Project Co to pay to Project Co, or pay to such party as otherwise directed by Project Co, the Finishing Holdback in accordance with this Section 5.2 and the *Construction Act* and shall not accept any redirection without the consent of the person to whom payment is directed. Project Co acknowledges and agrees that payment by Contracting Authority of the Finishing Holdback in accordance with this Section 5.2 as Project Co may direct, constitutes payment by Contracting Authority to Project Co in satisfaction of Contracting Authority’s obligation to pay the Finishing Holdback to Project Co under this Project Agreement and in satisfaction of any trust obligation of Contracting Authority with respect to such payment under the *Construction Act*.
- (b) Prior to the release of the Finishing Holdback, Project Co shall:
  - (i) submit a written request for release of the Finishing Holdback;
  - (ii) submit a CCDC 9A (2018) Statutory Declaration;
  - (iii) submit a declaration that there are no liens registered or written notices of lien given pursuant to the *Construction Act*, or provide proof that all liens and written notices of lien have been satisfied, vacated, discharged, withdrawn or otherwise provided for in accordance with Sections 17.2 and 17.3 of the Project Agreement; and
  - (iv) submit an original WSIB Clearance Certificate.
- (c) If Contracting Authority determines that Project Co is not entitled to some or all of the Finishing Holdback, then no later than forty (40) days after the date the Project Agreement is completed, abandoned or terminated, Contracting Authority shall publish a notice specifying the amount of the Finishing Holdback that the Contracting Authority will not pay (the “**Notice of Non-Payment of Finishing Holdback**”).
- (d) No later than three (3) days following the publication of the Notice of Non-Payment of Finishing Holdback, the Contracting Authority shall notify Project Co of the publication of the Notice of Non-Payment of Finishing Holdback.

- (e) Within forty (40) days after the date the Project Agreement is completed, abandoned or terminated, the Independent Certifier shall issue a certificate for payment of the Finishing Holdback (the “**Finishing Holdback Payment Certificate**”) in an amount equal to the Finishing Holdback less the amount specified in the Notice of Non-Payment of Finishing Holdback, if any (the “**Adjusted Finishing Holdback Amount**”).
- (f) Subject to any liens registered or written notices of lien being addressed pursuant to Sections 17.2 and 17.3 of the Project Agreement, the Adjusted Finishing Holdback Amount is due and payable by Contracting Authority within sixty (60) days from the date the Project Agreement is completed, abandoned or terminated, or such other time required or permitted by the *Construction Act*.
- (g) If Project Co disagrees with Contracting Authority regarding Project Co’s entitlement to Finishing Holdback or any or all of the amount specified in the Notice of Non-Payment of Finishing Holdback it may refer the matter for resolution in accordance with Schedule 27 – Dispute Resolution Procedure.

**5.3 Payment of Interim Completion Holdback, Completion Holdback and Seasonal Works Holdback**

- (a) Contracting Authority covenants and agrees with Project Co to pay to Project Co (or to such other person as Project Co otherwise directs) the following holdbacks, as applicable, together with all interest accrued thereon and applicable HST, and to not accept any redirection without the consent of any such other person to whom payment is directed:
  - (i) the Interim Completion Holdback in accordance with and on the date set out in Section 23.A.10(b);
  - (ii) the Completion Holdback in accordance with and on the dates set out in Section 24.10(b) and Section 24.10(c); and
  - (iii) the Seasonal Works Holdback in accordance with and on the date set out in Section 24.10(c).
- (b) Project Co acknowledges and agrees that payment by Contracting Authority of the Interim Completion Holdback, Completion Holdback, and Seasonal Works Holdback as applicable, in accordance with Section 5.3(a) of this Schedule 20, constitutes payment by Contracting Authority to Project Co in satisfaction of Contracting Authority’s obligation to pay the Interim Completion Holdback, Completion Holdback, and Seasonal Works Holdback as applicable, to Project Co under this Project Agreement and in satisfaction of any trust obligation of Contracting Authority with respect to such payments under the *Construction Act*.

## **SCHEDULE 21**

### **CONSTRUCTION PERIOD FAILURES**

#### **1. INTERPRETATION AND DEFINITIONS**

##### **1.1 Definitions**

In this Schedule 21, unless the context otherwise requires:

- (a) **“Construction Period”** means the period from the date of Financial Close to the Substantial Completion Date.
- (b) **“Construction Period Deduction”** means a deduction by Contracting Authority from the Substantial Completion Payment, as determined by Contracting Authority in its sole discretion, pursuant to Section 3.1 of this Schedule 21, and as calculated in accordance with Section 3.2 of this Schedule 21.
- (c) **“Construction Period Event”** means an incident or state of affairs that does not meet or comply with the Construction Period Performance Criteria, which is capable of becoming a Construction Period Quality Failure.
- (d) **“Construction Period Performance Criteria”** means a description, as set out in Column 2 of Tables 1 and 2 in Attachment A of this Schedule 21, of the level of performance that Project Co must achieve to attain compliance with the relevant provisions of the Project Agreement, as set out in Column 1 of Tables 1 and 2 in Attachment A of this Schedule 21.
- (e) **“Construction Period Quality Failure”** means any failure by Project Co to provide the services in accordance with any Construction Period Performance Criteria.
- (f) **“CPQF Objection Notice”** has the meaning given in Section 2.3(a) of this Schedule 21.
- (g) **“Failure Category”** means the category of failure assigned to each of the Construction Period Performance Criteria set forth in Column 3 of Tables 1 and 2 in Attachment A of this Schedule 21.
- (h) **“Remedial Period”** means the period of time described in Column 4 of Tables 1 and 2 in Attachment A of this Schedule 21.

#### **2. CONSTRUCTION PERIOD PERFORMANCE CRITERIA**

##### **2.1 Construction Period Quality Failures**

- (a) The Construction Period Performance Criteria are set out in Tables 1 and 2 in Attachment A of this Schedule 21. The failure by Project Co to meet any of the Construction Period Performance Criteria shall constitute a Construction Period Quality Failure.
- (b) Contracting Authority may identify and document a Construction Period Quality Failure. Where Contracting Authority identifies a Construction Period Quality Failure, Contracting Authority shall provide written notification in this regard to Project Co, such written notification to comply with the requirements set out in Section 3.3(a) of this Schedule 21.
- (c) After the occurrence of a Construction Period Quality Failure, Project Co shall remediate the Construction Period Quality Failure prior to the expiration of the applicable Remedial Period set out in Column 4 of Tables 1 and 2 in Attachment A to this Schedule 21. For clarity, the occurrence of a Construction Period Quality Failure shall entitle Contracting Authority to exercise its rights under Section 3.1 of this Schedule 21 in respect of that Construction Period Quality Failure, irrespective of the Remedial Period.

## **2.2 Intentionally Deleted**

## **2.3 Disputing a Construction Period Quality Failure**

- (a) Project Co may object to the assignment of a Construction Period Quality Failure by delivery of a written notice of objection in this regard (a “**CPQF Objection Notice**”) to Contracting Authority within 5 Business Days of receiving notice of such Construction Period Quality Failure pursuant to Section 2.1(b) of this Schedule 21. If the objection set forth in the CPQF Objection Notice has not been resolved by mutual agreement between the Parties within 5 Business Days of the delivery of the subject CPQF Objection Notice, then either Party may refer the matter to the Dispute Resolution Procedure for determination, except in the circumstances set forth in Section 2.3(b) of this Schedule 21.
- (b) Where a CPQF Objection Notice has been issued regarding a Construction Period Quality Failure designated as a Failure Category of “Minor” in Table 1 or 2 of Attachment A of this Schedule 21 and such objection has not been resolved by mutual agreement between Contracting Authority and Project Co within 5 Business Days of the delivery of such CPQF Objection Notice, the Parties agree that the determination as to whether or not a Construction Period Quality Failure has occurred shall be made by the Independent Certifier, and any Dispute regarding whether or not a Construction Period Quality Failure has occurred may be referred to Schedule 27 – Dispute Resolution Procedure for resolution.

## **3. CONSTRUCTION PERIOD DEDUCTIONS**

### **3.1 Contracting Authority Entitlement to Make Construction Period Deductions**

- (a) If, at any time during the Construction Period, Project Co commits a Construction Period Quality Failure, Contracting Authority may, in its sole discretion, and subject to Sections 2.1(b) and 3.1(c), (d) and (e) of this Schedule 21, make a Construction Period Deduction from the Substantial Completion Payment.
- (b) If, prior to the expiration of the applicable Remedial Period, Project Co demonstrates, to the satisfaction of Contracting Authority, that Project Co has remedied the Construction Period Quality Failure, no further Construction Period Deduction shall be applied in respect of that Construction Period Quality Failure. If Project Co fails to remediate a Construction Period Quality Failure prior to the expiration of the applicable Remedial Period, Contracting Authority, may, in its sole discretion, and subject to Sections 3.1(c), (d) and (e) of this Schedule 21, apply a further Construction Period Deduction and a further Remedial Period (or Remedial Periods) of the same duration shall be deemed to have commenced. Contracting Authority may, in its sole discretion, and subject to Sections 3.1(c), (d) and (e) of this Schedule 21, apply the applicable Construction Period Deduction each time Project Co fails to remediate a Construction Period Quality Failure prior to the expiration of the applicable Remedial Period until such time as Project Co demonstrates, to the satisfaction of Contracting Authority, that it has remediated the applicable Construction Period Quality Failure. If there is no Remedial Period specified for a Construction Period Quality Failure in Column 4 of Table 1 or Table 2 of Attachment A of this Schedule 21 (as indicated by an “N/A” in such column), Contracting Authority may, in its sole discretion, and subject to Sections 3.1(c), (d) and (e) of this Schedule 21, apply the applicable Construction Period Deduction each time the applicable Construction Period Quality Failure occurs.
- (c) All Construction Period Deductions shall be:
  - (i) calculated in accordance with Section 3.2 of this Schedule; and
  - (ii) accrued up to (and including) the Substantial Completion Date and deducted from the Substantial Completion Payment as contemplated pursuant to Section 4.3 of the Project Agreement.
- (d) Subject to Project Co meeting its obligations set out in Sections 31.2 and 31.3 of the Project Agreement, Contracting Authority shall not be entitled to make a Construction Period Deduction in respect of any Construction Period Quality Failure that has been directly caused by one or more of the events referred to in Section 31.1(a) of the Project Agreement, whether or not such event constitutes a Delay Event.
- (e) The maximum aggregate amount of all Construction Period Deductions that Contracting Authority can make pursuant to this Section 3.1 shall not exceed **[\$[REDACTED]]**.

- (f) For clarity:
  - (i) Contracting Authority shall automatically be entitled to set-off the aggregate amount of all Construction Period Deductions accrued up to (and including) the Substantial Completion Date against the Substantial Completion Payment as set out in Section 4.3 of the Project Agreement, all in accordance with Section 4.11 of the Project Agreement; and
  - (ii) the provisions of Sections 4.12 and 27 of the Project Agreement shall continue to apply in respect of any Construction Period Deduction made by Contracting Authority pursuant to this Section 3.1.

### **3.2 Calculation of the Construction Period Deduction**

- (a) The amount of the Construction Period Deduction in respect of a Construction Period Quality Failure shall be as follows:
  - (i) in the case of a Construction Period Quality Failure designated as a Failure Category of “Minor” in Attachment A of this Schedule 21, the first and any subsequent deductions shall be the sum of \$[REDACTED];
  - (ii) in the case of a Construction Period Quality Failure designated as a Failure Category of “Medium” in Attachment A of this Schedule 21, the first and any subsequent deductions shall be the sum of \$[REDACTED];
  - (iii) in the case of a Construction Period Quality Failure designated as a Failure Category of “Major” in Attachment A of this Schedule 21, the first and any subsequent deductions shall be the sum of \$[REDACTED]; and
  - (iv) in the case of a Construction Period Quality Failure designated as a Failure Category of “Critical” in Attachment A of this Schedule 21, the first and any subsequent deductions shall be the sum of \$[REDACTED].

### **3.3 Notice of Construction Period Quality Failures and Construction Period Deductions**

- (a) Any notice provided by Contracting Authority to Project Co pursuant to Section 2.1(b) of this Schedule 21 shall contain:
  - (i) the Construction Period Performance Criteria in respect of which Project Co has failed to attain compliance with the relevant provisions of the Project Agreement, and the date that such failure was identified;
  - (ii) the number of Construction Period Quality Failures for each Failure Category occurring, together with a description of each Construction Period Event applicable to the subject Construction Period Quality Failure;

- (iii) the dollar amount of each Construction Period Deduction for each Failure Category, and the aggregate value of all Construction Period Deductions for all Failure Categories; and
- (iv) the cumulative dollar amount of all Construction Period Deductions for each Failure Category, together with the cumulative value of all Construction Period Deductions, in each case, accrued since Financial Close.

**ATTACHMENT A**

**CONSTRUCTION PERIOD PERFORMANCE CRITERIA**

**[REDACTED]**



## **SCHEDULE 22**

### **VARIATION PROCEDURE**

#### **1. VARIATIONS**

##### **1.1 Definitions**

- (a) The following terms shall have the following meanings:
- (i) **“Direct Cost”** has the meaning given in Appendix A of this Schedule 22.
  - (ii) **“Estimate”** has the meaning given in Section 1.4(a).
  - (iii) **“Overhead”** has the meaning given in Appendix C of this Schedule 22.
  - (iv) **“Overhead and Profit”** has the meaning given in Appendix B of this Schedule 22.
  - (v) **“Project Co Variation Notice”** has the meaning given in Section 2.1(a).
  - (vi) **“Variation”** means a variation, addition, reduction, substitution, omission, modification, deletion, removal or other change to the whole or any part of the Works
  - (vii) **“Variation Confirmation”** has the meaning given in Section 1.7(a)(ii).
  - (viii) **“Variation Directive”** means a written instruction which is issued on a form designated as a “Variation Directive Form” and signed by the Contracting Authority Representative directing Project Co to immediately proceed with a Variation pending the finalization and issuance of a Variation Confirmation for that Variation.
  - (ix) **“Variation Enquiry”** has the meaning given in Section 1.3(a).

##### **1.2 General**

- (a) Contracting Authority has the right from time to time to propose and require Project Co to carry out and implement a Variation, and any such Variation shall be subject to the provisions of this Schedule 22, provided that Contracting Authority shall not be permitted to withdraw a Variation Enquiry (nor will a Variation Enquiry be deemed to have been withdrawn) with respect to those circumstances specified in the Project Agreement for which Contracting Authority is obligated to proceed with a Variation.
- (b) Contracting Authority shall be obligated to proceed with a Variation in certain circumstances specified in the Project Agreement, and any such Variation shall be subject to the provisions of this Schedule 22.
- (c) The only payment or compensation payable by Contracting Authority to Project Co in connection with any Variation shall be the sum of the following amounts:

- (i) the Direct Cost of such Variation; plus
  - (ii) Overhead and Profit, other than in the case of Pandemic and Epidemic Change in Law Compensation for which only Overhead shall be included.
- (d) Project Co will not be entitled to any payment, compensation or extension of time for a Variation except to the extent provided in a Variation Confirmation or Variation Directive in accordance with this Schedule 22.
- (e) Project Co shall attend and shall cause any relevant Subcontractors to attend any meetings requested by Contracting Authority from time to time to discuss the implementation of any Variation or Variations generally, including with respect to the administration and pricing of Variations.

### **1.3 Variation Enquiry**

- (a) If Contracting Authority proposes or is obligated pursuant to the terms of the Project Agreement or Applicable Law to initiate a Variation it shall deliver to Project Co a written Notice of the proposed Variation (a “**Variation Enquiry**”).
- (b) A Variation Enquiry shall:
- (i) describe the proposed Variation with sufficient detail to enable Project Co to prepare a detailed Estimate;
  - (ii) in the event that the proposed Variation will require a Capital Expenditure, state whether Contracting Authority intends to pay for the Variation by way of lump sum payment or payments, adjustment to the Guaranteed Price (and, if applicable, with a request for Project Co to obtain financing for all or part of the Variation), or a combination thereof; and
  - (iii) provide a preliminary indication of any provisions of the Project Agreement (including the Output Specifications or the Project Co Proposal Extracts) that will be affected by the proposed Variation, as well as the amendments to the Project Agreement (including the Output Specifications or the Project Co Proposal Extracts) that may be necessary to accommodate the Variation.

### **1.4 Delivery of Estimate**

- (a) As soon as practicable and in any event within 15 Business Days after receipt of a Variation Enquiry, or such longer period as the Parties agree acting reasonably, Project Co shall deliver its detailed breakdown, estimate and other information (an “**Estimate**”) prepared in accordance with and meeting the requirements of Section 1.6 and in the form prescribed by Contracting Authority, acting reasonably.

### **1.5 Project Co Grounds for Objection**

- (a) Project Co may only refuse to deliver an Estimate if Project Co can demonstrate to Contracting Authority's satisfaction, acting reasonably, within the period for delivery of an Estimate specified or agreed pursuant to Section 1.4(a), that:
- (i) the implementation of the Variation would materially and adversely affect the health and safety of any person;
  - (ii) the implementation of the Variation would:
    - (A) infringe Applicable Law;
    - (B) cause to be revoked any of the existing Permits, Licences, Approvals and Agreements required by Project Co to perform the Works, and any of such Permits, Licences, Approvals and Agreements is not, using commercially reasonable efforts, capable of amendment or renewal; or
    - (C) require any new Permits, Licences, Approvals and Agreements for Project Co to perform the Works, any of which will not, using commercially reasonable efforts by Project Co or Contracting Authority, as applicable, be obtainable;
  - (iii) the proposed Variation would have a material and adverse effect on performance of the Works (except those Works which have been specified as requiring amendment in the Variation Enquiry) in a manner not compensated pursuant to this Schedule 22;
  - (iv) the implementation of the Variation would be a departure from Good Industry Practice;
  - (v) Contracting Authority does not have the legal power or capacity to require the Variation to be implemented or to do anything envisaged by this Schedule 22 in respect of or in connection with the Variation;
  - (vi) the Variation would, if implemented, result in a change in the essential nature of the Facility;
  - (vii) the Variation Enquiry does not comply with the requirements of Section 1.3 (including a failure to include adequate information therein to enable Project Co to prepare an Estimate in respect thereof); or
  - (viii) in the case of a Variation relating to the Works, the time specified for commencement and/or completion of such Variation cannot be achieved by Project Co despite commercially reasonable efforts.
- (b) If Project Co refuses to provide an Estimate on the grounds set out in Section 1.5(a), Project Co shall, within the period for delivery of an Estimate specified or agreed pursuant to Section 1.4(a), deliver to Contracting Authority a written Notice specifying the grounds upon which Project Co rejects the Variation and the details thereof.

## **1.6 Estimate Requirements**

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- (a) Unless Contracting Authority in a Variation Enquiry requires only specified limited information, each Estimate shall include the following information, sufficient to demonstrate to Contracting Authority's reasonable satisfaction:
- (i) the steps Project Co will take to implement the Variation, in such detail as is reasonable and appropriate in the circumstances, including a schedule, work breakdown structure, contact list, description of roles and responsibilities and an organizational structure chart;
  - (ii) any impact on the Scheduled Interim Completion Date, the Scheduled Substantial Completion Date and any other schedule impact on the provision of the Facility and the completion of the Works (including for certainty, any impact of the proposed Variation after taking into consideration other Variations);
  - (iii) any impact on the performance of the Works and any other impact on the Project Agreement (including for certainty, any impact of the proposed Variation after taking into consideration other Variations);
  - (iv) any amendments to the Project Agreement or any Project Document required as a consequence of the Variation, the objective of such amendments being to ensure that (save for the obligation of Contracting Authority to make payments or altered payments in respect of the Variation) the Parties are in no better and no worse position in relation to the Project than they would have been in if the Variation had not been implemented and, in particular, that there will be no material adverse change to the risk profile of the Project as a result of the Variation;
  - (v) any impact on the Direct Cost to Project Co and each Subcontractor of the proposed Variation, including:
    - (A) any Capital Expenditure that will be incurred, reduced or avoided and the impact on Project Co's cash flows from incurring, reducing or avoiding such costs (whether financed by Project Co or Contracting Authority); and
    - (B) any other costs that will be incurred, reduced or avoided and the impact on Project Co's cash flows from incurring, reducing or avoiding such costs;
  - (vi) either, subject to Section 1.9:
    - (A) a confirmation that the proposed Variation will not affect Project Co's existing financing or that Project Co's existing financing is adequate to implement the Variation; or
    - (B) if new or additional financing is required to implement the Variation, an indication as to the availability of such new or additional financing and the cost and terms of such new or additional financing;
  - (vii) Project Co's preliminary indication of the potential increase or decrease, if any, to the Guaranteed Price;

- (viii) any Permits, Licences, Approvals and Agreements that must be obtained or amended for the Variation to be implemented, and the latest date by which Project Co must receive a Variation Confirmation and Project Co or Contracting Authority, as applicable, must obtain or amend such Permits, Licences, Approvals and Agreements for the Estimate to remain valid; and
- (ix) the proposed methods of certification of any construction or operational aspect of the Works required by the Variation if not covered by the provisions of the Project Agreement,

in each case, together with such supporting information and justification as is reasonably required.

- (b) In preparing its Estimate, Project Co shall include sufficient information to demonstrate to Contracting Authority's satisfaction, acting reasonably, that:
  - (i) subject to Sections 1.6(c) and 1.6(e), Project Co has used or has obliged each Subcontractor (or will oblige any Subcontractor not yet selected) to use commercially reasonable efforts, including the use of competitive quotes or tenders, to minimize any increase in costs and to maximize any reduction in costs;
  - (ii) except as otherwise set out in this Schedule 22, all costs of Project Co and each Subcontractor are limited to the Direct Cost of the proposed Variation described in Appendix A of this Schedule 22;
  - (iii) Overhead has been calculated in accordance with Appendix C of this Schedule 22 in respect of Pandemic and Epidemic Change in Law Compensation and, in respect of all other Variations, Overhead and Profit has been calculated in accordance with Appendix B of this Schedule 22;
  - (iv) all costs of providing Works, including Capital Expenditures, reflect:
    - (A) labour and material rates applying in the open market to providers of services similar to those required by the Variation;
    - (B) any and all changes in the Output Specifications arising out of the proposed Variation; and
    - (C) any and all changes in risk allocation;
  - (v) the full amount of any and all expenditures that have been reduced or avoided (including any Capital Expenditure) and that all such expenditures, including all applicable amounts for overhead and profit anticipated to be incurred but for the Variation, have been taken into account and applied in total to reduce the amount of all costs; and

- (vi) Project Co has mitigated or will mitigate the impact of the Variation, including on the Works Schedule, the performance of the Works, the expected usage of utilities, and the Direct Cost of the proposed Variation to be incurred.
- (c) Project Co shall use commercially reasonable efforts to obtain the best value for money when procuring and/or delivering any work, services, supplies, materials or equipment required by the Variation, including, at the request of Contracting Authority, applying, using and comparing applicable industry benchmarks or benchmarking data for such purposes, and will comply with all Good Industry Practice in relation to any such procurement, to a standard no less than Project Co would apply if all costs incurred were to its own account without recourse to Contracting Authority, including using commercially reasonable efforts to mitigate such costs. Also, to the extent the procurement or delivery of any work, services, supplies, materials or equipment required by the Variation results in costs or expenses that are in excess of those costs or expenses established by industry benchmarks or benchmarking data, Project Co shall provide Contracting Authority sufficient information and analysis to demonstrate to Contracting Authority's satisfaction, acting reasonably, that such excess costs or expenses are reasonable and justified in the context of the subject Variation.
- (d) As soon as practicable, and in any event not more than 15 Business Days after Contracting Authority receives an Estimate, Project Co and Contracting Authority shall discuss and seek to agree on the Estimate, including any amendments to the Estimate agreed to by the Parties.
- (e) At the request of Contracting Authority, including if Contracting Authority is required by Applicable Law or any policy applicable to Contracting Authority, to competitively tender any contract in relation to the proposed Variation, Project Co shall seek and evaluate competitive tenders for the proposed Variation, including in accordance with such Applicable Law or policy.
- (f) Contracting Authority may modify a Variation Enquiry in writing at any time for any matter relating to the Estimate or the discussions in relation thereto, in which case Project Co shall, as soon as practicable and in any event not more than 10 Business Days after receipt of such modification, notify Contracting Authority in writing of any consequential changes to the Estimate.
- (g) If the Parties cannot agree on an Estimate pursuant to Section 1.6(d), then any Dispute will be determined in accordance with Schedule 27 – Dispute Resolution Procedure.

## **1.7 Variation Confirmation**

- (a) As soon as practicable, and in any event within 15 Business Days after the later of the date the Estimate was delivered and the date the Estimate was either agreed to or any Dispute in respect thereof was determined in accordance with Schedule 27 – Dispute Resolution Procedure, Contracting Authority shall either:
  - (i) subject to Section 1.2(b) and Section 1.7(f), withdraw the Variation Enquiry by written Notice to Project Co; or

- (ii) issue a written confirmation of the Estimate signed by Contracting Authority (the “**Variation Confirmation**”), including any agreed modifications thereto or any modifications resulting for the determination of a Dispute in respect thereof, which Variation Confirmation may be subject to Project Co obtaining financing pursuant to Section 1.8.
- (b) Within five Business Days following Project Co’s receipt of a Variation Confirmation issued pursuant to Section 1.7(a)(ii), Project Co shall execute and deliver a copy of such executed Variation Confirmation to Contracting Authority.
- (c) If Contracting Authority does not issue a Variation Confirmation within such 15 Business Days, then, subject to Section 1.2(b) and Section 1.7(f), the Variation Enquiry shall be deemed to have been withdrawn.
- (d) Upon the Variation Confirmation being issued, and if applicable upon Project Co obtaining financing pursuant to Section 1.8:
  - (i) the Parties shall as soon as practicable thereafter do all acts and execute all documents to amend the Project Agreement necessary to implement the Variation, including in respect of any required extension of time and including provision for payment to Project Co as provided in Section 1.10;
  - (ii) Project Co shall implement the Variation as provided for in the Variation Confirmation, and subject to amendments pursuant to Section 1.7(d)(i), all provisions of the Project Agreement applicable to the Works shall apply to the Works as thereby changed and no additional claim with respect to the Variation or Variation Confirmation will be considered; and
  - (iii) payment in relation to the Variation shall be as provided for in Section 1.10 and pursuant to any amendments pursuant to Section 1.7(d)(i).
- (e) If a Variation Confirmation is subject to Project Co obtaining financing pursuant to Section 1.8, then the Variation Confirmation shall not be effective until:
  - (i) Project Co obtains such financing acceptable to Contracting Authority in its sole discretion; or
  - (ii) Contracting Authority in its sole discretion waives such requirement.
- (f) Except as hereinafter provided, until a Variation Confirmation has been issued:
  - (i) the determination of whether or not to proceed with a Variation shall at all times be at Contracting Authority’s sole discretion, despite any Dispute or any other matter in relation to a Variation being referred to or determined in accordance with Schedule 27 – Dispute Resolution Procedure; and

- (ii) Contracting Authority may at any time withdraw a Variation Enquiry and, subject to Section 1.7(g), Contracting Authority shall not be obligated to Project Co in respect of a Variation until such time as Contracting Authority in its sole discretion issues a Variation Confirmation and, if applicable, Project Co has obtained the financing requested by Contracting Authority or Contracting Authority has waived such requirement,

provided that Contracting Authority may not withdraw a Variation Enquiry in circumstances where Contracting Authority is obligated pursuant to the terms of the Project Agreement to proceed with a Variation. In such circumstances Schedule 27 – Dispute Resolution Procedure shall be employed to finalize any aspects of the Variation which cannot otherwise be agreed to in accordance with the terms of this Schedule 22.

- (g) If a Variation Confirmation is not issued for any Variation Enquiry in respect of which Project Co has used commercially reasonable efforts to produce a fair and accurate Estimate, Contracting Authority shall reimburse Project Co for the Direct Cost reasonably and properly incurred by Project Co in connection with preparing the Estimate.

## **1.8 Financing**

- (a) Subject to Section 1.9, if Project Co in its Estimate confirms that existing financing is not available to pay for the proposed Variation and if Contracting Authority requests Project Co to obtain financing for a Variation, then a Variation Confirmation may be issued subject to Project Co obtaining financing. In such event, Project Co shall use commercially reasonable efforts to obtain the requested financing on terms satisfactory to Project Co and Contracting Authority, provided that, Project Co shall not be required to seek debt financing from any source other than the existing Lenders.
- (b) If Project Co has used commercially reasonable efforts to obtain the requested financing but has been unable to obtain an offer of financing on terms reasonably satisfactory to Project Co and Contracting Authority within 60 days of the date that Contracting Authority issues the Variation Confirmation, then Project Co shall have no further obligation to obtain financing for the Variation and any Variation Confirmation subject to financing shall no longer have any effect unless Contracting Authority, in its sole discretion, waives the requirement for financing or unless Contracting Authority is obligated to proceed with the Variation pursuant to the terms of the Project Agreement.
- (c) Subject to Section 1.9, if Project Co obtains an offer of financing on terms reasonably satisfactory to Project Co, Project Co shall provide Contracting Authority with details of such financing, and Contracting Authority shall, in its sole discretion, determine whether Project Co should proceed with such financing. If Contracting Authority determines that Project Co should not proceed with such financing, then Project Co shall have no further obligation to obtain financing for the Variation and any Variation Confirmation subject to financing shall no longer have any effect unless Contracting Authority, in its sole discretion, waives the requirement for financing or unless Contracting Authority is obligated to proceed with the Variation pursuant to the terms of the Project Agreement.



- (d) Subject to Section 1.9, Contracting Authority may at any time withdraw the requirement for Project Co to use commercially reasonable efforts to obtain financing, after which Project Co shall have no further obligation to obtain financing for the Variation and any Variation Confirmation subject to financing shall no longer have any effect unless Contracting Authority in its sole discretion waives the requirement for financing or unless Contracting Authority is obligated to proceed with the Variation pursuant to the terms of the Project Agreement.
- (e) If Contracting Authority waives the requirement for financing or if Project Co has no further obligation to obtain financing for the Variation pursuant to Sections 1.8(b), 1.8(c) or 1.8(d), then Project Co shall proceed with the Variation as set out in the Variation Confirmation and Contracting Authority shall pay for the Variation as provided for in Section 1.10(a)(ii).

### **1.9 Increase or Decrease in the Cost of the Financing**

- (a) If there is an increase or a decrease in the Cost of the Financing as a result of a Variation, the Guaranteed Price shall be increased or decreased by the increase or decrease to the Cost of the Financing. Project Co shall provide the calculation of the increase or decrease in the Cost of the Financing, together with a certificate of the Lenders' Agent verifying such calculation. Where the increase in the Cost of the Financing includes breakage costs, but the impact of the Variation on the Cost of the Financing could also be accommodated without incurring breakage costs, calculations for both options shall be provided to Contracting Authority, together with a certificate of the Lenders' Agent addressed to Project Co (which will expressly provide that the certificate may be relied upon by Contracting Authority) verifying such calculations. Contracting Authority shall, in its sole discretion, within 5 Business Days of receiving such certificate from the Lenders' Agent, select its preferred option by providing written notice to Project Co and the Lenders' Agent. For greater certainty, the increases or decreases in the Cost of the Financing shall be calculated in a commercially reasonable manner and in accordance with the Lending Agreements, and without regard to the identity of the party paying such costs and expenses and, with respect to any swap breakage costs or gains, such costs or gains shall be calculated in accordance with standard market practices.
- (b) If a Variation gives rise to a net benefit to Project Co through a reduction of the Cost of the Financing, then Project Co shall pay any net benefit received by Project Co to Contracting Authority.

### **1.10 Payment**

- (a) If a Variation Confirmation has been issued and is not subject to financing, or if the requirement for financing has been satisfied by Project Co or has been waived by Contracting Authority, a price adjustment for the Variation, as set out in the Estimate and as adjusted and confirmed by the Variation Confirmation, shall be made as follows:
  - (i) the Guaranteed Price shall be adjusted as set out in the Variation Confirmation; or
  - (ii) payment for Capital Expenditures as set out in the Variation Confirmation and not financed by Project Co shall be paid as follows:

- (A) Contracting Authority shall pay such Capital Expenditures in lump sum payments based on a payment schedule agreed by Contracting Authority and Project Co, acting reasonably, to reflect the amount and timing of the Capital Expenditures to be incurred by Project Co in carrying out the Variation to the extent borne by Contracting Authority; and
- (B) where payment for part of the Variation reflects the carrying out of, or specific progress towards, an element within the Variation, Project Co shall provide satisfactory evidence confirming that the part of the Variation corresponding to each occasion when payment is due under the payment schedule has been duly carried out.

In the event Contracting Authority and Project Co fail to agree as to the terms of the payment schedule, the payment schedule shall be determined in accordance with Schedule 27 - Dispute Resolution Procedure, provided that, where all or any part of the Variation is being carried out by a third party under a contract with Project Co, subject to the terms of any contract between Project Co and that third party in relation to the implementation of the Variation having been approved by Contracting Authority (such approval not to be unreasonably withheld or delayed), the process under Schedule 27 - Dispute Resolution Procedure shall determine a payment schedule which would enable Project Co to be funded by Contracting Authority in time to make payments to that third party in accordance with its contract with Project Co.

For greater certainty, (I) the Interim Completion Payment and the Substantial Completion Payment shall only be adjusted as a result of a Variation if the Guaranteed Price is adjusted pursuant to Section 1.10(a)(i), and (II) neither the Interim Completion Payment, the Substantial Completion Payment nor the Guaranteed Price shall be adjusted as a result of the Variation if Project Co is paid for Capital Expenditures pursuant to Section 1.10(a)(ii).

- (b) Contracting Authority shall make payment to Project Co within 20 Business Days of receipt by Contracting Authority of invoices presented to Contracting Authority in accordance with the agreed payment schedule accompanied (where applicable) by the relevant evidence that the relevant part of the Variation has been carried out.
- (c) Payments by Contracting Authority in respect of a Variation shall be subject to applicable holdback provisions of the *Construction Act* (Ontario), as applicable.
- (d) Project Co shall not be entitled to any amount in excess of the amount of the Estimate confirmed in the Variation Confirmation.
- (e) Upon request by Project Co, Contracting Authority shall provide to Project Co copies of any consent or approval issued by Contracting Authority and/or Contracting Authority's board of directors in connection with a proposed Variation.

### **1.11 Reduction in Works**

- (a) If a Variation involves any reduction in the Works which results in savings in the Direct Cost to Project Co, such savings shall result in a reduction in the compensation payable to Project Co under the Project Agreement in an amount equal to such reduction in the Direct Cost and the Interim Completion Payment or the Substantial Completion Payment (as applicable, at Contracting Authority's discretion) shall be reduced accordingly.

### **1.12 Variation Directive**

- (a) If an Estimate is not promptly agreed upon by Contracting Authority and Project Co or if there is a Dispute in relation thereto or if Contracting Authority, in its sole discretion, requires a Variation to be implemented prior to issuing a Variation Confirmation, then Contracting Authority may issue a Variation Directive and, following receipt of the Variation Directive, Project Co shall promptly proceed to implement the Variation.
- (b) Without limiting Project Co's obligation to promptly implement such Variation:
- (i) the determination of the valuation and time extensions, if any, required in connection with such Variation, shall be made as soon as reasonably possible after commencement of the implementation of the Variation;
  - (ii) the Contracting Authority Representative shall initially determine the valuation of such Variation, acting reasonably and making the determination in accordance with Appendices A and B hereto, with any Dispute to be determined in accordance with Schedule 27 – Dispute Resolution Procedure; and
  - (iii) Contracting Authority shall fund all Variations implemented by way of a Variation Directive as provided for in Section 1.10(a)(ii).

## **2. PROJECT CO VARIATIONS**

### **2.1 General**

- (a) Project Co shall deliver to Contracting Authority a written Notice (a “**Project Co Variation Notice**”) for each Variation proposed by Project Co.

### **2.2 Project Co Variation Notice**

- (a) A Project Co Variation Notice shall:
- (i) set out details of the proposed Variation in sufficient detail to enable Contracting Authority to evaluate it in full;
  - (ii) specify Project Co's reasons for proposing the Variation;
  - (iii) indicate all reasonably foreseeable implications of the Variation, including whether there are any costs or cost savings to Contracting Authority; and

- (iv) indicate the latest date by which a Variation Enquiry must be issued.
- (b) If Contracting Authority, in its sole discretion, elects to consider the Variation proposed by Project Co, Contracting Authority may issue to Project Co a Variation Enquiry and the procedure set out in Section 1 will apply.
- (c) Project Co shall, promptly upon demand, reimburse Contracting Authority for all out-of-pocket costs and expenses reasonably incurred by Contracting Authority in connection with Contracting Authority's consideration of any Variation proposed by Project Co pursuant to Section 2 of this Schedule 22, including, without limitation, legal and consulting fees and disbursements, regardless of whether (i) a Variation Enquiry or Estimate is issued in connection therewith or (ii) such Variation is implemented.

**APPENDIX A**

**CALCULATION OF DIRECT COST**

**1. DIRECT COST**

1.1 Subject to Section 1.2 of this Appendix A, the term “**Direct Cost**” means the aggregate total, without duplication, of only the following amounts, as paid or incurred by Project Co or each Subcontractor, as applicable, to the extent that they specifically relate to, and are attributable to, the Variation under which Project Co is expressly entitled to its Direct Cost and would not otherwise have been incurred:

- (i) wages and benefits paid for labour in the direct employ of Project Co or each Subcontractor while performing that part of the Works on the Site;
- (ii) salaries, wages and benefits of Project Co’s or each Subcontractor’s personnel when stationed at the office on the Site in whatever capacity employed, or personnel engaged at shops or on the road, in expediting the production or transportation of materials or equipment;
- (iii) salaries, wages and benefits of Project Co’s or each Subcontractor’s office personnel engaged in a technical capacity;
- (iv) without limiting Sections 1.1(i), 1.1(ii) and 1.1(iii) of this Appendix A, contributions, assessments or taxes incurred for such items as employment insurance, provincial health insurance, workers’ compensation, and Canada Pension Plan, insofar as such costs are based on the wages, salaries, or other remuneration paid for employees pursuant to Sections 1.1(i), 1.1(ii) and 1.1(iii) of this Appendix A, but excluding for certainty all income taxes on such wages, salaries and other remuneration;
- (v) the cost of materials (including hand tools which have a retail value of \$[REDACTED] or less), products, supplies, equipment, temporary services and facilities, including transportation and maintenance thereof, which are consumed in the performance of the Variation;
- (vi) the rental costs of all tools (excluding hand tools which have a retail value of \$[REDACTED] or less), machinery, and equipment used in the performance of the Variation, whether rented from or provided by Project Co or others, including installation, minor repair and replacement, dismantling, removal, transportation and delivery costs thereof;
- (vii) deposits lost;
- (viii) except as otherwise set out in the Project Agreement, a reasonable amount of profit consistent with prevailing market rates that is charged by any Subcontractor, other than the Construction Contractor and any entity not at arms-length from Project Co;

- (ix) the reasonable fees and disbursements of the Lenders' Consultant and the external technical consultants and external legal advisors of Project Co and its Subcontractors;
- (x) the cost of third party quality assurance required by Contracting Authority, such as independent inspection and testing services;
- (xi) charges levied by Governmental Authorities, but excluding fines or penalties not related to the implementation of the Variation;
- (xii) subject to Section 1.1(iv) of this Appendix A, Taxes (and without limiting the obligation of Contracting Authority to pay HST payable by it under the Project Agreement), but excluding:
  - (A) HST;
  - (B) taxes imposed on Project Co or a Subcontractor based on or measured by income or profit or otherwise imposed under the *Income Tax Act* (Canada), the *Income Tax Act* (Ontario) or any similar statute in any other jurisdiction;
  - (C) capital taxes based on or measured by the capital of Project Co or a Subcontractor;
  - (D) taxes relating to withholdings on any payments by Project Co or a Subcontractor; and
  - (E) taxes relating to any business or activity other than the business or activities related to, and conducted for, the purposes of the Works;
- (xiii) the cost of removal and disposal of contaminants, hazardous substances, waste products and debris for which Project Co is not responsible under the Project Agreement;
- (xiv) termination payments which are required under Applicable Law to be made to employees of Project Co reasonably and properly incurred by Project Co arising as a direct result of any Variation reducing the scope of the Works, except to the extent that such termination payments are provided for in contracts of employment, agreements or arrangements that were not entered into in the ordinary course of business and on commercial arm's length terms;
- (xv) the cost of debt financing provided by the Lenders including all additional financing costs related to any delay caused by the implementation of the Variations;
- (xvi) the cost of competitively tendering any contract in relation to the proposed Variation that is required by Contracting Authority, including as a result of any Applicable Law or any policy applicable to Contracting Authority;
- (xvii) the cost of any additional insurance or performance security required or approved by Contracting Authority; and

(xviii) the cost of obtaining all Project Co Permits, Licences, Approvals and Agreements.

1.2 The Direct Cost otherwise payable shall be subject to and limited by the following:

- (i) the Direct Cost shall be net of all discounts, rebates and other price reductions and benefits, which relate to the Direct Cost incurred;
- (ii) the amount paid for materials, products, supplies and equipment incorporated into the Works as a result of the Variation shall not exceed commercially competitive rates available in the Province of Ontario for such materials, products, supplies and equipment from arms-length third party suppliers;
- (iii) the Direct Cost with respect to the per hour cost charged by Project Co or any Subcontractor for salaried personnel shall be calculated by dividing the annual salary (inclusive of all benefits, statutory remittances and holidays) by 2080 hours;
- (iv) the amount paid for machinery and equipment rental costs shall not exceed the prevailing competitive commercial rate for which such equipment or machinery can be obtained in the Greater Toronto Area;
- (v) any amounts paid in accordance with this Appendix A for fees, wages, salaries and benefits charged by Project Co or any Subcontractor shall be reasonable and shall not exceed commercially competitive rates available in the Greater Toronto Area;
- (vi) the Direct Cost shall not include:
  - (A) any cost incurred due to the failure on the part of Project Co or any Project Co Party to exercise reasonable care and diligence in its attention to the execution of that part of the Works (including any cost due to any negligence, improper work, deficiencies or breaches of contract by Project Co and/or any Subcontractor);
  - (B) the fees, costs or expenses, or any other form of compensation, paid or payable by Project Co or any Subcontractor to any person performing asset management, personnel services and/or similar, comparable or like services to or for the benefit of Project Co or any Subcontractor;
  - (C) the cost and expense of maintaining corporate offices, the cost and expense of office administration, estimation, accounting, payroll, printing, office supplies, phones and courier/postal service, the cost and expense of personnel not directly involved in the implementation of the Variation and any other overhead cost or expense;
  - (D) the cost of travel and subsistence expenses; or
  - (E) any costs or expenses associated with the participation of Project Co and any Subcontractor in the meetings described in Section 1.2(e) of this Schedule 22; and

- (vii) Direct Cost must be quantifiable and supported by evidence and proper documentation, such as invoices, proof of payments, and detailed hourly rate information as required by Contracting Authority. Proper documentation shall include unit rates or prices and quantities for all items, including labour and materials that comprise the Direct Cost, including for all work completed by any Subcontractor. Any Direct Cost item claimed as a percentage of any other Direct Cost item, such as a “risk contingency”, will not be permissible, unless approved by Contracting Authority in writing.



**APPENDIX B**

**CALCULATION OF OVERHEAD AND PROFIT**

- (a) **“Overhead and Profit”** means, for each of rows 1, 2 and 3 in Table A – Applicable Overhead and Profit, the product of:
  - (i) the Direct Cost of, as applicable, the work or services within the category described in such row, multiplied by
  - (ii) the percentage set out in such row as determined based on the Direct Cost of the Variation.
- (b) For greater certainty, the percentages applicable to Overhead and Profit shall not be determined based on any component or components of the subject Variation.
- (c) Project Co and the Construction Contractor shall charge no more than the amount of Overhead and Profit calculated in accordance with Appendix B of this Schedule 22.
- (d) No amount for Overhead and Profit shall be charged on any other amount of Overhead and Profit.
- (e) No other methodology for the calculation of Overhead and Profit shall be permitted or apply.
- (f) Project Co acknowledges and agrees that the Overhead and Profit payable in accordance with this Schedule 22 is intended to compensate Project Co and the Construction Contractor for all costs and expenses incurred in connection with a Variation other than the Direct Cost, including, without limitation, all overhead, profit, office administration and the amounts expressly excluded from the Direct Cost pursuant to Section 1.2 of Appendix A of this Schedule 22.

**TABLE A**  
**APPLICABLE OVERHEAD AND PROFIT**

Entity	Overhead and Profit		
	For a Variation with a Direct Cost under \$[REDACTED]	For a Variation with a Direct Cost of between \$[REDACTED] and \$[REDACTED]	For a Variation with a Direct Cost over \$[REDACTED]
1. Project Co (Own Work)	[REDACTED] %	[REDACTED] %	[REDACTED] %
2. Construction Contractor (Own Work)	[REDACTED] %	[REDACTED] %	[REDACTED] %
3. Construction Contractor (Subcontracted Work)	[REDACTED] %	[REDACTED] %	[REDACTED] %

**APPENDIX C**

**CALCULATION OF OVERHEAD FOR PURPOSES OF PANDEMIC AND EPIDEMIC  
CHANGE IN LAW COMPENSATION**

- (a) **“Overhead”** means, for each of rows (a) 1, 2 and 3 in Table A – Applicable Overhead, the product of:
  - (i) the Direct Cost of, as applicable, the work or services within the category described in such row, multiplied by,
  - (ii) the percentage set out in such row as determined based on the Direct Cost of the Variation.
- (b) For greater certainty, the percentages applicable to Overhead shall not be determined based on any component or components of the subject Variation.
- (c) Project Co and the Construction Contractor shall charge no more than the amount of Overhead calculated in accordance with Appendix C of this Schedule 22.
- (d) No amount for Overhead shall be charged on any other amount of Overhead.
- (e) No other methodology for the calculation of Overhead shall be permitted or apply.
- (f) Project Co acknowledges and agrees that the Overhead payable in accordance with this Schedule 22 is intended to compensate Project Co and the Construction Contractor for all costs and expenses incurred in connection with a Variation as the result of a Pandemic and Epidemic Change in Law other than the Direct Cost, including, without limitation, all overhead, office administration and the amounts expressly excluded from the Direct Cost pursuant to Section 1.2 of Appendix A of this Schedule 22, and excluding profit.

**TABLE A**

**APPLICABLE OVERHEAD FOR PURPOSES OF PANDEMIC AND EPIDEMIC CHANGE IN  
LAW COMPENSATION**

Entity	Overhead		
	For a Variation with a Direct Cost under \$[REDACTED]	For a Variation with a Direct Cost of between \$[REDACTED] and \$[REDACTED]	For a Variation with a Direct Cost over \$[REDACTED]
1. Project Co (Own Work)	[REDACTED] %	[REDACTED] %	[REDACTED] %
2. Construction Contractor (Own Work)	[REDACTED] %	[REDACTED] %	[REDACTED] %
3. Construction Contractor (Subcontracted Work)	[REDACTED] %	[REDACTED] %	[REDACTED] %

## **SCHEDULE 23**

### **COMPENSATION ON TERMINATION**

#### **1 DEFINITIONS**

##### **1.1 Definitions**

The following terms shall have the following meanings:

- (a) **“Contracting Authority Default Termination Sum”** has the meaning given in Section 2.1(b) of this Schedule 23.
- (b) **“Employee Termination Payments”** means termination payments which are required under Applicable Law to be made to employees of Project Co or any Project Co Party as a direct result of terminating this Project Agreement (provided that Project Co or the relevant Project Co Party shall take commercially reasonable steps to mitigate its loss) and provided that, in calculating such amount, no account should be taken of any liabilities and obligations of Project Co or the relevant Project Co Party arising out of:
  - (i) contracts of employment or other agreements or arrangements entered into by Project Co or the relevant Project Co Party to the extent that such contracts of employment, agreements or arrangements were not entered into in connection with the Project; or
  - (ii) contracts of employment or other agreements or arrangements entered into by Project Co or the relevant Project Co Party other than in the ordinary course of business and on commercial arm’s length terms, save to the extent that amounts would have arisen if such contracts or other agreements or arrangements had been entered into in the ordinary course of business and on commercial arm’s length terms.
- (c) **“Invoice Date”** means the date that is the later of:
  - (i) the date on which Contracting Authority receives an invoice from Project Co for the relevant termination sum; and
  - (ii) the date on which Contracting Authority receives the supporting evidence required pursuant to Section 5.1(a) of this Schedule 23.
- (d) **“Junior Debt Amount”** has the meaning set out in the Project Agreement.
- (e) **“Junior Debt Makewhole”** has the meaning set out in the Project Agreement.
- (f) **“Junior Lenders”** has the meaning set out in the Project Agreement.

- (g) “**Lenders**” has the meaning set out in the Project Agreement.
- (h) “**Lending Agreements**” has the meaning set out in the Project Agreement.
- (i) “**Non-Default Termination Sum**” has the meaning given in Section 4.1(b) of this Schedule 23.
- (j) “**Project Co Amount**” means any amount payable to Project Co as a return and/or profit to Project Co shown in the Financial Model, including for greater certainty any loans made or capital contributed to Project Co by any Affiliate of Project Co or a Project Co Party, prorated by a fraction, the numerator of which is the period between the date of commencement of the Works and the Termination Date, and the denominator of which is the period between the date of commencement of the Works and the Scheduled Substantial Completion Date.
- (k) “**Project Co Default Termination Sum**” has the meaning given to it in Section 3.1(b) of this Schedule 23.
- (l) “**Senior Debt Amount**” has the meaning set out in the Project Agreement.
- (m) “**Senior Debt Makewhole**” has the meaning set out in the Project Agreement.
- (n) “**Senior Lenders**” has the meaning set out in the Project Agreement.
- (o) “**Subcontractor Losses**” means, subject to Project Co’s obligations under this Project Agreement to limit any compensation to Subcontractors, the amount reasonably and properly payable by Project Co to the Construction Contractor under the terms of the Design and Construction Contract as a direct result of the termination of this Project Agreement (including any commercially reasonable breakage fee), provided that such amount shall be reduced to the extent that Project Co or the Subcontractors fail to take commercially reasonable steps to mitigate such amount; provided that, no account should be taken of any liabilities and obligations of Project Co to the Subcontractors arising out of:
  - (i) any loss of overhead or profit of such Subcontractor relating to any period or costs after the Termination Date (save to the extent the same are properly included in any commercially reasonable breakage fee set out in any of the Ancillary Documents);
  - (ii) agreements or arrangements entered into by Project Co or the Subcontractors to the extent that such agreements or arrangements were not entered into in connection with those parties’ obligations in relation to the Project; or
  - (iii) agreements or arrangements entered into by Project Co or the Subcontractors other than in the ordinary course of business and on commercial arm’s length terms, save to the extent that amounts would have arisen if such agreements or arrangements

had been entered into in the ordinary course of business and on commercial arm's length terms.

## **2 COMPENSATION ON TERMINATION FOR CONTRACTING AUTHORITY DEFAULT OR CONVENIENCE**

### **2.1 Compensation**

- (a) If Project Co terminates this Project Agreement pursuant to Section 36 of this Project Agreement or Contracting Authority terminates this Project Agreement pursuant to Section 37.3 of this Project Agreement, Contracting Authority shall pay to Project Co the Contracting Authority Default Termination Sum.
- (b) The "Contracting Authority Default Termination Sum" shall be an amount equal to the aggregate of:
  - (i) the Senior Debt Amount and the Senior Debt Makewhole;
  - (ii) the Junior Debt Amount and the Junior Debt Makewhole;
  - (iii) any amount payable by Contracting Authority to Project Co in accordance with Sections 33.2(b) and 34.2(b) of this Project Agreement;
  - (iv) the Employee Termination Payments and the Subcontractor Losses;
  - (v) any reasonable costs properly incurred by Project Co to wind up its operations; and
  - (vi) the Project Co Amount;

LESS, the aggregate (without double counting) of the following, to the extent it is a positive amount:

- (vii) all credit balances on any bank accounts held by or on behalf of Project Co on the Termination Date and the value of any insurance proceeds due to Project Co or to which Project Co would have been entitled had insurance been maintained in accordance with the requirements of this Project Agreement (save where such insurance proceeds are to be applied in reinstatement, restoration or replacement, or, in the case of third party legal liability, in satisfaction of the claim, demand, proceeding or liability or where Contracting Authority is required to procure insurances and to make proceeds available to Project Co under this Project Agreement and it has failed to do so) or sums due and payable from third parties other than sums wholly unrelated to the Works, the Project and this Project Agreement (but only when received from third parties) but excluding any claims under any Subcontracts or claims against other third parties which have not been determined or have been determined but not yet paid, provided that, in such case, Project Co shall assign any such rights and claims under the Subcontracts or claims

against other third parties (other than claims against other third parties wholly unrelated to the Works, the Project and this Project Agreement) to Contracting Authority and, at no additional cost to Project Co, give Contracting Authority reasonable assistance in prosecuting such claims;

- (viii) to the extent realized before the Invoice Date, the market value of any other assets and rights of Project Co (other than those transferred to Contracting Authority pursuant to this Project Agreement) less liabilities of Project Co properly incurred in carrying out its obligations under this Project Agreement as at the Termination Date, provided that no account should be taken of any liabilities and obligations of Project Co arising out of:
  - (A) agreements or arrangements entered into by Project Co to the extent that such agreements or arrangements were not entered into in connection with Project Co's obligations in relation to the Project; or
  - (B) agreements or arrangements entered into by Project Co other than in the ordinary course of business and on commercial arm's length terms, save to the extent that liabilities and obligations would have arisen if such agreements or arrangements had been entered into in the ordinary course of business and on commercial arm's length terms; and
- (ix) amounts which Contracting Authority is entitled to set off pursuant to Section 4.11(a)(i) of this Project Agreement,

provided that the Contracting Authority Default Termination Sum shall never be less than the aggregate of the Senior Debt Amount, the Senior Debt Makewhole, the Junior Debt Amount and the Junior Debt Makewhole.

- (c) To the extent that such assets and rights referred to in Section 2.1(b)(viii) of this Schedule 23 are not realized and applied pursuant thereto, Project Co shall, on payment of the Contracting Authority Default Termination Sum, assign such assets and rights to Contracting Authority.
- (d) Contracting Authority shall pay the Contracting Authority Default Termination Sum in accordance with Section 5 of this Schedule 23.

### **3 COMPENSATION ON TERMINATION FOR PROJECT CO DEFAULT**

#### **3.1 Compensation**

- (a) If Contracting Authority terminates this Project Agreement pursuant to Section 35 of this Project Agreement, Contracting Authority shall pay to Project Co the Project Co Default Termination Sum.



- (b) The “Project Co Default Termination Sum” shall be an amount equal to the Guaranteed Price, as adjusted in accordance with the terms of this Project Agreement as of the Termination Date, less the aggregate, without duplication, of each of the following:
- (i) any amount of the Substantial Completion Payment and any other amounts paid by Contracting Authority on or before the Termination Date;
  - (ii) Contracting Authority’s estimate of the cost to complete the Works, including the cost to remedy any defective or deficient Works determined on a reasonable basis in consultation with the Independent Certifier and Contracting Authority’s other consultants and including all reasonable and proper costs incurred by Contracting Authority in re-tendering the Works or any portion thereof;
  - (iii) Contracting Authority’s estimate of the aggregate of all Direct Losses suffered, sustained or incurred by Contracting Authority as a result of, in respect of, or arising out of the event or events which resulted in the termination of this Project Agreement and arising out of the termination together with all costs of entering into a new design and construction contract to complete the Works, including any warranty obligations for the Works in place and to be performed, on substantially the same terms and conditions as this Project Agreement;
  - (iv) (A) the Completion Holdback, and (B) the Interim Completion Holdback, in each case as at the time the Project Co Default Termination Sum is required to be made;
  - (v) the Legislative Holdback required to be maintained by Contracting Authority as at the time the Project Co Default Termination Sum is required to be made, which amount will be paid by Contracting Authority in accordance with the *Construction Act* (Ontario); and
  - (vi) amounts which Contracting Authority is entitled to set off pursuant to Section 4.11(a)(i) of this Project Agreement.
- (c) To the extent that any amounts that Contracting Authority has estimated or determined pursuant to Sections 3.1(b)(ii), 3.1(b)(iii) or 3.1(b)(iv) of this Schedule 23, are in excess of what is required by Contracting Authority to complete the Work or compensate for Direct Losses, the Completion Holdback or the Legislative Holdback, as applicable, Contracting Authority shall promptly return such excess amounts to Project Co.
- (d) Contracting Authority shall pay the Project Co Default Termination Sum in accordance with Section 5 of this Schedule 23.

**4 CONSEQUENCES OF NON-DEFAULT TERMINATION AND TERMINATION FOR RELIEF EVENT**

**4.1 Consequences**

- (a) If either Party terminates this Project Agreement pursuant to Section 37.1 of this Project Agreement, or if either Party terminates this Project Agreement pursuant to Section 37.2 of this Project Agreement, or if Contracting Authority terminates the Project Agreement pursuant to Section 37.5 of the Project Agreement, Contracting Authority shall pay to Project Co the Non-Default Termination Sum.
- (b) The “Non-Default Termination Sum” shall be an amount equal to the aggregate of:
- (i) the Senior Debt Amount and the Senior Debt Makewhole;
  - (ii) the Junior Debt Amount;
  - (iii) any amount payable by Contracting Authority to Project Co in accordance with Sections 33.2(b) and 34.2(b) of this Project Agreement; and
  - (iv) the Employee Termination Payments and the Subcontractor Losses (but excluding therefrom any claims for loss of profit);

LESS, the aggregate (without double counting) of the following, to the extent it is a positive amount:

- (v) all credit balances on any bank accounts held by or on behalf of Project Co on the Termination Date and the value of any insurance proceeds due to Project Co or to which Project Co would have been entitled had insurance been maintained in accordance with the requirements of this Project Agreement (save where such insurance proceeds are to be applied in reinstatement, restoration or replacement, or, in the case of third party legal liability, in satisfaction of the claim, demand, proceeding or liability or where Contracting Authority is required to procure insurances and to make proceeds available to Project Co under this Project Agreement and it has failed to do so) or sums due and payable from third parties other than sums wholly unrelated to the Works, the Project and this Project Agreement (but only when received from third parties) but excluding any claims under any Subcontracts or claims against other third parties which have not been determined or have been determined but not yet paid, provided that, in such case, Project Co shall assign any such rights and claims under the Subcontracts or claims against other third parties (other than claims against other third parties wholly unrelated to the Works, the Project and this Project Agreement) to Contracting Authority and, at no additional cost to Project Co, give Contracting Authority reasonable assistance in prosecuting such claims; and

- (vi) to the extent realized before the Invoice Date, the market value of any other assets and rights of Project Co (other than those transferred to Contracting Authority pursuant to this Project Agreement) less liabilities of Project Co properly incurred in carrying out its obligations under this Project Agreement as at the Termination Date, provided that no account should be taken of any liabilities and obligations of Project Co arising out of:
  - (A) agreements or arrangements entered into by Project Co to the extent that such agreements or arrangements were not entered into in connection with Project Co's obligations in relation to the Project; or
  - (B) agreements or arrangements entered into by Project Co other than in the ordinary course of business and on commercial arm's length terms, save to the extent that liabilities and obligations would have arisen if such agreements or arrangements had been entered into in the ordinary course of business and on commercial arm's length terms; and
- (vii) amounts which Contracting Authority is entitled to set off pursuant to Section 4.11(a)(i) of this Project Agreement,

provided that the Non-Default Termination Sum shall never be less than the aggregate of the Senior Debt Amount, the Senior Debt Makewhole and the Junior Debt Amount.

- (c) To the extent that such assets and rights referred to in Section 4.1(b)(vi) of this Schedule 23 are not realized and applied pursuant thereto, Project Co shall, on payment of the Non-Default Termination Sum, assign such assets and rights to Contracting Authority.
- (d) Contracting Authority shall pay the Non-Default Termination Sum in accordance with Section 5 of this Schedule 23.

## **5 GENERAL**

### **5.1 Payment and Interest Following Termination**

- (a) In respect of the termination payments to be made pursuant to either Section 2 or 4 of this Schedule 23, as soon as practicable after, and, in any event, within 30 days after, the Termination Date, Project Co shall give to Contracting Authority an invoice for the relevant termination sum and sufficient supporting evidence, reasonably satisfactory to Contracting Authority, justifying the amount of the relevant termination sum including a detailed breakdown of each of the individual items comprising such sum.
- (b) In respect of the termination payments to be made pursuant Section 3 of this Schedule 23, as soon as practicable, and in any event, within 120 days after the Termination Date, Contracting Authority shall calculate and notify Project Co of the Project Co Default

Termination Sum under Section 3.1(b) of this Schedule 23, and shall deliver to Project Co sufficient supporting evidence reasonably satisfactory to Project Co.

- (c) Contracting Authority shall:
- (i) pay to Project Co the relevant termination sum within 60 days after the Invoice Date or the date of delivery of the notice described in Section 5.1(b) of this Schedule 23, as applicable, and so long as all of demobilization of the Works has been completed; and
  - (ii) indemnify Project Co as provided in Section 45.2(c) of this Project Agreement in respect of any damages suffered or incurred as a result of the relevant termination sum (or any part of such sum that remains outstanding) not being received on the Termination Date:
    - (A) in an amount equivalent to the No Default Payment Compensation Amount for the period from (but excluding) the Termination Date to (and including) the date which is 60 days after the Invoice Date or the date of delivery of the notice described in Section 5.1(b) of this Schedule 23, as applicable; and
    - (B) thereafter, in an amount equivalent to the Payment Compensation Amount until the date of payment.
- (d) In respect of the termination payments to be made pursuant to Section 3 of this Schedule 23, if the applicable termination sum is negative, Contracting Authority shall have no obligation to make any payment to Project Co and Project Co shall also thereafter indemnify Contracting Authority as provided in Section 45.1(e) of this Project Agreement in respect of any damages suffered or incurred on such amount on the basis that the due date for the payment of the negative termination sum amount was the date 60 days after the Invoice Date until the date of payment in an amount equivalent to the Payment Compensation Amount.

## **5.2 Costs**

- (a) The costs and expenses to be taken into account in the calculation of all termination sums due pursuant to this Schedule 23 shall only be such costs and expenses to the extent that they are reasonable and proper in quantum and shall have been or will be reasonably and properly incurred.

## **5.3 Undisputed Amounts**

- (a) If the calculation of any termination amount is disputed then any undisputed amount shall be paid in accordance with this Section 5 and the disputed amount shall be dealt with in accordance with Schedule 27 – Dispute Resolution Procedure.

**5.4 Outstanding Debt Amounts**

- (a) Contracting Authority shall be entitled to rely on a certificate of the Lenders' Agent as conclusive as to the Senior Debt Amount, the Senior Debt Makewhole, the Junior Debt Amount and the Junior Debt Makewhole, as applicable, outstanding or payable at any relevant time.
- (b) If a receipt or other acknowledgement is given by the Lenders' Agent acknowledging or otherwise confirming receipt of payment or payments in respect of the Senior Debt Amount, the Senior Debt Makewhole, the Junior Debt Amount and the Junior Debt Makewhole, as applicable, such receipt or other acknowledgement shall discharge Contracting Authority's obligation to pay such portion of compensation due to Project Co that is equal to the amount acknowledged or confirmed.

**SCHEDULE 24**

**[REDACTED]**

**SCHEDULE 25**

**INSURANCE AND PERFORMANCE SECURITY REQUIREMENTS**

**1. WORKS PHASE INSURANCE COVERAGE**

1.1 Subject to Section 6, from and after execution of this Project Agreement and until the Substantial Completion Date, Project Co shall, at its own expense, obtain and maintain, or cause to be obtained and maintained, exclusively through the IO Construction Insurance Program (“**IOCIP**”) the following insurances as further described in Appendix A to this Schedule 25:

- (a) “All Risks” Course of Construction Property, including Boiler and Machinery;
- (b) “Wrap-Up” Commercial General Liability and Non-Owned Automobile Liability;
- (c) Project Specific Pollution Liability (combined Contractors’ Pollution Liability and Pollution Legal Liability); and
- (d) Project Specific Professional Liability.

1.2 Subject to Section 6, from and after execution of this Project Agreement and until the Substantial Completion Date, Project Co shall, at its own expense, obtain and maintain, or cause to be obtained and maintained, the following insurances as further described in Appendix A to this Schedule 25:

- (a) Automobile Liability;
- (b) Commercial General Liability and Non-Owned Automobile Liability (to be maintained by the Construction Contractor and each of the Subcontractors involved in the Works) with respect to off-site operations and activities;
- (c) Aircraft and Watercraft Liability (if any exposure);
- (d) “All Risks” Marine Cargo (if any exposure);
- (e) “All Risks” Contractors’ Equipment;
- (f) Comprehensive Crime; and
- (g) WSIB.

**2. NO LIMIT ON RECOVERY**

- 2.1 Notwithstanding any other provision of this Project Agreement, it is hereby agreed that the limits of liability specified in this Schedule 25 for insurance policies, whether such policies are required to be obtained (or caused to be obtained) by Contracting Authority or by Project Co, shall in no way limit Project Co's liability or obligations to Contracting Authority or Contracting Authority's liability or obligations to Project Co, as applicable.

**3. ADDITIONAL COVER**

- 3.1 Without prejudice to the other provisions of this Schedule 25, Contracting Authority and Project Co shall, at all relevant times and at their own expense, obtain and maintain (or cause to be obtained and maintained) those insurances which they are required to obtain and maintain (or cause to be obtained and maintained) by Applicable Law, or that they consider necessary.
- 3.2 Contracting Authority reserves the right to require Project Co to purchase such additional insurance coverage as Contracting Authority may reasonably require. Contracting Authority also reserves the right to request such higher or lower limits of insurance or otherwise alter the types of coverage requirements, their minimum amounts and deductibles (taking into consideration such matters as the nature of the Works, contract value, industry standards and availability of insurance) as Contracting Authority may reasonably require from time to time. Any additional costs of such additional and/or amended insurance shall be borne by Contracting Authority and any cost savings resulting from the implementation of such additional and/or amended insurance shall be for the account of Contracting Authority.

**4. RESPONSIBILITY FOR DEDUCTIBLES**

- 4.1 The Party responsible for the matter giving rise to a claim, to the extent responsible therefor, shall be responsible and liable for the payment of deductibles under any policy of insurance under which it is an insured party or under any policy of insurance Project Co is required to maintain (or cause to be maintained) under this Schedule 25. In the event that responsibility for the matter giving rise to the claim is indeterminable, the First Named Insured under the policy of insurance is responsible and liable for the payment of deductibles.

**5. COOPERATION WITH INSURER'S CONSULTANT**

- 5.1 If an insurer or an insurer's appointed consultant, for underwriting purposes or as a term of an insurance policy, needs to review any part of the performance of this Project Agreement, then Contracting Authority and Project Co shall, and shall require the Contracting Authority Parties and the Project Co Parties, respectively, to:



- (a) cooperate with the insurer and its consultant, including providing them with such information and documentation as they may reasonably require; and
- (b) allow the insurer and its consultant to attend meetings between Project Co and Contracting Authority (or, as applicable, and if reasonably required by the insurer, between Project Co and those engaged by or through Project Co).

## **6. UNINSURABLE RISKS**

6.1 The term “**Uninsurable Risk**” means a risk, or any component of a risk, against which Project Co is required to insure pursuant to this Schedule 25 and for which, at any time after the date of this Project Agreement, either:

- (a) the insurance required pursuant to this Schedule 25 (including the terms and conditions specified for such insurance herein) is not available in relation to that risk:
  - (i) where Applicable Laws require that the insurer be licensed in the Province of Ontario to insure such a risk, by insurers licensed in the Province of Ontario; or
  - (ii) where Applicable Laws do not require that the insurer be licensed in the Province of Ontario to insure such a risk, by any insurer otherwise permitted under the terms of the Project Agreement; or
- (b) the insurance premium payable or the terms and conditions for insuring that risk are such that the risk is not generally being insured against in the worldwide insurance market.

Project Co has the onus of demonstrating, to Contracting Authority’s reasonable satisfaction that the foregoing definition applies to a particular risk.

6.2 Project Co shall notify Contracting Authority as soon as possible and, in any event, within 15 Business Days of becoming aware of same, that a risk, or any component of a risk, has become an Uninsurable Risk, and shall provide Contracting Authority with all relevant details in relation to such risk, including a copy of the relevant insurance policy.

6.3 Project Co and Contracting Authority shall, as soon as possible following the provision of the notice referred to in Section 6.2, meet to discuss, in good faith, the appropriate means by which the Uninsurable Risk should be managed and, if Project Co and Contracting Authority are able to agree to alternative arrangements, the Uninsurable Risk shall be managed in accordance with such alternative arrangements.

6.4 In the event that Project Co and Contracting Authority, each acting in good faith, are unable to agree to alternative arrangements with respect to the management of an Uninsurable

Risk within 15 Business Days of the expiry of the period referred to in Section 6.2, Contracting Authority may, in its absolute discretion, either:

- (a) elect to assume responsibility for the Uninsurable Risk and, in respect of the year in which the relevant risk becomes an Uninsurable Risk and every year thereafter, withhold, in equal instalments over the course of such year, from the payment or payments otherwise due to Project Co an amount equal to the annual premium (index linked) relating to the Uninsurable Risk as was current on the date immediately prior to the date on which the relevant risk became an Uninsurable Risk, in which case this Project Agreement shall continue in full force and effect; or
- (b) terminate this Project Agreement in accordance with Section 37.2 of the Project Agreement as if such termination had occurred as a result of the Parties having failed to reach agreement in accordance with Section 37.2 of the Project Agreement following the occurrence of an event of Force Majeure, and, in accordance with the provisions of Schedule 23 – Compensation on Termination, pay to Project Co an amount equal to the Non-Default Termination Sum.

6.5 On the occurrence of an Uninsurable Risk, Contracting Authority may, in its absolute discretion, either:

- (a) pay to Project Co an amount equal to the insurance proceeds that would have been payable to Project Co in connection with such Uninsurable Risk had the relevant insurance continued to be available, in which case this Project Agreement shall continue in full force and effect; or
- (b) terminate this Project Agreement in accordance with Section 37.2 of the Project Agreement as if such termination had occurred as a result of the Parties having failed to reach agreement in accordance with Section 37.2 of the Project Agreement following the occurrence of an event of Force Majeure, and, in accordance with the provisions of Schedule 23 – Compensation on Termination, pay to Project Co an amount equal to the Non-Default Termination Sum.

6.6 With respect to any Uninsurable Risk:

- (a) Project Co shall continue to approach the insurance market on a regular basis and, in any event, at intervals of not less than 180 days and use reasonable efforts to obtain (or cause to be obtained) insurance to cover as much or all of the Uninsurable Risk as can be insured in the available insurance market from time to time; and
- (b) Subject to Section 6.6(a), Project Co shall be relieved of its obligation to maintain (or cause to be maintained) insurance in respect of the Uninsurable Risk.

6.7 Where a risk which was previously an Uninsurable Risk ceases to be so, Project Co shall, at its own expense, obtain and maintain (or cause to be obtained and maintained) insurance in accordance with the requirements of this Schedule 25 in respect of the risk and the provisions of this Section 6 shall no longer apply to such risk.

## **7. TOTAL OR SUBSTANTIAL DESTRUCTION**

7.1 In the event of damage to, or destruction of, all or substantially all of the Facility for which there is coverage under an insurance policy, any insurance proceeds received by Project Co shall first be applied so as to ensure the performance by Project Co of its obligations under this Project Agreement, including, where appropriate, the reinstatement, restoration or replacement of the Facility or any other assets, materials or goods necessary or desirable for the carrying out of the Works, all in accordance with the terms of the Insurance Trust Agreement.

## **8. SUBCONTRACTORS**

8.1 Project Co shall require that all Subcontractors are covered by, or obtain, the insurance described in this Schedule 25, provided that Project Co shall determine the applicable limits to be obtained for such insurance. Project Co shall be solely responsible and liable for any damages which Contracting Authority may suffer as a direct result of Project Co's failure to comply with the foregoing.

8.2 If Project Co receives notice that any Subcontractor employed by or through Project Co is not covered by any insurance required by this Schedule 25 to be obtained (or cause to be obtained) by Project Co, Project Co shall:

- (a) ensure that such insurance coverage is put in place;
- (b) remove the Subcontractor from the Site and ensure that such Subcontractor does not perform any further part of the Works until after such insurance coverage is put in place; or
- (c) if the Subcontractor cannot be covered by a particular policy as required by this Schedule 25, replace the Subcontractor with a new Subcontractor who can obtain the required insurance coverage; it being acknowledged by Project Co that the requirements and restrictions set forth in the Project Agreement regarding new and replaced Subcontractors shall be complied with.

## **9. RENEWAL**

9.1 Project Co shall provide to Contracting Authority, at least 5 Business Days prior to the expiry date of any policy of insurance required to be obtained (or cause to be obtained) by Project Co pursuant to this Schedule 25, evidence of the renewal of each such policy satisfactory to Contracting Authority, acting reasonably.

**10. NAMED AND ADDITIONAL INSUREDS AND WAIVER OF SUBROGATION**

10.1 All insurance provided by Project Co, shall:

- (a) include Project Co and Contracting Authority, IO, MAG as Named Insureds to the extent specified in Appendix A of this Schedule 25;
- (b) include Contracting Authority, IO, MAG, Municipality, the Lenders and the Lenders' Agent and Her Majesty the Queen in right of Ontario, Her Ministers, agents, appointees and employees, as the case may be, as Additional Insureds, or loss payees to the extent of their respective insurable interests to the extent specified in Appendix A of this Schedule 25;
- (c) except with respect to the Project Specific Professional Liability, Automobile Liability, Comprehensive Crime and WSIB specified in Appendix A to this Schedule 25, contain a waiver of subrogation as against the Lenders and the Lenders' Agent, Contracting Authority, the Contracting Authority Parties and their respective shareholders, officials, directors, officers, employees, servants, consultants (other than Design Consultants) and agents;
- (d) contain a breach of warranty provision whereby a breach of a condition by Project Co will not eliminate or reduce coverage for any other insured; and
- (e) be primary insurance with respect to any similar coverage provided by any insurance obtained by or available to Contracting Authority or the Lenders without any right of contribution of any insurance carried by Contracting Authority or the Lenders.

10.2 Notwithstanding that "Contracting Authority" includes each ministry, agency, board or other subdivision, department or branch of Contracting Authority, for purposes of this Schedule 25, including Appendix A hereto, certain ministries and agencies of Contracting Authority are listed as Named Insureds and/or Additional Insureds for greater certainty and for insurance evidence requirements.

**11. CERTIFICATES OF INSURANCE AND CERTIFIED COPIES OF POLICIES**

11.1 Prior to the execution of the Project Agreement, Project Co will provide Contracting Authority with certified copies of policies, confirming that the insurances specified in Section 1.1 have been obtained and are in full force and effect.

11.2 Prior to the execution of the Project Agreement, Project Co will provide Contracting Authority with certificates of insurance or certified copies of policies, confirming that the insurances specified in Section 1.2 have been obtained and are in full force and effect. If certificates of insurance are provided, certified copies of the entire contents of all relevant

insurance policies will be subsequently provided to Contracting Authority no later than 90 days after execution of this Project Agreement.

## **12. FAILURE TO MEET INSURANCE REQUIREMENTS**

- 12.1 If Project Co fails to obtain or maintain, or cause to be obtained and maintained, the insurance required by this Schedule 25, fails to furnish to Contracting Authority a certified copy of each policy required to be obtained by this Schedule 25 or if, after furnishing such certified copy, the policy lapses, is cancelled, or is materially altered, then Contracting Authority shall have the right, without obligation to do so, to obtain and maintain such insurance itself in the name of Project Co, and the cost thereof shall either, at Contracting Authority's option, be payable by Project Co to Contracting Authority on demand or be deducted by Contracting Authority from the next payment or payments otherwise due to Project Co.
- 12.2 If coverage under any insurance policy required to be obtained (or caused to be obtained) by Project Co should lapse, be terminated or be cancelled, then, if directed by Contracting Authority, all work by Project Co shall immediately cease until satisfactory evidence of renewal is produced.

## **13. MODIFICATION OR CANCELLATION OF POLICIES**

- 13.1 Except as noted in Appendix A to this Schedule 25, all insurance provided by Project Co shall contain endorsements confirming that the policy will not be cancelled, adversely reduced, adversely materially altered or adversely materially amended without the insurer(s) giving at least ninety (90) days prior written notice by registered mail, at the address specified, to Contracting Authority and the Lenders' Agent. For greater certainty, the terms "adversely reduced", "adversely materially altered" and "adversely materially amended" as used in this provision shall mean any decrease or reduction in policy limits, aggregate limits or sub-limits (other than as a result of claims under the policy), any increase in any policy deductible or self-insured retention, any reduction in the policy coverage period, cancellation or suspension of coverage with respect to any insured parties from the time the policy was issued for that policy period, addition of any exclusions or restrictions from the time the policy was issued for that policy period and any reduction or restriction in the scope of coverage provided under the policy, in all cases when such adverse reduction, adverse material alteration or adverse material amendment is initiated by the insurer.
- 13.2 All insurance provided by Project Co shall contain endorsements confirming that, in the event of cancellation for non-payment of premium, the insurer(s) will give at least fifteen (15) days prior written notice by registered mail, at the address specified, to Contracting Authority and the Lenders' Agent.
- 13.3 With respect to insurances described in Section 1.1(a), (b) and (c), and Section 1.2(d), breach of any of the terms or conditions of the policies required to be provided by Project

Co, or any negligence or wilful act or omission or false representation by an Insured under these policies, shall not invalidate the insurance with respect to Contracting Authority, the Lenders or any other Insured, but only to the extent that such breach is not known to these parties.

#### **14. INSURERS**

14.1 All policies of insurance to be obtained (or caused to be obtained) by Project Co in accordance with this Schedule 25 shall be issued by financially sound insurers acceptable to Contracting Authority and Lenders, acting reasonably, and, where required by statute, be licensed to insure such risk in the Province of Ontario.

14.2 To be eligible to provide insurance, an insurer must have the capacity to provide the particular insurance and shall have current ratings from time to time of either:

- (a) a Financial Strength Rating of not lower than “A-” for three out of the previous five years but not lower than “B” at any time during those five years, and a Financial Size Category not lower than VII, such ratings being those established by A.M. Best Company (**Best**); or
- (b) a Long-Term Financial Strength Rating of not lower than “A-” for three out of the past five years but not less than “BBB” at any time during those five years, a Short-Term Financial Strength Rating of not lower than “A-3” for three out of the previous five years and a Financial Enhancement Rating of not lower than “A-” for three out of the previous five years but not less than “BB+” at any time during those five years, such ratings being those established by Standard and Poor’s (**S&P**); or
- (c) if the insurer is not rated by Best or S&P, an insurer that is acceptable to Contracting Authority and Lenders, acting reasonably, with respect to the insurances required by this Schedule 25.

#### **15. POLICY TERMS AND CONDITIONS**

15.1 All policies of insurance to be obtained (or caused to be obtained) by Project Co in accordance with this Schedule 25 shall be in form and substance satisfactory to Contracting Authority, its insurance advisors and Lenders, acting reasonably.

15.2 To achieve the minimum limits for any type of insurance required under Appendix A, it is permissible to arrange the insurance under a single policy, or by a combination of primary, umbrella and/or excess policies.

#### **16. FAILURE TO COMPLY**

16.1 Neither failure to comply nor full compliance by Project Co with the insurance provisions of this Schedule 25 shall relieve Project Co of its liabilities and obligations under this Project Agreement.

**17. [REDACTED]**

**18. INSURANCE TRUST AGREEMENT**

18.1 All losses under the “All Risks” Course of Construction Property Insurance policy, including Boiler & Machinery Insurance carried by Project Co prior to Substantial Completion of the Works which relate to equipment purchased or owned by Contracting Authority shall be payable solely to Contracting Authority and shall not be payable to the Account Trustee or distributed pursuant to the Insurance Trust Agreement.

**APPENDIX A TO SCHEDULE 25  
INSURANCE REQUIREMENTS**

**[REDACTED]**



**APPENDIX B TO SCHEDULE 25  
[REDACTED]**

**APPENDIX C TO SCHEDULE 25  
[REDACTED]**

## **SCHEDULE 26**

### **RECORD PROVISIONS**

#### **1. General Requirements**

- 1.1 Project Co shall prepare, retain and maintain at its own expense, all the records (including superseded records) referred to in Section 2.1, as follows:
- (a) in accordance with this Section 1;
  - (b) in accordance with the Project Agreement;
  - (c) in accordance with the requirements of Good Industry Practice;
  - (d) having due regard to the guidelines and policies of the Office of the Information and Privacy Commissioner of Ontario;
  - (e) in accordance with the most stringent of Project Co's and the Construction Contractor's normal business practices;
  - (f) in accordance with Canadian GAAP;
  - (g) in chronological order;
  - (h) in electronic format on Contracting Authority's E-Builder system or Contracting Authority's designated record keeping system;
  - (i) in sufficient detail, in appropriate categories and generally in such a manner as to enable Project Co to comply with Project Co's obligations under Section 27 of the Project Agreement; and
  - (j) in a form that is capable of audit.
- 1.2 Project Co shall retain and maintain all records on the Site in addition to retaining and maintaining records referred to in Section 2.1 of this Schedule 26 in electronic format on Contracting Authority's E-Builder system or Contracting Authority's designated record keeping system..
- 1.3 Wherever practical, original records shall be retained and maintained in a hard copy form. Project Co may retain true copies of original records where it is not practical to retain original records.
- 1.4 Any drawings (including, without limitation, the As Built Drawings) required to be made or supplied pursuant to this Project Agreement shall be on the most updated version of the applicable software and editable in updated base software format, of a size appropriate to

show the detail to be depicted clearly without magnifying aids, shall be consistent in size and format to drawings previously submitted by Project Co to Contracting Authority, and shall conform to the Output Specifications and Good Industry Practice and the CAD Standards. Where by prior agreement Contracting Authority and Project Co have agreed to accept DVD or other storage media, Project Co shall make or supply drawings and other documents in such form as has been agreed by the Parties and shall include secure back up facilities.

- 1.5 Records may, with the consent of Contracting Authority, not to be unreasonably withheld or delayed, be stored in electronic form if Contracting Authority has access thereto and will continue to have access thereto, such that Contracting Authority will be able to read, copy, download, and search same without licence or payment.
- 1.6 Subject to Sections 1.7 and 1.8, Project Co shall retain and maintain in safe storage, at its expense, all records referred to in Section 2.1 for a period of at least 7 years or such longer period as required by Applicable Law.
- 1.7 Project Co shall notify Contracting Authority if Project Co wishes to destroy any records referred to in this Schedule 26, or in respect of which the required period under Section 1.6 of this Schedule 26 or under Applicable Law for their retention has expired. The Parties agree that:
  - (a) within 60 days of such notice, Contracting Authority may elect to require Project Co to deliver such records to Contracting Authority, in which case Project Co shall, at the expense of Contracting Authority, deliver such records (with the exception of Sensitive Information) to Contracting Authority in the manner and to the location as Contracting Authority shall specify; or
  - (b) if Contracting Authority fails to notify Project Co of its election pursuant to Section 1.7(a) within such 60 day period, Project Co may, at its expense, destroy such records.
- 1.8 In the event of termination of this Project Agreement in accordance with its terms, Project Co shall deliver all records that Project Co retains and maintains pursuant to this Schedule 26 to Contracting Authority in the manner and to the location that Contracting Authority shall reasonably specify. Contracting Authority shall make available to Project Co all the records Project Co delivers pursuant to this Section 1.8 subject to prior reasonable notice. Project Co may deliver true copies of original records required by:
  - (a) statute to remain with Project Co;
  - (b) Project Co in connection with its fulfilment of any outstanding obligations under this Project Agreement; or
  - (c) Project Co in connection with its fulfilment of any outstanding obligations under the Lending Agreements.

- 1.9 Where the termination of this Project Agreement arises:
- (a) as a result of an Contracting Authority Event of Default or pursuant to Section 37.3 of this Project Agreement, then the costs of delivering the records and the costs for retaining such records in safe storage will be borne by Contracting Authority; or
  - (b) for any other cause, then the costs of delivering the records and the costs for retaining such records in safe storage for a period of at least six years following the Termination Date (unless a longer period is required by Applicable Law), shall be borne by Project Co.
- 1.10 Within 30 days after the end of each year or partial year of the Project Term, Project Co shall deliver to Contracting Authority a report, as reasonably requested by Contracting Authority in connection with Contracting Authority's financial reporting, detailing to the best of Project Co's knowledge at the time of any such report any and all liabilities, claims and demands, including contingent liabilities, claims and demands, that Project Co has or may have against Contracting Authority or that may be owing by Contracting Authority to Project Co. The Parties acknowledge and agree that the contents of any such report or the failure to mention any matter in any such report shall not limit either Party's rights or remedies against the other Party as contemplated by this Project Agreement.
- 1.11 Project Co shall provide to Contracting Authority:
- (a) not later than 45 days after the end of the first three fiscal quarters of Project Co in each fiscal year, part or all of which falls in a year of the Project Term, a copy of Project Co's unaudited financial statements in respect of that period, including an unaudited balance sheet and an unaudited statement of income, all prepared in accordance with GAAP (as defined in the Lending Agreements), and
  - (b) not later than 120 days after the end of each fiscal year, a copy of Project Co's annual audited financial statements, in respect of that period, prepared in accordance with Applicable Law and GAAP (as defined in the Lending Agreements), together with a certificate of the auditors of Project Co setting forth that they have examined such statements and have conducted a general review of accounting procedures and such tests of accounting records and other supporting evidence as they consider necessary or advisable and confirming that in their opinion such statements present fairly the financial position of Project Co and the results of its operations for the fiscal year reported on and have been defined in accordance with GAAP (as defined in the Lending Agreements),

all of which documents, whether or not marked or identified as confidential or proprietary but subject to the exceptions contained in Section 41 of the Project Agreement, shall be treated by Contracting Authority as Confidential Information of Project Co.

**2. Records To Be Kept**

- 2.1 Without limiting any other requirement of this Project Agreement, Project Co shall prepare, retain and maintain at its own expense:
- (a) this Project Agreement, its Schedules and the Ancillary Documents, including all amendments to such agreements;
  - (b) all records relating to the appointment and replacement of the Contracting Authority Representative and the Project Co Representative;
  - (c) any Design Data, documents, drawings (including, without limitation, the As Built Drawings) or submissions in accordance with Schedule 10 - Review Procedure;
  - (d) any documents relating to Development Approvals and other Project Co Permits, Licences, Approvals and Agreements, including any refusals and appeals relating to any applications;
  - (e) all records relating to any statutory inspections of the Facility or the Site, including any roadways;
  - (f) any notices, reports, results and certificates relating to the Interim Completion, Substantial Completion, Final Completion and completion of the Interim Completion Project Co Commissioning and the Project Co Commissioning;
  - (g) all operation and maintenance manuals;
  - (h) any documents relating to events of Force Majeure, Delay Events, Compensation Events and Relief Events;
  - (i) all documents submitted in accordance with Schedule 22 - Variation Procedure;
  - (j) any documents related to decisions resulting from the Dispute Resolution Procedure;
  - (k) any documents related to a Project Co Change in Ownership or Change in Control;
  - (l) any documents relating to any Refinancing;
  - (m) all accounts for Taxes and transactions relating to Taxes, including in relation to HST applicable to the Project, but excluding any records for:
    - (i) Project Co's liabilities or payments under the Income Tax Act (Canada), the Income Tax Act (Ontario) or any similar statute in any other jurisdiction;
    - (ii) Project Co's liabilities or payments for capital taxes based on or measured by the capital of Project Co;

- (iii) the withholdings of any payments by Project Co; or
  - (iv) any business or activity in addition to the business or activities related to, and conducted for, the purpose of the Project;
  - (n) the financial accounts of Project Co referred to in Section 1.11;
  - (o) all records required by Applicable Law (including in relation to health and safety matters) to be maintained by Project Co with respect to the Works;
  - (p) any documents relating to insurance and insurance claims;
  - (q) all Jointly Developed Materials; and
  - (r) all other records, documents, information, notices or certificates expressly required to be produced or maintained by Project Co pursuant to this Project Agreement.
- 2.2 Either Party may review the documents required to be prepared, retained and maintained by Project Co pursuant to Section 2.1.

## SCHEDULE 27

### DISPUTE RESOLUTION PROCEDURE

#### 1. General

##### 1.1 Definitions

- (a) In this Schedule 27, unless the context otherwise requires:
- (i) “**Adjudication**” has the meaning given in Section 3.1(a).
  - (ii) “**Adjudication Dispute**” has the meaning given in Section 3.1(a)(ii).
  - (iii) “**Adjudicator**” has the meaning given in Section 3.1(a).
  - (iv) “**Arbitration Act, 1991**” means the *Arbitration Act, 1991*, S.O. 1991, c. 17, as amended from time to time.
  - (v) “**Arbitration Referral Period**” has the meaning given in Section 4.13(a).
  - (vi) “**CDB**” has the meaning given in Section 4.1(a).
  - (vii) “**CDB Expiry Date**” means the Final Completion Date, as may be extended pursuant to Section 4.1(b).
  - (viii) “**CDB Member Agreement**” has the meaning given in Section 4.1(a).
  - (ix) “**CDB Member Statement**” has the meaning given in Section 4.3(a).
  - (x) “**Claimant**” has the meaning given in Section 4.6(a).
  - (xi) “**Date of Commencement**” has the meaning given in Section 4.6(b).
  - (xii) “**Dispute**” means all disagreements, disputes, or controversies arising during the Project Term in relation to or arising out of the interpretation, enforceability, performance, breach, or validity of the Project Agreement or any provision of the Project Agreement, the rights or obligations of the Parties under the Project Agreement, or the exercise or failure to exercise a discretion or power given to a Party under the Project Agreement.
  - (xiii) “**Dispute Notice Supporting Documents**” has the meaning given in Section 1.6(b)(v).
  - (xiv) “**Member**” has the meaning given in Section 4.1(a).
  - (xv) “**Notice of Adjudication**” has the meaning given in Section 3.1(c).



- (xvi) “**Notice of Arbitration**” has the meaning given in Section 5(b).
- (xvii) “**Notice of Dispute**” has the meaning given in Section 1.6(a).
- (xviii) “**Notice of Request to Arbitrate**” has the meaning given in Section 5(b).
- (xix) “**Party Executive**” has the meaning given in Section 2(a).
- (xx) “**Party Representative**” means the Contracting Authority Representative or the Project Co Representative, as the context requires.
- (xxi) “**Project Agreement Arbitration**” has the meaning given in Section 7(a).
- (xxii) “**Public Safety Dispute**” means any Dispute which Contracting Authority or Project Co, acting reasonably, determines involves an alleged breach of the Project Agreement by the other Party or any act or omission on the part of the other Party or any person with whom the other Party is legally affiliated or for whom the other Party is legally responsible (including a Project Co Party or a Contracting Authority Party, as applicable), which creates or can reasonably be expected to create a serious threat to the health, safety or security of any person, including any user of any part of or the whole of the Project or the Lands, or to the environment.
- (xxiii) “**Reply**” has the meaning given in Section 4.7.
- (xxiv) “**Respondent**” has the meaning given in Section 4.6(a).
- (xxv) “**Rules of Civil Procedure**” means R.R.O. 1990, Reg. 194: Rules of Civil Procedure under the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended from time to time.
- (xxvi) “**Statement of Case**” has the meaning given in Section 4.6(a).
- (xxvii) “**Statement of Reply**” has the meaning given in Section 4.7.
- (xxviii) “**Third Party Arbitration**” has the meaning given in Section 7(a).
- (xxix) “**Third Party Litigation**” has the meaning given in Section 7(b).

## **1.2 Applicability of this Schedule 27**

- (a) All Disputes shall be resolved in accordance with this Schedule 27.

## **1.3 Independent Certifier Determinations and Decisions**

- (a) Save and except as set out in Sections 23A.4(h) and 24.4(i) of the Project Agreement and Section 3, (i) no determination or decision of the Independent

Certifier made pursuant to the Project Agreement shall be binding upon the Parties, and (ii) any Party may refer a Dispute in respect of any such determination or decision of the Independent Certifier for resolution pursuant to this Schedule 27.

#### **1.4 Project Co's Obligation to Continue Performance During Dispute Resolution**

- (a) Project Co and Contracting Authority shall diligently carry out their respective obligations under the Project Agreement during the pendency of any Disputes. If during the pendency of any Dispute it is considered necessary by either Party to proceed in respect of a matter that is in Dispute, then subject to Section 1.4(b), either Party may proceed without prejudice to either Party's rights under the Project Agreement in respect of the Dispute (including in respect of any entitlement of Project Co to a Delay Event, Compensation Event and/or Variation).
- (b) While a Dispute is pending, Contracting Authority may give such written instructions as in Contracting Authority's opinion are necessary in respect of the matter that is in Dispute, including for Project Co to proceed with the Works which are the subject of the Dispute in accordance with the position of Contracting Authority, and Project Co shall comply with such instructions forthwith. A pending Dispute will not justify Project Co's failure or refusal to comply with any written instructions issued by Contracting Authority, including in the event that complying with such instructions would prevent Project Co from achieving Substantial Completion by the Scheduled Substantial Completion Date.
- (c) Any claims for time and/or cost consequences of complying with this Section 1.4 shall be addressed as part of the Dispute, provided that, in the event a matter in Dispute is determined in favour of Project Co, proceeding in accordance with Contracting Authority's instructions pursuant to Section 1.4(b) shall (i) subject to and in accordance with Section 31 of the Project Agreement, be treated as a Delay Event; (ii) subject to and in accordance with Section 32 of the Project Agreement, be treated as a Compensation Event; and (iii) subject to and in accordance with Schedule 22 - Variation Procedure, result in a Variation.

#### **1.5 Mutual Resolution Efforts**

- (a) The Parties agree that at all times each of them will make reasonable efforts to:
  - (i) resolve in the ordinary course in accordance with the Project Agreement any and all Disputes arising between them starting with the Project teams of the Parties;
  - (ii) following the issuance of a Notice of Dispute, resolve by amicable negotiations any and all Disputes arising between them on a without prejudice basis starting with the Project teams of the Parties and the Party Representatives; and

- (iii) provide full, frank, candid and timely disclosure of relevant facts, information and documents (subject to legal privilege) as may be required or reasonably requested by the other Party to facilitate the resolution of any Disputes.
- (b) The communication of facts, documents, or information by a Party on a without prejudice basis does not relieve that Party of any obligation to deliver any facts, documents or information required under the Project Agreement.

## **1.6 Notice of Dispute**

- (a) If the Parties are unable to resolve a Dispute pursuant to Section 1.5, either Party may deliver to the Party Representative of the other Party a written notice of dispute (the “**Notice of Dispute**”) in accordance with Section 1.6(b).
- (b) To be effective, the Notice of Dispute must:
  - (i) expressly state that it is a “Notice of Dispute” pursuant to this Section 1.6;
  - (ii) provide particulars of the matters in Dispute;
  - (iii) describe any relief sought, including:
    - (1) the amount claimed or, if the amount claimed is not available, the approximate value of the claim; and
    - (2) with regards to the Works prior to Final Completion, any extension of time sought, or if that is not available, any anticipated extension of time sought;
  - (iv) identify whether the Dispute is a Public Safety Dispute;
  - (v) attach all documents relevant to the Dispute on which the Party intends to rely for the purposes of resolving the Dispute pursuant to this Schedule 27 in the possession or control of such Party following reasonable due diligence, including:
    - (1) all documents substantiating entitlement to the relief sought;
    - (2) all documents substantiating the relief sought, including the amount claimed or anticipated to be claimed and extension of time sought or anticipated to be sought; and
    - (3) any other documents required to be provided under the applicable provisions of the Project Agreement in connection with the matter giving rise to the Dispute

- (collectively, the “**Dispute Notice Supporting Documents**”); and
- (vi) be signed by the Party Representative for the Party delivering the Notice of Dispute.
  - (c) An effective Notice of Dispute that meets the requirements of Section 1.6(b) must be delivered as a precondition to the Parties proceeding with any further steps contemplated in Sections 2 to 5. Subject to the *Construction Act*, the Party that received the Notice of Dispute may refuse to proceed with further dispute resolution contemplated in Sections 2 to 5 if the Party initiating the Dispute fails to deliver an effective Notice of Dispute, provided that the Party who received the Notice of Dispute gives any such refusal in writing to the Party initiating the Dispute, substantiating the reasons for why the Notice of Dispute fails to meet the requirements of Section 1.6(b), within seven Business Days (or such longer period agreed by the Parties in writing, acting reasonably) of such Party’s receipt of the Notice of Dispute. If the Party who received the Notice of Dispute does not give a refusal in writing before the expiry of such period, then the Party initiating the Dispute shall be deemed to have delivered an effective Notice of Dispute.
  - (d) Prior to the CDB Expiry Date, either Party may refer in writing a Dispute in respect of a refusal of a Party to proceed with further dispute resolution given in accordance with Section 1.6(c) to the CDB for a final and binding decision. In such an event, the CDB may request that a Party submit additional written statements or documentation to assist the CDB in preparing its decision. Each such request shall be communicated in writing by the CDB to the Parties, and any additional written statements or documentation submitted in response to the CDB’s request shall be submitted to the CDB and the other Party within five Business Days or such longer period identified by the CDB. The CDB shall permit the other Party five Business Days or a longer amount of time that is reasonable in the circumstances to review and respond to such additional written statements or documentation. The CDB shall issue its final and binding decision within seven Business Days of the later of the date of (i) its receipt of the referral of such Dispute, (ii) the final submission of any such requested additional written statements or documentation, and (iii) any response of a Party to such additional written statements or documentation.
  - (e) The requirements of this Section 2 cannot be waived or amended except as expressly agreed by the Parties pursuant to Section 9(b).

## **2. Amicable Resolution by Party Executives**

- (a) Within 15 Business Days (or such longer period agreed by the Parties in writing) from the date of delivery of an effective Notice of Dispute or the release of the CDB’s decision confirming the effectiveness of a challenged Notice of Dispute, the Dispute shall be escalated for amicable resolution by an executive of each Party (each a “**Party Executive**”).
- (b) The selected Party Executive for each Party shall be:

- (i) in a position of authority above that of the Party Representative; and
  - (ii) shall have or be delegated full authority to resolve the Dispute subject only to approval of the Chief Executive Officer and board of directors or similar governing or regulatory body of the Party (as applicable).
- (c) The Party Executives shall meet promptly after the Dispute has been referred to them and make reasonable efforts to resolve the Dispute.
- (d) All discussions and negotiations held, and all communications exchanged, between the Parties in connection with the Party Executive negotiations shall be on a without prejudice basis to facilitate the resolution of the Dispute.
- (e) Either Party may terminate the process of amicable resolution by the Party Executives by providing Notice of termination of such process at any time:
- (i) if the meeting is not promptly scheduled or does not occur in accordance with such Section 2(c); or
  - (ii) 15 Business Days after the last attendance of the Party Executives at a meeting described in Section 2(c).
- (f) The requirements of this Section 2 cannot be waived or amended except as expressly agreed by the Parties pursuant to Section 9(b).

### **3. Adjudication**

#### **3.1 Referral to Adjudication**

- (a) Either Party may refer a Dispute to a qualified and independent representative of the Independent Certifier for determination by adjudication, or otherwise to a qualified and independent listed adjudicator (in either case, the “**Adjudicator**”) in accordance with this Section 3 (“**Adjudication**”) and the *Construction Act*, provided that the Dispute:
- (i) relates to the Works and arises prior to Final Completion; and
  - (ii) is a matter pursuant to which there is a statutory right to submit such matter to adjudication in accordance with and to the extent set out in the *Construction Act* (each an “**Adjudication Dispute**”), including any matter expressly referred to adjudication pursuant to any provision of the Project Agreement.
- (b) The Parties confirm that they expressly do not agree to refer any matter to Adjudication which is a Public Safety Dispute, a claim for delay, disruption or acceleration, or any claim for

- (i) a Delay Event;
- (ii) determination of any entitlement under the Project Agreement to a Compensation Event, an Excusing Cause, a Relief Event, or an event of Force Majeure; or
- (iii) determination as to whether
  - (1) Contracting Authority is obligated pursuant to the Project Agreement to proceed with a Variation; or
  - (2) any works subject to a Dispute are Works under the Project Agreement or whether Project Co is entitled to a Variation in respect of such works.
- (c) The Party referring an Adjudication Dispute for Adjudication by the Adjudicator shall deliver to the Adjudicator and the other Party a written notice of Adjudication (a “**Notice of Adjudication**”) in accordance with the requirements of the *Construction Act*.
- (d) The responding Party may deliver to the Adjudicator and the other Party a response to the Notice of Adjudication. The Parties agree that the responding Party shall have at least 21 days within which to deliver its response, or such further time specified by the Adjudicator, giving consideration to the Notice of Adjudication, the amount in dispute, and the principles of fairness, including ensuring that the responding Party has a reasonable amount of time to review and respond to any documents the referring Party intends to rely on during the Adjudication included in the Notice of Adjudication (including any Dispute Notice Supporting Document that was not previously disclosed in the Notice(s) of Dispute (if available)).
- (e) The Parties shall consent to any request by the Adjudicator to extend the deadline for the Adjudicator’s determination in accordance with Section 13.13(2)(a) of the *Construction Act*, and shall agree to any extension reasonably requested by a Party to extend the deadline for the Adjudicator’s determination pursuant to Section 13.13(2)(b) of the *Construction Act*.

### **3.2 Powers of the Adjudicator During Adjudication**

- (a) In conducting an Adjudication, the Adjudicator shall have the powers granted to adjudicators by the *Construction Act*, and:
  - (i) shall act impartially;
  - (ii) may conduct the Adjudication in the manner he or she determines appropriate in the circumstances, subject to the obligation to conduct the

Adjudication in an impartial manner and subject to any joint procedural directions delivered jointly by Project Co and Contracting Authority;

- (iii) may issue directions respecting the disclosure of documents which a party intends to rely on or that a party has requested from another party in the Adjudication in a manner that ensures that each party to the Adjudication has an opportunity to review such documents, and with regard to principles of proportionality and the desire of the parties for a cost-effective process;
- (iv) may refuse to hear the Adjudication if the preconditions to bringing an Adjudication Dispute to Adjudication have not yet been met; and
- (v) shall make his or her determination of the matter that is the subject of an Adjudication on the basis of applicable laws and the Project Agreement.

### **3.3 Review of Adjudicator's Determination**

- (a) 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 Dispute pursuant to Section 5(b). In such an event, the determination of the Adjudicator shall be reviewed *de novo* by an arbitration tribunal in accordance with Section 4.1. If neither Party delivers a Notice of Request to Arbitrate the Dispute pursuant to Section 5(b) before the expiry of such period, or if any arbitration that is commenced pursuant to Section 4.1 is subsequently abandoned by the Parties before an arbitral award is made pursuant to Section 4.1, then the determination of the Adjudicator shall be final and binding on the Parties.
- (b) The Parties agree that any determination of the Adjudicator that becomes final and binding on the Parties in accordance with Section 3.3(a) shall not be subject to appeal, arbitration, litigation or any other dispute resolution process and expressly agree to waive any and all such rights in respect of the Dispute resolved by the Adjudicator.

## **4. Combined Dispute Board**

### **4.1 Appointment of the CDB**

- (a) The Combined Dispute Board ("**CDB**") shall be a standing body composed of one member appointed in accordance with this Schedule 27 (each a "**Member**"). On or before Financial Close, the CDB shall be constituted by a written agreement between the Parties and the Member substantially in the form set out in Appendix "B" to this Schedule 27 and executed and delivered in accordance with Schedule 2 – Completion Documents of the Project Agreement (the "**CDB Member Agreement**").

- (b) The CDB shall remain constituted until the CDB Expiry Date. The Parties may agree in writing to extend the term of the CDB, and shall agree in writing to any extensions necessary in order to obtain CDB decisions in relation to Disputes referred to the CDB which remain outstanding upon the end of the CDB term.
- (c) Unless otherwise agreed by the Parties in writing, the Member shall have significant experience in construction law and shall be either: (A) a lawyer who is licensed to practice law in Ontario or another province of Canada other than Quebec; or (B) an ex-judge or master of a superior court in Ontario or another province of Canada other than Quebec providing adjudication, arbitration and/or mediation services in Ontario or another province of Canada.
- (d) Unless otherwise agreed by the Parties in writing, the Member shall be independent, impartial and skilled in resolving and deciding disputes of a type, complexity and value commensurate with the Dispute(s) likely to be referred to the CDB.
- (e) The Parties shall jointly appoint the Member on or prior to Financial Close, and deliver the CDB Member Statement for the Member upon appointment in accordance with Schedule 2 – Completion Documents of the Project Agreement.
- (f) Before commencing CDB activities, the Member shall sign with the Parties a CDB Member Agreement. The CDB Member Agreement may be terminated in accordance with the CDB Member Agreement.
- (g) If the Member is successfully challenged and removed, the CDB Member Agreement shall be automatically terminated upon removal.

#### **4.2 Replacement of the Member**

- (a) When the Member must be replaced due to death, incapacity, resignation, termination or removal, the new Member shall be appointed within 30 days of the need for replacement arising, in the same manner as the Member being replaced was originally selected in accordance with this Schedule 27, unless otherwise agreed by the Parties in writing. All actions taken by the CDB prior to the replacement of the Member shall remain valid.
- (b) If the Parties are unable to appoint a replacement Member within the period of time set out in Section 4.2(a), either Party may refer the appointment of the replacement Member for a court determination pursuant to Section 6(b).

#### **4.3 Impartiality of the Member and Security Clearance Check Requirements/Background Check Requirements**

- (a) The prospective Member shall sign a statement of acceptance, availability, impartiality and independence and disclose in writing to the Parties, any facts or circumstances which might call into question the Member's independence in the



eyes of the Parties or give rise to reasonable doubts as to the prospective Member's impartiality, substantially in the form set out in Appendix "A" to this Schedule 27 (the "**CDB Member Statement**").

- (b) The Member shall immediately disclose in writing to the Parties any facts or circumstances concerning the Member's impartiality or independence which may arise in the course of the Member's tenure.
- (c) Should any Party wish to challenge a prospective or the current Member on the basis of an alleged lack of impartiality, independence or qualifications, it may, within 14 days of learning of the facts upon which the challenge is based, submit to the CDB and the other Party a request for a decision upon the challenge including a written statement of such facts.
- (d) If the challenged prospective or the current Member does not withdraw, and the other Party does not agree to the challenge, either Party may refer the matter for a court determination pursuant to Section 6(b).
- (e) No Party shall challenge the current Member on the basis of an alleged lack of impartiality or independence as a result of the Member carrying out its duties under the CDB Member Agreement, including the provision of without prejudice dispute resolution assistance.
- (f) If a prospective or the current Member is successfully challenged, the prospective Member shall not be appointed, or the current Member shall be removed forthwith from the CDB and the CDB Member Agreement, if any, shall be automatically terminated.
- (g) Each prospective and the current Member shall submit security and background checks in accordance with Schedule 32 - Background Check Requirements. In the event that any of the events specified in Sections 8(c) through and including (f) of Schedule 32 - Background Check Requirements have occurred in respect of a prospective or the current Member, Contracting Authority may, in its sole discretion, require that the prospective Member not be appointed or that the current Member be removed forthwith from the CDB and that the CDB Member Agreement be terminated.

#### **4.4 Ongoing Project Monitoring by the CDB**

- (a) The Parties shall fully cooperate with the CDB and communicate information to it in a timely manner.
- (b) The Parties shall ensure that the CDB is kept informed of the performance of the Parties' obligations under the Project Agreement and of any Disputes arising in the course thereof by such means as reports or Notices issued by the Parties in respect

of the Works, and meetings and participation in site visits. In particular, the CDB shall receive copies of any and all:

- (i) amendments to the Project Agreement and Variation Confirmations;
- (ii) Notices of Dispute;
- (iii) Works Reports;
- (iv) Monthly Reports and Quarterly Reports (as such terms are defined in the Independent Certifier Agreement);
- (v) Proceeding at Risk Notices;
- (vi) Notices delivered to Project Co by Contracting Authority pursuant to Section 13.4(a)(iii) of the Project Agreement ;
- (vii) Notices of, and responses to Notices of, Delay Events, Compensation Events, Relief Events, Excusing Causes, and events of Force Majeure;
- (viii) the Interim Completion Certificate, the Substantial Completion Certificate, the Final Completion Certificate, and the other Notices and documents provided by each of the Parties and the Independent Certifier pursuant to Sections 23A.4, 23A.7, 23A.10(b), 24.4, 24.7, 24.8(d), 24.10(b), 24.11 and 24.12 of the Project Agreement;
- (ix) such other Project documentation, Notices, and communications that either Party reasonably believes will assist to keep the CDB informed of the performance of the Project Agreement and of any Disputes arising in the course thereof,

at the same time they are delivered in accordance with the Project Agreement, from the Party that is delivering the document.

- (c) The CDB shall, in consultation with the Parties, establish a schedule of meetings and site visits (which may be conducted via teleconference or videoconference). The frequency of scheduled meetings and site visits shall be sufficient to keep the CDB informed of the performance of the Project Agreement and of any Disputes, but shall be at least monthly unless otherwise agreed by the Parties and the CDB in writing. The Parties and the CDB shall attend all such meetings and site visits. In the event that a Party fails to attend, the CDB and the other Party may nevertheless decide to proceed.
- (d) The CDB shall, after consultation with the Parties, inform them in writing of the nature, format and frequency of any further documents that the Parties shall send to the CDB.

- (e) During scheduled meetings and site visits the CDB shall review the performance of the Parties' obligations under the Project Agreement with the Parties and may provide informal assistance to the Parties in avoiding or addressing Disputes. The Parties may request such informal assistance at any time by agreement in writing, or the CDB may take the initiative to suggest that the Parties obtain such assistance at any time, subject to Section 4.4(f). On the agreement of the Parties, the CDB may also mediate any Dispute. All assistance or mediation pursuant to this Section 5.4(e) is provided on a without prejudice basis and shall not be considered or referred to if a Dispute is later submitted for a CDB decision.
- (f) The Parties may formally refer a Dispute to the CDB for a CDB decision in accordance with this Section 4. During the formal referral there shall be no informal conversations and no separate meetings between the Member and any Party with respect to any of the issues covered by the formal referral.

#### **4.5 CDB to Resolve Disputes**

- (a) If the Parties are unable to resolve a Dispute prior to the CDB Expiry Date through amicable resolution by the Party Executives pursuant to Section 2 (if applicable), then subject to Section 3 or the written agreement of the Parties, the Dispute shall be resolved by decision of the CDB.

#### **4.6 Statement of Case**

- (a) The Party referring a Dispute to the CDB (the "**Claimant**") shall submit a concise written statement of its case (the "**Statement of Case**") to the responding Party (the "**Respondent**") and the CDB. The Statement of Case shall only include:
  - (i) the Notice of Dispute, including the Dispute Notice Supporting Documents;
  - (ii) the issues submitted to the CDB for decision; and
  - (iii) a statement of the Claimant's position, including a statement of relevant facts and law.
- (b) The date on which the Statement of Case is received by the CDB shall be deemed to be the date of the commencement of the CDB proceeding (the "**Date of Commencement**").
- (c) Unless the CDB orders otherwise, the Claimant shall not be entitled to rely upon any documents other than the documents contained in its Statement of Case. In the event that the CDB permits the Claimant to rely on any additional documents, the CDB shall permit the responding Party a reasonable amount of time to review and respond to such additional documents.

#### **4.7 Statement of Reply**

- (a) Subject to the written consent of the Parties or the order of the CDB, within 30 days of the Date of Commencement, the Respondent shall deliver to the Claimant and the CDB a concise written statement of its reply to the Statement of Case (the “**Statement of Reply**”). The Statement of Reply shall only include:
  - (i) a statement of the responding Party’s position, including a statement of relevant facts and law;
  - (ii) the issues submitted to the CDB for a decision;
  - (iii) any documents not contained in the Statement of Case on which the Respondent intends to rely; and
  - (iv) a statement of the Respondent’s position, including a statement of relevant facts and law.

#### **4.8 Additional Documents**

- (a) The CDB may at any time request a Party to submit additional written statements or documentation to assist the CDB in preparing its decision. Each such request shall be communicated in writing by the CDB to the Parties, and any additional written statements or documentation submitted in response to the CDB’s request shall be submitted to the CDB and the other Party. The CDB shall permit the other Party a reasonable amount of time to review and respond to such additional written statements or documentation.

#### **4.9 Evidence and Powers of the CDB**

- (a) Subject to Section 4.9(b), the CDB shall decide Disputes based on the Parties’ Statement of Case and Statement of Reply and any additional documents and responses delivered pursuant to Section 4.6(c) or Section 4.8(a).
- (b) If there are any material factual disputes between the Parties or other issues arising from the Parties’ Statement of Case or Statement of Reply, the CDB may order such additional procedural steps or give such directions as the CDB considers appropriate to address such disputes or issues, with a view to proportionality and the Parties’ desire to resolve Disputes in a cost-effective and expeditious manner.
- (c) Without limiting Section 4.9(b), the CBD may appoint one or more experts after considering the positions of the Parties or obtain and consider the opinion of the Independent Certifier, as an expert.

#### **4.10 Hearings**

- (a) The CDB shall order that a hearing take place unless the Parties and CDB agree in writing that a hearing is not required.

- (b) The hearing shall be conducted in Toronto, Ontario or by teleconference or videoconference on written agreement of the Parties and the CDB.
- (c) The Parties shall appear through duly authorized representatives. In addition, the Parties may be assisted or represented by advisers and legal counsel. If any Party refuses or fails to take part in the CDB hearing or in any preceding steps, the CDB may proceed notwithstanding such refusal or failure.
- (d) The CDB may request the Parties to provide and exchange summaries of their argument in advance of the hearing. Subject to the discretion of the CDB, the hearing shall proceed as follows:
  - (i) the Claimant shall present its case;
  - (ii) the Respondent shall present its case; and
  - (iii) the Claimant shall have an opportunity to reply.

#### **4.11 Basis for Decision**

- (a) The CDB shall make decisions based on the Project Agreement and the law applicable to the Dispute.
- (b) The CDB may take into account:
  - (i) any failure of a Party to comply with the Project Agreement, including any of its mitigation obligations or its procedural obligations under this Schedule 27; and
  - (ii) any unreasonable delay of the Claimant in bringing its claim, including any unreasonable delay that prevented or prejudiced the Respondent's proper investigation of, opportunity for mitigation of, or ability to respond to the claim.
- (c) A decision of the CDB shall state the findings, reasons, and determination of the CDB and include:
  - (i) a summary of the Dispute, the positions of the Parties and the decision requested; and
  - (ii) a summary of the relevant provisions of the Project Agreement and the relevant facts and law considered by the CDB.
- (d) The CDB shall issue its decision promptly and, in any event, within 30 days after the hearing unless the Parties consent in writing to an extension, which consent shall not be unreasonably withheld. Failure to issue a decision of the CDB within the time allowed does not invalidate the decision.

#### **4.12 Costs**

- (a) All Member fees and expenses and any other costs associated with the establishment and activities of the CDB (including in relation to obtaining CDB decisions) shall be shared equally and paid by the Parties in accordance with the CDB Member Agreement, unless otherwise agreed by the Parties in writing or ordered by the CDB.
- (b) Each Party shall bear its own costs associated with Disputes referred to the CDB for a decision.

#### **4.13 Subsequent Dispute Resolution Procedure to the CDB**

- (a) Any Party that is dissatisfied with a decision of the CDB may, within 30 days of the release of the CDB's decision (or such longer period agreed by the Parties, acting reasonably) (the "**Arbitration Referral Period**"), deliver a Notice of Request to Arbitrate the Dispute pursuant to Section 5(b). The decision of the CDB shall be stayed during the Arbitration Referral Period. If the Dispute is arbitrated pursuant to Section 4.1, the arbitration tribunal shall conduct the arbitration *de novo* and the decision of the CDB shall not be binding on the Parties. If neither Party delivers a Notice of Request to Arbitrate the Dispute pursuant to Section 5(b) before the expiry of the Arbitration Referral Period, or if any arbitration that is commenced pursuant to Section 4.1 is subsequently abandoned by the Parties before an arbitral award is made pursuant to Section 4.1, then the decision of the CDB shall be final and binding on the Parties.
- (b) The Parties agree that any decision of the CDB that becomes final and binding on the Parties in accordance with Section 4.13(a) shall not be subject to appeal, arbitration, litigation or any other dispute resolution process and expressly agree to waive any and all such rights in respect of the Dispute resolved by the CDB.

### **5. Arbitration**

- (a) Prior to the CDB Expiry Date, if the Parties fail to resolve a Dispute through the processes set out in Sections 2 and 3 or Sections 2 and 4 (if and as applicable) and where no final and binding Adjudication determination or final and binding CDB decision exists in respect of the Dispute, then the Dispute shall be resolved by *de novo* arbitration in accordance with this Section 4.1.
- (b) Either Party may deliver a Notice of request to arbitrate a Dispute eligible to be referred to arbitration in accordance with this Schedule 27 (each a "**Notice of Request to Arbitrate**").
- (c) A Notice of Request to Arbitrate will not be effective unless it:
  - (i) is signed by the Party Representative;

- (ii) is delivered to the other Party Representative within 30 days of release of any applicable Adjudication or CDB decision;
  - (iii) indicates it is a Notice of Request to Arbitrate pursuant to Section 4.1(b); and
  - (iv) expressly identifies the Dispute to be arbitrated.
- (d) The *Arbitration Act, 1991* shall apply to an arbitration pursuant to this Section 4.1.
- (e) A Dispute referred to arbitration shall be resolved by a single arbitrator unless:
  - (i) the Parties otherwise agree in writing; or
  - (ii) one of the Parties, by Notice delivered to the other Party within seven days after delivery of a Notice of Request to Arbitrate, requires the Dispute to be resolved by a three person arbitral tribunal, in which case the Dispute shall be resolved by a three person arbitral tribunal.
- (f) If the arbitral tribunal is comprised of a single arbitrator:
  - (i) the Parties shall jointly appoint the arbitrator; and
  - (ii) if the Parties are unable to agree on the arbitrator within 30 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, 1991*.
- (g) If the arbitral tribunal is comprised of three arbitrators:
  - (i) each Party shall appoint one arbitrator and the first two arbitrators shall jointly appoint the third arbitrator, who shall act as the chair; and
  - (ii) if the Parties have not appointed an arbitrator or arbitrators pursuant to Section 4.1(g)(i) or if the Parties or the arbitrators are unable to agree on the third arbitrator within 30 days after delivery of the Notice of Request to Arbitrate, either Party may apply to the Ontario Superior Court of Justice to appoint the remaining arbitrator(s) pursuant to the *Arbitration Act, 1991*.
- (h) All arbitrators must have qualifications and experience relevant to the issues in the Dispute commensurate with the nature, complexity and value of the Dispute(s) to be arbitrated.
- (i) 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 conduct of the Works or in the business affairs of Contracting Authority, Project Co, or any

consultant, subconsultant or subcontractor of any of them who may be involved or implicated in the Dispute.

- (j) Unless otherwise agreed by the Parties, the seat of the arbitration shall be Toronto, Ontario. The language of the arbitration shall be English.
- (k) The arbitral tribunal 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 arbitral tribunal.
- (l) The costs of the arbitration are within the discretion of the arbitral tribunal. In exercising discretion to award costs, the arbitrator(s) 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.
- (m) The award of the arbitral tribunal shall be final and binding upon the Parties and not subject to appeal.

## **6. Litigation**

- (a) If necessary to prevent irreparable harm to a Party, including in connection with a Public Safety Dispute, nothing contained in this Schedule 27 will prevent the Parties from seeking interim protection from the Ontario Superior Court of Justice, including seeking an interlocutory injunction. However, the Parties agree that no irreparable harm shall occur if the Project Agreement is terminated and that any termination of the Project Agreement by either Party, if found to be wrongful, would be adequately compensated for by an award of damages.
- (b) 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 Member or arbitrator.
- (c) All litigation permitted pursuant this Schedule 27 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 Disputes or matters which arise under the Project Agreement or in connection with the Project and which are to be resolved by litigation.

## **7. Stay and Consolidation with Third Party Disputes**

- (a) Subject to Section 7(c), if either Party is involved in an arbitration in the Province of Ontario with a third party (“**Third Party Arbitration**”), and if such Third Party Arbitration involves common factual or legal issues (including common issues of damages) which are also the subject of a Dispute between the Parties for which a Notice of Dispute has been given, then any arbitration of the Dispute between the Parties which includes those common factual, legal or damages issues (“**Project**



**Agreement Arbitration**”) shall be stayed, consolidated or joined with the Third Party Arbitration(s) but only if each of Contracting Authority, Project Co, and the other parties all agree in writing.

- (b) Subject to Section 7(c), if either Party is involved in litigation in the Province of Ontario with a third party (“**Third Party Litigation**”) and if:
  - (i) such Third Party Litigation involves common factual or legal issues (including common issues of damages) which are the subject of a Project Agreement Arbitration; and
  - (ii) one of the Parties is brought directly into the Third Party Litigation as a party to that litigation,

then on the application of either Party to the court in the Province of Ontario having jurisdiction the court may, if it determines that it is just and convenient in all the circumstances, order a stay of the Third Party Litigation.

- (c) Sections 7(a) and 7(b) only apply:
  - (i) if the Dispute between the Parties includes a claim by one Party against the other for contribution or indemnity for that Party’s liability or potential liability to the third party where such liability results or will result from an award in the Third Party Arbitration or a judgment in the Third Party Litigation; and
  - (ii) to those specific issues that are common issues in the Project Agreement Arbitration, the Third Party Arbitration and the Third Party Litigation, such that all other issues in the Dispute shall continue to be resolved by Project Agreement Arbitration and shall not be consolidated with the Third Party Arbitration or Third Party Litigation.

## **8. Confidentiality**

- (a) Unless otherwise agreed by the Parties in writing or required by law, no Party shall rely on or introduce as evidence in any subsequent proceeding or investigation, and shall treat as confidential and inadmissible in any arbitration or litigation proceeding or other investigation or proceeding, any information, data, statements, submissions, admissions, settlement proposals, recommendations, discussions, opinions, or any other documents within the meaning of the *Rules of Civil Procedure*, other than documents which would otherwise be admissible pursuant to the *Rules of Civil Procedure*, which were obtained, exchanged or delivered:
  - (i) on a without prejudice basis, including through the process for the amicable resolution of the Dispute by the Party Executives set out in Section 2;

- (ii) through the Adjudication process by any party or the Adjudicator, except in relation to the determination and reasons of the Adjudicator, which may be introduced in any subsequent dispute resolution processes or proceedings regarding the same Dispute(s); or
  - (iii) through the decision process by any Party or the CDB or any Member, except for a decision and reasons of the CDB, which may be introduced in any subsequent dispute resolution processes or proceedings regarding the same Dispute(s).
- (b) Any Member or arbitrator appointed pursuant this Schedule 27 shall keep all information about any Dispute(s) referred to the CDB or for arbitration confidential and shall not disclose such information to anyone other than the Parties.
  - (c) Any Adjudicator, Member of the CDB or arbitrator shall execute non-disclosure agreements in a form satisfactory to the Parties, providing that, among other things, material delivered by a Party in connection with Adjudication, a CDB decision or arbitration shall not be disclosed to any person or used for any other purpose, in accordance with this Section 8, and all such material shall remain the property of the Party disclosing or delivering same.
  - (d) An Adjudicator, Member of the CDB or arbitrator shall not be compelled to give evidence in any proceeding in respect of a Dispute that was referred to the Adjudicator, CDB or arbitrator for a decision.

## **9. Miscellaneous**

- (a) The Parties shall indemnify each other in respect of any damages suffered or incurred in relation to amounts agreed in writing to be paid pursuant to resolution of a Dispute by the Party Executives pursuant to Section 2, and on the amount of any award or judgment as follows:
  - (i) for amounts payable by Project Co to Contracting Authority, Project Co shall indemnify Contracting Authority in accordance with Section 45.1(e) of the Project Agreement from and against any damages suffered or incurred resulting from any overpayment to Project Co or, as applicable, any underpayment or non-payment by Project Co from the date of any overpayment to Project Co or, as applicable, from the date on which payment was due under the Project Agreement to Contracting Authority until the date of payment; and
  - (ii) for amounts payable by Contracting Authority to Project Co, Contracting Authority shall indemnify Project Co in accordance with Section 45.2(c) of the Project Agreement from and against any damages suffered or incurred resulting from any overpayment to Contracting Authority or, as applicable, any underpayment or non-payment by Contracting Authority from the date

of any overpayment to Contracting Authority or, as applicable, from the date on which payment was due under the Project Agreement to Project Co until the date of payment.

- (b) The Parties can, by written agreement on a Dispute by Dispute basis:
- (i) extend any or all timelines set out in this Schedule 27;
  - (ii) agree to waive or by-pass any one or more of the Dispute resolution processes in Sections 2, 3 and 4 (to the extent permitted by law or they are required by this Schedule 27) and, instead, proceed directly to resolution of the Dispute by arbitration pursuant to Sections 4.1;
  - (iii) agree to a different process for arbitration than the one contemplated in this Schedule 27; or
  - (iv) agree to refer any Dispute to mediation by a neutral third party mediator.

APPENDIX A

FORM OF CDB MEMBER STATEMENT OF  
ACCEPTANCE, AVAILABILITY, IMPARTIALITY AND INDEPENDENCE

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

**AND TO:** HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO as represented by the Minister of Government and Consumer Services, as represented by Ontario Infrastructure and Lands Corporation (“Contracting Authority”)

**AND TO:** MINISTRY OF THE ATTORNEY GENERAL

**AND TO:** [•] (“Project Co”) [Note to Proponents: Project Co may be a corporation, a limited partnership or a general partnership, in each case formed under the laws of any Canadian jurisdiction and otherwise acceptable to Contracting Authority.]

**RE:** Project agreement (as amended, supplemented or modified from time to time, the “Project Agreement”) dated the [•] day of [•], 20[•] between Contracting Authority and (“Project Co”) in respect of the [•] project

---

**1. GENERAL**

**1.1 Name and Position**

- (a) **Family Name(s):**
- (b) **Given Name(s):**
- (c) Please attach a current copy of your CV.

**1.2 Definitions, Interpretation and Governing Law**

- (a) This statement (the “**Statement**”) shall be interpreted in accordance with Schedule 27 – Dispute Resolution Procedure to the Project Agreement, and governed by the laws of Ontario, without regard to conflict of laws provisions. Please initial below all relevant statements.

**1.3 Acceptance**

- (a) I accept to serve as the Member in accordance with the Project Agreement.

**Initial:** \_\_\_\_\_

- (b) I decline to serve as the Member in accordance with the Project Agreement. *(If you tick here, simply date and sign the form without completing any other sections).*

**Initial:** \_\_\_\_\_

**1.4 Availability**

- (a) I confirm, on the basis of the information presently available to me that I have received and reviewed a copy of Schedule 27 – Dispute Resolution Procedure to the Project Agreement and can devote the time necessary to discharge the duties of the Member throughout the entire duration of the CDB’s anticipated activities as diligently, efficiently and expeditiously as possible in accordance with the timelines and procedures set out in Schedule 27 – Dispute Resolution Procedure to the Project Agreement.

**Initial:** \_\_\_\_\_

- (b) I understand that it is important to discharge the duties of the Member set out in Schedule 27 – Dispute Resolution Procedure to the Project Agreement as promptly as reasonably practicable. My current and anticipated professional roles and significant engagements are set out below for the information of the Parties (anonymized as necessary to remain compliant with my professional obligations).

**Initial:** \_\_\_\_\_

Number of currently pending matters or roles in which I am involved *(i.e. arbitrations and dispute board activities pending now, not previous experience; additional details you wish to make known to the Parties in relation to these matters can be provided on a separate sheet):*

	<b>As tribunal or dispute board chair / sole arbitrator / sole DB member</b>	<b>As co-arbitrator / co-dispute board member</b>	<b>As counsel</b>	<b>As other</b>
Standing dispute boards				
Ad-hoc dispute boards				
Arbitrations				
Court litigation (e.g. international)				

commercial courts)				
Other (attach separate sheet if necessary)				

I have attached a calendar showing for the next 24 months all currently scheduled hearings and other existing commitments (anonymized as necessary) that would prevent me from attending meetings or sitting in a hearing on this Project.

I have further marked in the box below or on a separate sheet any other relevant information regarding my availability.

- (c) I shall make best efforts to maintain the availability necessary to discharge the duties of the Member throughout the entire duration of the CDB’s anticipated activities which require my involvement, and shall immediately disclose in writing to the Parties any additional significant matters that I may become involved in and any other relevant information regarding my availability which may arise in the course of my tenure as the Member and which may materially affect my ability to discharge my duties as the Member.

**Initial:** \_\_\_\_\_

### **1.5 Independence and Impartiality**

- (a) In deciding which disclosure method applies to you, you should take into account, whether there exists any past, present or future, anticipated or planned relationship, direct or indirect, whether financial, professional or of any other kind, between you and any of the Parties, their lawyers or other representatives, or related entities and individuals. You are also required to disclose all recent, professional or personal, relationships with all key members of all Parties. Any doubt must be resolved in favour of disclosure. Any disclosure should be complete and specific, identifying inter alia relevant dates (both start and end dates), financial arrangements, details of companies and individuals, and all other relevant information.
  - (i) **Nothing to disclose:** I am impartial and independent of the Parties and intend to remain so. To the best of my knowledge, and having made due enquiry, there are no facts or circumstances, past or present, that I should disclose because they might be of such a nature as to call into question my independence in the eyes of

any of the Parties and no circumstances that could give rise to reasonable doubts as to my impartiality.

**Initial:** \_\_\_\_\_

- (ii) **Acceptance with disclosure:** I am impartial and independent and intend to remain so. However, mindful of my obligation to disclose any facts or circumstances which might be of such a nature as to call into question my independence in the eyes of any of the Parties or that could give rise to reasonable doubts as to my impartiality, I draw attention to the matters below and/or on the attached sheet.

I confirm that the matters disclosed above represent full and complete disclosure with respect to any facts or circumstances which might be of such a nature as to call into question my independence in the eyes of any of the Parties or that could give rise to reasonable doubts as to my impartiality.

**Initial:** \_\_\_\_\_

- (b) I shall make best efforts to maintain the independence and impartiality necessary to discharge the duties of the Member throughout the entire duration of the CDB's anticipated activities, but shall immediately disclose in writing to the Parties any facts or circumstances concerning my impartiality or independence which may arise in the course of my tenure as the Member.

**Initial:** \_\_\_\_\_

- (c) In accordance with Schedule 27 – Dispute Resolution Procedure of the Project Agreement, I understand that the Parties may exercise their right to challenge me on the basis of an alleged lack of impartiality, independence or qualifications. In the event that I do not withdraw and the other Party does not agree to the challenge, I understand that the challenge shall be determined in accordance with Schedule 27 – Dispute Resolution Procedure of the Project Agreement.

**Initial:** \_\_\_\_\_

- (d) In the event that I am successfully challenged, I understand that I will be removed from the CDB forthwith and that my CDB Member Agreement shall be terminated.

**Initial:** \_\_\_\_\_

**1.6 Security and Background Checks**

- (a) I shall submit to security and background checks in accordance with Schedule 32 – Background Check Requirements to the Project Agreement, and understand that if any of the events described in Sections 8(c) through and including (f) of Schedule 32 – Background Check Requirements to the Project Agreement have occurred that Contracting Authority may, in its sole discretion, remove me from the CDB forthwith and terminate my CDB Member Agreement.
- (b) I shall immediately disclose in writing to the Parties and the other Members if any of the events described in Sections 8(c) through and including (f) of Schedule 32 – Background Check Requirements to the Project Agreement have occurred.

**Initial:** \_\_\_\_\_

**1.7 Delivery**

- (a) This Statement may be delivered by sending a fully executed copy by electronic mail or other electronic transmission to the Parties, and such delivery shall be as effective as the manual delivery of this executed Statement.

***[SIGNATURE PAGE FOLLOWS IMMEDIATELY]***

Date:

Signature:

---



## **APPENDIX B**

### **FORM OF CDB MEMBER AGREEMENT**

This CDB Member Agreement (the “**Agreement**”) is entered into between:

- (a) **CDB Member:** [*Note: Full name and title (sole Member)*] (the “**Member**”);
- (b) **Party 1:** [●] (“**Contracting Authority**”); and
- (c) **Party 2:** [●] (“**Project Co**”)

(collectively, the “**Undersigned Parties**”).

#### **WHEREAS:**

- A. Contracting Authority and Project Co have entered into an agreement dated [**date of the Project Agreement**] (the “**Project Agreement**”) for the Brampton Courthouse Addition Phase 2 & Toronto Region Bail Centre Project (the “**Project**”);
- B. Schedule 27 – Dispute Resolution Procedure of the Project Agreement provides for the appointment of a Combined Dispute Board (the “**CDB**”), and that the CDB shall, inter alia, establish a schedule of meetings and site visits, issue decisions, review the performance of Project Co and Contracting Authority under the Project Agreement, and perform other tasks in accordance with Schedule 27 – Dispute Resolution Procedure to the Project Agreement (the “**CDB Services**”);
- C. Certain Disputes may be referred to the CDB for determination in accordance with Schedule 27 – Dispute Resolution Procedure of the Project Agreement; and
- D. The undersigned individual has been appointed to serve on the CDB as a Member;

The Member and the Parties therefore agree as follows:

#### **1.1 Definitions and Interpretation**

- (a) This Agreement shall be interpreted in accordance with Schedule 27 – Dispute Resolution Procedure to the Project Agreement and defined terms shall have the same meaning as in the Project Agreement, unless otherwise specified here.
- (b) If there is any conflict between this Agreement and Schedule 27 – Dispute Resolution Procedure to the Project Agreement, this Agreement will take precedence to the extent of the conflict.

#### **1.2 Undertaking**

- (a) The Member shall act as a sole Member and hereby agrees to perform the duties of a Member and provide the CDB Services in accordance with the terms of the Project Agreement and the terms of this Agreement.
- (b) The Member confirms that he or she is and shall remain impartial and independent of the Parties.
- (c) The Member further confirms that he or she has executed and will comply with the terms of the CDB Member Statement.

### **1.3 Composition of the CDB and Contact Details**

- (a) Subject to Section 4 of Schedule 27 – Dispute Resolution Procedure to the Project Agreement, the CDB shall be composed of one independent and impartial Member.
- (b) The Member can be contacted as follows:
  - Member: **[Note: Include name, address, telephone, email and any other contact details]**
- (c) The Parties to the Project Agreement are those indicated above with the following contact details:
  - (i) **Party 1: [Note: Include contact information]**
  - (ii) **Party 2: [Note: Include contact information]**
- (d) Any changes in these contact details shall be immediately communicated to all other Undersigned Parties.

### **1.4 Qualifications**

- (a) The Parties recognise that the Member is **[a lawyer licensed to practice in Ontario]**, in accordance with Section 4.1(c) of Schedule 27 – Dispute Resolution Procedure to the Project Agreement.
- (b) The Parties recognise that the Member is independent, impartial and skilled in resolving and deciding disputes of a type, complexity and value commensurate with the Dispute(s) likely to be referred to the CDB, in accordance with Section 4.1(d) of Schedule 27 – Dispute Resolution Procedure to the Project Agreement.

### **1.5 Fees and Disbursements**

- (a) In consideration of the Member performing the CDB activities in accordance with this Agreement and Schedule 27 – Dispute Resolution Procedure of the Project Agreement, the Member shall be entitled to be paid the monthly management fee

(the “**Monthly Management Fee**”) and the ad-hoc hourly fee (the “**Ad-hoc Hourly Fee**”) described in this Section 1.5.

- (b) The Monthly Management Fee shall be [CAD \$[●]] per month and shall be payable from Financial Close until the end of the Member’s involvement on the CDB.
- (c) The Member’s Monthly Management Fee shall cover:
  - (i) reviewing and becoming and remaining familiar with the Project Agreement, including without limitation, Schedule 15 – Output Specifications to the Project Agreement and Schedule 27 – Dispute Resolution Procedure to the Project Agreement;
  - (ii) reviewing any amendments to the Project Agreement and Variation Confirmations;
  - (iii) reviewing progress reports, correspondence from the Parties, and other documents which the CDB is required to review pursuant to Schedule 27 – Dispute Resolution Procedure to the Project Agreement;
  - (iv) reviewing specific documents which the CDB requests for its review;
  - (v) attending ordinary course scheduled meetings and/or site visits (monthly unless otherwise agreed by the Parties);
  - (vi) providing informal assistance with Disputes or potential Disputes;
  - (vii) any overhead and office expenses.
- (d) The Member’s Ad-hoc Hourly Fee shall be [CAD \$[●] per hour], and shall be billed in hourly increments for certain work performed. The Ad-hoc Hourly Fee shall cover:
  - (i) preparation for and attendance at ad-hoc meetings/site visits with the Parties (excluding the ordinary course scheduled meetings and/or site visits described in Section 1.5(c)(v)); and
  - (ii) any work carried out in connection with referrals for a CDB decision, including preparation, attendance at hearings, review of the Parties’ submissions, delivery of the CDB decision, and revisions to same.
- (e) Any non-productive ad-hoc travel (i.e. travel not covered as part of the Member’s Monthly Management Fee) shall be reimbursed at half the hourly rate of the Member’s Ad-hoc Hourly Fee.
- (f) Reasonable Member expenses and disbursements relating to (i) flights (at economy class rates), (ii) hotel (to a maximum of CAD\$[REDACTED] per night), and (iii)

the cost of retaining any experts shall be reimbursed at cost, with the prior approval of the Parties. All other costs and disbursements are and shall be deemed to be included in the Monthly Management Fee the Ad-hoc Hourly Fee. The Member shall retain all receipts and proof of payment of claimed disbursements and expenses, and shall provide them to the Parties or either Party upon request. The Parties shall have no obligation to reimburse the Member if the Member fails to produce receipts and proof of payment upon request.

## **1.6 Payment of Fees and Expenses**

- (a) Unless otherwise agreed by the Parties and the Member in writing, all fees, expenses and disbursements payable under this Agreement shall be invoiced by the Member to the Parties on a monthly basis, which invoice shall reflect the performance of the CDB activities performed in the pervious month and be in form and substance reasonably satisfactory to the Parties.
- (b) Project Co and Contracting Authority shall each pay one half of such fees, expenses and disbursements to the Member. While each Party is responsible for paying one half of the Member's fees, expenses and disbursements, this obligation is several and not joint. If one Party fails to make payment, the other Party may make payment of the amounts owed by the non-paying Party and recover the costs of doing so from the non-paying Party, but has no obligation to do so.
- (c) All payments to the Member shall be made to the following account: **[name of bank, account number, SWIFT code, etc.]**.
- (d) All payments to the Member under this Agreement shall be payable by the Parties monthly in arrears, and by no later than the date that is 30 days of the receipt by the Parties of an invoice provided by the Member in accordance with this Agreement.
- (e) The Monthly Management Fee payable to the Member under this Agreement shall accrue from day to day, and if for any reason it shall become necessary to calculate any Monthly Management Fee for a period of less than one calendar month, an appropriate pro-rata adjustment shall be made on a daily basis.

## **1.7 Duration and Termination of the Agreement**

- (a) Subject to Section 4 of Schedule 27 – Dispute Resolution Procedure to the Project Agreement, the Member agrees to serve for the duration of the CDB to the extent reasonably possible.
- (b) The Parties may at any time, without cause and with immediate effect, jointly terminate this Agreement but shall pay the Monthly Management Fee to the Member for a period of one month following the termination, unless otherwise agreed by the Parties and the Member in writing.

- (c) The Member may terminate this Agreement at any time by giving a minimum of three months' written notice to the Parties, unless otherwise agreed by the Parties and the Member in writing.
- (d) If the Member is successfully challenged in accordance with Section 4.3 of Schedule 27 – Dispute Resolution Procedure to the Project Agreement, the Member shall be removed forthwith from the CDB and this Agreement shall be terminated.
- (e) Contracting Authority may, in its sole discretion, remove the Member forthwith from the CDB and terminate this Agreement if any of the events specified in Sections 8(c) through and including (f) of Schedule 32 - Background Check Requirements of the Project Agreement have occurred in respect of the Member.
- (f) The Member shall be entitled to claim payment for work performed to the date of termination of this Agreement in accordance with this Agreement, but shall not be entitled to claim any further payment.

## **1.8 Indemnity**

- (a) The Parties shall jointly and severally indemnify and hold harmless the Member from any claims of third parties for anything done or omitted to be done in the discharge of the Member's activities under this Agreement.
- (b) The indemnity provided in Section 1.8(a) shall not extend to:
  - (i) any act or omission of the Member that is shown to have been in bad faith;
  - (ii) any breach of this Agreement by the Member,
  - (iii) any negligent or unlawful act or omission or willful misconduct of the Member;
  - (iv) any action taken by the Member outside the scope of authority set forth in this Agreement; or
  - (v) any debt, cost, expense, claim or demand for which insurance proceeds are recoverable by the Member.
- (c) The indemnity provided in Section 1.8(a) shall survive the termination of this Agreement.

## **1.9 Confidentiality**

- (a) The Member and all of the member's affiliates, employees, servants and agents shall keep all information about the Project, the Member's involvement on the Project, any CDB Services performed by the CDB, and any Dispute(s) referred for

a CDB decision strictly confidential and shall not disclose such information to anyone other than the Parties.

- (b) The Member shall treat as confidential any information, data, statements, submissions, admissions, settlement proposals, recommendations, discussions, opinions, or any other documents within the meaning of the *Rules of Civil Procedure*, other than documents which would otherwise be admissible pursuant to the *Rules of Civil Procedure*, which were obtained, exchanged or delivered on a without prejudice basis or through the CDB decision process by any other Party or the CDB or any Member, except as set out in Section 8(a)(iii) of Schedule 27 – Dispute Resolution Procedure to the Project Agreement.
- (c) Material delivered by a Party in connection with a CDB decision shall not be disclosed to any person or used, copied, supplied or reproduced for any other purpose other than for the performance of the CDB Services, and all such material shall remain the property of the Party disclosing or delivering same.
- (d) The Member shall be bound by and shall comply with the confidentiality and communication provisions set out in Section 41 of the Project Agreement.
- (e) The Parties may at any time require the Member to give and to arrange for its officers, directors, members, employees, servants and agents engaged in the performance of the CDB Services to give written undertakings, in the form of confidentiality agreements on terms required by the Parties, relating to the non disclosure of confidential information, in which case the Member must promptly arrange for such agreements to be made.

#### **1.10 Disputes and Applicable Law**

- (a) All disputes arising out of this Agreement which are not subject to resolution pursuant to Section 6(b) of Schedule 27 – Dispute Resolution Procedure to the Project Agreement shall be finally settled by arbitration by one arbitrator agreed by the Undersigned Parties in writing or appointed in accordance with the *Arbitration Act, 1991*. This Agreement shall be governed by the laws of Ontario, without regard to conflict of laws provisions. The place of arbitration shall be Toronto, Ontario. The language of the arbitration shall be English.

#### **1.11 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 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.

*[Remainder of page intentionally left blank]*

This Agreement is entered into on [specify date] at [specify place].

**[signature]**

---

[Member]

**[signature]**

---

[Project Co]

**[signature]**

---

[Contracting Authority]

**SCHEDULE 28**

**FF&E LIST**

**Part 1: Category 1 FF&E**

<b>Part 1: Category 1 FF&amp;E Items</b>	
Desks	Occasional Chairs
Credenzas (at Casegoods)	Soft seating
Bookcases	Lunchroom Tables
Workstations	Lunchroom Chairs
Judicial Office Chairs	Lateral File Cabinets
Ergonomic Chairs, Task Chairs	Storage Cabinets
Side Chairs, Guest Chairs, Visitor Chairs	Supplies Cabinets
Meeting and Boardroom Chairs	Tape and DVD Storage Cabinets
Meeting / Conference Room, Boardroom, Pre-Trial and Conference Settlement Room Tables	File Cabinet Worktops (except where shown as millwork)
Jury Deliberation Room Tables	Task lights
Interview Room Tables	Lamps (floor, table)
Judicial Courtroom Chairs	Keyboard trays (at Systems Furniture)
Sled-based Courtroom Chairs	Monitor Arms (at Systems Furniture)
Jury Box Chairs	Desk and office accessories
End Tables (loose)	First Aid Resting Bed
Side Tables (loose)	Foot rests
Coffee Tables	Wire Management (at Systems Furniture)
Occasional Tables	Ancillary Systems Furniture Components
Worktables	High Density Mobile Filing Units
Open Docket Storage Cabinets	Mobile File Pedestals
Training Tables	Laptop Holders
Distribution Carts	Printer Tables
Computer Tables	Mobile File and Distribution Carts
Fire Proof Cabinets	Digital Display Screens
Bariatric Chairs	Wardrobes



**Part 2: Category 2 FF&E**

<b>Part 2: Category 2 FF&amp;E Items</b>	
Desks	Occasional Chairs
Credenzas (at Casegoods)	Soft seating
Bookcases	Lunchroom Tables
Workstations	Lunchroom Chairs
Judicial Office Chairs	Lateral File Cabinets
Ergonomic Chairs, Task Chairs	Storage and Supplies Cabinets
Side Chairs, Guest Chairs, Visitor Chairs	Tape and DVD Storage Cabinets
Meeting Room and Boardroom Chairs	Task lights
Meeting Room Tables	Lamps (floor, table)
Interview Room Tables	Keyboard trays (at Desks and Workstations)
Judicial Courtroom Chairs	Monitor Arms (at Desks & Workstations)
Sled-based Courtroom Chairs	Desk and office accessories
End Tables (loose)	First Aid Resting Bed
Side Tables (loose)	Foot rests
Coffee Tables	Wire Management
Occasional Tables	High Density Mobile Filing Units
Worktables	Mobile File Pedestals
Wardrobes	Laptop Holders
Child Chairs	Layout Tables
Child Tables	Printer Tables
Training Tables	Fire Proof Cabinets
Clock Radios	Bariatric Chairs
Computer Tables	Safes
Cash Registers	Postage Meters
Mobile File and Distribution Carts	Document Binders
Tape Recorders	Laminators
VHS Players	MFD Printers and Copies
Portable Video Conferencing Equipment	Fax Machines
Shredding Machines and Shred Boxes	Police Portable Radio System/Chargers
Livescan Unit	Televisions
CD/DVD/Blu-ray Players	iPad Charging Cabinets
Digital Recording Equipment	Key Cabinets and Key Drop Boxes

<b>Part 2: Category 2 FF&amp;E Items</b>	
Lektrievers	Taser Proofing / Bullet Dislodge Equipment
Duplicating Machines	Point of Purchase Equipment
Wheelchairs	

**Part 3: Category 3 FF&E – NOT USED**

**Part 4: Category 4 FF&E**

<b>Part 4: Category 4 FF&amp;E Items</b>	
Safes	DVD/CD/Blu-ray Players
Televisions	Kettles
Printers / Multi-Functional Devices	Coffee Makers
Fax Machines	Scanners
Photocopiers	Toasters
Routers	Water coolers
Servers	Courtroom Recording Equipment
Shredding Machines	Wheelchairs

**Part 5: Category 5 FF&E – NOT USED**

**SCHEDULE 29**

**REFINANCING**

**1. DEFINITIONS**

1.1 The following terms shall have the following meanings:

- (a) **“Exempt Refinancing”** means:
- (i) a change in taxation or change in accounting treatment pursuant to a Change in Law or change in Canadian GAAP;
  - (ii) the exercise of any right, the grant of any amendment, waiver or consent or any similar action under the Lending Agreements by the Lenders that does not provide for a financial benefit to Project Co under those agreements;
  - (iii) any Qualifying Bank Transaction;
  - (iv) any Rescue Refinancing;
  - (v) any Refinancing that was approved by Contracting Authority prior to the execution of this Project Agreement and occurs during the first six months following the date of this Project Agreement;
  - (vi) any amendment, variation or supplement of any Lending Agreement approved by Contracting Authority as part of any Variation under this Project Agreement; or
  - (vii) any Permitted Borrowing.
- (b) **“Qualifying Bank”** means a lending institution that is:
- (i) a bank listed in Schedule I, II or III of the *Bank Act* (Canada); or
  - (ii) a bank, life insurance company, pension fund or fund managed by a professional fund manager that, in each case, controls, either directly or through its affiliates, funds in excess of \$[REDACTED],
- provided such institution is not a Restricted Person.
- (c) **“Qualifying Bank Transaction”** means:
- (i) the disposition by a Lender of any of its rights or interests in the Lending Agreements to a Qualifying Bank;

- (ii) the grant by a Lender to a Qualifying Bank of any rights of participation in respect of the Lending Agreements; or
  - (iii) the disposition or grant by a Lender to a Qualifying Bank of any other form of benefit or interest in either the Lending Agreements or the revenues or assets of Project Co, whether by way of security or otherwise.
- (d) **“Qualifying Refinancing”** means any Refinancing that will give rise to a Refinancing Gain that is not an Exempt Refinancing.
- (e) **“Refinancing”** means:
- (i) any amendment, variation, novation, supplement or replacement of any Lending Agreement;
  - (ii) entering into any new Lending Agreement;
  - (iii) the exercise of any right, or the grant of any waiver or consent, under any Lending Agreement;
  - (iv) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, the Lending Agreements or the creation or granting of any other form of benefit or interest in either the Lending Agreements or the contracts, revenues or assets of Project Co whether by way of security or otherwise; or
  - (v) any other arrangement put in place by Project Co or another person which has an effect which is similar to any of the foregoing provisions of this definition above or which has the effect of limiting Project Co’s ability to carry out any of the foregoing provisions of this definition.
- (f) **“Refinancing Financial Model”** means a comprehensive and detailed financial model satisfactory to Contracting Authority, acting reasonably, prepared for the purpose of Section 2 of this Schedule 29, which financial model shall be similar in form and content to the Financial Model, suitable for the purposes for which it will be used in this Schedule 29, and shall take into account:
- (i) cash flows for the entire remaining Project Term;
  - (ii) any changes in structure and funding since the date of this Project Agreement;
  - (iii) the performance of the Works to the date of the Refinancing;
  - (iv) macroeconomic assumptions; and

- (v) all other relevant factors.
- (g) **“Refinancing Gain”** means an amount equal to the greater of zero and (A - B), where:
  - A = the sum of the Senior Debt Amount and Junior Debt Amount as projected to be outstanding at Substantial Completion immediately prior to the Refinancing (using the Refinancing Financial Model but without taking into account the effect of the Refinancing).
  - B = the sum of the Senior Debt Amount and Junior Debt Amount as projected to be outstanding at Substantial Completion immediately prior to the Refinancing (using the Refinancing Financial Model and taking into account the effect of the Refinancing).
- (h) **“Rescue Refinancing”** means any Refinancing which takes place due to the failure or prospective failure of Project Co to comply with any material financial obligation under the Lending Agreements, or any of them, which does not increase any liability of Contracting Authority, whether actual or potential.

## **2. REFINANCING**

### **2.1 Project Co shall not carry out:**

- (a) any Qualifying Refinancing unless Project Co has obtained the prior written consent of Contracting Authority, which consent, subject to Section 2.2, shall not be unreasonably withheld or delayed; or
- (b) any Exempt Refinancing or any other Refinancing which does not result in a Refinancing Gain unless Project Co has delivered notice of such Refinancing to Contracting Authority at least ten Business Days before such Refinancing, except that such notice shall not be required for a disposition by a Lender of its rights or participation in the Lending Agreements where such disposition is a trade of bonds issued as provided under a book-based system of a depository and pursuant to a trust indenture that comprises a portion of the Financing.

### **2.2 Contracting Authority may withhold its consent to any Qualifying Refinancing, in its sole discretion:**

- (a) where any person with whom Project Co proposes to carry out a Qualifying Refinancing is a Restricted Person;
- (b) if, at the time the Qualifying Refinancing is contemplated and effected, the Qualifying Refinancing will materially adversely affect the ability of Project Co to perform its obligations under the Project Documents or this Project Agreement; or

- (c) if, at the time the Qualifying Refinancing is contemplated and effected, the Qualifying Refinancing will have the effect of increasing any liability of Contracting Authority, whether actual or contingent, present or future, known or unknown.

2.3 Contracting Authority shall be entitled to receive:

- (a) a [REDACTED]% share of any Refinancing Gain arising from a Qualifying Refinancing, in respect of any Refinancing Gain up to (when considered in aggregate with all previous Qualifying Refinancings) a Refinancing Gain of \$[REDACTED];
- (b) a [REDACTED]% share of any further Refinancing Gain arising from a Qualifying Refinancing, in respect of any Refinancing Gain in excess of \$[REDACTED] and up to (when considered in aggregate with all previous Qualifying Refinancings) a Refinancing Gain of \$[REDACTED]; and
- (c) a [REDACTED]% share of any further Refinancing Gain arising from a Qualifying Refinancing.

2.4 Project Co shall promptly provide Contracting Authority with full details of any proposed Qualifying Refinancing, including a copy of the proposed Refinancing Financial Model and the basis for the assumptions used in the proposed Refinancing Financial Model. Contracting Authority shall (before, during and at any time after any Refinancing) have unrestricted rights of audit over the Refinancing Financial Model and any documentation (including any aspect of the calculation of the Refinancing Gain) used in connection with such Refinancing (whether or not such Refinancing is determined to be a Qualifying Refinancing). Project Co shall promptly, and, in any event, within 5 Business Days of receiving a written request from Contracting Authority, provide any information in relation to a proposed Refinancing as Contracting Authority may reasonably require. Project Co shall keep Contracting Authority informed as to any changes to the terms of the Refinancing. Both Contracting Authority and Project Co shall at all time act in good faith with respect to any Refinancing.

2.5 Contracting Authority's share of the Refinancing Gain shall be received as a reduction in the amount of the Substantial Completion Payment.

2.6 Contracting Authority and Project Co will negotiate in good faith to agree upon the basis and method of calculation of the Refinancing Gain. If the parties fail to agree upon the basis and method of calculation of the Refinancing Gain or the payment of Contracting Authority's share, the Dispute shall be determined in accordance with Schedule 27 - Dispute Resolution Procedure. Both Contracting Authority and Project Co shall work collaboratively to establish the rate setting process required to complete the Refinancing.

- 2.7 The Refinancing Gain shall be calculated after taking into account the reasonable out-of-pocket costs that each Party directly incurs in relation to the Qualifying Refinancing and on the basis that, within 15 Business Days of any Qualifying Refinancing, Project Co will reimburse Contracting Authority for all such reasonable out-of-pocket costs incurred by Contracting Authority.

**SCHEDULE 30  
INSURANCE TRUST AGREEMENT**

**THIS AGREEMENT** is made as of 1<sup>st</sup> day of June, 2021

**AMONG:**

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**, as represented by the Minister of Government and Consumer Services, as represented by Ontario Infrastructure and Lands Corporation, 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

(“**Contracting Authority**”)

**AND:**

[REDACTED], acting as agent for and on behalf of the Lenders

(the “**Lenders’ Agent**”)

**AND:**

**TRANS/FORM BY POMERLEAU INC.**, a corporation incorporated under the laws of [REDACTED] (“**Project Co**”)

**AND:**

[REDACTED]

(the “**Account Trustee**”)

**WHEREAS:**

- A. Contracting Authority and Project Co have entered into the Project Agreement.
- B. Contracting Authority, the Lenders’ Agent and Project Co have entered into the Lenders’ Direct Agreement.
- C. Contracting Authority, the Lenders’ Agent and Project Co have agreed that all amounts from time to time contained in the Insurance Trust Account are to be held in trust by the Account Trustee in accordance with the terms of this Insurance Trust Agreement, and that no releases, distributions or transfers of any funds from the Insurance Trust Account shall be made other than in accordance with the terms of this Insurance Trust Agreement.



- D. Contracting Authority, the Lenders' Agent and Project Co have agreed that the Bonds are to be held in trust by the Account Trustee in accordance with the terms of this Insurance Trust Agreement and that no releases of the Bonds shall be made other than in accordance with the terms of this Insurance Trust Agreement.

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

## **1. DEFINITIONS**

In this Insurance Trust Agreement, unless the context otherwise requires:

- (a) **“Account Trustee”** has the meaning given in the introductory paragraph of this Insurance Trust Agreement.
- (b) **“Appointed Representative”** has the meaning given in the Lenders' Direct Agreement.
- (c) **“Bank”** means [REDACTED].
- (d) **“Bonds”** means a performance bond issued by [REDACTED], in favour of Project Co , in the form attached to the Project Agreement as Appendix B to Schedule 25 – Insurance and Performance Security Requirements and a labour and material payment bond issued by [REDACTED], in favour of Project Co, in the form attached to the Project Agreement as Appendix C to Schedule 25 – Insurance and Performance Security Requirements.
- (e) **“Business Day”** has the meaning given in the Project Agreement.
- (f) **“Change of Authorization Event”** has the meaning given in Section 9(a) of this Insurance Trust Agreement.
- (g) **“Change of Authorization Notice”** has the meaning given in Section 9(b)(ii) of this Insurance Trust Agreement.
- (h) **“Contracting Authority”** has the meaning given in the introductory paragraph of this Insurance Trust Agreement.
- (i) **“Default Notice”** means a written notice given by the Lenders' Agent to the Account Trustee and Contracting Authority that an event of default under the Lending Agreements has occurred and is continuing.
- (j) **“Default Period”** means the period commencing on the date upon which the Account Trustee and Contracting Authority receives a Default Notice and ending on the date upon which the Account Trustee and Contracting Authority receives

written notice from the Lenders' Agent that the event of default which was the subject matter of the applicable Default Notice has been cured.

- (k) **“Governmental Authority”** has the meaning given in the Project Agreement.
- (l) **“Insurance Policies”** has the meaning given in Section 4 of this Insurance Trust Agreement.
- (m) **“Insurance Proceeds”** has the meaning given in Section 6(a) of this Insurance Trust Agreement.
- (n) **“Insurance Trust Account”** means [REDACTED].
- (o) **“Insurance Trust Agreement”** means this Insurance Trust Agreement.
- (p) **“Lenders”** has the meaning given in the Project Agreement.
- (q) **“Lenders’ Agent”** has the meaning given in the introductory paragraph of this Insurance Trust Agreement.
- (r) **“Lenders’ Direct Agreement”** means the Lenders’ Direct Agreement made on or about the date hereof between Contracting Authority, Project Co and the Lenders’ Agent.
- (s) **“Lending Agreements”** has the meaning given in the Project Agreement.
- (t) **“Multiple Obligee”** means a multiple obligee under the applicable Bond.
- (u) **“Multiple Obligee Rider(s)”** means the multiple obligee rider(s) applicable to the Bonds pursuant to which Project Co, Contracting Authority and the Lenders’ Agent are multiple obligees under the Bonds.
- (v) **“Notice Period”** has the meaning given in the Lenders’ Direct Agreement.
- (w) **“Order”** has the meaning given in Section 8(k) of this Insurance Trust Agreement.
- (x) **“Party”** means any of Contracting Authority, Project Co, the Lenders’ Agent or the Account Trustee, and **“Parties”** means all of Contracting Authority, Project Co, the Lenders’ Agent and the Account Trustee.
- (y) **“Project”** has the meaning given in the Project Agreement.
- (z) **“Project Agreement”** means the project agreement made on or about June 1, 2021 between Contracting Authority and Project Co.

- (aa) “**Project Co**” has the meaning given in the introductory paragraph of this Insurance Trust Agreement.
- (bb) “**Project Co Event of Default**” has the meaning given in the Project Agreement.
- (cc) “**Replacement Project Agreement**” has the meaning given in the Lenders’ Direct Agreement.
- (dd) “**Replacement Project Co**” has the meaning given in the Lenders’ Direct Agreement.
- (ee) “**Step-In Notice**” has the meaning given in the Lenders’ Direct Agreement.
- (ff) “**Step-In Period**” has the meaning given in the Lenders’ Direct Agreement.
- (gg) “**Surety**” has the meaning given in the Project Agreement.
- (hh) “**Trust Property**” means all of the property held in trust by the Account Trustee pursuant to this Insurance Trust Agreement, including, without limitation, the Bonds, the Insurance Trust Account, and all amounts from time to time contained therein, the Insurance Policies and the Insurance Proceeds.

## **2. INTERPRETATION**

This Insurance Trust Agreement shall be interpreted according to the following provisions, unless the context requires a different meaning:

- (a) The headings in this Insurance Trust Agreement are for convenience of reference only and shall not constitute a part of this Insurance Trust Agreement or be taken into consideration in the interpretation of, or affect the meaning of, this Insurance Trust Agreement.
- (b) Unless the context otherwise requires, references to specific Sections, Clauses, Paragraphs, Subparagraphs, and other divisions are references to such Sections, Clauses, Paragraphs, Subparagraphs, or divisions of this Insurance Trust Agreement and the terms “Section” and “Clause” are used interchangeably and are synonymous.
- (c) Words importing persons or parties are to be broadly interpreted and include an individual, corporation, limited liability company, joint stock company, 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.

- (d) 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.
- (e) References to any standard, principle, agreement or document include (subject to all relevant approvals and any other provisions of this Insurance Trust Agreement concerning amendments) a reference to that standard, principle, agreement or document as amended, supplemented, restated, substituted, replaced, novated or assigned.
- (f) The words in this Insurance Trust Agreement shall bear their natural meaning.
- (g) References containing terms such as:
  - (i) “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 Insurance Trust Agreement taken as a whole; and
  - (ii) “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”.
- (h) In construing this Insurance Trust Agreement, the rule known as the ejusdem generis rule shall not apply nor shall any similar rule or approach apply to the construction of this Insurance Trust 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.
- (i) Where this Insurance Trust 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.
- (j) Where this Insurance Trust 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.
- (k) Any reference to time of day or date means the local time or date in Toronto, Ontario.

- (l) Unless otherwise indicated, time periods will be strictly construed and time shall be of the essence hereof.
- (m) Whenever the terms “will” or “shall” are used in this Insurance Trust Agreement they shall be construed and interpreted as synonymous and to read “shall”.

### **3. BONDS AND INSURANCE TRUST ACCOUNT**

- (a) Prior to the commencement of a Default Period, the Bonds the Insurance Trust Account and all amounts from time to time contained therein, including interest thereon, shall be held in trust by the Account Trustee for the benefit of Project Co. During a Default Period, the Bonds, the Insurance Trust Account, and all amounts from time to time contained therein, shall be held in trust by the Account Trustee for the benefit of the Lenders’ Agent and the Lenders, provided that, upon receipt by the Account Trustee of a Change of Authorization Notice, the Bonds, the Insurance Trust Account, and all amounts from time to time contained therein, shall be held in trust by the Account Trustee for the benefit of Contracting Authority.
- (b) The Account Trustee shall not release the Bonds or release, distribute or transfer any funds from the Insurance Trust Account other than in accordance with the terms of this Insurance Trust Agreement.
- (c) Notwithstanding any other provision of this Insurance Trust Agreement and subject to Section 3(d), the Lenders’ Agent, Contracting Authority, and Project Co agree that (x) if Project Co or the Lenders’ Agent receives the Bonds, then the Bonds will be enforced for the purpose of completion of the Project, and (y) if any of them either receives any Insurance Proceeds from the Insurance Trust Account or has the right to direct the Account Trustee to advance funds in respect of any Insurance Proceeds from the Insurance Trust Account to third parties, such funds shall be directed, used or advanced only for one of the following purposes:
  - (i) the repair, reinstatement, restoration or replacement of the Facility or any other assets, materials or goods necessary or desirable for the carrying out of the Works in respect of which such Insurance Proceeds have been paid;
  - (ii) the completion of the Project; or
  - (iii) indemnification for any Contracting Authority loss for which the subject Insurance Proceeds were paid under the Insurance Policies (as defined below).

For greater certainty, use of any Insurance Proceeds received in respect of a claim by Project Co for delay in start-up, soft costs or business interruption may be applied in accordance with the terms of the Lending Agreements so as to enable Project Co to carry out the Works.

- (d) Notwithstanding anything in this Insurance Trust Agreement, if Contracting Authority is entitled to indemnification under the Insurance Policies in respect of any loss incurred by Contracting Authority, such related insurance proceeds are to be paid directly to Contracting Authority by the insurer or the Account Trustee and shall not be Insurance Proceeds subject to Section 3(c)(i) or (ii) of this Insurance Trust Agreement. For greater certainty it is understood and agreed that Contracting Authority shall be required to use such proceeds for carrying out the purposes referred to in Sections 3(c)(i) or (ii) in respect of which such proceeds have been paid.

#### **4. DELIVERY OF BONDS AND INSURANCE POLICIES**

Project Co shall deliver, or cause to be delivered, to the Account Trustee, the Bonds that Project Co is required to obtain under the Project Agreement and certified copies or originals of all insurance policies that Project Co is required to maintain under the Project Agreement (collectively, the “**Insurance Policies**”), and the Account Trustee shall hold the Bonds and Insurance Policies in trust for the benefit of each of the beneficiaries and loss payees, as the case may be, thereunder.

#### **5. BONDS**

- (a) If the Account Trustee and Contracting Authority have received a Default Notice, and if Lenders’ Agent presents to the Account Trustee (and the other parties to this Insurance Trust Agreement) a declaration that it or any person Lenders’ Agent designates requires possession of the Bonds for the purpose of establishing and/or enforcing the rights of any Multiple Obligee thereunder, and the Account Trustee has received written authorization from Contracting Authority confirming Lenders’ Agent’s right to receive the Bonds, the Account Trustee shall provide the Bonds to Lenders’ Agent or such designated party, without the need for further investigation or inquiry by the Account Trustee, provided that, if at any time prior to the release of the Bonds to Lenders’ Agent or a person designated by it, pursuant to the foregoing, the Account Trustee receives a Change of Authorization Notice and Contracting Authority presents to the Account Trustee a declaration that it or any person designated by it requires possession of the Bonds for the purpose of establishing and/or enforcing the rights of any Multiple Obligee thereunder, the Account Trustee shall provide the same to Contracting Authority or such designated party, without the need for further investigation or inquiry by the Account Trustee that Contracting Authority or the designated party presenting the declaration is entitled to receive the Bonds. Contracting Authority shall provide, no later than 5 Business Days following receipt by Contracting Authority of a request by the Lenders’ Agent, either (i) the written authorization referred to in this Section 5(a); or (ii) written justification detailing Contracting Authority’s rationale for refusing to provide such authorization.

- (b) Project Co agrees to obtain or cause to be obtained from the Surety any required amendment to the Bonds to provide for the foregoing provisions by way of amendment or replacement of the Multiple Obligee Rider now attached to and forming part of the Bonds.
- (c) Contracting Authority, Lenders' Agent and Project Co covenant and agree to observe and perform their respective covenants, agreements and obligations under the provisions of the Lender's Direct Agreement and further covenant and agree as between them, that if there is any conflict or inconsistency between the provisions of Lender's Direct Agreement and this Insurance Trust Agreement, the provisions of the Lender's Direct Agreement shall govern and prevail to the extent of such conflict or inconsistency.

## **6. INSURANCE PROCEEDS**

- (a) Subject to Section 3(d), the Account Trustee shall distribute any proceeds of any Insurance Policy that are paid over to it by any insurer, Project Co, the Lenders' Agent or Contracting Authority (the "**Insurance Proceeds**") as follows:
  - (i) in the case of third party legal liability or employer's liability insurance, to the relevant claimant in satisfaction of the claim, demand, proceeding or liability in respect of which such Insurance Proceeds are payable;
  - (ii) in the case of any property builders' risk "All Risk" insurance, boiler and machinery insurance or property insurance policies that Project Co is required to maintain under the Project Agreement:
    - (A) if the Account Trustee has not received a Default Notice and:
      - (1) if the amount of such Insurance Proceeds, together with the aggregate of all Insurance Proceeds in respect of the assets in respect of which such Insurance Proceeds have been paid in the same calendar month, is less than \$[REDACTED], to Project Co to repair, restore or replace the assets in respect of which such Insurance Proceeds have been paid; or
      - (2) if the amount of such Insurance Proceeds, together with the aggregate of all Insurance Proceeds in respect of the assets in respect of which such Insurance Proceeds have been paid in the same calendar month, is equal to or greater than \$[REDACTED], to the Lenders' Agent to reimburse Project Co for the costs of repairing, restoring or replacing the assets in respect of which such Insurance Proceeds have been paid; or

- (B) if the Account Trustee has received a Default Notice, to the Insurance Trust Account to be distributed by the Account Trustee in such amounts and to such persons as the Lenders' Agent may at any time or from time to time direct in writing, provided that, if the Account Trustee has received a Change of Authorization Notice, the Account Trustee shall release such Insurance Proceeds from the Insurance Trust Account in such amounts and to such parties as Contracting Authority may at any time or from time to time direct in writing, in each case, to repair, restore or replace the assets in respect of which such Insurance Proceeds have been paid; and
- (iii) in the case of any other Insurance Policies, to the Lenders' Agent, or, following receipt by the Account Trustee of a Change of Authorization Notice, to Contracting Authority, to be distributed to the parties entitled thereto.
- (b) The Account Trustee shall distribute any excess Insurance Proceeds remaining after the distributions contemplated in Section 6(a) have been made, including, without limitation, any Insurance Proceeds held in the Insurance Trust Account:
  - (i) if the Account Trustee has not received a Default Notice, to Project Co; and
  - (ii) if the Account Trustee has received a Default Notice, to such persons as the Lenders' Agent, or, following receipt by the Account Trustee of a Change of Authorization Notice, Contracting Authority, may at any time or from time to time direct in writing.
- (c) Each of Project Co, the Lenders' Agent and Contracting Authority shall forthwith deliver, or cause to be delivered, to the Account Trustee, any and all Insurance Proceeds it received from time to time and is not otherwise entitled to in accordance with the terms of this Insurance Trust Agreement.
- (d) The Account Trustee shall deposit to the Insurance Trust Account all amounts that are paid over to it pursuant to the Insurance Policies or otherwise by Project Co, Contracting Authority or the Lenders' Agent and shall not transfer, release or distribute any such proceeds other than in accordance with this Insurance Trust Agreement.

## **7. ACCOUNT AGREEMENT**

- (a) The Account Trustee hereby agrees to promptly provide to the Lenders' Agent all monthly statements and other information with respect to the Insurance Trust Account provided to the Account Trustee by the Bank pursuant to the relevant account agreement. The Account Trustee further agrees that it shall make such



requests to the Bank for additional information with respect to the Insurance Trust Account as the Lenders' Agent may from time to time request in writing.

- (b) The Account Trustee hereby agrees to promptly provide to Contracting Authority all monthly statements and other information with respect to the Insurance Trust Account provided to the Account Trustee by the Bank pursuant to the relevant account agreement. The Account Trustee further agrees that it shall make such requests to the Bank for additional information with respect to the Insurance Trust Account as Contracting Authority may from time to time request in writing.

## **8. THE ACCOUNT TRUSTEE**

- (a) The Account Trustee shall not have any duty or obligation to manage, control, use, make any payment in respect of, register, record, insure, inspect, sell, dispose of or otherwise deal with any part of the Trust Property except as expressly provided by the terms of this Insurance Trust Agreement. The Account Trustee shall carry out all written directions given by the Lenders' Agent, Contracting Authority or Project Co, as applicable, in accordance with this Insurance Trust Agreement and shall not be required to exercise any discretion in exercising any of its duties under this Insurance Trust Agreement in pursuance of such written directions. The Account Trustee shall not be bound to do or take any act, action or proceeding by virtue of the powers conferred on it hereby unless and until it shall have been required to do so under the terms hereof and has received instruction, advice or direction from the Lenders' Agent, Contracting Authority or Project Co, as applicable, as to the action to be taken (except with respect to actions specifically set out herein to be performed by the Account Trustee).
- (b) The Account Trustee will exercise its powers and carry out its obligations hereunder as account trustee honestly, in good faith and in the best interests of the beneficiaries hereunder and in connection therewith will exercise that degree of care, diligence, and skill that a reasonably prudent professional trustee would exercise in comparable circumstances. Unless otherwise required by law, the Account Trustee will not be required to give bond surety or security in any jurisdiction for the performance of any duties or obligations hereunder. No provision of this Insurance Trust Agreement shall be construed to relieve the Account Trustee from liability for its own dishonesty, fraud, negligence (including, without limitation, negligence in the handling of funds), wilful misconduct, bad faith or reckless disregard of any duty hereunder.
- (c) The Account Trustee will not be subject to any liability whatsoever, in tort, contract or otherwise in connection with the Trust Property or the carrying out of its duties under this Insurance Trust Agreement to the Lenders' Agent, the Lenders, Contracting Authority, Project Co or any other person for any action taken or permitted by it to be taken, or for its failure to take any action, or for not performing any act or fulfilling any duty, obligation or responsibility hereunder by reason of

any occurrence beyond the control of the Account Trustee (including, but not limited to, any act or provision of any present or future law or of any Governmental Authority, any act of God or war, or the unavailability of any wire or communication facility), provided that the foregoing limitation will not apply in respect of any action or failure to act arising from or in connection with wilful misconduct, negligence or reckless disregard of duty by the Account Trustee. The Account Trustee in doing anything or permitting anything to be done in respect of the Trust Property or the carrying out of its duties under this Insurance Trust Agreement is, and will be conclusively deemed to be, acting as trustee for the beneficiaries hereunder and not in any other capacity. Except to the extent provided in this Section 8(c), the Account Trustee will not be subject to any liability for debts, liabilities, obligations, claims, demands, judgments, costs, charges or expenses against or with respect to the Trust Property, arising out of anything done or permitted by it to be done or its failure to take any action in respect of the execution of its duties hereunder and resort will be had solely to the Trust Property for the payment or performance thereof, and no other property or assets of the Account Trustee, whether owned in its personal capacity or otherwise, will be subject to levy, execution or other enforcement procedure with regard to any obligation under this Insurance Trust Agreement.

- (d) The Account Trustee shall not be required to expend or risk its own funds or otherwise incur financial liability in the performance of any of its duties hereunder, or in the exercise of any of its rights or powers hereunder, or in acting at the request or direction of the Lenders' Agent on behalf of the Lenders or of Contracting Authority or of Project Co, unless it shall have received adequate indemnity or security against such risk or liability satisfactory to it.
- (e) Notwithstanding the foregoing, the Account Trustee shall be liable for any action or failure to act arising from or in connection with the dishonesty, fraud, negligence (including, without limitation, negligence in the handling of funds), wilful misconduct, bad faith or reckless disregard of any duty hereunder by the Account Trustee or any of its directors, officers or employees, or the failure to comply with the standard of care referred to in Section 8(b).
- (f) Except as otherwise provided in Sections 8(c), 8(d) and 8(e):
  - (i) the Account Trustee may rely and shall be protected in acting or refraining from acting upon any signature, resolution, certificate, statement, instrument, opinion, report, notice, request, direction, consent, order or other paper or document reasonably believed by it in good faith to be genuine and to have been signed or presented by the proper party or parties; and
  - (ii) the Account Trustee may exercise its powers and perform its duties by or through such attorneys, representatives, agents and employees as it shall

appoint; and may consult with counsel, accountants and other skilled persons selected and employed or retained by it, and the Account Trustee shall not be liable for anything done, suffered or omitted in good faith by it in accordance with the written advice of such counsel, accountants or other skilled persons (provided that such advice pertains to such matters as the Account Trustee may reasonably presume to be within the scope of such person's area of competency) and not contrary to any express provision in this Insurance Trust Agreement.

- (g) Project Co hereby agrees to pay, indemnify and hold harmless the Account Trustee from and against any and all loss, liability, cost, claim and expense incurred by the Account Trustee with respect to the performance of this Insurance Trust Agreement by the Account Trustee or any of the Account Trustee's directors, officers or employees, unless arising from its or their own dishonesty, fraud, negligence (including, without limitation, negligence in the handling of funds), wilful misconduct, bad faith or reckless disregard of any duty hereunder.
- (h) Subject to the terms and conditions set forth in the Account Trustee fee letter, the Account Trustee shall receive from the Trust Property reasonable compensation for its services hereunder and shall be reimbursed by Project Co for its reasonable fees and expenses (including the disbursements and reasonable fees of counsel).
- (i) The Account Trustee agrees to look solely to Project Co, and not, except as expressly set forth herein, to the Lenders' Agent, the Lenders or Contracting Authority for any claim for indemnification which may arise under this Insurance Trust Agreement.
- (j) The Account Trustee shall be responsible for keeping all appropriate books and records relating to the receipt and disbursement of all money which it receives hereunder.
- (k) If at any time the Account Trustee is served with any judicial or administrative order, judgment, decree, writ or other form of judicial or administrative process which in any way affects the Trust Property held by it hereunder (including, but not limited to, orders of attachment or garnishment or other forms of levies or injunctions or stays relating to the transfer of Trust Property) (each, an "**Order**"), the Account Trustee is authorized to comply therewith in any manner as it or legal counsel of its own choosing deems appropriate. The Account Trustee shall in no way be bound to call for further evidence (whether as to due execution validity or effectiveness, or the jurisdiction of any court, or as to the truth of any fact), and shall not be responsible for any loss that may be occasioned by its failing to do so. If the Account Trustee complies with any Order, the Account Trustee shall not be liable to any of the parties hereto or to any other person or entity even though such Order may be subsequently modified or vacated or otherwise determined to have been without legal force or effect. If the Account Trustee is served with any Order,

it shall forthwith and, in any event, within three (3) Business Days, deliver a copy of such Order to each of the Lenders' Agent, Contracting Authority and Project Co.

- (l) Unless otherwise specifically set forth herein, the Account Trustee shall proceed as soon as practicable to collect any cheques or other collection items at any time deposited hereunder. All such collections shall be subject to the Account Trustee's usual collection practices or terms regarding items received by the Account Trustee for deposit or collection. Except and to the extent provided herein, the Account Trustee shall not be required, or have any duty, to notify any person of any payment or maturity under the terms of any instrument deposited hereunder, nor to take any legal action to enforce payment of any cheque, note or security deposited hereunder, or to exercise any right or privilege which may be afforded to the holder of any such security.
- (m) In the event that the Account Trustee determines that any direction, instruction, notice or other communication given under this Insurance Trust Agreement by the Lenders' Agent or, where the Account Trustee has received a Change of Authorization Notice, Contracting Authority, is ambiguous or uncertain, the Account Trustee may, in its sole discretion, refrain from taking any action other than retaining possession of the Trust Property, unless the Account Trustee has received written instructions, signed by the Lenders' Agent or, if the Account Trustee has received a Change of Authorization Notice, Contracting Authority, which resolve such ambiguity or uncertainty, provided that the Account Trustee shall, forthwith upon determining that such direction, instruction, notice or other communication is ambiguous or uncertain, seek clarification from the Lenders' Agent, or where the Account Trustee has received a Change of Authorization Notice, Contracting Authority, to resolve such ambiguity or uncertainty.
- (n) Prior to receipt of a Change of Authorization Notice by the Account Trustee, any instruction, notice or other communication delivered to the Account Trustee by the Lenders' Agent shall be paramount to and supersede any direction, instruction, notice or other communication from any other party to this Insurance Trust Agreement, and the Account Trustee shall comply with such direction, instruction, notice or other communication from the Lenders' Agent. After the Account Trustee has received a Change of Authorization Notice, any instruction, notice or other communication delivered to the Account Trustee by Contracting Authority shall be paramount to and supersede any direction, instruction, notice or other communication from any other party to this Insurance Trust Agreement, and the Account Trustee shall comply with such direction, instruction, notice or other communication from Contracting Authority.
- (o) Each of the Lenders' Agent and Contracting Authority shall provide to the Account Trustee an incumbency certificate setting out the names and sample signatures of individuals authorized to give instructions to the Account Trustee hereunder. The Account Trustee shall be entitled to rely on each such incumbency certificate until

a revised or replacement incumbency certificate is provided to the Account Trustee by the Lenders' Agent or Contracting Authority, as applicable. The Account Trustee shall refuse to act upon any instruction given by the Lenders' Agent or Contracting Authority which is signed by any person other than an individual named in the incumbency certificate provided to the Account Trustee by the Lenders' Agent or Contracting Authority, as applicable, pursuant to this Section 8(o), as any such incumbency certificate may be amended, supplemented or replaced from time to time.

- (p) The Account Trustee shall be entitled to rely on, and act upon, any direction, instruction, notice or other communication provided to it hereunder which is sent to it by facsimile transmission, provided that any such direction, instruction, notice or other communication is signed by an individual named in the incumbency certificate delivered to the Account Trustee by the Lenders' Agent or Contracting Authority, as applicable, pursuant to Section 8(o).
- (q) The Account Trustee shall retain the right not to act and shall not be liable for refusing to act if, due to a lack of information or for any other reason whatsoever, the Account Trustee, in its sole judgment, determines that such act might cause it to be in non-compliance with any applicable anti-money laundering or anti-terrorist legislation, regulation or guideline. Further, should the Account Trustee, in its sole judgment, determine at any time that its acting under this Insurance Trust Agreement has resulted in its being in non-compliance with any applicable anti-money laundering or anti-terrorist legislation, regulation or guideline, then it shall have the right to resign on 10 days' written notice to Project Co and Contracting Authority, or any shorter period of time as agreed to by Project Co and Contracting Authority, notwithstanding the provisions of Section 8(a) of this Insurance Trust Agreement, provided that (i) the Account Trustee's written notice shall describe the circumstances of such non-compliance; and (ii) if such circumstances are rectified to the Account Trustee's satisfaction within such 10 day period, then such resignation shall not be effective.

## **9. LENDERS' AGENT AND CONTRACTING AUTHORITY RIGHTS TO DIRECT**

- (a) Until the first to occur of:
  - (i) the expiry of the Notice Period under the Lenders' Direct Agreement where no Step-In Notice has been delivered thereunder;
  - (ii) the expiry of the Step-In Period under the Lenders' Direct Agreement where:
    - (A) there has been no assignment to a Replacement Project Co;
    - (B) no Replacement Project Agreement has been entered into; or

(C) the Appointed Representative has not cured the Project Co Event of Default,

(each, a “**Change of Authorization Event**”), the Lenders’ Agent shall, subject to Sections 3 and 4 of this Insurance Trust Agreement, have the exclusive right to direct the Account Trustee with respect to the Insurance Trust Account, the Insurance Policies, the Bonds and the Insurance Proceeds.

- (b) Upon the occurrence of a Change of Authorization Event:
- (i) the Lenders’ Agent shall cease to be entitled, and Contracting Authority shall thenceforth be entitled, to direct the Account Trustee with respect to the Insurance Trust Account, the Insurance Policies, the Bonds and the Insurance Proceeds; and
  - (ii) the Lenders’ Agent and Contracting Authority shall jointly provide notice to the Account Trustee (a “**Change of Authorization Notice**”) that Contracting Authority shall, as of the date of such Change of Authorization Event, have the exclusive right to direct the Account Trustee with respect to the Insurance Trust Account, the Insurance Policies, the Bonds and the Insurance Proceeds.

## **10. TERMINATION**

- (a) Subject to the provisions of Section 10(b), this Insurance Trust Agreement shall remain in full force and effect and be binding in accordance with and to the extent of its terms until:
- (i) the obligations of Project Co to the Lenders’ Agent and the Lenders under the Lending Agreements have been paid and performed in full and the Lenders have no further obligation to make any further advances or other credit accommodations under the Lending Agreements; and
  - (ii) the obligations of Project Co to Contracting Authority have been paid and performed in full.
- (b) The Account Trustee may terminate this Insurance Trust Agreement at any time upon 60 days prior written notice to the other parties hereto, provided that no termination of this Insurance Trust Agreement by the Account Trustee shall be effective until such time as the Lenders’ Agent, Contracting Authority, and Project Co have entered into a replacement Insurance Trust Agreement on the same terms and conditions as this Insurance Trust Agreement with a replacement account trustee satisfactory to the Lenders’ Agent, the Lenders and Contracting Authority.



submission shall not be invalid by reason only of a Party's failure to comply with this Section 12(b).

- (c) Any Party to this Insurance Trust Agreement may, from time to time, change any of its contact information set forth in Section 12(a) by prior notice to the other Parties, 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.
- (d) Subject to Sections 12(e), 12(f) and 12(g):
  - (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.
- (e) 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 Section 12.
- (f) 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 4:00 p.m. (recipient's local time), then such notice shall be deemed to have been received by such recipient on the next Business Day.
- (g) A notice given by electronic submission shall be deemed to have been received by the recipient on the day it is transmitted only if a electronic submission report (maintained by the sender) indicates that the transmission of such notice was successful.

### **13. AMENDMENTS**

This Insurance Trust 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 Insurance Trust Agreement.

### **14. WAIVER**

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

## **15. CONTRACTING AUTHORITY DESIGNATE**

At any time and from time to time, Contracting Authority may designate any ministry, branch, agency, division, department or office of the Government of Ontario to carry out administrative responsibility for the rights and obligations of Contracting Authority under this Insurance Trust Agreement and Project Co, the Lenders' Agent and the Account Trustee may deal exclusively with the designated person in respect of all such matters and is entitled to rely on the actions, directions, requests, notices, consents, approvals, waivers, comments relating to the review of documentation and other administrative matters and decisions determined by such designated person from time to time, until Contracting Authority has notified Project Co, the Lenders' Agent and the Account Trustee in writing that such designated person is no longer the person designated by Contracting Authority hereunder and such notice shall have effect on the later of the date of delivery of such notice and the date specified in the written notice. Contracting Authority shall advise Project Co, the Lenders' Agent and the Account Trustee in writing of any designation hereunder. The rights and obligations of the parties to this Insurance Trust Agreement shall be in no way affected by reason of any such designation. Project Co, the Lenders' Agent and the Account Trustee acknowledge the right of Contracting Authority to delegate administrative responsibilities hereunder as set forth in this Section 15.

## **16. RELATIONSHIP BETWEEN THE PARTIES**

The Parties are independent contractors. This Insurance Trust Agreement is not intended to and does not create or establish between the Parties any relationship as partners, joint venturers, employer and employee, master and servant, or, except as provided in this Insurance Trust Agreement, of principal and agent.

## **17. ENTIRE AGREEMENT**

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

**18. SEVERABILITY**

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

**19. ENUREMENT**

This Insurance Trust Agreement shall enure to the benefit of, and be binding on, each of the Parties and their respective successors and permitted transferees and assigns.

**20. GOVERNING LAW AND JURISDICTION**

- (a) This Insurance Trust Agreement shall be governed by and construed in accordance with the laws of Ontario and the laws of Canada applicable therein and shall be treated in all respects as an Ontario contract, without regard to conflict of laws principles.
- (b) The Parties agree that the courts of the Province of Ontario and all courts competent to hear appeals therefrom shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Insurance Trust Agreement and hereby irrevocably attorn to the exclusive jurisdiction of such courts.
- (c) Nothing in this Insurance Trust Agreement affects the rights, protections and immunities of the Crown under the *Proceedings Against the Crown Act* (Ontario).

**21. FURTHER ASSURANCE**

Each Party shall do all things, from time to time, and execute all reasonable further documents necessary to give full effect to this Insurance Trust Agreement.

**22. LANGUAGE OF AGREEMENT**

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

**23. COUNTERPARTS**

This Insurance Trust 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.

**24. COPYRIGHT NOTICE**

The Parties acknowledge that the Queen's Printer for Ontario is the exclusive owner of the copyright in the Project Agreement and this Insurance Trust Agreement.

*[SIGNATURE PAGES IMMEDIATELY FOLLOW]*

**IN WITNESS WHEREOF** the Parties have executed this Insurance Trust Agreement as of the date first above written.

**HER MAJESTY THE QUEEN IN RIGHT OF  
ONTARIO** as represented by the Minister of  
Government and Consumer Services, as represented  
by Ontario Infrastructure and Lands Corporation

Per: \_\_\_\_\_

Name: **[REDACTED]**

Title: **[REDACTED]**

I have authority to bind the corporation.

**[REDACTED]**

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

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

I/We have authority to bind the corporation.

**TRANS/FORM BY POMERLEAU INC.**

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

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

I/We have authority to bind the corporation

**[REDACTED]**

Per: \_\_\_\_\_

Name: **[REDACTED]**

Title: **[REDACTED]**

Per: \_\_\_\_\_

Name: **[REDACTED]**

Title: **[REDACTED]**

I/We have authority to bind the corporation

**SCHEDULE 31**

**PROJECT CO INFORMATION**

**[REDACTED]**



**SCHEDULE 32**

**BACKGROUND CHECK REQUIREMENTS**

1. In order to prevent persons who pose a security risk from gaining access to sensitive information or otherwise compromising the judicial process or the security or integrity of the Facility, the following persons (the “**Designated Project Co Employees**”) shall, at Project Co’s cost and expense, submit to a criminal record name check through the Canadian Police Information Center (“**CPIC**”):
  - (a) prior to the entry on to the Site, the Facility and/or the Existing Facilities by such person to perform the Works:
    - (i) each and every person employed or engaged by Project Co or a Project Co Party who is to carry out any of the responsibilities of Project Co under this Project Agreement during the period from the date of this Project Agreement to the earlier of the Expiry Date or the Termination Date, including, without limitation, any person who is to provide any of the Works for and on behalf of Project Co. For greater certainty, such persons include, but are not limited to, each and every person employed, engaged or hired by Project Co or a Project Co Party who is involved in the installation, testing, maintenance or repair of the Facility’s:
      - (A) computer, phone or other communications or information technology wiring, cables or equipment; or
      - (B) security features, including all security related equipment or devices, locks, monitors, listening mechanisms, motion detectors, cameras or alarms; and
    - (ii) each and every person employed or engaged by Project Co or a Project Co Party who is identified by name in any proposal submitted by Project Co or who is hired in replacement of any person so named; and
  - (b) each and every other person otherwise designated as a Designated Project Co Employee by MAG or Contracting Authority from time to time in its sole discretion.
2. In its discretion, Contracting Authority may prescribe additional or alternative security or other background checks that are to be conducted with respect to any Designated Project Co Employees, subject to Project Co being entitled to a Variation in accordance with Section 25.6(e) of the Project Agreement. Without limiting the generality of this Section 2, Contracting Authority may require a check under the Security Screening Program operated by CSIS for any Designated Project Co Employee and for any person who, in the performance of his or her duties, will have or is likely to have access to secure areas of the Facility or to classified government or court-related assets or

information. The cost of CSIS checks and any other additional or alternative security checks (other than the CPIC checks) will be borne by Contracting Authority. Notwithstanding Section 1, Contracting Authority may, in its sole discretion:

- (a) direct Project Co to submit information relating to the Designated Project Co Employees in order for Contracting Authority or MAG to carry out the background and security checks on the Designated Project Co Employees itself and not require Project Co to carry out the CSIS check; or
- (b) carry out a background and security check on any Project Co Party or Designated Project Co Employee.

If Contracting Authority or MAG elects to carry out a background and security check pursuant to this Section 2, Project Co shall and shall cause all Project Co Parties and Designated Project Co Employees, to cooperate with Contracting Authority and MAG for the purpose of carrying out the background and security check and to obtain all consents as may be required by Applicable Law or otherwise authorizing the disclosure of such information to Contracting Authority and MAG.

3. Notwithstanding Sections 1 and 2, in an emergency situation only (as determined by Contracting Authority in its sole discretion), a Designated Project Co Employee and any other person contemplated in Section 2 who has not submitted to a background check or other security check in accordance with Sections 1 and 2 may be permitted access to the Site, the Facility and/or the Existing Facilities provided that such person, while on the Site, the Facility and/or the Existing Facilities, is accompanied at all times by a representative of Project Co or the Construction Contractor who has submitted to a CPIC check in accordance with Section 1 and has submitted to the additional or alternative background checks set forth in Section 2, if such checks were required by Contracting Authority.
4. Contracting Authority may require the renewal of a background check provided for under Sections 1 and 2, with respect to Project Co, a Project Co Party that is not an individual, a Designated Project Co Employee, any individual person, class of persons or all persons within the scope of those sections, at such intervals as Contracting Authority may reasonably direct. The cost of renewed background checks provided for under Section 1 shall be borne by Project Co. The cost of renewed security checks provided pursuant to Section 2 shall be borne by Contracting Authority.
5. Except as required under Section 1, 2 or 4, no security and background check shall be required with respect to any other person employed or engaged by Project Co or a Project Co Party in respect of the Project.
6. Project Co shall, at its cost and expense, obtain, maintain and renew, as applicable, written consent, on a prescribed Government of Ontario or Ontario Provincial Police form, authorizing the conduct of a security or background check pursuant to Sections 1, 2 and 4 from each person liable to a check under each of those Sections.

7. Every person who is employed or engaged by Project Co or a Project Co Party with respect to:
- (a) the movement of staff or equipment into, out of, or within the Facility and/or the Existing Facilities;
  - (b) the installation, testing or repair of computer, phone or other communications or information technology wiring, cables or equipment; or
  - (c) the installation, testing or repair of security features of the Facility and/or the Existing Facilities, including all security related equipment or devices, locks, monitors, listening mechanisms, motion detectors, cameras, or alarms,
- shall be bonded.

8. Subject to Applicable Law, Contracting Authority may, in its sole discretion direct that any person shall not be:
- (a) employed by Project Co or any Project Co Party with respect to the performance of any of Project Co's responsibilities under this Agreement; or
  - (b) otherwise have access to the Site, the Existing Facilities or the Facility at any time,

where that person,

- (c) refuses to submit to a background check under Section 1, 2 or 4, or fails to provide the required consent to permit such a check to be conducted;
- (d) has been refused a Level I security clearance from CSIS, in the event that Contracting Authority has directed that such a security clearance is required;
- (e) has been charged with or convicted, at any time within the previous 6 years, of any offense:
  - (i) of moral turpitude in Canada or elsewhere;
  - (ii) for which a record exists under the *Criminal Records Act*; or
  - (iii) otherwise designated as a Relevant Conviction by Contracting Authority from time to time,

and that conviction remains in effect at that time and is one for which a pardon has not been granted (a "**Relevant Conviction**"); or

- (f) is otherwise considered to constitute a security risk in the reasonable opinion of MAG, including with respect to the safety and welfare of persons located in or at the Site and/or the Facility, the reputation of, and public confidence in the Province, the Ontario Court system, the security of revenue, equipment or any other property of the Province and the Government of Ontario, and the confidentiality and integrity of court or government records and information, Confidential Information and/or Personal Information.

For greater certainty Contracting Authority's discretion under this Section 8 shall be interpreted to be absolute and unrestricted except as provided by Applicable Law.

- 9. Where a person has been rejected on the basis of his or her criminal record under Section 8, that person may request,
  - (a) that a further inquiry be made to determine whether a subsequent pardon or acquittal on appeal has not been properly recorded in the records maintained by CPIC; or
  - (b) that the alleged record be verified by way of a fingerprint search through CPIC,

and Contracting Authority shall withdraw its objection with respect to any such person who is exonerated or vindicated as a result of that inquiry or verification.

- 10. Where a person liable to a check under Section 1, 2 or 4 is not an individual, a security and background check may be required of each of each such person's partners, trustees, members officers, or directors.

For greater certainty, pursuant to Section 2.9 of Schedule 1 – Definitions and Interpretation of the Project Agreement, in this Schedule 32, words importing persons or parties are to be broadly interpreted and include an individual, corporation, limited liability company, joint stock company, 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.

**SCHEDULE 33**

**FACILITY CONSTRUCTION REQUIREMENTS**

**[REDACTED]**

**SCHEDULE 34**

**SITE AND LANDS**

For the purpose of the Project Agreement:

- (a) **“Lands”** means, collectively, the following lands, including all buildings (including for greater certainty, the Existing Facilities), structures, installations, fixtures, services and any other such improvements thereon and therein:
- (i) in respect of the BCA Facility, all of PIN 14029-1389, Part Lot 14 Concession 1 East of Hurontario Street, Being Parts 1 to 6 on 43R-22193 save & except Parts 1 & 2 on 43R-22659 & Parts 1 to 6 on 43R-35913; s/t easement over Parts 3, 4, 5 on 43R-22659 as in LT1811152 (partially release by PR3061997); subject to an easement over Parts 4 & 5 on 43R-22193 as in TT65156; subject to an easement over Parts 1, 5, 6 on 43R-22193 save & except pts. 1 & 2 on 43R-22659 as in VS26325; subject to an easement over Parts 2,3,4 on 43R-22193 as in VS26325; City of Brampton; and
  - (ii) in respect of the TRBC Facility, the Premises, as defined in the Lease Agreements.
- (b) **“Site”** means, at any time and from time to time, in respect of the Works and at all time in accordance with the Project Co Phasing Plan, that portion or those portions of the Lands as shown on the site plans attached hereto as Appendix A (including for greater certainty, the Existing Facilities), on, in or above which Project Co or any Project Co Party will be, is or was engaged in the performance of the Works as set out in the Output Specifications, including but not limited to, any portion or portions of the Lands (i) required for construction or Demolition activities; (ii) required for access, loading, construction staging and laydown area purposes; and (iii) that are hoarded, cordoned, or otherwise fenced off by Project Co or any Project Co Party for the purpose of the Works and, as required by Good Industry Practice, any Lands immediately surrounding such hoarding, cordons or fencing.

**APPENDIX A**

**SITE PLANS**

**[REDACTED]**

**SCHEDULE 35**

**INTENTIONALLY DELETED**

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**SCHEDULE 36**

**CONTRACTOR SITE SPECIFIC SAFETY MANUAL REQUIREMENTS**

**1. General Requirements**

The Contractor Site Specific Safety Manual shall, at a minimum, comply in all respects with:

- a) all applicable requirements of the *Occupational Health and Safety Act* (Ontario);
- b) industry best practices;
- c) health and safety requirements set by Project Co with respect to the Project and the Site, and
- d) health and safety requirements of the Project Agreement.

**2. Minimum Categories**

The Contractor Site Specific Safety Manual shall, at a minimum, contain narrative addressing the categories and sub-categories as set out below.

<b>1.0</b>	<b>Overview and Scope</b> The manual shall have an introduction that shall set out an overview and scope of the Project.
<b>2.0</b>	<b>Health and Safety Statement</b> A statement that shall refer to the safety goals of the project and the culture of safety planned to be implemented by the Construction Contractor.
2.1	Statement of Commitment by an Officer: this statement shall specifically refer to the manual itself and be executed by an officer of the Construction Contractor with authority to bind the Construction Contractor.
2.2	Project Company Mandate and OHS Policy
2.3	Statement of Commitment Regarding Keeping Subcontractors Responsible
2.4	Site Plot Plan: which shall include an illustration.
<b>3.0</b>	<b>Project Health and Safety Objectives and Performance Measurement</b> Description of methodology for measuring health and safety performance, including key performance indicators to assess whether objectives are being met.
<b>4.0</b>	<b>Roles and Responsibilities</b> Description of the specific roles and responsibilities of the following individuals/entities in relation to meeting the health and safety objectives.
4.1	Project Co.
4.2	Project Director
4.3	Safety Manager
4.4	Construction Manager
4.5	Safety Coordinator
4.6	Joint Occupational Health and Safety Committee/Trades Committee
4.7	Subcontractor
4.8	Subcontractor Supervisor

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4.9	Workers
4.11	Visitors
4.12	External Parties
4.13	Contact Sheet
<b>5.0</b>	<b>Sub-contractor Health and Safety Management Plan</b>
<b>6.0</b>	<b>Health and Safety Training &amp; Competency</b> Description of the training program to be implemented to ensure that all persons who will be entering and/or working on the Site are appropriately trained.
6.1	Site Specific Orientation
6.2	Project Specific Orientation
6.3	Worker Training to Specific Site Hazards
6.4	Visitor/Short Duration Work Orientation
6.5	Personal Protective Equipment: identify the minimum PPE that will be required on-site)
6.6	Delivery Driver/Supplier Orientation
6.7	Worker/ Supervisor Competency and Evaluation: describe how competency of workers and supervisors will be identified, met and evaluated on an on-going basis.
<b>7.0</b>	<b>Meetings and Communication Plan</b> Description of frequency of meetings relating to health and safety, how meetings will be documented and how agreed outcomes will be communicated to the appropriate parties.
<b>8.0</b>	<b>Emergency Response Plan</b> Description of measures to respond to injuries and accidents.
8.1	Emergency Contacts and Roles
8.2	Emergency Evacuation Plan
8.3	Emergency Response Procedure
8.4	Property, Equipment and Environmental Damage Procedure
8.5	First Aid
8.6	Drills and Exercises
<b>9.0</b>	<b>Inspections and Audits</b> Description of the Construction Contractor's strategy for implementing an inspection regime in relation to health and safety on the Site.
9.1	Informal Inspections
9.2	Formal Inspections
9.3	Audits
9.4	Inspection and Audit Schedule
9.5	Inspection Follow-up/Corrections Action Plan
9.6	Maintenance of Records
<b>10.0</b>	<b>Incident Reporting and Investigations Procedure</b> Description of the procedure for reporting incidents, proactive investigations intended to prevent future incidents and measures to resolve the incident.

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<b>11.0</b>	<b>Rules of Conduct and Disciplinary Actions</b> Description of disciplinary actions to be taken in the case of health and safety infractions.
11.1	Drugs and Alcohol
11.2	Workplace Violence and Harassment
11.3	Disciplinary Action
11.4	Workers Rights
<b>12.0</b>	<b>Security Plan</b> Provision of a plan that details guidelines for implementing safety on the Site.
12.1	Methodology for Securing the Site and Restricting Trespassers
<b>13.0</b>	<b>Hazard Identification and Control</b>
13.1	Hazard Identification and Control
13.2	Designated Substances
13.3	Task Safety Analysis
13.4	Job Hazard Analysis: analysis to detail a technique that focuses on job tasks as a way to identify hazards before they occur. It focuses on the relationship between the worker, the task, the tools, and the work environment. It breaks down the job in smaller steps to examine potential hazards and potential preventative steps.
13.5	Project Specific Health and Safety Requirements: provide a project-specific health and safety risk register which details any unique safety requirements of the Project.
<b>14.0</b>	<b>Traffic Management and Control Plan</b>
<b>15.0</b>	<b>Others</b>