

**THE CITY OF EDMONTON**  
**DESIGN-BUILD AGREEMENT**  
**CAPITAL LINE SOUTH LRT EXTENSION**

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## DESIGN-BUILD AGREEMENT

### THE CITY OF EDMONTON – CAPITAL LINE SOUTH LRT EXTENSION

made this 31st day of May, 2024

BETWEEN:

The City of Edmonton  
(the “City”)

AND:

Capital Line Design-Build Ltd  
(“Design-Builder”)

#### PREAMBLE:

Pursuant to the RFQ process and the RFP process, the City has selected Design-Builder to design, build, test and commission the Infrastructure.

The City and Design-Builder therefore agree as follows:

#### 1. KEY CLOSING DOCUMENTS

##### 1.1 Document Deliveries

Concurrently with the Commercial Close:

- (a) Design-Builder has delivered to the City the documents described in Section 2 *[Documents to be Delivered by Design-Builder]* of Schedule 25 *[Completion Documents]*; and
- (b) the City has delivered to Design-Builder the documents described in Section 3 *[Documents to be Delivered by the City]* of Schedule 25 *[Completion Documents]*.

##### 1.2 Subcontracts - Records and Reports

- (a) Consistent with Good Industry Practice, Design-Builder shall maintain a record of all Subcontracts and all changes, amendments and notices pursuant to those Subcontracts. Design-Builder shall provide the City with a summary report in respect of these Subcontracts and matters arising or occurring for each calendar quarter during the Term. These reports, including any nil reports, must be provided to the City pursuant to and in accordance with Section 3.2 *[Monthly Progress Report]* of Schedule 4 *[Design and Construction Protocols]*.
- (b) Design-Builder shall promptly provide a written report to the City in respect of any development or circumstances that arises that triggers, or that could reasonably be expected to trigger after the lapse of time, the right of Design-Builder or a Designer to exercise a right of termination of a Subcontract for a Designer, or to suspend a material right or obligation under a Subcontract for a Designer. This report shall include a

description of the development or circumstance and Design-Builder's planned steps or actions in response, and the timetable proposed or established for such steps or actions being taken.

### 1.3 Early Works Agreement

- (a) The Parties acknowledge and agree that the Early Works Agreement shall terminate effective as of Commercial Close and that this Agreement supersedes the Early Works Agreement in its entirety. All activities undertaken pursuant to the Early Works Agreement prior to Commercial Close are deemed to have been undertaken by the Design-Builder as Project Work pursuant to this Agreement, notwithstanding that the Early Works may have been executed by Capital Line Design-Build Ltd. (the "**Early Works Contractor**") and not directly by the Design-Builder. Design-Builder accepts and assumes the risk, responsibility and liability for and in respect of such Early Works in accordance with the provisions of this Agreement.
- (b) None of Design-Builder, the Early Works Contractor, the City or any other party to the Early Works Agreement shall be entitled to make a claim against each other or against any Design-Builder Person or against any City Person under or in connection with the Early Works Agreement (whether in contract, tort or otherwise), including, without limitation, any claim in damages, for extensions of time or for additional payments, unless such claim is permitted under this Agreement.
- (c) Any dispute in connection with or arising out of the Early Works Agreement and existing at Commercial Close shall, unless otherwise agreed in writing by the Parties, be resolved in accordance with Schedule 20 [*Dispute Resolution Procedure*].

## 2. SCOPE OF DESIGN-BUILDER OBLIGATIONS

### 2.1 Overall Obligations

Without limiting any obligations of Design-Builder in this Agreement, Design-Builder shall, at its own cost and risk:

- (a) observe and comply with all provisions of this Agreement that apply to Design-Builder;
- (b) carry out and perform all Project Work:
  - (i) in accordance with this Agreement, including all terms of all Schedules;
  - (ii) in compliance with Applicable Law;
  - (iii) in compliance with all Project Approvals and so as to preserve the existence and continued effectiveness of any such Project Approvals at all relevant times;
  - (iv) so as to satisfy the Project Requirements, including the Bid Extracts as applicable;
  - (v) in accordance with Good Industry Practice, including Utility Best Practices and Environmental Best Management Practices;
  - (vi) by establishing or arranging for its own support services and facilities; and
  - (vii) with due regard to the health and safety and security of Persons, property and the environment; and

- (c) cooperate with the City in the fulfillment of the purposes and intent of this Agreement, provided, however that, for the avoidance of doubt, Design-Builder shall not be under any obligation to perform any of the City's obligations under this Agreement.

## **2.2 Restricted Person**

Notwithstanding any other provision of this Agreement, at no time shall Design-Builder be or become a Restricted Person.

## **2.3 Assumption of Risk**

Except to the extent otherwise expressly allocated to the City by the provisions of this Agreement, all risks, costs and expenses in relation to the performance by Design-Builder of its obligations under this Agreement are allocated to, and as between the City and Design-Builder are the exclusive responsibility of, Design-Builder.

## **2.4 Warranty Period**

Design-Builder shall perform all Warranty Work required during the Warranty Period in accordance with Section 6 [*Warranty*].

## **2.5 Responsibility for Project Management and Integration**

Design-Builder shall be responsible for the complete project management oversight, coordination and integration of all elements and activities comprising the Project Work and for effective Integration.

## **2.6 Project Team Alignment**

Design-Builder shall proactively organize Project team alignment sessions utilizing an experienced professional facilitator, the first such session to occur no later than 60 days following Commercial Close and, thereafter, no less than one full Business Day in each calendar year following the anniversary of Commercial Close throughout the Construction Period, to promote and foster effective, integrated and collaborative working relationships among the designated senior representatives from Design-Builder, the Subcontractors having responsibility for the Project (including at a minimum all appointed Key Individuals and all appointed members of the working joint committees for the Project), the City Representative and any other City Persons, Other Contractors and/or such other representatives of the City as the City Representative may designate from time to time.

## **2.7 Intellectual Property**

Design-Builder shall provide to the City the Intellectual Property Rights, according to the terms of Schedule 8 [*Intellectual Property*].

# **3. LAND MATTERS**

## **3.1 Access and Use**

Effective from the Effective Date and throughout the Term, and subject to the terms, conditions, obligations and limitations set out in this Section 3 [*Land Matters*], the City hereby grants to Design-Builder a non-exclusive licence to access and use the City Lands and the Infrastructure as is required by Design-Builder, solely for the purpose of and sufficient for (subject to Design-Builder performing its obligations described in the Project Approvals) the performance of the Project Work, in accordance with this Section 3 [*Land Matters*] and Schedule 14 [*City Lands*].

For greater certainty the licence in this Section 3.1 [*Access and Use*]:

- (a) applies to all City Lands, but not to the Adjoining Lands;
- (b) applies to the Additional Lands, if and when acquired in accordance with Section 3.6 *[Additional Lands]*; and
- (c) shall provide Design-Builder with incidental access to Existing Infrastructure (other than Incorporated Infrastructure) owned or held by the City and located on the City Lands to the extent agreed by the City and Design-Builder on a case-by-case basis and for the sole purpose of carrying out Project Work activities, including the Deconstruction Work.

### **3.2 Sub-licences**

Subject to and in accordance with the terms and conditions of this Section 3 *[Land Matters]* and Schedule 14 *[City Lands]*, Design-Builder shall be entitled to grant non-exclusive sub-licences (not exceeding the scope of the licence granted to Design-Builder in Section 3.1 *[Access and Use]*) to access and use the City Lands and the Infrastructure to Design-Builder Persons.

### **3.3 Status of City Lands**

Except as otherwise expressly set out in this Agreement:

- (a) subject to Section 10 *[Relief Events and Limited Relief Events]* and Schedule 10 *[Environmental Performance Requirements]*, the condition of, access to and use of the Lands is being provided to Design-Builder on an “as is” basis;
- (b) subject to Section 19.4(d), the City provides no representations or warranties with respect to the Lands (including as to their adequacy or suitability for the Project), except for the representations and warranties in Section 12.1 *[City’s Representations]*;
- (c) none of the rights in the City Lands granted pursuant to Section 3.1 *[Access and Use]* shall extend beyond the boundaries of the City Lands or exceed any limits on the interests in the City Lands or to any Lands other than the City Lands, other than easements, rights of way, licences and similar interests of the City which benefit the City Lands and are hereafter obtained, to the extent the same are necessary for the Project Work as more particularly described in Schedule 14 *[City Lands]*;
- (d) subject to the terms, conditions and protocols referred to in Section 5.2 *[Other Work]*, and Section 3.14 *[Uninterrupted Access and Use]* as it relates to the temporary use of certain Existing Infrastructure, the rights granted to Design-Builder hereunder shall be non-exclusive and the City and any Person authorized by the City or any Person having an interest in the City Lands pursuant to a Permitted Encumbrance may access, use, occupy and possess the City Lands, including the Existing Infrastructure, without the prior consent of Design-Builder. Design-Builder shall not, except as permitted under this Agreement, disrupt the occupation, possession or use of the City Lands or Existing Infrastructure by these Persons;
- (e) the licence granted to Design-Builder hereunder is a personal property right and Design-Builder acquires no estate, title or ownership interest in the City Lands, including the Existing Infrastructure or the Infrastructure or any other interest in land pursuant to this Agreement or otherwise;
- (f) none of the rights in the City Lands granted pursuant to Section 3.2 *[Sub-licences]* shall entitle Design-Builder to extract any mineral from the City Lands for sale and, as between the Parties and subject to the lawful claims of other Persons, any extracted minerals that should become extracted and that can be sold shall remain the property of the City.

Design-Builder may use soil extracted from the City Lands and other materials salvaged by Design-Builder from its Deconstruction Work on the Site, other than minerals, in carrying out the purposes of the Project Work and dispose and sell for its own account, any such extracted materials that are excess to the Project Requirements;

- (g) subject to Section 10 [*Relief Events and Limited Relief Events*], any rights Design-Builder requires to access or use the Adjoining Lands shall be the responsibility of Design-Builder to obtain, either pursuant to the Adjoining Lands Access Protocol, with City support in accordance with Section 3.17 [*Work on Adjoining Lands*] or otherwise; and
- (h) the Identified Encumbrances and the Existing Utility Agreements contain certain limitations or restrictions and associated obligations with which Design-Builder must comply in accessing and using the City Lands to perform the Project Work, all of which are further listed and described in Schedule 14 [*City Lands*] and Schedule 28 [*Project Approvals and Utility Matters*] Part 2 [*Utility Matters*].

### 3.4 Duration

Subject to Section 3.15 [*Access and Use Rights to Cease*], Design-Builder's right to non-exclusive access to and use of the City Lands, the Existing Infrastructure and the Infrastructure continues throughout the Term. Such right to non-exclusive access and use (together with any sub-licence right of access and use granted by Design-Builder pursuant to Section 3.1 [*Access and Use*]) automatically terminates upon any termination of this Agreement. Access to and use of the City Lands, the Existing Infrastructure and the Infrastructure, from and following Final Completion shall be granted in accordance with and subject to the terms and conditions specified in Section 6 [*Warranty*] of this Agreement.

### 3.5 No Access Fee

No fee or other amount shall be payable by Design-Builder to the City for its rights of access to and use of the City Lands, the Existing Infrastructure and the Infrastructure.

### 3.6 Additional Lands

If, despite Design-Builder's acknowledgement in Section 4.4 [*Construction Within the Lands*], Design-Builder determines that Real Property Interests in addition to the City Lands are required for the Project Work (the "**Additional Lands**"), then:

- (a) Design-Builder shall, at its earliest practicable opportunity, submit to the City notice of its recommended acquisition by one of Design-Builder, a Subcontractor or the City of the Additional Lands, including a detailed explanation identifying the requirement and rationale for such acquisition, evidence of investigations respecting possible Contamination and Hazardous Substances remediation requirements or liabilities and all other relevant explanatory documentation, including the legal description and title documentation in respect of such Additional Lands, an explanation of the nature of the interest in the Additional Lands to be acquired, any available environmental reports in respect of such Additional Lands and Design-Builder's recommendation as to which Party should acquire and pay for these Additional Lands.
- (b) Unless and until the City has consented, in its discretion, to the acquisition of the Additional Lands, Design-Builder shall not acquire and shall prohibit Design-Builder Persons from acquiring such Additional Lands. The City will confirm whether it accepts Design-Builder's recommendation regarding the acquisition of Additional Lands and will give its consent within: (i) 30 Business Days after receipt of notice and all relevant documentation; and (ii) if the City fails to give or deny its consent within such time period it will be deemed to have denied its consent;

- (c) If Design-Builder requests consent to a proposed acquisition of Additional Lands pursuant to Section 3.6(a), Design-Builder will pay, without duplication, the City's reasonable internal administrative and personnel costs and all reasonable out-of-pocket costs (including in respect of technical, financial and legal advisors) in connection with the City's consideration of such request. At the time of making a request, Design-Builder will make a payment to the City in the amount of \$15,000 as an advance against (and not in satisfaction of) its obligations under this Section 3.6(c). After the City renders its decision, the City will either refund any overpayment or invoice Design-Builder for any additional amounts owing under this Section 3.6(c) and Design-Builder will promptly pay such additional amount to the City. Concurrently with providing such refund or invoice, the City will provide Design-Builder with a breakdown of the City's costs in connection with its consideration of Design-Builder's request for consent;
- (d) Where Design-Builder, or a Subcontractor, is given consent by the City to acquire Additional Lands, rather than the City, Design-Builder shall, or shall cause the Subcontractor in question, to grant to the City an option, exercisable upon notice given at any time within 30 Business Days before or after expiry of the Term or sooner termination of this Agreement, to purchase such Additional Lands for a purchase price of one dollar. Design-Builder shall promptly notify the City of any Additional Lands that Design-Builder or a Subcontractor acquires pursuant to this Section 3.6 *[Additional Lands]* and shall, in furtherance of the option hereby granted and at the request of the City from time to time, enter into a formal option agreement in such form as the City may reasonably require. Design-Builder shall not grant or assume any Encumbrance other than a Permitted Encumbrance affecting or against such Additional Lands or do or omit to do, or cause, suffer or permit to be done or omitted to be done, anything that would result in any Encumbrance other than a Permitted Encumbrance against or affecting the Additional Lands;
- (e) Any Additional Lands acquired by the City shall, upon such acquisition, constitute City Lands, provided, however, that, notwithstanding anything to the contrary in this Agreement:
- (i) Design-Builder shall be responsible for and shall indemnify and hold harmless the City from and against all costs, risks, obligations and liabilities in respect of, or arising in connection with, such Additional Lands (and any portion of such Additional Lands comprising a Site) and the acquisition thereof, including claims relating to Contamination, fossils, Utility Infrastructure or artifacts and other objects having artistic, historic, archaeological or monetary value, including human remains and burial sites;
- (ii) The City provides no representation or warranty, and shall have no obligation to Design-Builder, in respect of, or arising in connection with, any Additional Lands (and any portion of Additional Lands comprising a Site), including, for certainty and without limitation, pursuant to Sections 3.3 *[Status of City Lands]*, 12.1 *[City's Representations]*, 19.4 *[Design-Builder's Reliance on Information]*, Section 23 *[Historical Resources]* of Schedule 10 *[Environmental Performance Requirements]*, City Approvals pursuant to Schedule 28 *[Project Approvals and Utility Matters]* Part 1 *[Project Approvals]*, and Schedule 29 *[Security Matters]*; and
- (iii) To the extent related to or arising in connection with the Additional Lands, Design-Builder shall not be entitled to claim any Relief Event, Force Majeure Event or Change; and
- (f) The Parties acknowledge that this Section 3.6 *[Additional Lands]* is not intended to apply to, and does not apply to, Real Property Interests intended to be used by Design-Builder:

- (i) on a temporary basis (such as temporary stockpiling or staging areas, marshalling yards, lay-down areas, or similar); or
- (ii) that will not contain any of the Infrastructure and will not affect the ownership or use of the Infrastructure following expiry of the Term or sooner termination of this Agreement.

### **3.7 Utility and Pipeline Matters**

The allocation of responsibilities, tasks and risks as between the City and Design-Builder in relation to the use of the City Lands and Existing Infrastructure for Utility Work is set out in Schedule 28 *[Project Approvals and Utility Matters]* Part 2 *[Utility Matters]*.

### **3.8 Required Condition of the Lands and Infrastructure**

Design-Builder shall maintain the City Lands and Infrastructure in good and proper order, condition and repair and protect the same from damage resulting from the Project Work and in compliance with the Project Requirements throughout the Term up to and including the Construction Completion Date.

Subject to Section 8 *[Insurance, Damage and Destruction]* Design-Builder shall, at its sole cost and expense, promptly repair any damage to the City Lands, Infrastructure or the Adjoining Lands caused by Design-Builder or any Design-Builder Person, including resulting from the performance of the Project Work, except for the Deconstruction Work or such other damage expressly included in or contemplated by the Project Work and other normal wear and tear associated with the Project Work.

Design-Builder's responsibilities regarding the maintenance and repair of the Adjoining Lands will be consistent with its responsibilities regarding the City Lands and Infrastructure, to the extent applicable and as described or contemplated in this Section 3.8 *[Required Condition of the Lands and Infrastructure]* or any other provisions of this Agreement, including Section 3.17 *[Work on Adjoining Lands]* and Section 19.2 *[Approvals and Authorizations]*.

### **3.9 Permitted Use of Lands**

Design-Builder covenants that it and all Design-Builder Persons:

- (a) will use the City Lands, the Existing Infrastructure and the Infrastructure only for the purposes of the Project Work and not for any other purposes; and
- (b) will comply with all City protocols for issuing public notices in respect of Construction, as outlined in Section 3.17 *[Work on Adjoining Lands]*, Schedule 5 *[D&C Performance Requirements]* and Schedule 12 *[Communications and Engagement]*.

### **3.10 Encumbrances**

Subject to Section 3.14 *[Uninterrupted Access and Use]* and, if applicable, Schedule 28 *[Project Approvals and Utility Matters]* Part 2 *[Utility Matters]*, Design-Builder shall recognize and respect the lawful rights of the holders of Permitted Encumbrances and shall not:

- (a) grant, create, incur or, to the extent within its control to prevent the same, permit any Encumbrance that is not a Permitted Encumbrance upon, affecting or against all or any part of the City Lands;
- (b) do or omit to do, or cause, suffer or permit to be done or omitted by any Person for whom Design-Builder is in law responsible, anything that results or could result in any

Encumbrance that is not a Permitted Encumbrance upon, against or affecting all or any part of the City Lands; or

- (c) interfere with or disturb the lawful rights of the holders of the Permitted Encumbrances.

Each of Design-Builder and the City shall promptly notify the other of any Encumbrance as soon as it becomes aware thereof, provided, however, that failure by the City to provide notice to Design-Builder of any Encumbrance pursuant to this Section 3.10 *[Encumbrances]* shall not release Design-Builder from any of its obligations or liabilities under this Agreement, nor shall such failure give rise to a right of Design-Builder to a Relief Event, a Force Majeure Event, a Change or any other right or remedy under or pursuant to this Agreement.

If any part of the City Lands or any interest therein becomes subject to any Encumbrance due to an act or omission of Design-Builder or any Design-Builder Person or arising in relation to the Project Work, other than a Permitted Encumbrance, Design-Builder shall immediately take all necessary steps to remove, vacate or discharge such Encumbrance. If Design-Builder fails to remove any such Encumbrance within 15 Business Days (or such longer period as may reasonably be required in the circumstances provided Design-Builder is proceeding with all due diligence to remove the same) of Design-Builder becoming aware or when it ought reasonably to have become aware of such Encumbrance then, without prejudice to any other rights or remedies the City may have, the City may 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 to seek immediate recovery of the amount of any such payment and any associated costs, including legal costs, from Design-Builder, and Design-Builder will, on demand by City, reimburse all such payments and costs properly attributable to Design-Builder, having regard to the extent the Encumbrance was caused or contributed to by Design-Builder.

In the event that the City Lands or any part thereof or any interest therein is or becomes subject to any Encumbrance which is not a Permitted Encumbrance and which is not due to an act or omission of Design-Builder or any Design-Builder Person, or which has not arisen in relation to the Project Work, at such time as Design-Builder became aware (or, acting reasonably, should have become aware) of such Encumbrance and prior to performing obligations under any such Encumbrance, Design-Builder shall notify the City of any such Encumbrance and the City shall:

- (d) cause the Encumbrance to be removed, vacated or discharged;
- (e) perform the required obligations thereunder; or
- (f) instruct Design-Builder to perform the required obligations thereunder.

If (i) the City requires Design-Builder to perform obligations under an Encumbrance pursuant to Section 3.10(f) which performance imposes costs or delays in the performance of the Project Work, or (ii) the Encumbrance affects Design-Builder's performance of its obligations under this Agreement the impact of which is demonstrated by written evidence and documentation provided by Design-Builder to the City which is satisfactory to the City, acting reasonably, then such performance shall, subject to Section 10 *[Relief Events and Limited Relief Events]*, constitute a Relief Event under Section 10.1.1(b)(iv).

### **3.11 Permitted Encumbrances**

Notwithstanding Section 3.10 *[Encumbrances]*, Design-Builder shall perform all obligations under all Permitted Encumbrances other than obligations which Design-Builder is not legally capable of performing for or on behalf of the City.

All Project Work performed by or on behalf of Design-Builder shall be performed in a manner which does not breach the Permitted Encumbrances. Subject to Encumbrances that Design-Builder is required to remove pursuant to Section 3.10 *[Encumbrances]*, no act or omission by Design-Builder or any Design-



Builder Person shall give rise to a right for any Person to obtain title to or any interest in the Lands or any part thereof, except in accordance with the express terms of this Agreement.

### **3.12 Prompt Payment and Construction Lien Act**

- (a) The Parties acknowledge that Section 3.10 [*Encumbrances*] shall apply to claims for liens made against the Lands pursuant to the PPCLA and shall also apply to claims made against the City or the holdback under the PPCLA as though such a claim were an Encumbrance against the Lands as referred to therein. For clarity and without limiting the generality of the foregoing, Design-Builder shall promptly pay all proper accounts for work done or materials furnished under all contracts it enters into relating to the Project Work, subject to payment of those sums required to be retained under, and paid in accordance with, the provisions of Applicable Law, including the PPCLA, to the extent applicable to the Project Work and the Lands and Design-Builder shall not, by any act or omission, cause, encourage, suffer or allow any lien or claim under any Applicable Law or in equity to be made against the City or filed or registered against the Lands, the Existing Infrastructure or the Infrastructure by reason of work, services or materials supplied or claimed to have been supplied to Design-Builder or anyone claiming through or under Design-Builder. Design-Builder shall, at its own expense, promptly take all steps required to effect a discharge of any lien so filed or registered
- (b) Design-Builder 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 PPCLA, require that a certificate of substantial performance under section 19 of the PPCLA 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.
- (c) Design-Builder shall follow the requirements of the PPCLA and Good Industry Practice for posting and advertising certificates of substantial performance and completion when issued.
- (d) Design-Builder shall provide the City with a copy of supporting documents that evidence compliance with the PPCLA.
- (e) Upon request by the City, Design-Builder shall perform and deliver to the City a sub-search of title on the Lands or any part thereof. The City shall pay the reasonable costs of any such search except (i) a search that reveals Encumbrances due to an act or omission of Design-Builder or any Design-Builder Person or arising in relation to the Project Work, (ii) a search requested based on a reasonable suspicion that an Encumbrance due to an act or omission of Design-Builder or any Design-Builder Person or arising in relation to the Project Work has been registered on title to the Lands and such suspicion is verified, and (iii) a search requested for the purpose of confirming that an Encumbrance due to an act or omission of Design-Builder or any Design-Builder Person or arising in relation to the Project Work has been discharged from title to the Lands.
- (f) Design-Builder shall provide to the City a certificate of substantial performance in accordance with the PPCLA.

### **3.13 Ownership of Improvements and Other Project Assets**

#### **3.13.1 Ownership of Improvements**

The Infrastructure and all other fixed improvements that Design-Builder may from time to time construct upon the City Lands shall at all times be the property of the City upon installation or affixation.

#### **3.13.2 Ownership of Equipment**

The Equipment shall become the property of the City at the time of delivery to the City Lands or at the time it is considered to be delivered for the purpose of payment as described in Section 3.3 [*Progress Measurement Parameters*] of Schedule 4 [*Design and Construction Protocols*], whichever is earlier.

#### **3.13.3 Ownership of Intellectual Property Rights**

Except for City Intellectual Property, Design-Builder shall retain ownership or control over all Intellectual Property Rights, subject however to the Intellectual Property Rights granted by Design-Builder to the City according to the terms of Schedule 8 [*Intellectual Property*].

#### **3.13.4 Ownership of Inventory, Tools and Support Vehicles**

All tangible personal property other than Equipment, including without limitation, all consumables, tools, equipment, vehicles, components, spare parts, materials, supplies, inventory items and all miscellaneous goods and chattels used by Design-Builder or a Design-Builder Person in the performance of the Project Work and which is regularly consumed or turned over in the normal course of business shall remain the property of Design-Builder at all times.

#### **3.13.5 Risk of Loss**

Notwithstanding the foregoing provisions of Section 3.13 [*Ownership of Improvements and Other Project Assets*], but subject to Section 8 [*Insurance, Damage and Destruction*], all risk of loss or damage or destruction of the Infrastructure and other fixed improvements constructed upon the City Lands by Design-Builder, the Equipment, the Intellectual Property Rights and the tangible personal property shall reside with Design-Builder until Construction Completion except to the extent such risk has been expressly retained or transferred to the City according to the terms of this Agreement.

#### **3.13.6 City Entitlement to Emission Credits**

As provided for in Section 1(g) of Schedule 10 [*Environmental Performance Requirements*], the City owns all GHG and Environmental Benefits.

### **3.14 Uninterrupted Access and Use**

The City covenants that Design-Builder's access to and use of the City Lands and the Infrastructure pursuant to Section 3.1 [*Access and Use*] shall be without any material disturbance or material undue interference from the City or any City Person, and shall be available throughout the Term as is necessary to enable Design-Builder to carry out the Design and Construction, subject to the following:

- (a) the Permitted Encumbrances (but subject in each case to the obligations of the City under Section 5.2 [*Other Work*] and pursuant to Schedule 28 [*Project Approvals and Utility Matters*]);
- (b) the exercise by the City of any express right under and in accordance with this Agreement, including the City's right under Section 4.5 [*Stop Work Order*] to direct Design-Builder to cease any Project Work; the City's rights under Section 5.2 [*Other*

*Work*] and to undertake additional improvements or expansion; the City's right under Section 11.4 *[Access, Inspection and Testing]*; Section 7.3.5 *[City's Access to Lands]* of Schedule 4 *[Design and Construction Protocols]*; Section 16.7 *[Business Opportunities]* to access and use the Lands and Infrastructure and the City's step-in rights under Section 13.7 *[City's Remedial Rights]*;

- (c) performance of the City Works;
- (d) any express restriction or limitation on Design-Builder's access to or use of the Lands, including Section 1-4.1 *[Construction Constraints]* of Schedule 5 *[D&C Performance Requirements]* and Section 16.1 *[Restricted Periods for Vegetation Clearing]* of Schedule 10 *[Environmental Performance Requirements]*;
- (e) access granted by Design-Builder to the City as may be required to prepare for Service Readiness; and
- (f) Design-Builder's responsibilities for prevention of intrusion, trespass and unauthorized access, pursuant to Schedule 29 *[Security Matters]*.

### **3.15 Access and Use Rights to Cease**

Upon termination of this Agreement, Design-Builder shall cease to have any right of access to and use of the City Lands and the Infrastructure other than as is available to any member of the public and, if Design-Builder fails to comply with this Section 3.15 *[Access and Use Rights to Cease]*, it shall indemnify the City against any Direct Losses incurred by the City in consequence of such failure.

Notwithstanding the foregoing sentence, if termination of this Agreement occurs prior to the expiry of the Construction Period, the City shall permit Design-Builder reasonable access and use of the City Lands, as soon as reasonably practical and during the one-month period (or such longer period as Design-Builder demonstrates is reasonably required) following termination of this Agreement, to demobilize and remove any of Design-Builder's equipment and materials from the City Lands. If termination of this Agreement occurs following the Construction Period and prior to expiry of the Term, any access by Design-Builder to and use of the City Lands in order to demobilize and remove any of Design-Builder's equipment and materials shall be at such times and for such periods as the City may, in its discretion, determine, having regard to potential interference with or effect on the operation of the Capital Line South LRT Extension or access by the public thereto. Design-Builder shall, in the event this Agreement is terminated pursuant to Section 14.1(a) for a Termination Event, indemnify the City against any Direct Losses incurred by the City in consequence of Design-Builder accessing and using the City Lands and Infrastructure after termination of this Agreement pursuant to this provision. In all other cases of the early termination of this Agreement, Design-Builder shall be required to indemnify the City for Direct Losses associated with the foregoing access and use of the City Lands to the extent the Legal Fault of Design-Builder caused or contributed to the Direct Losses.

### **3.16 City Lands and Incorporated Infrastructure Adequate**

Subject to, and without limiting Design-Builder's rights under this Agreement, including pursuant to Section 12.1 *[City's Representations]*, Section 10 *[Relief Events]* and Section 19.4 *[Design-Builder's Reliance on Information]* by entering into this Agreement, Design-Builder shall be deemed to have: (i) made those enquiries, reviews and assessments in respect of the City Lands, Adjoining Lands, and Incorporated Infrastructure (including the Disclosed Data) as of the Financial Bid Response Deadline, (ii) performed all necessary due diligence and investigation on the City Lands, the Adjoining Lands, Incorporated Infrastructure, and (iii) satisfied itself as to the structural, environmental and general condition of any Incorporated Infrastructure as it considered necessary to have satisfied itself with its assessment of these assets in relation to the carrying out of the Project Work and the performance of its obligations under this Agreement, to accept the City Lands, Existing Infrastructure and the Infrastructure

(except as expressly provided to the contrary in this Agreement) on an “as is where is” basis and to accept all risks and related responsibilities relating to the foregoing, including:

- (a) the adequacy of the Lands and of the rights of access to, from and through the Lands for the Project Work, having regard in part to the anticipated utilization of the Adjoining Lands and in accordance with Section 3.17 [*Work on Adjoining Lands*] and any accommodation it may require for the purposes of fulfilling its obligations under this Agreement;
- (b) access and parking;
- (c) temporary storage of building materials and equipment;
- (d) existing Utilities and existing works or infrastructure on and adjacent to the City Lands;
- (e) subject to Schedule 10 [*Environmental Performance Requirements*], the condition of the City Lands and the Incorporated Infrastructure, including the existence of Contamination and Hazardous Substances on, in or under the City Lands; and
- (f) geotechnical conditions generally,
- (g) the site conditions of the Adjoining Lands; and
- (h) the form and nature of the City Lands (including the ground and the subsoil and the level and quantity of groundwater), the loadbearing and other relevant properties of the City Lands, the risk of injury or damage to property affecting the City Lands, 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 Project Work.

Design-Builder further acknowledges and agrees that, other than as referred to or contained in this Agreement, no representations or warranties have been made, nor documentation delivered to Design-Builder or any Design-Builder Person, which would indicate that Design-Builder would be unable to perform the Project Work in a lawful manner.

### **3.17 Work on Adjoining Lands**

#### **3.17.1 Adjoining Lands**

Design-Builder acknowledges that, in order to complete the Construction, temporary access and remedial construction may be required on the Adjoining Lands and that temporary access easements and remedial construction agreements have not been obtained by the City to such lands.

#### **3.17.2 Design-Builder Obligations**

Subject to Section 10 [*Relief Events and Limited Relief Events*], if applicable, Design-Builder will be responsible for all temporary access and remedial construction in respect of the Adjoining Lands, and will utilize the following protocol in managing access to and use of the Adjoining Lands (the “**Adjoining Lands Access Protocol**”) and such protocol shall be conducted in a manner that will permit Design-Builder to perform its obligations pursuant to Schedule 12 [*Communications and Engagement*]. Design-Builder shall:

- (a) determine, prior to the start of Construction, the exact location and elevation of landscaping, structures, or other improvements or fixtures on and otherwise relating to the Adjoining Lands that may be affected by the Project Work and which will require

some scope of encroachment or access to, on or over the Adjoining Lands to support the Project Work;

- (b) complete, prior to entering any Adjoining Lands, a comprehensive photographic record of the Site and coordinate all required rights of temporary access with the owners and occupiers of such Adjoining Lands;
- (c) provide, at all times, reasonable alternative and continuous pedestrian and vehicular access to the Adjoining Lands when existing access is impaired by the Construction;
- (d) follow the public notification requirements established in Schedule 12 *[Communications and Engagement]* as they pertain to access onto and use of private property;
- (e) make all reasonable efforts to minimize interference, disturbance or encroachment within or on the Adjoining Lands affected by the Construction;
- (f) remediate or repair the condition (including to tie back in, match existing surface treatments, maintain existing grades or improve drainage patterns to meet the Project Requirements) of any landscaping, improvements, structures and encroachments in respect of the Adjoining Lands that are affected by the Construction to no less than their condition existing prior to Construction, and to a better standard where it may be required in order to improve drainage patterns to meet the Project Requirements; and
- (g) adhere to and follow applicable Good Industry Practice in carrying out and performing all Project Work in relation to the Adjoining Lands, including in a cooperative manner to the extent reasonably possible in the circumstances;

### **3.18 Development Charges**

- (a) Subject to this Section 3.18 *[Development Charges]*, the City shall be responsible for paying the following fees, costs and charges (including any applicable taxes thereon) that become due and payable to a City department or agency acting as a Governmental Authority (the “**Development Charges**”):
  - (i) amounts due and payable to the Planning Branch, in respect of the “permanent area contributions or “PAC”;
  - (ii) amounts due and payable to the Planning Branch, in respect of the “sanitary servicing strategy expansion assessment” or “EA”; and
  - (iii) amounts due and payable to the Planning Branch, in respect of the “sanitary sewer trunk charge” or “SSTC”,

notwithstanding that such Development Charges may be applicable to and arise from one or more development permits for the Project Work included in the Project Approvals for which Design-Builder is responsible pursuant to Schedule 28 *[Project Approvals and Utility Matters]* Part 1 *[Project Approvals]*. Design-Builder acknowledges and agrees that this Section 3.18 *[Development Charges]* applies only in respect of the Development Charges and no other fees, costs or charges applicable to or arising from a Project Approval, all of which Design-Builder hereby acknowledges are the responsibility of Design-Builder under this Agreement.

- (b) Promptly, but not less than 10 Business Days, prior to Design-Builder making an application for a Project Approval for which a Development Charge may become due and payable, Design-Builder shall notify the City’s Representative in writing of:

- (i) the Project Approval to which the Development Charge relates, and provide City's Representative with all information and documentation relating to the Project Approval as may be required by City Representative to assess and validate the payment that has become due, including the application for such Project Approval, as applicable;
  - (ii) the amount of the Development Charge, including working papers setting forth the basis for and computation of the amount of the Development Charge; and
  - (iii) the date on which the Development Charge is due and payable;
- (c) The City shall:
- (i) pay any applicable Development Charges under a Project Approval on or before the date on which the Development Charge is due and payable; and
  - (ii) provide evidence of making of such payment under the Project Approval to Design-Builder;
- provided, however, that no such payment shall be made by Design-Builder on behalf of the City without obtaining the prior written approval of the City and the City shall have no obligation to reimburse or compensate Design-Builder in the event Design-Builder makes any such payment without having obtained the prior written approval of the City.
- (d) Any refund, partial rebate or credit granted relating to the Development Charges shall be for the benefit of the City.

### **3.19 Unsuitable Soil**

- (a) The Design-Builder is responsible for managing the removal of Unsuitable Soil found on the Lands in order to carry out the Project Work, including the costs, schedule and other impacts as follows:
- (i) Design-Builder is solely responsible for Unsuitable Soil up to 10,000 m3.
  - (ii) Design-Builder will be compensated for Unsuitable Soil in excess of 10,000 m3 at a unit rate of [REDACTED]. The unit rate is full compensation to the Design-Builder for all costs and schedule impacts associated with managing the Unsuitable Soil including any associated costs for import fill.
  - (iii) Managing volumes of Unsuitable Soil greater than 40,000 m3, shall be considered a Relief Event in accordance with Section 10 [*Relief Events and Limited Relief Events*].
- (b) In order for soil to be considered Unsuitable Soil, the Design-Builder must demonstrate that the removal of the soil is required in order to complete the Project Work in accordance with the Construction Soil Management Sub-Plan.
- (c) Design-Builder shall provide monthly reports to the City's Representative that include the following information:
- (i) evidence demonstrating that the soil removed meets the requirements of Unsuitable Soil;

- (ii) a description of that part of the Project Work that is affected by the Unsuitable Soil; and
- (iii) details of how the Design-Builder has managed the Unsuitable Soil.
- (d) Volume of Unsuitable Soil will be calculated from evidence of weight and agreed upon densities for the Unsuitable Soil or as otherwise agreed by the City.
- (e) Unsuitable Soil that contains Contamination shall be considered Contamination in accordance with Section 15.2 [*Responsibility for Contamination*] of Schedule 10 [*Environmental Performance Requirements*] and not subject to Subsections (a), (b), (c) and (d) above.

#### **4. DESIGN AND CONSTRUCTION OF THE INFRASTRUCTURE**

##### **4.1 Design-Builder's Obligations**

Design-Builder shall perform and carry out the Design and Construction and the Warranty Work in accordance with this Agreement, including the Design and Construction Requirements and in material conformity with the Construction Schedule, as the same may be amended from time to time in accordance with this Agreement.

##### **4.2 Design and Construction Requirements**

Notwithstanding any other provision of this Agreement, Design-Builder's obligation to conduct the Design and Construction of the Infrastructure in accordance with the Design and Construction Requirements is absolute, and cannot be modified or waived except by amendment of the Design and Construction Requirements made in accordance with Section 5 [*Modifications, Change Orders, Other Works and City Works*], Schedule 13 [*Changes*] or as otherwise expressly permitted in accordance with this Agreement. If Design-Builder asserts that any aspect of the Design and Construction Requirements is uncertain or ambiguous, either Party may require that the interpretation of that aspect of the Design and Construction Requirements be determined by the Dispute Resolution Procedure if they are not able to resolve the matter through their respective Representatives.

##### **4.3 Design-Builder Solely Responsible for Costs**

Design-Builder is solely responsible for paying all costs, fees and charges of any nature whatsoever required to complete the Design and Construction and the Warranty Work except:

- (a) as otherwise expressly set forth in this Agreement; and
- (b) costs, fees and charges of the City's own personnel, consultants and professional advisors in respect of the City acting as a counterparty to any Project Document.

Notwithstanding subsection (b) above, Design-Builder will be responsible for payment of costs, fees and charges of the City's own personnel, consultants and professional advisors if

- (c) the costs, fees and charges are in respect of the City acting as a Governmental Authority; or
- (d) the costs, fees and charges of the City are expressly set forth in this Agreement as being the responsibility of Design-Builder.

#### 4.4 Construction Within the Lands

Design-Builder agrees to install the Infrastructure entirely within the Lands, and acknowledges that it has fully familiarized itself with the Design and Construction Requirements and the Lands and has satisfied itself that no other land outside the Lands is required.

#### 4.5 Stop Work Order

The City may at any time direct Design-Builder to cease any Project Work that it considers to be not in accordance with the Project Requirements. If it is subsequently determined that the work was in accordance with the Project Requirements, then such direction shall, subject to Section 10 [*Relief Events and Limited Relief Events*], constitute a Relief Event under Section 10.1.1(a)(ii).

#### 4.6 Construction Completion

- (a) The requirements for, and achievement of Construction Completion are as set out in Schedule 7 [*Construction Completion, Service Readiness and Final Completion*];
- (b) Unless Design-Builder obtains the prior written consent of the City (which the City may grant or refuse in its sole discretion), Design-Builder shall not be entitled to the Certificate of Construction Completion prior to, and the Construction Completion Date shall not be earlier than, the Target Construction Completion Date;
- (c) If Design-Builder advises the City that it expects to be able to achieve Construction Completion prior to the Target Construction Completion Date, the City's Representative shall be entitled to require Design-Builder to produce and submit to the City's Representative a proposed revision to the then-current Construction Schedule showing the manner and the periods in which the Project Work shall be performed and what the revised date for Construction Completion would be so as to enable the City to consider at its sole discretion:
  - (i) if applicable, whether to agree to an earlier Construction Completion Date or Target Construction Completion Date; and
  - (ii) what modifications, if any, may be required to this Agreement in order to accommodate such earlier Construction Completion Date, or Target Construction Completion Date.
- (d) Default Points and liquidated damages shall continue to be applicable in accordance with this Agreement, including for failure to achieve Construction Completion on the Target Construction Completion Date as the same may be revised pursuant to this Section 4.6.
- (e) The City may at any time require monitoring, rectification and/or exercise step-in rights as contemplated in Section 13.7 [*City's Remedial Rights*].

#### 4.7 Construction Milestones

In addition to Construction Completion, Design-Builder shall satisfy all requirements and preconditions set out in Schedule 7 [*Construction Completion, Service Readiness and Final Completion*].

#### 4.8 Term

Unless this Agreement is terminated earlier in accordance with its terms, the term (the "**Term**") shall commence on the Effective Date and shall expire on the date (the "**Expiry Date**") which is the last to occur of:



- (a) the date the Certificate of Final Completion has been issued in accordance with Schedule 7 [*Construction Completion, Service Readiness and Final Completion*]; and
- (b) the expiry of the Warranty Period.

## **5. MODIFICATIONS, CHANGE ORDERS, OTHER WORKS AND CITY WORKS**

### **5.1 Modification and Change Orders**

#### **5.1.1 City Change Orders**

If the City wishes to modify the Project or the Project Requirements, it shall proceed as provided in Schedule 13 [*Changes*], provided that:

- (a) except as otherwise agreed between the City and Design-Builder (including without limitation any arrangement proposed by Design-Builder under Section 5.1.1(b) and agreed to by the City), Design-Builder shall be entitled to payment from the City, on a progress basis, as part of the Monthly Construction Payment, of the costs and adjustments of carrying out the Change calculated in accordance with Schedule 13 [*Changes*] and as set out in the applicable Change Order Confirmation; and
- (b) if Design-Builder anticipates that the Change will delay Construction Completion, but is of the opinion the delay can be avoided or mitigated through extraordinary measures, Design-Builder may propose to the City that such extraordinary measures be taken by Design-Builder at the City's expense.

Design-Builder may also submit an Innovation Proposal in respect of the Project or the Project Requirements for consideration by the City in accordance with Schedule 13 [*Changes*].

#### **5.1.2 City Directions**

Notwithstanding Section 5.1.1 [*City Change Orders*], Design-Builder shall, subject to and in accordance with Schedule 13 [*Changes*], be entitled to a Change if a written direction issued by or on behalf of the City to Design-Builder or any Design-Builder Person results in a variation, addition, reduction, substitution, omission, modification, deletion, removal or other change to the whole or any part of the Project Work.

### **5.2 Other Works and City Works**

#### **5.2.1 City Responsibilities; Other Works and City Works**

Where the City:

- (a) enters into a contract with an Other Contractor in respect of Other Works or City Works;
- (b) undertakes Other Works or City Works using its own forces; or
- (c) issues a permission, consent, approval, certificate, license, authorization or permit to an Other Contractor in respect of Other Works or City Works,

in each case, where such Other Works or City Works will be carried out at the same time as any Project Work, the City shall:

- (d) cooperate with Design-Builder and Other Contractors in relation to the coordination and scheduling of the Project Work, Other Works and City Works;

- (e) participate, upon reasonable request and, where practicable, on not less than one week's advance notice, in coordination and scheduling meetings between Design-Builder and the Other Contractors;
- (f) make commercially reasonable efforts to include conditions which are compatible with the conditions of this Agreement in the applicable contracts, permissions, consents, approvals, certificates, licences, agreements, authorizations and permits in respect of such Other Works and City Works; and
- (g) make commercially reasonable efforts to require the Other Contractors performing such Other Works or City Works to:
  - (i) meet with Design-Builder and to comply, and perform the Other Works and City Works in accordance, with Design-Builder's reasonable scheduling and coordination protocols;
  - (ii) comply, and perform the Other Works and City Works in accordance with Design-Builder's reasonable site rules, access control protocols and instructions relating to health, safety and security, to the extent that such Other Works and City Works are being performed on a worksite for which Design-Builder or a Subcontractor has been designated "Prime Contractor" in accordance with Schedule 11 [*Construction Safety Requirements*];
  - (iii) cooperate, and participate, with Design-Builder, the City and Other Contractors in the coordination and scheduling of the Project Work, Other Works and City Works; and
  - (iv) provide property damage (if applicable) and commercial general liability insurance coverage as would be required by a prudent owner similarly situated, and coordinate such insurance with the insurance coverage of Design-Builder, provided that the commercial general liability insurance to be provided by the Other Contractors performing such Other Works shall be not less than \$5,000,000.

### **5.2.2 Design-Builder Responsibilities; Other Works and City Works**

In connection with Other Works and City Works, Design-Builder shall:

- (a) cooperate with the City and Other Contractors, so as to permit the efficient performance of the Other Works and City Works, while minimizing the impact to the Project Work;
- (b) use commercially reasonable efforts to coordinate and schedule the Other Works and City Works with the Project Work;
- (c) perform, or cause to be performed, its obligations pursuant to this Agreement, including its obligations as "Prime Contractor" in accordance with Schedule 11 [*Construction Safety Requirements*] and its security and site access control obligations in accordance with Schedule 4 [*Design and Construction Protocols*] and Schedule 29 [*Security Matters*];
- (d) comply, and perform the Project Work in accordance with Other Contractors' reasonable site rules, access control protocols and instructions relating to health, safety and security, but only to the extent that such Project Work or City Work is being performed on a worksite for which the Other Contractor has been designated "Prime Contractor";

- (e) provide reasonable and timely access to the City Lands and any Additional Lands in order to permit Other Contractors and the City to perform the Other Works and City Works;
- (f) afford the City and Other Contractors reasonable opportunity to introduce and store their equipment, machinery, tools, materials and other products on the Lands and to use their machinery, tools, materials, equipment and other products to execute the Other Works and City Works;
- (g) provide reasonable input, upon request from the City, with respect to the proposed terms of any contracts, permissions, consents, approvals, certificates, licences, agreements, authorizations and permits in respect of Other Works and City Works;
- (h) make Design-Builder's site rules, access control protocols and instructions relating to health, safety and security available to the City and Other Contractors; and
- (i) where part of the Project Work is affected by or depends upon, for its proper execution, Other Works or City Works, promptly report to the City in writing and prior to proceeding with that part of the Project Work, any deficiencies in the Other Works or City Works of which Design-Builder has knowledge. Failure or delay by Design-Builder to report within ten Business Days from proceeding with the Project Work, and to the extent such failure or delay, has prejudiced the City's ability to rectify the deficiency or mitigate its impact will be taken into account in the determination of any claim for relief under Section 10 [*Relief Events and Limited Relief Events*].

### **5.2.3 Cooperation; Other Works and City Works**

For the purpose of Sections 5.2.1 [*City Responsibilities; Other Works and City Works*] and 5.2.2 [*Design-Builder Responsibilities; Other Works and City Works*], the obligation to "cooperate" shall mean:

- (a) arranging and participating in meetings with respect to the effective and efficient coordination and scheduling of Other Works, City Works and the Project Work;
- (b) establishing mutually acceptable protocols for the effective and efficient coordination and scheduling of Other Works, City Works and the Project Work;
- (c) accommodating reasonable requests for adjustments to scheduled activities as required (provided that such adjustments do not adversely affect the Construction Completion Date) to permit the effective and efficient performance of the Project Work, City Works and Other Works;
- (d) providing timely response to inquiries and requests, including reasonable requests for commentary on relevant designs; and
- (e) taking reasonable steps to avoid disputes.

## **6. WARRANTY**

### **6.1 Warranty Obligations**

- (a) Design-Builder represents, warrants and covenants that the Infrastructure, including, for greater certainty, all Equipment, parts and workmanship, including those replaced during the applicable Warranty Period, shall:

- (i) conform to the Project Requirements, Applicable Law and all professional engineering principles generally accepted as standards of the industry in the Province of Alberta;
  - (ii) be free of Deficiencies; and
  - (iii) be comprised of material and Equipment that is new, of good quality, of merchantable quality and fit for its intended purpose, except to the extent that material or Equipment has been prescribed in the Design and Construction Requirements.
- (b) Design-Builder shall promptly, at its sole cost and expense, correct and Make Good all Deficiencies (whether patent or latent) discovered in respect of the Infrastructure during the Warranty Period. For greater certainty, Design-Builder is required to correct and Make Good Deficiencies related to any Equipment during the Warranty Period notwithstanding Design-Builder having obtained on the City's behalf Manufacturer Warranties in accordance with Section 6.1(d).
- (c) The warranties set out in this Section 6.1 [*Warranty Obligations*] shall cover labour and materials, including the costs of removal and replacement of covering materials. None of the warranties shall limit extended warranties on any item of Equipment called for elsewhere in the Project Requirements or otherwise provided by any manufacturer of such item of Equipment.
- (d) Design-Builder shall obtain warranties from the manufacturers of each item of Equipment (each, a **"Manufacturer Warranty"**):
- (i) for the duration(s) and in accordance with the applicable requirements specified in the Project Requirements; and
  - (ii) where, in respect of an item of Equipment, the Project Requirements do not specify a specific duration and/or other requirements, industry-standard warranties using commercially reasonable efforts to ensure that such Equipment warranties extend for as long a period from the Construction Completion Date, as can be obtained from the applicable manufacturer, but in any event for no less than two years, provided that, Design-Builder will not have breached this Section 6.1.(e)(ii) provision if, having used commercially reasonable efforts, it is unable to obtain a warranty for such period, but Design-Builder's warranty obligations under this Agreement will continue to apply in respect of such Equipment.

Design-Builder shall obtain such Manufacturer Warranties in the name of and to the benefit of Design-Builder and, to the extent possible, the City. Each Manufacturer Warranty shall be issued by the applicable manufacturer and delivered to Design-Builder no later than 30 days prior to the Construction Completion Date. Design-Builder shall ensure that each Manufacturer Warranty is fully assigned to the City, at no cost or expense to the City, at the end of the Warranty Period, as such period may be extended in accordance with Section 6.2(a).

- (e) On or before the Construction Completion Date, Design-Builder shall provide to the City at least two copies of the compilation of warranty certificates for the Infrastructure. Design-Builder shall update all copies of the compilation from time to time in respect of any extensions of the Warranty Period as each Warranty Period commences. The compilation shall indicate the start and completion date of each Design-Builder warranty.

- (f) Design-Builder acknowledges that the City may, in its sole discretion, maintain, repair and/or alter (or cause any other City Person to maintain, repair or and/or alter) any part or parts of the Project Work during the Warranty Period, including the replacement of Equipment, and Design-Builder agrees that such work shall not affect any of the warranties (or any Manufacturer Warranty) provided by Design-Builder hereunder, provided that such work is carried out in accordance with Good Industry Practice and, if applicable, the Operating and Maintenance Manuals and that such work does not materially alter the affected part or parts of the Project Work.
- (g) Notwithstanding Sections 6.1(b), Design-Builder shall not be responsible for the repair, replacement or correction of any Deficiencies or any damage to the Infrastructure to the extent such Deficiencies or damage arise out of or result from any of the following causes:
  - (i) improper operation or maintenance of the Infrastructure by the City or City Persons;
  - (ii) normal wear and tear;
  - (iii) damage to the Infrastructure caused by Persons other than Design-Builder or Design-Builder Persons; and
  - (iv) subject to Section 6.1(f), damage to the Infrastructure or work or modifications to the Infrastructure performed by the City or City Persons;

## 6.2 Warranty Work and Prompt Repair of Warranty Work

- (a) Design-Builder shall carry out all Project Work, including correction of Deficiencies, to satisfy the warranties provided pursuant to this Section 6 [Warranty], and in accordance with the Warranty Period, and Design-Builder shall also Make Good any damage to other works caused by the repairing of such defects, deficiencies, or failures to comply (collectively, the “**Warranty Work**”). All Warranty Work shall be carried out and completed at Design-Builder’s sole cost and expense and Warranty Work shall not be the basis of a claim for a Relief Event, a Force Majeure Event, a Change or additional compensation or damages. The Warranty Period shall be extended for a further two years from the date of the last Warranty Work completed and accepted by the City in respect of the Infrastructure, provided that the maximum aggregate length of the Warranty Period shall be five (5) years from the Construction Completion Date. For clarity, any extension of a Warranty Period for the purposes of a correction shall only apply to the relevant Warranty Work and not the Project Work as a whole.
- (b) Design-Builder acknowledges and agrees that the timely performance of Warranty Work is critical to the ability of the City to maintain effective operations of the Capital Line LRT. Design-Builder shall use commercially reasonable efforts to respond to any requirement by the City to perform Warranty Work within the time periods required by the City to perform the Warranty Work for the Infrastructure. Design-Builder shall commence and complete Warranty Work as expeditiously as possible and at times convenient to the City, which may require work outside normal working hours at Design-Builder’s expense. Any extraordinary measures required to complete such Warranty Work, as directed by the City to accommodate the operation of the Capital Line LRT or other aspects of the Infrastructure as constructed, shall be at Design-Builder’s sole cost and expense. In relation to critical areas required for effective operations, Design-Builder shall commence, carry out and complete Warranty Work on an urgent basis with all due haste, taking into account the circumstances and any timelines for commencement and completion as may be communicated by the City to Design-Builder.

- (c) Design-Builder acknowledges and agrees that if the City is unable to contact Design-Builder and/or obtain the performance of the Warranty Work promptly (having regard to whether the Warranty Work is of an urgent nature), the City may take such steps as are reasonable and appropriate (including the engagement of third parties or the use of the City's own forces) to correct any Deficiencies or failures to comply with the Agreement, at Design-Builder's sole cost and expense. Except in the case of damage caused by the City's own forces or by third parties engaged by the City, but subject to Section 6.1(f), such steps taken by the City's own forces or by third parties engaged by the City, as applicable, shall not invalidate any Design-Builder warranties.
- (d) Design-Builder acknowledges and agrees that all safety requirements set out in Schedule 11 [*Construction Safety Requirements*], and any LRT rules and standard operating procedures established by the City (provided such rules and operating procedures are generally consistent with standard industry practice in respect of Canadian LRTs) or otherwise required pursuant to Applicable Law, apply to Design-Builder's performance of its obligations in accordance with this Section 6 [*Warranty*].
- (e) Subject to Section 13.4(b) the warranties set out in this Section 6 [*Warranty*] shall not deprive the City of any action, right or remedy otherwise available to the City at law or in equity, and the periods referred to in this Section 6 [*Warranty*], shall not be construed as a limitation on the time in which the City may pursue such other action, right or remedy.
- (f) Neither test results, nor selection or approval by the City or the City's Representative of testing entities, nor any other provision in this Agreement shall have the effect of limiting or shortening or otherwise affecting in any way whatsoever the duration, effectiveness or content of any guarantee or warranty set forth in this Section 6 [*Warranty*] or any other document or material forming part of this Agreement and, where Design-Builder has failed to perform Warranty Work and the City is entitled to perform such Warranty Work itself or using the City's own forces and at Design-Builder's cost, the City may, at any time and from time to time, fund the cost of completing such Warranty Work by drawing against the Performance Letter of Credit subject to the terms thereof.

## **7. PAYMENT**

### **7.1 Payment by City**

Subject to Design-Builder meeting the requirements for payment set out in this Agreement, including Schedule 16 [*Payment Mechanism*], the City will pay Design-Builder amounts the City is expressly obligated to pay under the Agreement, including:

- (a) the Design and Procurement Payments as set out in Schedule 16 [*Payment Mechanism*];
- (b) the Monthly Construction Payments as set out in Schedule 16 [*Payment Mechanism*];
- (c) the Construction Completion Payment;
- (d) the Legislative Holdback Payment;
- (e) amounts owing under Section 3 [*Land Matters*];
- (f) amounts owing under Section 9 [*Force Majeure*];
- (g) amounts owing under Section 10 [*Relief Events and Limited Relief Events*];
- (h) the Termination Payments as set out in Section 15 [*Termination Payments*];

- (i) amounts owing under Schedule 10 [*Environmental Performance Requirements*];
- (j) amounts owing under Schedule 13 [*Changes*];
- (k) amounts owing for Construction Payment Adjustments as set out in Section 2.3 [*Construction Payment Adjustments*] of Schedule 16 [*Payment Mechanism*];
- (l) amounts owing under Schedule 17 [*Insurance and Performance Security Requirements*];
- (m) amounts owing under Schedule 20 [*Dispute Resolution Procedure*]; and
- (n) amounts owing under Schedule 28 [*Project Approvals and Utility Matters*] Part 2 [*Utility Matters*].

in accordance with the provisions of this Agreement.

## **7.2 Limitations on Payments**

- (a) Other than the payments expressly provided for in this Agreement, Design-Builder will have no right to any further payment from the City in connection with the performance and completion of all or any portion of the Project Work or otherwise under or in relation to this Agreement or the Project.
- (b) No payment hereunder shall be construed as an acceptance or approval of incomplete, defective or improper performance by Design-Builder of any of its obligations under this Agreement, nor shall it operate to relieve Design-Builder from the performance of any of its obligations under this Agreement which have not been performed.

## **7.3 Legislative Holdback Payment**

- (a) Subject to Section 14.5(a), the City covenants and agrees with Design-Builder to pay to Design-Builder the Legislative Holdback Payment or pay to such Person as otherwise directed by Design-Builder and shall not accept any redirection without the consent of the Person to whom payment is directed. The City agrees to pay the Legislative Holdback Payment as Design-Builder may direct in accordance with any such direction. Design-Builder acknowledges and agrees that payment by the City of the Legislative Holdback Payment in accordance with this Section 7.3 [*Legislative Holdback Payment*] as Design-Builder may direct, constitutes payment by the City to Design-Builder in satisfaction of the City's obligation to pay the Legislative Holdback Payment to Design-Builder under Section 2.6 [*Legislative Holdback Payment*] of Schedule 16 [*Payment Mechanism*] and in satisfaction of any trust obligation of the City with respect to such payments under the PPCLA.
- (b) Payment of the Legislative Holdback Payment is subject to the provisions of Section 3.12 [*Prompt Payment and Construction Lien Act*] and the removal of claims for liens preserved or perfected pursuant to the PPCLA arising in relation to the performance of the Project Work.

## **7.4 Payment Procedure**

- (a) All payments by the City to Design-Builder shall be made in accordance with this Section 7.4 [*Payment Procedure*] and/or Section 4 [*Payment Procedures and Reporting*] and Section 5 [*Payment of Proper Invoice*] of Schedule 16 [*Payment Mechanism*], as applicable.

- (b) All payments under this Agreement shall be made in Canadian dollars and shall be electronically transferred, quoting the invoice number or description against which payment is made, in immediately available funds on the due date to the bank accounts located in Canada as may be designated by the recipient from time to time by written notice to the other Party (acting reasonably).
- (c) If the due date is not a Business Day, then the electronic transfer shall be made on the Business Day immediately succeeding such day.
- (d) Unless specific timeframes are stipulated for payment of any amounts owing or payable by one Party to the other Party under this Agreement, such amounts shall be paid within 28 days of receipt or deemed receipt of a Proper Invoice therefor.

## 7.5 Taxes

- (a) Except as otherwise provided in this Agreement, all amounts specified in this Agreement are expressed exclusive of GST and other similar taxes payable by the City but inclusive of all other Taxes. Applicable GST shall be paid in accordance with the Excise Tax Act (Canada). As required by the Excise Tax Act (Canada), Design-Builder shall provide to the City appropriate documentation containing all the information necessary for the City to claim an input tax credit or rebate, including the amount of GST payable and the registration number of Design-Builder.
- (b) Subject to Section 3.5 *[No Access Fee]*, Section 3.18 *[Development Charges]* and Schedule 28 *[Project Approvals and Utility Matters]* Part 1 *[Project Approvals]*, the City shall pay or otherwise be responsible for, when due and payable, all property taxes, local improvement levies or payments in lieu of property taxes that are assessed in respect of ownership or use of the City Lands or Infrastructure.
- (c) Within 3 weeks of the end of the month in which a supply is completed for the purposes of paragraph 168(3) of the Excise Tax Act (Canada) (in this Section an “**Acceleration Event**”), if applicable, the City shall pay to Design-Builder all GST payable in accordance with paragraph 168(3) of the Excise Tax Act (Canada) in respect of such supply for remittance to the Canada Revenue Agency, which amount, if any, shall be set out in an invoice issued by Design-Builder to the City upon the occurrence of the Acceleration Event and shall reflect the Total Capital Cost Amount of such supply, which shall serve as a reasonable estimate of the full consideration for such supply. For clarity, the amount of each payment made by the City to Design-Builder pursuant to paragraph 168(3) of the Excise Tax Act (Canada) does not include any GST amounts already paid by the City to Design-Builder.
- (d) Subject to Section 7.5(e), in each Proper Invoice provided by Design-Builder to the City, Design-Builder shall show on a distinct line of the invoice the Previously Paid Monthly GST Amount used to determine the amount of unpaid GST payable by the City on such Payment. For clarity, a Previously Paid Monthly GST Amount must be credited to the City on each Proper Invoice.
- (e) The City shall pay all applicable GST properly payable in accordance with the Excise Tax Act (Canada) by the City upon and in connection with payments by the City to Design-Builder under this Agreement.
- (f) Design-Builder shall not undertake any action or transaction that, if undertaken, would cause or result in Design-Builder ceasing to be a corporation for purposes of the Income Tax Act (Canada) or becoming a Non-Resident without the City’s prior written consent, which consent may be withheld in the City’s discretion.



- (g) Design-Builder shall not, without the prior written consent of the City, undertake any action or transaction that, if undertaken, would cause the City to have (or result in the City 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 Design-Builder under this Agreement or under any other Project Document.
- (h) If (i) Design-Builder becomes a Non-Resident, or (ii) the City 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 Design-Builder by the City under this Agreement, then the City shall be entitled to make any applicable deductions or withholdings from any amount paid or credited or to be paid or credited to Design-Builder on or after the date on which (A) Design-Builder becomes a Non-Resident and at all times while it remains a Non-Resident; or (B) the City 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 the City under this Agreement to Design-Builder, shall be paid or credited net of such deductions or withholdings. Any amount deducted and withheld in respect of Taxes shall be deemed to have been paid to Design-Builder on the due date of the related amount payable.
- (i) If (i) Design-Builder becomes a Non-Resident, or (ii) the City or any City Person 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 Design-Builder or a Design-Builder Person by the City or any City Party under this Agreement or under any of the Project Documents, Design-Builder shall, in each case, indemnify and hold harmless the City for (A) the full amount of all Taxes (in this Section “**Indemnifiable Taxes**”) that arise, are imposed on or are required to be paid by the City in respect of any amounts paid or credited by the City to Design-Builder under this Agreement as a result of either of the foregoing items less any amount withheld or deducted by the City 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 (in this Section “**Associated Liabilities**”).
- (j) Payment of Indemnifiable Taxes shall be made within 28 days from the date the City makes written demand for payment. A certificate containing reasonable detail as to the amount of Indemnifiable Taxes and Associated Liabilities submitted to Design-Builder by the City shall be conclusive evidence, absent manifest error, of the amount due from Design-Builder to the City. The City shall be entitled to exercise its rights of set off under Section 7.6 [*Set-off*] of any amounts owing under this indemnification against other amounts owing to Design-Builder.
- (k) If Section 182 of the Excise Tax Act (Canada) is applicable to any amount payable under this Agreement, such payment will be increased by an amount such that after remitting the applicable GST Design-Builder will be in the same position as it would have been if Section 182 of the Excise Tax Act (Canada) were not applicable.
- (l) Design-Builder acknowledges and understands that this Agreement may require the performance of Scientific Research and Experimental Development (“**SR&ED**”) as defined in subsection 248(1) of the Income Tax Act (Canada). The City agrees that, to the extent that SR&ED is required, the SR&ED will be performed by Design-Builder and Design-Builder is entitled to claim such credits or incentives.

(m) GST Adjustment:

- (i) The City will pay to Design-Builder amounts equal to any GST or similar taxes (e.g. HST, if applicable), incurred by Design-Builder or a Sub-Contractor in respect of the supply of any good or service to the City that is consumed, used or supplied or to be consumed, used or supplied exclusively by Design-Builder or a Sub-Contractor in the course of carrying out the Project Work or otherwise performing Design-Builder's obligations under this Agreement, to the extent that Design-Builder or the Sub-Contractor is unable to recover or be credited with input tax credits, refunds, rebates or exemptions for such taxes as a result of a change in Applicable Law after the Financial Bid Response Deadline related to such taxes, and only to the extent necessary to leave Design-Builder in no better or worse position than before such change in Applicable Law.
- (ii) Design-Builder will pay to the City, directly or by way of set-off against Payments, amounts equal to any GST or similar taxes (e.g. HST, if applicable), incurred by Design-Builder or a Sub-Contractor in respect of the supply of any good or service to the City that is consumed, used or supplied or to be consumed, used or supplied exclusively by Design-Builder or a Sub-Contractor in the course of carrying out the Project Work or otherwise performing Design-Builder's obligations under this Agreement, to the extent that Design-Builder or the Sub-Contractor is able to recover, or be credited with, input tax credits, refunds, rebates or exemptions for such taxes as a result of a change in Applicable Law after the Financial Bid Response Deadline related to such taxes, and only to the extent necessary to leave Design-Builder in no better or worse position than before such change in Applicable Law.

## 7.6 Set-off

The Parties agree that their rights of set-off at law or in equity are limited to the right of:

- (a) the City to set off against any amounts otherwise due to Design-Builder pursuant to the terms of this Agreement or any other agreement or arrangement between the Parties any amounts which are due to the City by Design-Builder pursuant to the terms of this Agreement or any other agreement or arrangement between the Parties; and
- (b) Design-Builder to set off against any amounts otherwise due to the City pursuant to the terms of this Agreement or any other agreement or arrangement between the Parties any amounts which are due to Design-Builder by the City pursuant to the terms of this Agreement or any other agreement or arrangement between the Parties.

## 7.7 Interest on Overdue Payments

Except as otherwise provided in Section 14.5(a), any amount payable under this Agreement and not paid when it becomes due shall bear interest daily at the Default Rate of Interest, without compounding, from the due date of the amount payable until the date (or dates) of payment. Where pursuant to the Dispute Resolution Procedure a disputed amount is determined to have been payable, then subject to any contrary determination pursuant to the Dispute Resolution Procedure, interest at the Default Rate of Interest, without compounding, shall be payable from the date when such amount ought to have been paid until the date (or dates) of payment.

## 7.8 Disputed Amounts

A Party will pay any undisputed portion of any amount payable to the other Party in accordance with this Agreement. Any disputed portion or amount, which does not include any Payment Adjustments provided

for under the Payment Mechanism, will not be payable until the Dispute is resolved in accordance with the Dispute Resolution Procedure. In the event that Design-Builder disputes the amount of any Payment, Design-Builder shall bring such Dispute in accordance with the Dispute Resolution Procedure and if the Design-Builder does not bring such Dispute within 45 days after the date the Payment is received, absent a manifest error, Design-Builder shall be estopped from later disputing the amount so paid.

## **7.9 Payments by Design-Builder**

Design-Builder will pay the City amounts Design-Builder is expressly obligated to pay under the Agreement, including:

- (a) amounts owing under Section 7.5 [*Taxes*];
- (b) amounts owing under Section 13.1 [*Design-Builder's Indemnity*];
- (c) amounts owing under Section 15 [*Termination Payments*];
- (d) amounts owing under Schedule 4 [*Design and Construction Protocols*]
- (e) amounts owing under Schedule 7 [*Construction Completion, Service Readiness and Final Completion*].
- (f) amounts owing under Schedule 10 [*Environmental Performance Requirements*];
- (g) amounts owing under Schedule 13 [*Changes*];
- (h) amounts owing under Schedule 16 [*Payment Mechanism*];
- (i) amounts owing under Schedule 17 [*Insurance and Performance Security Requirements*];
- (j) amounts owing under Schedule 20 [*Dispute Resolution Procedure*]; and
- (k) amounts owing under Schedule 26 [*Representatives and Key Individuals*],

in accordance with the provisions of this Agreement.

## **7.10 Lump Sum Payments**

Notwithstanding anything else to the contrary in this Agreement, to the extent a Party:

- (a) is entitled to payment from the other Party under this Agreement, other than a payment expressly described in Section 15 [*Termination Payments*] or Schedule 16 [*Payment Mechanism*]; or
- (b) is entitled to share in a benefit and to receive payment therefor from the other Party expressly provided for under this Agreement;

the entitled Party may make written demand for such payments from time to time after becoming entitled to payment, including in respect of any Direct Losses after such Direct Losses have been incurred, and in respect of any shared benefit, after receipt by the other Party of the shared benefit.

After delivery of written payment demand supported by all relevant information, the City or Design-Builder as the case may be, shall make such payment by a lump sum amount within 28 days unless the Parties mutually agree to an adjustment to the Payments as the means of structuring the payment.

## 8. INSURANCE, DAMAGE AND DESTRUCTION

### 8.1 Insurance Requirements

Subject to Section 4 [*Uninsurability*] of Schedule 17 [*Insurance and Performance Security Requirements*],

- (a) Design-Builder shall take out, maintain in force and renew, or cause to be taken out, maintained in force or renewed, all such insurance and Performance Security as set out in Schedule 17 [*Insurance and Performance Security Requirements*]; and
- (b) The City shall take out, maintain in force and renew, or cause to be taken out, maintained in force or renewed, all such insurance for the Project as set out in as set out in Schedule 17 [*Insurance and Performance Security Requirements*].

### 8.2 Design-Builder's Obligations - Damage or Destruction

- (a) Unless this Agreement is terminated or expires in accordance with its terms, if all or any part of the Infrastructure is damaged or destroyed at any time during the Construction Period, Design-Builder shall, at its own cost and expense, repair or replace, as applicable, the Infrastructure or such part of the Infrastructure, as applicable (the "**Reinstatement Work**"), promptly and in any event as soon as practicable in the circumstances. For clarity, such obligations shall extend to and include Existing Infrastructure only to the extent that any damage or destruction to such Existing Infrastructure arises as a result of the Project Work or any act or omission of Design-Builder or any Design-Builder Person.
- (b) Except as otherwise expressly provided, the partial destruction or damage or complete destruction of the Infrastructure by fire or other casualty shall not permit either Party to terminate this Agreement or entitle Design-Builder to surrender possession of the Infrastructure or to demand any increase in any amounts payable to Design-Builder under this Agreement and all of the provisions of this Agreement, including Section 9 [*Force Majeure*] and Section 10 [*Relief Events and Limited Relief Events*] shall continue to apply.

### 8.3 Reinstatement Plan

If the Reinstatement Work is reasonably likely to cost more than [REDACTED] (index linked), Design-Builder shall, as soon as practicable and in any event within 20 Business Days after the occurrence of the damage or destruction (or if, with the exercise of all due diligence more than 20 Business Days is reasonably required for such purposes, then within such longer period of time after the occurrence of such damage or destruction as may be reasonably required with the exercise of all due diligence, provided Design-Builder exercises and continues to exercise all such due diligence) submit to the City Representative pursuant to Schedule 2 [*Submittal Review Procedure*] a plan (a "**Reinstatement Plan**") prepared by Design-Builder for carrying out the Reinstatement Work setting out, in reasonable detail, *inter alia*:

- (a) a description of the Reinstatement Work required to restore, replace and reinstate the damage or destruction;
- (b) Design-Builder's proposed schedule for the execution of the Reinstatement Work, accompanied by a proposed revision to the then-current Construction Schedule; and
- (c) the information required pursuant to Schedule 13 [*Changes*] as if such plan were a Change Estimate;

and the Reinstatement Work must not be commenced until the City Representative consents thereto in accordance with Schedule 2 *[Submittal Review Procedure]* except to the extent necessary to address any Emergency or public safety needs.

Design-Builder shall cause the Reinstatement Work to be carried out in accordance with the Design and Construction Requirements and all other applicable requirements under this Agreement and, where applicable, in accordance with the Reinstatement Plan consented to by the City Representative in accordance with Schedule 2 *[Submittal Review Procedure]*.

If requested by the City Representative, the Persons (and if applicable, a suitable parent entity thereof acceptable to the City) retained by Design-Builder to design and carry out any Reinstatement Work shall, as a condition of their retainer and prior to commencing any Reinstatement Work or design work in connection therewith, enter into a construction contract with Design-Builder in a form that is satisfactory to the City, acting reasonably, and a direct agreement with the City in a form that is satisfactory to the City, acting reasonably.

#### **8.4 City's Election Not to Reinstale**

Subject to the City's rights under Section 14.3 *[Termination Upon Force Majeure]*, the City may, by notice to Design-Builder not later than 30 days after receipt of the Reinstatement Plan pursuant to Section 8.3 *[Reinstatement Plan]*, terminate this Agreement and pay compensation to Design-Builder in accordance with Section 4 *[Consequences of Non-Default Termination]* of Schedule 27 *[Compensation on Termination]*.

#### **8.5 Application of Insurance Proceeds If No Termination**

Unless the City has terminated this Agreement (including pursuant to Section 8.4 *[City Election Not to Reinstale]*), Design-Builder shall cause all:

- (a) applicable Insurance Proceeds which it has received; and
- (b) applicable Insurance Receivables which it is entitled to receive

to be applied to the reinstatement of the Infrastructure in accordance with the terms of this Agreement.

#### **8.6 Application of Insurance Proceeds In Case of Termination**

If the City has terminated this Agreement pursuant to Section 8.4 *[City's Election Not to Reinstale]*:

- (a) any Insurance Proceeds received by Design-Builder prior to the date on which the City must make the Termination Payment and not already applied to the repair of such damage shall first be applied against the Termination Payment and any Insurance Proceeds remaining after such application shall be paid to the City; and
- (b) on the date on which the City must make the Termination Payment, Design-Builder shall assign to the City the benefit of all Insurance Receivables which have been taken into account in calculating the Termination Payment.

#### **8.7 Standards of Replacement, Repair or Reconstruction**

Any replacement, repair, or reconstruction of the Infrastructure or any part thereof pursuant to the provisions of Sections 8.2 *[Design-Builder's Obligations - Damage or Destruction]* shall be made or done in compliance with Schedule 4 *[Design and Construction Protocols]* and/or the Design and Construction Requirements to the extent specified in Section 8.2 *[Design-Builder's Obligations - Damage or Destruction]*, subject to the terms of any Change Order Confirmation or agreement that may be made

between the City and Design-Builder to revise the Design and Construction Requirements as they pertain to any Reinstatement Work.

## **8.8 Mitigation**

Design-Builder shall take all reasonable steps to mitigate the effects of any risks or claims covered by this Section 8 [*Insurance, Damage and Destruction*] (including minimizing the amount of any costs and expenses which might result).

## **8.9 Effect on Indemnity and Force Majeure**

The foregoing provisions of this Section 8 [*Insurance, Damage and Destruction*] shall not affect:

- (a) Design-Builder's obligations pursuant to Section 13.1 [*Design-Builder's Indemnity*]; and
- (b) the Parties' rights to terminate this Agreement pursuant to Section 14.3 [*Termination Upon Force Majeure*].

## **9. FORCE MAJEURE**

### **9.1 Force Majeure**

If a Force Majeure Event occurs, then notwithstanding any other provision of this Agreement, but subject to the provisions of this Section 9 [*Force Majeure*]:

- (a) no liability or right of termination, other than either Party's right to terminate this Agreement pursuant to Section 14.3 [*Termination Upon Force Majeure*] arises under this Agreement from any failure by a Party to perform any of its obligations under this Agreement, but only to the extent that such failure to perform that obligation is directly caused by the occurrence of a Force Majeure Event;
- (b) if the Force Majeure Event or multiple Force Majeure Events causes a critical path delay for an aggregate period of at least ten calendar days within the Construction Period (the "**Force Majeure Waiting Period**") then the Target PICO Completion Date, the Target Construction Completion Date, and the date in Section 13.8(f) shall be extended by a period equal to the period of delay in excess of the Force Majeure Waiting Period caused by the relevant Force Majeure Events. For clarity, if two or more Force Majeure Events occur concurrently, then for the period of concurrency and for the purposes of calculating the Force Majeure Waiting Period, only one of the Force Majeure Events will be counted.
- (c) where the Target PICO Completion Date or the Target Construction Completion Date is adjusted as set out in Section 9.1(b) above, the only compensation that the City will pay to Design-Builder is an amount equal to the Direct Losses resulting from the adjusted completion date; excluding Avoidable Costs and applicable Insurance Proceeds and insurance proceeds which Design-Builder would have recovered in connection with the Force Majeure Event if it had complied with the requirements of this Agreement or any policy of insurance maintained or required to be maintained under this Agreement;
- (d) provided that Design-Builder complies with its obligations under this Section 9 [*Force Majeure*],
  - (i) any failure by Design-Builder to perform any affected Project Work in accordance with the requirements of this Agreement shall not constitute a Default;

- (ii) the City shall not be entitled to exercise its rights or remedies under Section 13.7 *[City's Remedial Rights]*;
- (iii) Construction Payment Adjustments shall not be made pursuant to Section 2.3 *[Construction Payment Adjustment]* of Schedule 16 *[Payment Mechanism]* and
- (iv) Default Points shall not be assessed,

in each case only to the extent that and for so long as the relevant Force Majeure Event directly prevents Design-Builder from being able to perform such Project Work or obligations in accordance with the requirements of this Agreement; and

- (e) if Design-Builder anticipates that the Force Majeure Event will delay Construction Completion, but is of the opinion that the delay can be avoided or mitigated through extraordinary measures not otherwise required under this Agreement, Design-Builder may propose to the City that such extraordinary measures be taken by Design-Builder at the City's expense and the City may, in its sole discretion, direct Design-Builder to take any or all of such extraordinary measures.

For greater certainty, except as specifically provided in this Section 9.1 *[Force Majeure]*, all other rights and obligations of the Parties under this Agreement remain unaffected by the occurrence of a Force Majeure Event and a Party shall only be relieved of its obligations under this Agreement arising from any delay or failure in performing any of such obligations to the extent, if any, provided for in this Section 9.1 *[Force Majeure]*.

## **9.2 Procedure on Force Majeure Event**

- (a) A Party shall provide written notice to the other Party within 5 Business Days of becoming aware of the occurrence of a Force Majeure Event.
- (b) The Party providing notice shall, within 15 Business Days after such notification, provide further written details to the other Party which shall include:
  - (i) a statement of which Force Majeure Event the claim is based upon;
  - (ii) details of the event or circumstances forming the basis for the Party's claim;
  - (iii) details of the contemporary records which such Party shall maintain to substantiate its claim for relief;
  - (iv) details of the consequences (whether direct or indirect, financial or non-financial) which such Force Majeure Event may have upon such Party and its obligations under this Agreement, accompanied by copies of all supporting records in such Party's custody or available to such Party which substantiate or support such Party's claim; and
  - (v) details of any measures which the Party proposes to adopt to mitigate the consequences of such Force Majeure Event.
- (c) In addition to the requirements of Section 9.2(a), if there is a potential impact on the Construction Schedule, then Design-Builder shall:
  - (i) submit to the City within 5 Business Days (or other timeline as agreed between the Parties on a case-by-case basis) after such notification a Schedule Update progressed to the date of the occurrence of the Force Majeure Event;

- (ii) for a Force Majeure Event that continues for longer than 30 calendar days, provide a monthly update of the impact of the Force Majeure Event to the Construction Schedule, which shall include a detailed description of the impact to the satisfaction of the City, acting reasonably;
  - (iii) submit to the City within 10 Business Days (or other timeline as agreed between the Parties on a case-by-case basis) after the Force Majeure Event ceases to affect Design-Builder's performance of the Project Work a Schedule Update progressed to the date of the conclusion of the Force Majeure Event; and
  - (iv) shall submit a forensic schedule analysis in accordance with AACE International Recommended Practice No. 29R-03 (a "**Forensic Schedule Analysis**") within 10 Business Days (or other timeline as agreed to between the Parties on a case by case basis) of the conclusion of the Force Majeure Event or the portion of the Force Majeure Event(s) that impacts the Construction Schedule. The Forensic Schedule Analysis shall include adequate justification for the selected forensic schedule analysis method and demonstrate that it produces the most accurate assessment of the event impact.
- (d) As soon as possible, but in any event within 5 Business Days, of the Party providing notice (the "**Notifying Party**") receiving, or becoming aware of, any supplemental information which may further substantiate or support its claim, it shall submit further particulars including copies of all related available records associated with such information to the other Party (the "**Notified Party**").
- (e) The Notified Party shall, after receipt of written details under Sections 9.2(a) or 9.2(c), be entitled by written notice to require the Notifying Party to provide such further supporting particulars as it may reasonably consider necessary. The Notifying Party shall provide the required supporting particulars in their entirety to the Notified Party as soon as practicable and, in any event, no later than 20 Business Days, after receiving the written notice and afford the Notified Party reasonable facilities for investigating the validity of its claim, including on-site inspection. Failure to provide the requested further supporting particulars within 20 Business Days shall result in the notice of the Force Majeure Event provided by Design-Builder pursuant to Section 9.2(a) being deemed to have been withdrawn.
- (f) If a Party is (or claims to be) affected by a Force Majeure Event, it shall, and shall require its respective Design-Builder Persons or City Persons, as applicable 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 Agreement
  - (ii) to continue to perform its obligations under this Agreement to the extent possible; and
  - (iii) to resume performance of its obligations under this Agreement affected by the Force Majeure Event as soon as practicable.
- (g) For clarity, no extension under Section 9.1(b) to the Target PICO Completion Date, the Target Construction Completion Date or the date in Section 13.8(f) will be granted unless the Forensic Schedule Analysis, provided in accordance with Section 9.2(c)(iv) demonstrates that the Force Majeure Event has caused a delay to a Key Date, and then only once all related schedule float is consumed, and in no event shall any such



extension exceed the necessary extension of the critical path resulting from the Force Majeure Event

- (h) To the extent that a Party does not comply with its obligations under this Section 9.2 [*Procedure on Force Majeure Event*], such failure (including without limitation, the effect of such failure on the other Party's ability to mitigate such Force Majeure Event) shall be taken into account in determining such Party's entitlement to relief and any compensation or schedule relief that might otherwise be provided under this Section 9 [*Force Majeure*] shall be reduced to the extent the other Party is prejudiced by such failure to comply.

### **9.3 Exclusions from Force Majeure Event**

Notwithstanding any other provision of this Agreement, including the definition of "Force Majeure Event" in Schedule 1 [*Definitions and Interpretation*], neither Design-Builder nor the City shall have the right to claim relief (as provided for in this Section 9 [*Force Majeure*]) from any liability or consequence arising from its inability to perform the obligation that is prevented, hindered or delayed by the Force Majeure Event to the extent that:

- (a) in the case of Design-Builder, the Project Requirements expressly require or contemplate that Design-Builder was or is expected to perform the obligations in question notwithstanding the occurrence of the Force Majeure Event;
- (b) the Party claiming the relief could have avoided (in whole or in part) the event, occurrence, circumstance or could have mitigated the related liability, consequences or impacts, by complying with its obligations under this Agreement, including any applicable prevention or control obligations and its mitigation obligations; or
- (c) such event, occurrence, circumstance or the related liability, consequence or impact, arises or is contributed to, directly or indirectly, as a result of any Legal Fault of the Party claiming the relief.

## **10. RELIEF EVENTS AND LIMITED RELIEF EVENTS**

### **10.1 Definitions**

#### **10.1.1 Relief Events**

In this Agreement, "**Relief Event**" means any of the following events, conditions, or circumstances if and to the extent that it interferes adversely with, or causes a failure of, the carrying out of the Project Work or causes Direct Losses to Design-Builder or any Design-Builder Person:

- (a) **City Events:**
  - (i) breach of any provision of this Agreement by the City or any other Legal Fault of the City or City Person (including any delay by the City in acquiring the required Real Property Interests in the City Lands described in Schedule 14 [*City Lands*], by such date as is specified in the Schedule);
  - (ii) a stop work order is issued without proper cause by the City as contemplated by and pursuant to Section 4.5 [*Stop Work Order*];
  - (iii) any Remedial Action taken by the City in the circumstances specified in Section 13.7(c)(iii);

- (iv) where the City directs Design-Builder to proceed with a matter in Dispute under Section 7.3.6(c) of Schedule 4 *[Design and Construction Protocols]* and the Dispute is determined in favour of Design-Builder;
  - (v) where the City exercises its rights under Section 7.3.6 *[Inspection]* of Schedule 4 *[Design and Construction Protocols]* and upon inspection it is determined there are no Deficiencies or other Nonconformities in the relevant part of the Infrastructure;
  - (vi) in the circumstances provided for in Section 6.3 *[The City's Directive]* of Schedule 20 *[Dispute Resolution]* where the City directs Design-Builder to carry out additional work and the related Dispute is decided in Design-Builder's favour;
  - (vii) in the circumstances provided for in Section 2.8.6 *[Design-Builder Constraints]* of Schedule 28 *[Project Approvals and Utility Matters]* Part 2 *[Utility Matters]*;
  - (viii) the existence of any material defect or deficiency in City Works;
  - (ix) failure to complete City Works within the "City Works Period" noted in Table 1-1.3.1 *[City Works]* of Schedule 5 *[D&C Performance Requirements]*;
- (b) **Site Conditions:**
- (i) the presence in, under or on the City Lands, of Historical Resources, which presence could not have been ascertained by Design-Builder or Design-Builder Persons by the exercise of Standard Due Diligence prior to the Financial Bid Response Deadline;
  - (ii) the presence on or around the City Lands of animal or plant species protected by Environmental Laws, which presence could not have been known or discovered by Design-Builder or Design-Builder Persons by the exercise of Standard Due Diligence prior to the Financial Bid Response Deadline;
  - (iii) a requirement under Section 3.11 for Design-Builder to perform obligations under a Permitted Encumbrance added after the Financial Bid Response Deadline;
  - (iv) a requirement under Section 3.10(f) for Design-Builder to perform obligations under an Encumbrance or the Encumbrance affects Design-Builder's performance of its obligations and Design-Builder has provided satisfactory evidence thereof in accordance with the requirements of Section 3.10(f);
  - (v) factual errors in the borehole logs or field and laboratory test data contained in the reports listed in Section 19.4(d) *[Design-Builder's Reliance on Information]*
    - (A) subject to the limitations and qualifications specified in Section 19.4(c) *[Design-Builder's Reliance on Information]*, and
    - (B) excluding where
      - (I) any delay or additional costs or expense that result from any interpretation of or extrapolation from or assumption made on the basis of any such interpretation, or from any action taken or omitted on the basis of any interpolation, extrapolation or assumption, or

- (II) if it was not in all the relevant circumstances and having regard to any other information known to Design-Builder at the relevant time reasonable in accordance with Good Industry Practice for Design-Builder to rely on the information containing the factual error or to rely on such information without further investigation or site examination;;
  - (vi) the existence of any material defect or deficiency in the Specified Existing Infrastructure discovered during the Construction Period that was not and could not reasonably have been known or discovered by a competent and experienced contractor in accordance with Good Industry Practice during a visual inspection of the Specified Existing Infrastructure prior to the Financial Bid Response Deadline;
  - (vii) the presence of a Baseline Condition Exceedance within the GBR Area;
  - (viii) the existence of any material defect or deficiency in the equipment, components, systems and sub-systems within the Existing Infrastructure discovered during the Construction Period that was not and could not reasonably have been known or discovered by a competent and experienced contractor in accordance with Good Industry Practice during a review of the Disclosed Data or during a visual inspection of the Existing Infrastructure prior to the Financial Bid Response Deadline;
- (c) **Third Party Events:**
- (i) an act or omission of an Other Contractor engaged in the performance of Other Works during the Term;
  - (ii) claims of aboriginal title or treaty rights in respect of all or any part of the Lands;
  - (iii) subject to Design-Builder and all Design-Builder Persons complying with their obligations under Section 3.9 [*Permitted Use of Lands*], injurious affection or public nuisance claims made by any Person other than a Design-Builder Person by reason of the Project;
  - (iv) an order granted by a court of competent jurisdiction directly resulting from any proceeding brought by a third party against the City or to which the City is a party;
- (d) **Utility Work Relief Events:**
- (i) the existence of undisclosed Utility Infrastructure that is not properly inferable from the Disclosed Data at the Financial Bid Response Deadline and from other information or data available to Design-Builder in the course of carrying out Utility Best Practices;
  - (ii) the existence of Mislocated Utilities;
  - (iii) the existence of latent defects in the existing Utility Infrastructure that is not properly inferable from the Disclosed Data at the Financial Bid Response Deadline and from other information or data available to Design-Builder in the course of carrying out Utility Best Practices. For greater certainty, but without limiting the Relief Event referred to in Section 10.1.1(d)(i), the location of Utility Infrastructure shall not be considered a latent defect;

- (iv) the occurrence of an Extraordinary Delay notwithstanding compliance by Design-Builder with this Agreement, including the adoption and application of Utility Best Practices; and
- (v) failure by the City to enter into the Pipeline Agreements in the time periods specified in Section 2.5.4 of Schedule 28 *[Project Approvals and Utility Matters]* Part 2 *[Utility Matters]*.

The Relief Events set forth in this Section 10.1.1(d) are sometimes referred to as “**Utility Work Relief Events**”; and

- (e) **Other:**
  - (i) the Relief Event referred to in Section 15.2(a)(i)(3) of Schedule 10 *[Environmental Performance Requirements]*;
  - (ii) the Relief Event referred to in Section 15.7(n) of Schedule 10 *[Environmental Performance Requirements]*;
  - (iii) the Relief Event referred to in Section 3.19 *[Unsuitable Soil]*;
  - (iv) the existence of any material defect or deficiency in a product on the Approved Products List which is required to be used by the Design-Builder in accordance with the Design and Construction Requirements;
  - (v) any other matter expressly defined as a Relief Event in this Agreement, and
  - (vi) Hyper Escalation.

#### 10.1.2 Limited Relief Events

In this Agreement, “**Limited Relief Event**” means any of the following events, conditions, or circumstances if and to the extent that it interferes adversely with, or causes a failure of, the carrying out of the Project Work:

- (a) **Third Party Events:**
  - (i) a general strike or other labour disruption in Alberta that is applicable broadly to the transportation construction sector in Alberta or that is specifically directed at the City, but excluding any strike or labour disruption by Design-Builder Persons against Design-Builder which is not part of the foregoing scope of general strike or labour disruption;
  - (ii) any interference with Design-Builder access to the Lands caused by a blockade, embargo, civil disobedience or protest action, including any action taken by a Person or Persons protesting or demonstrating against the carrying out of any part of the Project, which interference cannot reasonably be avoided or resolved by means other than injunctive or other judicial remedies from a Court;
  - (iii) Supply Event;
- (b) **Other:**
  - (i) Epidemic;

- (ii) accidental loss or damage to the Project Work and/or the Infrastructure;
- (iii) fire, explosion, lightning, storm, tempest, hurricane, tornado, flood, bursting or overflowing of water tanks, apparatus or pipes, ionizing radiation, earthquake;
- (iv) any other matter expressly defined as a Limited Relief Event in this Agreement; and
- (v) extreme weather in the greater Edmonton area involving heat, cold, or precipitation for a two week period that is one standard deviation more extreme than the average based on relevant data covering the preceding five year period using reporting from "Edmonton AB Research Park" weather station (Climate ID 3012235).

### **10.1.3 Exclusions from Relief Events and Limited Relief Events**

Notwithstanding any other provision of this Agreement, Design-Builder shall have no right to claim the relief provided for in this Section 10 [*Relief Events and Limited Relief Events*] from any liability or consequence arising from a Relief Event or Limited Relief Event to the extent that:

- (a) the Project Requirements expressly require or contemplate that Design-Builder was or is expected to perform the obligations in question notwithstanding the occurrence of the Relief Event or Limited Relief Event;
- (b) Design-Builder could have avoided the event, occurrence, circumstance or the related liability, consequences or impacts, by complying with its obligations under this Agreement, including any applicable prevention or control obligations, and its mitigation obligations; and
- (c) such event, occurrence, circumstance or the related liability, consequence or impact, arises or is contributed to, directly or indirectly, as a result of any Legal Fault by Design-Builder, or a Design-Builder Person provided that, for clarity, Design-Builder will not be at Legal Fault if, and to the extent that, it is determined that the Project or the performance of the Project Work according to the terms of this Agreement, constitutes a public nuisance or establishes the basis for an injurious affection claim by third parties, without any other Legal Fault of Design-Builder or a Design-Builder Person.

### **10.1.4 No Limited Relief Event at Commercial Close**

Design-Builder acknowledges and agrees that any circumstances from or relating to the existence of an Epidemic as at the Financial Bid Response Deadline will not, in the absence of any change thereto, give rise to or cause the occurrence of a Limited Relief Event.

## **10.2 Consequences of Relief Event and Limited Relief Event**

### **10.2.1 Consequences of Relief Event**

If a Relief Event occurs, then subject to the provisions of this Section 10 [*Relief Events and Limited Relief Events*]:

- (a) no right of termination arises under this Agreement from any failure by Design-Builder to perform any of its obligations under this Agreement, but only to the extent that such failure to perform is caused by the occurrence of a Relief Event;

- (b) if the Relief Event causes a critical path delay for a period of at least five consecutive days, then the Target PICO Completion Date and the Target Construction Completion Date shall be extended, and where the Target PICO Completion Date and the Target Construction Completion Date is extended, the date in Section 13.8(f) shall be extended, in each case, by a period equal to the period of delay caused by the relevant Relief Event;
- (c) if the Relief Event, when aggregated with the effect of any other Relief Event or Relief Events occurring in the same calendar year and not previously claimed for by Design-Builder, increases Design-Builder's net cost of carrying out the Design and Construction by at least ██████ in such calendar year, then subject to Section 10.3 [*Procedure on Relief Event*] and subject in every case to Design-Builder's obligation to take reasonable steps to mitigate the increase in its costs, the City shall, as soon as practicable following receipt from Design-Builder of appropriate documentation establishing the amount payable, pay to Design-Builder the lesser of the:
  - (i) reasonable Direct Losses incurred by Design-Builder as a direct result of the Relief Event (including the amount of any applicable insurance deductibles); and
  - (ii) the net increase in the costs of Design-Builder performing its obligations under this Agreement resulting directly from the Relief Event;

excluding, for certainty:

- (iii) Avoidable Costs;
- (iv) applicable Insurance Proceeds and insurance proceeds which Design-Builder would have recovered in connection with the Relief Event if it had complied with the requirements of this Agreement or any policy of insurance maintained or required to be maintained under this Agreement; and
- (v) Indirect Losses.

For greater certainty, in respect of a Relief Event that results in an extension of the Target PICO Completion Date or the Target Construction Completion Date pursuant to Section 10.2.1(b) above, the compensation payable to Design-Builder pursuant to this Section 10.2.1(c) shall include amounts which, but for the delay attributable to the Relief Event, would have been paid by the City to Design-Builder, provided, however, that the Construction Completion Payment shall in no event be paid to Design-Builder prior to the Construction Completion Date.

For greater certainty, except as specifically provided in this Section 10.2.1 [*Consequences of Relief Event*] and Section 10.2.3 [*General Consequences*], all other rights and obligations of the Parties under this Agreement remain unaffected by the occurrence of a Relief Event and Design-Builder shall only be relieved of its obligations under this Agreement arising from any delay or failure in performing any of such obligations to the extent, if any, provided for in this Section 10.2.1 [*Consequences of Relief Event*] and/or Section 10.2.3 [*General Consequences*].

### **10.2.2 Consequences of Limited Relief Event**

If a Limited Relief Event occurs, then subject to the provisions of this Section 10 [*Relief Events and Limited Relief Events*]:

- (a) no right of termination arises under this Agreement from any failure by Design-Builder to perform any of its obligations under this Agreement, but only to the extent that such failure to perform is caused by the occurrence of a Limited Relief Event;

- (b) if the Limited Relief Event causes a critical path delay for a period of at least five consecutive days, then the Target PICO Completion Date and the Target Construction Completion Date shall be extended, and where the Target PICO Completion Date and the Target Construction Completion Date is extended, the date in Section 13.8(f) shall be extended, in each case, by a period equal to the period of delay caused by the relevant Limited Relief Event.
- (c) in respect of the Limited Relief Events referred to in Sections 10.1.2(a), 10.1.2(b)(i) and 10.1.2(b)(v), where the Target PICO Completion Date and the Target Construction Completion Date is adjusted as set out in Section 10.2.2(b) above, the only compensation that the City will pay to Design-Builder is an amount equal to the Direct Losses arising from the adjusted completion date excluding Avoidable Costs and applicable Insurance Proceeds and insurance proceeds which Design-Builder would have recovered in connection with the Limited Relief Event if it had complied with the requirements of this Agreement or any policy of insurance maintained or required to be maintained under this Agreement.

For greater certainty, except as specifically provided in this Section 10.2.2 [*Consequences of Limited Relief Event*] and Section 10.2.3 [*General Consequences*], all other rights and obligations of the Parties under this Agreement remain unaffected by the occurrence of a Limited Relief Event and Design-Builder shall only be relieved of its obligations under this Agreement arising from any delay or failure in performing any of such obligations to the extent, if any, provided for in this Section 10.2.2 [*Consequences of Limited Relief Event*] and/or Section 10.2.3 [*General Consequences*]

### **10.2.3 General Consequences**

If a Relief Event or a Limited Relief Event occurs, then:

- (a) provided that Design-Builder complies with its obligations under this Section 10 [*Relief Events and Limited Relief Events*],
  - (i) any failure by Design-Builder to perform any affected Project Work in accordance with the requirements of this Agreement shall not constitute a Default
  - (ii) the City shall not be entitled to exercise its rights or remedies under Section 13.7 [*City's Remedial Rights*],
  - (iii) no Construction Payment Adjustment pursuant to Section 2.3 [*Construction Payment Adjustment*] of Schedule 16 [*Payment Mechanism*]; and
  - (iv) no Default Points shall be assessed,

only to the extent that and for so long as the relevant Relief Event or Limited Relief Event directly prevents Design-Builder from being able to perform such Project Work or obligations in accordance with the requirements of this Agreement;
- (b) if Design-Builder anticipates that the Relief Event or Limited Relief Event will delay Construction Completion, but is of the opinion that the delay can be avoided or mitigated through extraordinary measures not otherwise required under this Agreement, Design-Builder may propose to the City that such extraordinary measures be taken by Design-Builder at the City's expense and the City may, in its sole discretion, direct Design-Builder to take any or all of such extraordinary measures.

### 10.3 Procedure on Relief Event and Limited Relief Event

- (a) Design-Builder shall provide written notice to the City within 5 Business Days of becoming aware of the occurrence of a Relief Event or Limited Relief Event.
- (b) Design-Builder shall, within 15 Business Days after such notification, provide further written details to the City which shall include:
  - (i) a statement of which Relief Event or Limited Relief Event the claim is based upon;
  - (ii) details of the event or circumstances forming the basis of Design-Builder's claim;
  - (iii) details of the contemporary records which Design-Builder shall maintain to substantiate its claim for relief;
  - (iv) details of the consequences (whether direct or indirect, financial or non-financial) which such Relief Event or Limited Relief Event may have upon Design-Builder and its obligations under this Agreement, accompanied by copies of all supporting records in Design-Builder's custody or available to Design-Builder which substantiate or support Design-Builder's claim; and
  - (v) details of any measures which Design-Builder proposes to adopt to mitigate the consequences of such Relief Event.
- (c) In addition to the requirements of Section 10.3(a), if there is potential impact on the Construction Schedule, then Design-Builder shall:
  - (i) submit to the City within 5 Business Days (or other timeline as agreed between the Parties on a case-by-case basis) after such notification a Schedule Update progressed to the date of the occurrence of the Relief Event or Limited Relief Event;
  - (ii) for a Relief Event or Limited Relief Event that continues for longer than 30 calendar days, provide a monthly update of the impact of the Relief Event or Limited Relief Event to the Construction Schedule, which shall include a detailed description of the impact to the satisfaction of the City, acting reasonably;
  - (iii) submit to the City within 10 Business Days (or other timeline as agreed between the Parties on a case-by-case basis) after the Relief Event or Limited Relief Event ceases to affect Design-Builder's performance of the Project Work a Schedule Update progressed to the date of the conclusion of the Relief Event or Limited Relief Event; and
  - (iv) shall submit a Forensic Schedule Analysis within 10 Business Days (or other timeline as agreed to between the Parties on a case by case basis) of the conclusion of the Relief Event or Limited Relief Event or the portion of the Relief Event or Limited Relief Event that impacts the Construction Schedule. The Forensic Schedule Analysis shall include adequate justification for the selected forensic schedule analysis method and demonstrate that it produces the most accurate assessment of the event impact.
- (d) As soon as possible but in any event within five Business Days of Design-Builder receiving, or becoming aware of, any supplemental information which may further substantiate or support Design-Builder's claim, Design-Builder shall submit further



particulars including copies of all related available records associated with such information to the City.

- (e) The City shall, after receipt of written details under Sections 10.3(b)(iii) or 10.3(c), be entitled by written notice to require Design-Builder to provide such further supporting particulars in their entirety as the City may reasonably consider necessary. Design-Builder shall provide the required supporting particulars to the City no later than 10 Business Days after receiving the written notice and shall afford the City reasonable facilities for investigating the validity of Design-Builder's claim, including on-site inspection. Failure to provide the requested further supporting particulars within 10 Business Days shall result in the notice of the Relief Event or Limited Relief Event provided by Design-Builder pursuant to Section 10.3(a) being deemed to have been withdrawn.
- (f) If Design-Builder is, or claims to be, affected by a Relief Event or Limited Relief Event, Design-Builder shall, and shall require all Design-Builder Persons 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 Agreement;
  - (ii) to continue to perform its obligations under this Agreement to the extent possible; and
  - (iii) to resume performance of its obligations under this Agreement affected by the Relief Event or Limited Relief Event as soon as practicable.
- (g) For clarity, no extension under Section 10.2.1(b) or Section 10.2.2(b) to the Target PICO Completion Date or the Target Construction Completion will be granted unless the Forensic Schedule Analysis and contemporary records, provided in accordance with Section 10.3(c)(iv) demonstrates that the Relief Event or Limited Relief Event has caused a delay to a Key Date, and then only once all related schedule float is consumed, and in no event shall any such extension exceed the necessary extension of the critical path resulting from the Relief Event or Limited Relief Event.
- (h) To the extent that Design-Builder does not comply with its obligations under this Section 10.3 [*Procedure on Relief Event and Limited Relief Event*], such failure (including without limitation the effect of such failure on the City's ability to mitigate such Relief Event or Limited Relief Event) shall be taken into account in determining Design-Builder's entitlement to relief and any compensation or schedule relief that might otherwise be provided under this Section 10 [*Relief Events and Limited Relief Events*] shall be reduced accordingly.

#### **10.4 City Determination of Entitlement**

Within 30 days of the City's receipt of all requested information pursuant to Section 10.3 (including any supporting information requested from the Design-Builder as the City may reasonably consider necessary to make a determination), the City shall provide Design-Builder with written notice of the City's determination of Design-Builder's entitlement to claim relief for a particular event. If the City determines that Design-Builder is not entitled to claim relief (as provided for in this Section 10 [*Relief Events and Limited Relief Events*]), for a particular event, the City may provide written notice to Design-Builder of this determination with reasons. Unless Design-Builder initiates the Dispute Resolution Procedure within 30 days of receiving the City's determination, Design-Builder will not be entitled to claim relief (as provided for in this Section 10 [*Relief Events and Limited Relief Events*]), for that event.

## 10.5 Designated Change in Law

- (a) Following any and all changes in Applicable Law, Design-Builder shall perform the Project Work in accordance with the terms of this Agreement, including in compliance with Applicable Law.
- (b) On the occurrence of a Designated 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 Design-Builder of performing the Project Work so as to put such Party in no better and no worse position than it would have been in had the Designated Change in Law not occurred. Any such compensation shall be calculated in accordance with this Section 10.5 *[Designated Change in Law]*.
- (c) On the occurrence of a Designated Change in Law:
  - (i) either Party may give notice to the other of the need for a Change as a result of such Designated Change in Law, including details on how the Designated Change in Law has or will increase or decrease (as the case may be) the net cost to Design-Builder of performing the Project Work;
  - (ii) the Parties shall meet within 20 Business Days of such notice to consult with respect to the effect of the Designated Change in Law and to reach an agreement on whether a Change is required as a result of such Designated Change in Law, and, if the Parties have not, within 10 Business Days of this meeting, reached an agreement, either Party may refer the question of whether a Designated Change in Law has occurred or the effect of any Designated Change in Law for resolution in accordance with Schedule 20 *[Dispute Resolution Procedure]*; and
  - (iii) the City shall, within 10 Business Days of agreement or determination that a Change is required, issue a Change Enquiry and the relevant provisions of Schedule 13 *[Changes]* shall apply except that:
    - (A) Design-Builder may only object to any such Change Enquiry on the grounds that the implementation of the Change would not enable it to comply with the Designated Change in Law or as provided in Section 1.6 of Schedule 13 *[Changes]*;
    - (B) Design-Builder shall be responsible for obtaining all Project Approvals required in respect of the Change;
    - (C) the City shall not be entitled to withdraw any such Change Enquiry unless the Parties otherwise agree;
    - (D) Design-Builder shall proceed to implement the Change within such period as will enable it to comply with the Designated 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 Agreement:
      - (I) use commercially reasonable efforts to mitigate the adverse effects of any Designated Change in Law and take commercially reasonable steps to minimize any increase in costs arising from such Designated Change in Law; and

- (II) use commercially reasonable efforts to take advantage of any positive or beneficial effects of any Designated Change in Law and take commercially reasonable steps to maximize any reduction in costs arising from such Designated Change in Law; and
- (F) any entitlement to compensation payable shall be in accordance with this Section 10.5, and any calculation of compensation shall take into consideration, inter alia:
  - (I) any failure by a Party to comply with Section 10.5(c)(iii)(E);
  - (II) any Avoidable Costs;
  - (III) any increase or decrease in its costs resulting from such Designated Change in Law; and
  - (IV) any Insurance Proceeds and insurance proceeds which Design-Builder would have received in connection with the Designated Change in Law if it had complied with the requirements of this Agreement or any policy of insurance maintained or required to be maintained under this Agreement, which amounts, for greater certainty, shall not include any excess or deductibles or any amount over the maximum amount insured under any such insurance policy.
- (d) Design-Builder shall not be entitled to any payment or compensation or relief in respect of any Designated Change in Law, or the consequences thereof, other than in accordance with this Section 10.5 [*Designated Change in Law*].
- (e) In relation to a Designated Change in Law that results in a net increase or decrease in costs incurred by Design-Builder in delivery of the Project Work, taking into consideration, inter alia, Section 10.5(c)(iii)(E), if the cost impact of such Designated Change in Law in a given calendar year (in aggregate with all other such Designated Changes in Law that have a cost impact in the same year) amounts to less than ██████ (index linked) in that calendar year, neither the City nor Design-Builder shall be entitled to any payment or compensation pursuant to this Section 10.5 [*Designated Change in Law*] in respect of the cost impact of that Designated Change in Law in that calendar year, or any other relief in respect of such Designated Change in Law in that calendar year except Construction Schedule amendments that are required in connection with any Change arising from a Designated Change in Law as contemplated by Section 10.5(c) and the relevant provisions of Schedule 13 [*Changes*].

## 10.6 Changes to Technical Standards

- (a) Where this Agreement requires Design-Builder to comply with a technical standard, guideline or guidance document in respect of the Project Work, and that standard, guideline or guidance document has changed between the Financial Bid Response Deadline and the date that such compliance is required, then Design-Builder or the City shall give notice to the other Party of such change.
- (b) If, after such notice, the City requires compliance with the changed standard, guideline or guidance document rather than the one applicable as of the Financial Bid Response Deadline, then, to the extent such change affects the Project Work and where such change occurs within one year of the Financial Bid Response Deadline and would not

have otherwise been taken into account by compliance with Good Industry Practice, such changed standard, guideline or guidance document shall, subject to and in accordance with Schedule 13 [*Changes*], result in a Change.

- (c) If the City does not require compliance with the changed standard, then Design-Builder shall continue to comply with the standard guideline or guidance document applicable as of the Financial Bid Response Deadline, without a Change.

## **11. DESIGN-BUILDER'S REPRESENTATIONS AND OBLIGATIONS**

### **11.1 Design-Builder's Representations**

Design-Builder represents and warrants to the City that, as of the Commercial Close:

- (a) Design-Builder is a corporation, duly created and validly existing under the laws of the Province of Alberta and has full power and capacity to enter into, carry out the transactions contemplated by, and duly observe and perform all its obligations contained in this Agreement and all other documents, instruments and agreements required to be executed and delivered by Design-Builder pursuant to this Agreement;
- (b) the execution of this Agreement and all other documents, instruments and agreements required to be executed and delivered by Design-Builder pursuant to this Agreement, and the completion of the transactions contemplated by this Agreement, have been duly authorized by all necessary corporate action on the part of Design-Builder, and this Agreement has been duly executed and delivered by the Design-Builder and constitutes a legal, valid and binding obligation of Design-Builder enforceable in accordance with its terms, subject to
  - (i) limitations by bankruptcy, insolvency, liquidation, reorganization, reconstruction and other similar laws of general application affecting the enforceability of remedies and rights of creditors and
  - (ii) the availability of equitable remedies such as specific performance and injunction that are in the discretion of a court;
- (c) except as set out in Schedule 24 [*Design-Builder's Ownership Information*], there is as at the date of this Agreement no outstanding offer, agreement or other arrangement pursuant to which any Person is obligated to subscribe for, or take by means of transfer or by conversion, any form of investment, security or voting rights in Design-Builder;
- (d) all required third party consents to the execution by Design-Builder of, and performance of its obligations under, this Agreement have been received, other than the Project Approvals it is to obtain and other approvals contemplated herein to be obtained following the date of this Agreement in connection with the Project Work;
- (e) Design-Builder's Bid, to the extent it consists of statements of fact, is at the time of Commercial Close in every material respect true and not misleading (except as has been disclosed in writing to and accepted in writing by the City prior to Commercial Close);
- (f) Design-Builder, either in Design-Builder's Bid or in formal communications with the City under the RFP, has made accurate and true disclosure to the City of all facts and circumstances regarding Design-Builder, its intended Subcontractors, and Design-Builder has not knowingly failed to disclose to the City any fact which if learned by the City would be reasonably expected to be material to the willingness of the City to enter into this

Agreement with Design-Builder having regard to the information requested by the City in the RFP;

- (g) Design-Builder and the Design-Builder Persons, collectively, have extensive experience and are knowledgeable in the design and construction of LRT projects similar to the Project in scale, scope, type and complexity and have the required ability, experience, skill and capacity to perform the Project Work in a timely and professional manner as set out in this Agreement;
- (h) no steps or proceedings have been taken or are pending to supersede or amend the constating documents, articles or by-laws of Design-Builder in a manner that would impair or limit its ability to perform its obligations under this Agreement;
- (i) the execution, delivery, and performance by Design-Builder of this Agreement does not and will not violate or conflict with, or constitute a default under:
  - (i) its constating, formation or organizational documents, including any by-laws;
  - (ii) any Applicable Law; or
  - (iii) 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 to the extent that such conflict or default would have or be reasonably likely to have a material adverse effect on the performance by Design-Builder of its obligations under this Agreement;
- (j) all of the information regarding Design-Builder set out in Schedule 24 [*Design-Builder's Ownership Information*] is true and correct in all material respects;
- (k) there are no actions, suits, proceedings, or investigations pending or threatened against Design-Builder or, to Design-Builder's knowledge, any Design-Builder Person 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 impairment of its ability to perform its obligations under this Agreement, and Design-Builder 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 impairment;
- (l) Design-Builder has carefully reviewed the whole of this Agreement, and all other documents made available to Design-Builder by or on behalf of the City, and, to Design-Builder's knowledge, nothing contained herein or therein inhibits or prevents Design-Builder from completing the Project Work in accordance with this Agreement in a good and safe manner so as to achieve and satisfy the requirements of this Agreement;
- (m) Design-Builder is able to meet its obligations as they generally become due;
- (n) Design-Builder is registered under Division V of Part IX of the Excise Tax Act (Canada) and its GST registration number is [REDACTED];
- (o) the Target PICO Completion Date and the Target Construction Completion Date are realistic dates and achievable by Design-Builder performing the Project Work in accordance with this Agreement; and
- (p) Design-Builder is not a Non-Resident.

## 11.2 Reporting Requirements

In addition to all specific reports and notices required by Schedule 19 *[Records and Reports]* and the Project Requirements, but subject to Schedule 18 *[Freedom of Information and Protection of Privacy]*, Design-Builder shall provide to the City the following reporting in relation to any aspect of the business of Design-Builder, the Project Work or Project Documents to the City:

- (a) supplemental reports requested from time to time by the City, acting reasonably;
- (b) such other reports as the City may from time to time reasonably require in order to provide required reporting to a Contribution Agreement Party; and
- (c) timely responses to any inquiry reasonably made by the City in relation to any aspect of the business of Design-Builder, the Project Work, or this Agreement in order to reasonably facilitate the City's performance of its obligations under the Agreement; to support the City's communication plans and activities as described in Schedule 12 *[Communications and Engagement]*; and to facilitate the proper exercise of the City's review, inspection, audit, and remedial rights as set out in the Agreement.

Subject to Schedule 18 *[Freedom of Information and Protection of Privacy]*, to the extent that any of the foregoing reporting includes commercially sensitive information, Design-Builder may deliver such information in confidence and expressly mark or label the parts of the information as confidential according to Section 16.3 *[Confidential Information]*. The City will be deemed to be acting unreasonably for the purposes of this Section 11.2 *[Reporting Requirements]* if the City's request for supplemental reporting as contemplated by Section 11.2(b) and 11.2(c) above would require Design-Builder to reasonably incur more than ██████ in net aggregate incremental staffing, resource and preparation costs, taking into account any prior or concurrent City directed reduced reporting on the same or different topics. City requests for supplemental reporting that would require Design-Builder to incur incremental costs in excess of this threshold must be made pursuant to Schedule 13 *[Changes]*.

## 11.3 Records and Reports

Design-Builder shall comply with the requirements of Schedule 19 *[Records and Reports]*.

## 11.4 Access, Inspection and Testing

- (a) Without prejudice to Design-Builder's rights under Section 3.14 *[Uninterrupted Access and Use]* and Section 5.2 *[Other Work]*, Design-Builder acknowledges and agrees that, at all times until the end of the Term, the City and City Persons, subject to complying with all reasonable safety procedures and reasonable Site rules, shall have full and free access to:
  - (i) subject to Section 11.4(a)(ii) below, the Lands; and
  - (ii) on reasonable prior notice, the Site and/or any other site occupied by Design-Builder or a Subcontractor, or to which Design-Builder or a Subcontractor has access, where plant, goods, products, commodities, materials, supplies, machinery, equipment, apparatus or other tangible property to be used in the Project Work are fabricated or stored,

for the purpose of inspecting the Lands or any Infrastructure so as to be able to determine compliance by Design-Builder with the terms of this Agreement, and such access shall not of itself be construed as constituting disturbance or interference with Design-Builder's uninterrupted access to the Lands.

For the purpose of such inspection, the City may at all reasonable times perform any measurement, test or other observation or investigation. Design-Builder shall provide reasonable cooperation to arrange and facilitate any such measurements, tests or other observations or investigations. The City shall conduct all such measurements, tests and other observations or investigations at its own expense and in a manner that will not materially disturb, interfere with or disrupt the Project Work.

- (b) Subject to Section 3.14 [*Uninterrupted Access and Use*], to the extent applicable and without limiting, and in addition to any access rights afforded such Persons as members of the general public, pursuant to an express right under this Agreement, or pursuant to Applicable Law, Design-Builder shall, and shall cause each Subcontractor, to ensure that throughout the Term, the following Persons have full and free access to the Lands and the Infrastructure for the following purposes:
- (i) the City and the City Persons, for the purpose of:
    - (A) undertaking the City's rights and obligations set out in this Agreement;
    - (B) performing security, policing and providing other emergency services in respect of the Infrastructure or the ETS LRT Network;
    - (C) carrying out City Works; and
    - (D) carrying out City Activities;
  - (ii) Emergency Services, for the purpose of carrying out any work (including surveys, inspections, training and provision of emergency response) in accordance with, or to exercise any right or power, or perform any duty or obligation under, any Applicable Law;
  - (iii) Other Contractors, for the purpose of carrying out Other Works or City Works;
  - (iv) third parties pursuant to a Permitted Encumbrance, for the purpose of accessing their facilities or infrastructure located on the Lands;
  - (v) with the prior authorization of the City, any of the Contribution Agreement Parties, for the purpose of determining compliance by the City with the terms of a Contribution Agreement;
  - (vi) any Governmental Authorities, for the purpose of carrying out any work (including surveys and inspections) in accordance with, or to exercise any right or power, or perform any duty or obligation under any Applicable Law; and
  - (vii) any Utility Companies, for the purposes of performing Utility Work or accessing their facilities or infrastructure within the Lands; and
- (c) As a condition to exercising access pursuant to Section 11.4(b) [*Access, Inspection and Testing*], Design-Builder may require each Person referred to therein (except in the case of access rights for Emergency Services) to:
- (i) provide reasonable prior notice, appropriate to the circumstances;
  - (ii) comply with all reasonable safety procedures and reasonable Site rules issued by, or on behalf of, Design-Builder from time to time; and

- (iii) if reasonably required by Design-Builder, be accompanied by a representative of Design-Builder.

## **11.5 Safety and Security**

Design-Builder shall observe and comply with all safety and security requirements specifically set out in Schedule 11 [*Construction Safety Requirements*] and in Schedule 29 [*Security Matters*].

## **11.6 General Audit Obligations**

- (a) Design-Builder shall provide and shall cause each Subcontractor to provide to the City all information, reports, documents, records and the like, in the possession of, or available to, Design-Builder or such Subcontractor as the City may reasonably require from time to time for any purpose related to assessing compliance with this Agreement, other than Sensitive Information. Design-Builder 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 Subcontractor shall be available to Design-Builder and Design-Builder shall include relevant terms in all Subcontracts to this effect.
- (b) Design-Builder shall also provide to the City, and shall require each Subcontractor, to provide to the City (at the City's reasonable cost), all information, reports, documents, records and the like required to be provided pursuant to Section 11.6(a) which subsequently come into the possession of, or become available to, Design-Builder or each Subcontractor, as the City may reasonably require from time to time to enable the City to provide reports, notices, returns and the like pursuant to Applicable Law, including information and documentation pertaining to the physical condition of the Infrastructure, security, health and safety, fire safety, emergency preparedness, environmental matters, employees and human resources related matters, other than Sensitive Information.
- (c) Design-Builder shall promptly after receipt provide the City 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 Project Work and Design-Builder shall include relevant terms in all Subcontracts to this effect.
- (d) Design-Builder shall promptly notify the City of any actions, suits, proceedings, or investigations commenced, pending or threatened against Design-Builder or, to Design-Builder's knowledge, any Design-Builder Person 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 Design-Builder or in any impairment of its ability to perform its obligations under this Agreement.
- (e) All information, reports, documents and records in the possession of, or available to, Design-Builder which are required to be provided to or available to the City hereunder, shall be subject and open to inspection and audit by the City upon reasonable notice at any time and from time to time, which inspection and audit shall take place during normal business hours and at Design-Builder's normal places of business unless the City and Design-Builder otherwise agree. The City shall also have the right to monitor and audit the performance of any and all the activities within the Project Work wherever located, and Design-Builder shall cooperate with, and shall require each Subcontractor to cooperate with, and provide access to the representatives of the City monitoring and auditing the Project Work, including providing them with access and copies (at the City's reasonable cost) of all relevant information, reports, documents and records pertaining to the performance of the activities within the Project Scope. Except as otherwise provided herein, all of the City's costs for the inspections, audits and monitoring shall be borne by the City.



- (f) In conducting an audit of Design-Builder under Section 11.6(e) or as otherwise provided under this Agreement, the City shall have all rights necessary or incidental to conducting an audit, including the right to have access to and inspect and take copies (at the City's reasonable cost) of all books and records of Design-Builder required to be provided to or available to the City hereunder, upon reasonable notice and at reasonable times. Design-Builder shall fully cooperate with the City 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 Design-Builder further agrees to promptly review and settle with the City all matters arising from such audits, including the refunding of monies to the City where applicable. At the reasonable request of the City's auditors, Design-Builder shall provide such information, reports, documents and records as the City's auditors may reasonably require, other than Sensitive Information.
- (g) The City's rights pursuant to this Section shall be in addition to, and shall not limit, any other audit, information, inspection or similar rights under this Agreement.

### **11.7 General Duty of Design-Builder to Mitigate**

In all cases under this Agreement where Design-Builder is entitled (or claims to be entitled) to receive from the City any compensation in addition to the payments described in Section 7 [*Payment*], Direct Losses, costs, damages, extensions of time or other relief from its performance obligations, including as contemplated by Section 9.1(b), Design-Builder shall use all commercially reasonable efforts to mitigate such amount required to be paid by the City to Design-Builder, or the length of the extension of time or delay in performance. Upon request from the City, Design-Builder shall promptly submit a detailed description, supported by all such documentation as the City may reasonably require, of the measures and steps taken, and intended to be taken, by Design-Builder to meet its mitigation obligations under this Section 11.7 [*General Duty of Design-Builder to Mitigate*] and any other provision of this Agreement that applies to the circumstance in question.

## **12. CITY'S REPRESENTATIONS AND OBLIGATIONS**

### **12.1 City's Representations**

The City represents and warrants to Design-Builder, as of the Commercial Close, that:

- (a) the City has full capacity, power and authority to enter into, carry out all transactions contemplated by, and duly observe and perform all its obligations contained in this Agreement and all other documents, instruments, and agreements, required to be executed and delivered by the City hereunder;
- (b) this Agreement has been duly authorized, executed, and delivered by or on behalf of the City, and upon execution and delivery constitutes a legal, valid and binding obligation of the City enforceable in accordance with its terms subject to (i) limitations by bankruptcy, insolvency, liquidation, reorganization, reconstruction and other similar laws of general application affecting the enforceability of remedies and rights of creditors and (ii) the availability of equitable remedies such as specific performance and injunction that are in the discretion of a court;
- (c) the City has acquired the Real Property Interests in the City Lands described in Schedule 14 [*City Lands*] indicated as being acquired on or prior to the Commercial Close in Schedule 14 [*City Lands*] and as confirmed in Section 3.10 [*No Encumbrance on City Lands*] in each case free and clear of all Encumbrances, except the Permitted Encumbrances;

- (d) the City has not granted any leases that are outstanding in respect of the City Lands, except for the leases forming part of the Permitted Encumbrances and the leases described in Schedule 14 [*City Lands*]; and
- (e) the City has the power, right and authority to grant Design-Builder the license to the City Lands as set out in Section 3.1 [*Access and Use*].

## 12.2 City Roles

The City will participate in the Project in various capacities and for clarification, for the purposes of this Agreement:

- (a) As a counterparty to this Agreement, the City will act through and on the delegated authority of the City's Representative, as a member of the City LRT and no other City department, office, agency or representative shall represent the City as counterparty to this Agreement with any authority to exercise, perform, represent, satisfy any right or obligation or bind the City in any way under or pursuant to this Agreement, except as expressly authorized or confirmed in writing by the City's Representative.
- (b) EPCOR Water Services Inc. and EPCOR Distribution and Transmission shall be considered and treated as arm's length Utility Companies for the purposes of this Agreement, including Schedule 28 [*Project Approvals and Utility Matters*] Part 2 [*Utility Matters*].
- (c) Other City officials, departments, offices, agencies and representatives shall be considered as arm's length Governmental Authorities, including as rail regulatory authorities.

## 12.3 City Duty to Mitigate

In all cases under this Agreement where the City is entitled to receive from Design-Builder any compensation, costs or damages, but not in any other case, the City shall use all commercially reasonable efforts to mitigate such amount required to be paid by Design-Builder to the City (or deducted by the City) under this Agreement, provided that such obligation shall not require the City to:

- (a) take any action which is contrary to the public interest, as determined by the City in its discretion;
- (b) undertake any mitigation measure that might be available arising out of its status as a public body, but which measure would not normally be available to a private commercial party; or
- (c) alter the amount of any NPE Adjustments or Construction Payment Adjustments it is entitled to make in accordance with Schedule 16 [*Payment Mechanism*].

The City shall have no obligation to mitigate, implied or otherwise under this Agreement or Applicable Law, except as set out in this Section 12.3 [*City Duty to Mitigate*] or as otherwise expressly set out in this Agreement. Upon request from Design-Builder, the City shall promptly submit a detailed description, supported by all such documentation as Design-Builder may reasonably require, of the measures and steps taken by the City to meet its mitigation obligations under this Section 12.3 [*City Duty to Mitigate*].

## 12.4 Design-Builder Recourse

The City acknowledges and agrees that Design-Builder shall be entitled (without prejudice to any of Design-Builder's obligations hereunder) to claim and/or otherwise initiate and carry out proceedings

against any third party that causes or contributes to any damage to the Infrastructure or otherwise causes or contributes to any Design-Builder loss. The City shall, in response to any reasonable request by Design-Builder and at Design-Builder's cost, provide all reasonable information and assistance to enable Design-Builder to assert and manage any such claims and/or proceedings.

### **13. DEFAULT, REMEDIES AND TERMINATION EVENTS**

#### **13.1 Design-Builder's Indemnity**

Subject to Section 13.4 [*Exclusivity of Specified Remedies*], Design-Builder shall indemnify and hold harmless the City and the City Persons against all Direct Losses arising from:

- (a) any Legal Fault of Design-Builder or any Design-Builder Person in performing its obligations under this Agreement;
- (b) subject to Section 4.2(b) of Schedule 8 [*Intellectual Property*] any third party claim alleging infringement by Design-Builder or a Design-Builder Person, in relation to the Project Work, of any Intellectual Property Rights of third parties;
- (c) any physical loss of or damage to all or any part of the Infrastructure or to any Equipment, assets or other property related thereto arising out of or in consequence of or involving or relating to the Legal Fault of Design-Builder or a Design-Builder Person;
- (d) the death or personal injury of any Person arising out of or in consequence of or involving or relating to the Legal Fault of Design-Builder or a Design-Builder Person;
- (e) any physical loss of or damage to property or assets of any third party arising out of or in consequence of or involving or relating to the Legal Fault of Design-Builder or a Design-Builder Person;
- (f) subject to Section 3.9 [*Permitted Use of Lands*] any other loss or damage of any third party, including injurious affection or public nuisance, arising from or in consequence of any act or omission of Design-Builder or a Design-Builder Person in respect of the performance of the Project Work that is not in compliance with the requirements set out in this Agreement and Applicable Law;
- (g) Contamination and Hazardous Substances for which Design-Builder is responsible pursuant to Schedule 10 [*Environmental Performance Requirements*];
- (h) the breach by Design-Builder of, or non-compliance by Design-Builder with, Project Approvals or Applicable Law, or the failure of Design-Builder to obtain all necessary Project Approvals in accordance with this Agreement;
- (i) any claims for occupier's liability in respect of the Lands, including any claims for which the City has liability solely as a result of being the registered owner of the City Lands, except to the extent caused by any Person exercising rights under a Permitted Encumbrance or Future Utility Work and except to the extent caused by the City, City Persons or Other Contractors, carrying out City Works or Other Works;
- (j) any obligations of Design-Builder to satisfy judgments and pay costs resulting from builders' or construction liens arising from the performance of the Project Work or actions brought in connection with any such liens, or in connection with any other claim or lawsuit brought against the City by any Person that provided services or materials which constituted part of the Project Work;

- (k) any other matter for which Design-Builder shall indemnify the City as set out in this Agreement,

except to the extent the Direct Losses were caused, or contributed to, by non-compliance by the City with any provision of this Agreement or any document, instrument or agreement delivered by the City as required under this Agreement or other Legal Fault of the City or a City Person or compliance by Design-Builder with a lawful instruction or direction by the City or a City Person.

### **13.2 City's Indemnity**

Subject to Section 13.4 [*Exclusivity of Specified Remedies*], the City shall indemnify and hold harmless Design-Builder and Design-Builder Persons against 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:

- (a) the death or personal injury of any Person arising, directly or indirectly, out of Legal Fault of the City or any City Person, except to the extent caused, or contributed to, by the breach of this Agreement by or other Legal Fault of Design-Builder or any Design-Builder Person;
- (b) any physical loss of or damage to all or any part of any property or assets of Design-Builder or any Design-Builder Person, arising, directly or indirectly, out of, Legal Fault of the City or any City Person, except to the extent caused, or contributed to, by the breach of this Agreement by or other Legal Fault of Design-Builder or any Design-Builder Person, and;
- (c) 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 Legal Fault of the City or any City Person, except to the extent caused, or contributed to, by the breach of this Agreement by or other Legal Fault of Design-Builder or any Design-Builder Person;

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

### **13.3 No Indirect Losses**

Without prejudice to the City's rights under Schedule 16 [Payment Mechanism] and/or Section 7 [Payment], or the Parties' rights in respect of payments provided for herein (including the City's entitlement to liquidated damages pursuant to Section 2.2 [*Delays in Achieving Construction Completion*] of Schedule 7 [*Construction Completion, Service Readiness and Final Completion*]), the indemnities under this Agreement shall not apply and there shall be no right to claim damages for breach of this Agreement, in tort or on any other basis whatsoever, for Indirect Losses.

### **13.4 Exclusivity of Specified Remedies**

- (a) The City shall not be entitled to claim Direct Losses (including by way of indemnification Claims) in respect of specific events or circumstances which constitute (or would constitute, if the applicable threshold set out in the Project Requirements were met) grounds for a Construction Payment Adjustment.
- (b) Every right to claim compensation or indemnification or reimbursement under this Agreement shall be construed so that recovery is without duplication to any other amount recoverable under this Agreement.

- (c) Notwithstanding anything else in this Agreement, the City's sole remedies for delays in Design-Builder's Construction Schedule, including failure to achieve PICO Completion by the Target PICO Completion Date or Construction Completion by the Target Construction Completion Date, shall be the Termination Events set out in Section 13.8(f), (g) and (h), the applicable remedial rights set out in Section 13.7 *[City's Remedial Rights]* and the City's entitlement to liquidated damages pursuant to Section 2.2 *[Delays in Achieving Construction Completion]* and Section 6.2 *[Delays in Achieving PICO Completion]* of Schedule 7 *[Construction Completion, Service Readiness and Final Completion]*.

### **13.5 Maximum Liability**

- (a) Subject to Section 13.5(b), the maximum aggregate liability of Design-Builder in respect of all claims 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 (other than the Performance Guarantee of DB Guarantor) or policies maintained in accordance with Schedule 17 *[Insurance and Performance Security Requirements]*.
- (b) The limitation of liability in Section 13.5(a) shall not apply in respect of:
- (i) matters referred to in Section 13.4(c) for which liquidated damages are stated to be the sole remedy;
  - (ii) Design-Builder Default Termination Sum;
  - (iii) wilful misconduct or deliberate acts of wrongdoing; and
  - (iv) Construction Payment Adjustments
- (b) The maximum aggregate liability of the City in respect of all claims under Section 13.2 shall not exceed [REDACTED]. This limit shall be index linked and shall be exclusive of any insurance proceeds received or which will be received pursuant to policies maintained in accordance with Schedule 17 *[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 13.5 shall restrict, limit, prejudice or in any other way impair the rights and/or remedies of the Parties under any other provision of this Agreement.

### **13.6 Exclusivity of Termination Provisions**

Neither Party shall have any right to terminate this Agreement except as expressly set out in Sections 14.1 *[Termination by City]*, 14.2 *[Termination by Design-Builder]* or 14.3 *[Termination upon Force Majeure or Limited Relief Event]*; and without limiting the generality of the foregoing neither Party shall in any event be entitled to terminate this Agreement on the basis of fundamental breach.

### **13.7 City's Remedial Rights**

Without limiting any other rights and remedies of the City in this Agreement, including: (i) to issue a stop work order pursuant to Section 4.5 *[Stop Work Order]*; (ii) to make Construction Payment Adjustments and/or to accord Default Points; or (iii) to issue a Notice of Default, the City shall have the following remedial rights at all times during the Term:

- (a) *Increased Monitoring and Reporting.* If the City is of the opinion, acting reasonably, that there are defects in the Project Work or that Design-Builder has failed to comply, in any

material respect, or in cases of reoccurring and failed mitigation attempts at correcting reoccurring defects, with the requirements of this Agreement, the City may, without prejudice to any other right or remedy available to it, by notice to Design-Builder, increase the level and frequency of Design-Builder's reporting and monitoring of its own performance of its obligations under this Agreement to such level until such time as Design-Builder shall have demonstrated, to the City's satisfaction, that it is capable of performing and will perform, in all material respects, its obligations under this Agreement.

- (b) *Step-in Events.* If at any time during the Term the City reasonably believes that any of the following events or circumstances has occurred, it may exercise the step-in or other remedial rights set out in Section 13.7(c):
- (i) a Default by Design-Builder, or any act or omission of Design-Builder or any Design-Builder Person, does or can reasonably be expected to create or cause a serious threat to the health, safety or security of any Person or a serious risk to the environment;
  - (ii) Design-Builder or any Design-Builder Person is preventing or interfering with the discharge or performance by the City or any City Person or other Governmental Authority of a statutory duty;
  - (iii) Design-Builder or Subcontractors are excluding or limiting public use of the Lands or the Infrastructure (other than for purposes expressly contemplated by the Project Requirements or in a manner otherwise consistent with the Agreement);
  - (iv) an Emergency;
  - (v) if Design-Builder, a Subcontractor, or Key Individual has been identified by the City as a Restricted Person or has committed a Prohibited Act that may result in a material interruption or impairment to the conduct or performance of the Project Work;
  - (vi) failure by Design-Builder to comply with any written direction issued by or on behalf of the City;
  - (vii) undue interference of any Project Work that is being carried out in breach of the Agreement with the City's transit operations or that does or can reasonably be expected to materially prejudice the performance of any City Activities; or
  - (viii) Design-Builder has one or more Default Point(s) subsisting at any time during the Term.
- (c) *Remedial Action.* Without prejudice to the City's rights under this Section 13 [*Default, Remedies and Termination Events*] or Section 14 [*Termination*] or any other rights of the City pursuant to this Agreement, the City may, upon notice to Design-Builder (which notice shall specify pertinent details of the intended action), take such action (the "**Remedial Action**") in relation to the Project Work as the City reasonably considers necessary to mitigate the risk or the impact of one or more of the foregoing developments, and in that event:
- (i) the City shall provide Design-Builder with written notice of its intentions to exercise its rights under this Section 13.7 [*City's Remedial Rights*] and shall provide Design-Builder an opportunity to promptly respond to this notice and advise the City of Design-Builder's willingness, capacity and capability to take the

necessary Remedial Action to satisfactorily mitigate and manage the risk and impact of the relevant development as identified by the City. The notice provided by the City shall specify the time by which the City requires this response from Design-Builder as the City may reasonably determine having regard to the urgency of the situation and the potential for adverse impacts to occur if Remedial Action is not attended to in a prompt and effective manner;

- (ii) after providing the notice described in the preceding sub-paragraph and considering the Design-Builder response, if any, the City may either:
  - (A) if it considers that there is sufficient time and that it is likely that Design-Builder will be willing and able to provide assistance, require Design-Builder to take such steps as are necessary or expedient to perform the Remedial Action, and Design-Builder shall use all commercially reasonable efforts to comply with the City's requirements as soon as reasonably practicable; or
  - (B) if it considers, acting reasonably, that there is not sufficient time, or that Design-Builder is not likely to be willing and able to take the necessary steps, take such steps as the City considers are appropriate, either itself or by engaging others and, to ensure performance of the relevant Project Work to the standards required by this Agreement, or as closely as possible to those standards as the circumstances permit. The City shall carry out such steps as quickly as is practicable, and in such manner as will minimize undue interference with Design-Builder's performance of its obligations under this Agreement; and
- (iii) if either
  - (A) the need for the Remedial Action does not arise as a result of any breach by Design-Builder or any Design-Builder Person of any provision of this Agreement or any other Legal Fault of Design-Builder or any Design-Builder Person, or
  - (B) the City exercises its rights pursuant to this Section 13.7 [*City's Remedial Rights*], and it is later acknowledged by the City or determined through the Dispute Resolution Procedure that the City was not entitled to do so under the terms of this Agreement,

then the Remedial Action shall constitute a Relief Event under and be subject to Section 10 [*Relief Events and Limited Relief Events*].

- (d) *Rectification Rights.* Without prejudice to any of its other rights or remedies pursuant to this Section 13.7 [*City's Remedial Rights*], if the City gives notice of Remedial Action to Design-Builder under Section 13.7(b) and Design-Builder either:
  - (i) does not confirm, within five Business Days of such notice, or such shorter period as is appropriate in the case of an Emergency, that it is willing to perform the Remedial Action as required in such notice or present an alternative plan to the City to mitigate, rectify and protect against the breach, event, circumstance of other matter described in such notice that the City may, within a further five Business Days, accept or reject, acting reasonably; or

- (ii) fails to perform the Remedial Action as set out in such notice or as confirmed in an accepted alternate plan within such time as set out in such notice or accepted alternate plan or within such time as the City, acting reasonably, will stipulate,

then the City may take such steps as it considers necessary or expedient to perform the Remedial Action either itself or by engaging others. Such steps may include the partial or total suspension of the right and obligation of Design-Builder to provide the relevant Project Work, but only for so long as the attendant circumstances subsist. If the attendant circumstances no longer subsist or if Design-Builder has proposed a plan acceptable to the City, acting reasonably, for mitigating, rectifying and protecting against the circumstances that caused the City to give notice to Design-Builder under Section 14.6(b), any suspension of the right and obligation of Design-Builder to provide any Project Work will cease and such right and obligation will once again be in full force and effect.

- (e) *Ongoing Performance.* The exercise by the City of any of its rights under this Section 13.7 [*City's Remedial Rights*] will not reduce or affect in any way Design-Builder's responsibility and obligations in respect of the Project Work.
- (f) *Deferral of Rights.* Design-Builder has no right to require a determination of whether or not the City is entitled under the terms of this Agreement to exercise its rights pursuant to this Section 13.7 [*City's Remedial Rights*] until Design-Builder has complied with all of the City's requirements by performing or taking the Remedial Action. Only concurrently with or after complying with the City's requirements shall Design-Builder be entitled, as applicable, to claim a Relief Event, Change or refer any Dispute for resolution in accordance with Schedule 20 [*Dispute Resolution Procedure*].
- (g) *Costs and Expenses:* Subject to Section 13.7(c)(iii) above and Sections 13.7(h) and 13.7(i) below, Design-Builder shall bear all costs and expenses incurred by Design-Builder in relation to the exercise of the City's rights pursuant to this Section 13.7 [*City's Remedial Rights*] and Design-Builder shall reimburse the City for all reasonable costs and expenses incurred by the City in relation to the exercise of the City's rights pursuant to this Section 13.7 [*City's Remedial Rights*].
- (h) *Reimbursement if Improper Exercise of Rights.* If the City exercises its rights pursuant to this Section 13.7 [*City's Remedial Rights*], but the City was not entitled to do so, the City shall reimburse Design-Builder for the reasonable costs and expenses directly incurred by Design-Builder over and above those that would otherwise have been incurred by Design-Builder in the proper performance of its obligations under this Agreement and that are directly and reasonably incurred by Design-Builder in complying with those written requirements of the City issued as a result of the City having exercised such rights.
- (i) *Reimbursement for Emergencies.* If the City either takes steps itself or requires Design-Builder to take steps in accordance with this Section 13.7 [*City's Remedial Rights*] as a result of an Emergency that is not caused or contributed to by an act or omission of Design-Builder or any Design-Builder Person or a breach by Design-Builder or any Design-Builder Person of any obligation under this Design-Build Agreement:
  - (i) the City shall reimburse Design-Builder for the reasonable costs and expenses incurred by Design-Builder in relation to the exercise of the City's rights pursuant to this Section 13.7 [*City's Remedial Rights*] that would not otherwise have been incurred by Design-Builder in the proper performance of its obligations under this Design-Build Agreement; and



- (ii) the City shall bear all costs and expenses incurred by the City in relation to the exercise of the City's rights pursuant to this Section 13.7 [*City's Remedial Rights*].
- (j) *Subcontracts*. Design-Builder shall ensure that the provisions contained in all applicable Subcontracts do not prevent or inhibit the City from exercising its rights under this Section 13.7 [*City's Remedial Rights*].

### **13.8 Termination Events**

The following shall constitute Termination Events, except where solely caused directly and specifically by (i) the City withholding without lawful cause any amount due and payable under this Agreement except to the extent disputed by the City in good faith; or (ii) Legal Fault of the City or City Person:

- (a) if Design-Builder is declared or adjudged a bankrupt, makes a general assignment for the benefit of creditors, or takes the benefit of any legislation in force for (i) protection against creditors, (ii) orderly payment of debts, or (iii) winding up or liquidation;
- (b) if a receiver or receiver-manager is appointed for the business of Design-Builder, unless the appointment is canceled within 21 days;
- (c) if any material part of the property of Design-Builder is seized or attached and such seizure or attachment is not successfully contested by Design-Builder within 21 days;
- (d) if Design-Builder ceases active business operations;
- (e) if, during the Term, Design-Builder abandons the Design or Construction;
- (f) if it is determined by the City (subject to Design-Builder's right to refer a Dispute in respect of such determination for resolution pursuant to the Dispute Resolution Procedure) that, by the Percent Completion Default Date, the Percent Completion is less than 20%;
- (g) if Design-Builder fails to achieve Construction Completion by the Long Stop Date;
- (h) if at any time after the date that is one year prior to the Long Stop Date it is finally determined pursuant to the Dispute Resolution Procedure that Construction Completion is not reasonably expected to occur on or before the Long Stop Date;
- (i) if Design-Builder, upon receiving a Notice of Default from the City where the specified Default has a Material Adverse Effect, fails to:
  - (i) cure the Default within 21 days;
  - (ii) where the Default cannot by reasonable commercial efforts be cured within 21 days, communicate to the City and initiate within that 21 days a commercially reasonable course of action designed to cure the Default, and thereafter diligently pursue that course of action until the Default is cured; or
  - (iii) where the Default is an Incurable Default, within 21 days communicate to the City and initiate a commercially reasonable course of action designed to mitigate the consequences of the Incurable Default to the maximum extent practicable, and thereafter diligently pursue that course of action until the consequences of the Incurable Default have been so mitigated.

- (j) if Design-Builder, a Subcontractor or Key Individual is identified by the City in accordance with Section 13.7 [*City's Remedial Rights*] to be a Restricted Person or has committed a Prohibited Act that is not appropriately managed or remedied by Design-Builder to the City's satisfaction, acting reasonably, as provided for in Section 13.7 [*City's Remedial Rights*];
- (k) if Design-Builder is assigned a total of four or more Default Points; or
- (l) where any provision of this Agreement expressly provides for a right of termination in favour of the City by reason of Design-Builder Default.

## **14. TERMINATION**

### **14.1 Termination by City**

The City may terminate this Agreement by notice to Design-Builder:

- (a) upon or within a reasonable time (having regard to Section 18.3 [*Termination and Dispute Resolution Procedure*]) after the City becomes aware of the occurrence of a Termination Event;
- (b) at any time upon 30 days advance written notice to Design-Builder, in the absolute and unfettered discretion of the City and for any reason whatsoever or for no reason at all, and at the convenience of the City; or
- (c) the conditions set out in Section 8.4 [*City's Election Not to Reinstate*] have arisen.

No notice of termination under this Section 14.1 [*Termination by City*] shall be effective unless, in the case of a notice under clause (a), it specifies the Termination Event relied on, in the case of a notice under clause (b), it states that the termination is for convenience, or in the case of a notice under clause (c), it specifies the Section of the Agreement on the basis of which the Agreement is being terminated.

### **14.2 Termination by Design-Builder**

Subject to Section 14.3 [*Termination Upon Force Majeure or Limited Relief Event*], Design-Builder may suspend or terminate this Agreement by notice to the City and in accordance with the terms of this Section 14.2 [*Termination by Design-Builder*] only if

- (a) the City has failed to pay any sum or sums due to Design-Builder under this Agreement, which sum or sums are not being disputed in accordance with Schedule 20 [*Dispute Resolution Procedure*] or have not been set off by the City pursuant to Section 7.6 [*Set-off*] and which sum or sums, either singly or in the aggregate, exceed(s) \$250,000 (index linked) and such failure continues for 30 days, in any such case, from receipt by the City of a notice of non-payment from Design-Builder;
- (b) the City committing a material breach of its obligations under Section 3.1 [*Access and Use*] (other than as a consequence of a breach by Design-Builder of its obligations under this Agreement), which breach materially adversely affects the ability of Design-Builder to perform all or substantially all of its obligations under this Agreement for a continuous period of not less than 60 days;
- (c) an act of any Governmental Authority which renders it impossible for Design-Builder to perform all or substantially all of its obligations under this Agreement (other than as a consequence of a breach by Design-Builder of its obligations under this Agreement) for a continuous period of not less than 60 days (for greater certainty, the non-issuance of, or

the imposition of any conditions or limitations in, any of the Project Approvals shall not constitute an “act of any Governmental Authority”); or

- (d) the City is in breach of Section 21.7 *[Assignment by City]*.

Upon the occurrence of any of the events listed in (a), (b), (c) or (d) above and while the same is continuing, Design-Builder may give notice to the City of the occurrence of the event and, at Design-Builder’s option and without prejudice to its other rights and remedies under this Agreement, may: (i) suspend performance of the Project Work until such time as the City has remedied such event; or (ii) if such event has not been remedied within 30 days of receipt by the City of notice of the occurrence of such event, terminate this Agreement in its entirety by notice in writing having immediate effect.

### **14.3 Termination Upon Force Majeure or Limited Relief Event**

Either Party may by notice to the other terminate this Agreement if:

- (a) any Force Majeure Event directly causes Design-Builder to be unable to perform all or a material part of the Design and Construction for an aggregate of 120 days falling within any 180 day period after the date of delivery of notice of such Force Majeure Event by either Party pursuant to Section 9.2(a) *[Procedure on Force Majeure Event]*;
- (b) any Limited Relief Event that directly causes Design-Builder to be unable to perform all or a material part of the Design and Construction for an aggregate of 120 days falling within any 180 day period after the date of delivery of notice of such Limited Relief Event by either Party pursuant to Section 10.3(a) *[Procedure on Relief Event and Limited Relief Event]*;

except that this Section 14.3 *[Termination Upon Force Majeure or Limited Relief Event]* shall not apply if a termination right is available under Section 8.4 *[City’s Election Not to Reinstate]*.

### **14.4 City’s Election Not to Terminate**

Notwithstanding Section 14.3(b), in respect of a Limited Relief Event for Epidemic only, if Design-Builder gives notice to the City under Section 14.3(b) terminating this Agreement, the City will have the option either to accept such notice or to respond in writing on or before the date falling 10 Business Days after the date of receipt of such notice stating that it requires this Agreement to continue. If the City gives Design-Builder such response then:

- (a) Design-Builder’s termination notice will be deemed null and void and Design-Builder, insofar as it is able to do so, will continue to perform its obligations in accordance with the provisions of this Agreement;
- (b) the Limited Relief Event will be deemed to constitute a Relief Event occurring as of the date the Limited Relief Event first occurred;
- (c) at any time so long as the Relief Event referred to in Section 14.4(b) is continuing, the City may terminate this Agreement by notice to Design-Builder; and
- (d) Design-Builder may at any time so long as the Relief Event referred to in Section 14.4(b) is continuing after a further period of 180 days after the date on which Design-Builder delivered the termination notice pursuant to Section 14.3(b) terminate this Agreement by notice to the City.

## 14.5 Consequences of Termination

Following the service of a notice of termination of this Agreement under Sections 14.1 [*Termination by City*], 14.2 [*Termination by Design-Builder*], 14.3 [*Termination Upon Force Majeure or Limited Relief Event*] or 14.4 [*City's Election Not to Terminate*] or termination on the Expiry Date in accordance with Section 4.8 [*Term*]:

- (a) the City shall pay to Design-Builder the Termination Payment in the amount and on the date specified under the pertinent Sections of Schedule 27 [*Compensation on Termination*];
- (b) Design-Builder shall, no later than five Business Days following the Termination Date, at no cost to the City, provide the City with copies of all records of any kind whatsoever that pertain to Design-Builder's performance of, or may otherwise facilitate the City or its contractors assuming responsibility for performing, the Design and Construction Requirements;
- (c) in so far as title shall not have already passed to the City pursuant to this Agreement, Design-Builder shall, promptly following the Termination Date, hand over to, and there shall vest in, the City, free from all Encumbrances (other than the Permitted Encumbrances and any Encumbrances caused or consented to by the City), the Infrastructure together with all other assets and rights owned or held by Design-Builder or a Design-Builder Person capable of being transferred that are necessary for the performance of the Project Work, and to the extent that any such assets or rights are not capable of being transferred by Design-Builder to the City, Design-Builder shall enter into agreements or make other arrangements in order to permit the use of the assets or rights by the City in order to enable it, or its designated agents or subcontractors, to continue to perform the activities which would have otherwise been performed by Design-Builder if this Agreement had not been terminated;
- (d) if termination is prior to the Construction Completion Date, without limiting Section 14.5(c), in so far as any transfer will be necessary to fully and effectively transfer property to the City, Design-Builder shall, on the Termination Date, transfer to, and there shall vest in, the City, free from all Encumbrances (other than the Permitted Encumbrances and any Encumbrances caused or consented to by the City) such part of the Infrastructure as has been constructed and all or any part of the stocks of material and other assets, road vehicles, construction equipment, spare parts and other moveable property owned by Design-Builder or any Subcontractor and used in respect of the Project Work.
- (e) if termination is prior to the Construction Completion Date, if the City so elects, all construction plant and Equipment owned by a Subcontractor and used in respect of the Project Work, whether or not on the Lands, shall remain available to the City for the purposes of completing the Project Work, subject to payment by the City of the relevant Subcontractor's reasonable charges;
- (f) subject to the rights and obligations set forth in Schedule 8 [*Intellectual Property*], the City shall be entitled to retain all defined Intellectual Property which may, thereafter be used by the City in accordance with the licences granted herein;
- (g) Design-Builder shall use commercially reasonable efforts to assign, or otherwise transfer, to the City, no later than the Termination Date, free from all Encumbrances (other than the Permitted Encumbrances and any Encumbrances caused or consented to by the City), the benefit of all Manufacturer Warranties, including all documentation in respect thereof, in respect of mechanical and electrical and equipment used or made available by Design-Builder under this Agreement and included in the Infrastructure;

- (h) to the extent permitted by Applicable Law and their respective terms, Design-Builder shall, no later than the Termination Date, assign all Project Approvals to the City;
- (i) Design-Builder shall, no later than the Termination Date, deliver to the City all records required to be kept by Design-Builder hereunder (Design-Builder having the right to retain copies thereof), unless such documents are:
  - (i) required by Applicable Law to be retained by Design-Builder, in which case complete copies will be delivered to the City; or
  - (ii) privileged from production pending resolution of any outstanding Dispute under the Dispute Resolution Procedure, in which case such records will be delivered forthwith upon resolution of such dispute, provided that any records that are necessary for the performance of the Project Work will be delivered to the City no later than the date of the Termination Payment;
- (j) Design-Builder shall cooperate fully with the City and any successors providing services in the nature of any of the Project Work in order to achieve a proper transfer of the manner in which the Project Work is performed;
- (k) Design-Builder shall as soon as practicable remove from the Lands all property belonging to Design-Builder that is not acquired or retained by the City pursuant to this Section 14.5 *[Consequences of Termination]* or otherwise, and, if Design-Builder has not done so within 60 days after any notice from the City requiring it to do so, the City 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 Design-Builder;
- (l) Design-Builder shall, no later than the Termination Date, deliver to the City's Representative:
  - (i) all keys to, and any pass cards and other devices used to gain access to any part of the Infrastructure; and
  - (ii) to the extent transferable and in addition to and without prejudice to the City's rights pursuant to Schedule 8 *[Intellectual Property]* or this Section 14.5 *[Consequences of Termination]*, any copyright licences for any computer programs, or licences to use the same, used in connection with the operation of the Infrastructure; and
- (m) Design-Builder shall as soon as practicable vacate the Lands and, without limiting Design-Builder's obligations under this Agreement, shall leave the Lands and the Infrastructure in a safe, clean and orderly condition.

#### **14.6 Survival of Rights and Obligations**

All rights and obligations under this Agreement that necessarily extend beyond termination of this Agreement in order to fully achieve their intended purpose shall survive termination of this Agreement, including without limiting the generality of the foregoing:

- (a) all indemnification and hold harmless rights and obligations, insofar as they apply to events that occurred prior to termination of this Agreement;
- (b) the rights and obligations of the City and Design-Builder under Section 14.5 *[Consequences of Termination]*;

- (c) the right of Design-Builder to receive, and the obligation of the City to make the Termination Payment specified in Section 15 [*Termination Payments*];
- (d) the rights and obligations of the Parties in relation to Confidential Information set out in Schedule 18 [*Freedom of Information and Protection of Privacy*] and Sections 16.3 [*Confidential Information*] 16.4 [*Disclosure of Confidential Information*] and 16.5 [*Public Disclosure of Agreement*];
- (e) the rights and obligations of the Parties set out in Section 6 [*Warranty*];
- (f) the rights and obligations set out in Schedule 8 [*Intellectual Property*] and Schedule 10 [*Environmental Performance Requirements*] that expressly or by necessary implication survive termination of this Agreement;
- (g) the right of Design-Builder to be paid the amounts payable pursuant to Sections 9.1(b) and 10.2.1(c) (as applicable) from the City in respect of Force Majeure Events or Relief Events for which the City is liable to pay compensation in respect of claims made by Design-Builder prior to the termination of the Agreement;
- (h) the right of Design-Builder to be paid its Direct Losses resulting from third party claims against Design-Builder or a Design-Builder Person made after termination of the Agreement for which the City is liable to pay compensation for such Direct Losses pursuant to Section 10 [*Relief Events and Limited Relief Events*] and as if the Relief Event occurred during the Term;
- (i) the rights and obligations of the Parties in relation to the Dispute Resolution Procedure set out in Section 18 [*Dispute Resolution*] to the extent required to resolve any Disputes in respect of the foregoing; and
- (j) the rights and obligations of the Parties in relation to Section 5 [*Landscape Final Completion*] of Schedule 7 [*Construction Completion, Service Readiness and Final Completion*] to the extent such rights and obligations have not been performed or satisfied prior to the Expiry Date.

## **15. TERMINATION PAYMENTS**

### **15.1 Compensation on Termination**

- (a) If this Agreement is terminated pursuant to Sections 14.1 [*Termination by City*], 14.2 [*Termination by Design-Builder*], 14.3 [*Termination Upon Force Majeure or Limited Relief Event*] or 14.4 [*City's Election Not to Terminate*], then Schedule 27 [*Compensation on Termination*] shall apply and the City shall pay to Design-Builder any applicable compensation on termination in accordance with the provisions of Schedule 27 [*Compensation on Termination*];
- (b) Design-Builder acknowledges and agrees that payment by the City of the Termination Payment constitutes satisfaction of any trust obligation of the City with respect to such payments under section 22 of the *Prompt Payment and Construction Lien Act*.

### **15.2 Delivery of Information**

Upon any termination of this Agreement, each Party shall as soon as practicable deliver to the other Party all information within the possession of, or that thereafter from time to time comes into the possession of, that Party that is relevant to the determination and calculation of the Termination Payment.

**16. COMMUNICATIONS**

**16.1 Notices**

Any notice, consent, approval or other communication under any provision of this Agreement (each, a "Notice") must be in writing to be effective, and is effective when delivered by any means, including e-mail, to the following respective addresses:

(a) if to the City:

[Redacted address information]

With a copy to:

[Redacted address information]

(b) if to Design-Builder:

[Redacted address information]

With a copy to:

[Redacted address information]

Either Party may change its address information by giving notice to the other in the above manner.

**16.2 Public Announcements, Communications and Engagement**

All communications and engagement with the public and all third parties shall be managed and carried-out in accordance with the protocols and requirements of Schedule 12 [Communications and Engagement]. Subject to Schedule 12 [Communications and Engagement], Design-Builder shall not make and shall not cause or permit any Design-Builder Person to make, any public announcement relating to this Agreement except as approved in advance by the City, acting reasonably, provided, however, that nothing herein shall preclude Design-Builder from making such disclosure as may be required pursuant to applicable stock exchange rules and securities laws and further provided that Design-Builder shall, to the extent practicable, provide reasonable prior notice to the City of any such required disclosure,

### 16.3 Confidential Information

Each Party shall, upon delivering any information to the other that includes information delivered in confidence, identify the information delivered in confidence (the “**Confidential Information**”). The receiving Party shall maintain (and shall ensure that its City Persons, in the case of the City, and Design-Builder Persons, in the case of Design-Builder) the confidentiality of the Confidential Information, with the exception of information that:

- (a) at the time of the disclosure to the receiving Party, without an obligation of confidentiality, was in the public domain;
- (b) after disclosure to the receiving Party became part of the public domain through no fault of the receiving Party or those for whom it is responsible at law;
- (c) was in the possession of the receiving Party without an obligation of confidentiality at the time of disclosure to it, as demonstrated by written records; or
- (d) was received by the receiving Party from a third party who had a lawful right to disclose the information.

### 16.4 Disclosure of Confidential Information

Neither Party shall disclose Confidential Information delivered by the other except:

- (a) the City or Design-Builder may disclose or grant access to such information to its professional advisers and consultants, to the extent necessary, to enable it to perform, or to cause to be performed, or to enforce its rights or obligations under this Agreement, and provided further that Design-Builder may, subject to obtaining confidentiality restrictions similar to those set out in this Agreement provide to a Subcontractor and its advisors, or provide or cause to be provided to other third parties, Confidential Information which is necessary to enable Design-Builder to perform, or to cause to be performed, its obligations under this Agreement;
- (b) as required by FOIP or Applicable Law;
- (c) as contemplated in Schedule 18 [*Freedom of Information and Protection of Privacy*];
- (d) subject to the City requesting confidentiality, to a Contribution Agreement Party in connection with any obligations of the City pursuant to a Contribution Agreement, and in the event of such disclosure, Design-Builder acknowledges that the Contribution Agreement Parties may be subject to FOIP, Access to Information Act (Canada) or other Applicable Law in respect of the use, protection and/or disclosure of such information;
- (e) by the City, to the extent such disclosure is required pursuant to City policy concerning the City's Confidential Information, the details of which have been provided to Design-Builder in writing prior to the disclosure;
- (f) by the City, in respect of authorizing other Persons to access and use Project Intellectual Property and related Intellectual Property Rights in accordance with this Agreement;
- (g) by the City, to the extent such disclosure is required in connection with the operation, maintenance, rehabilitation or improvement of the Project or by the LRV Supplier in connection with the delivery or commissioning of LRVs; or
- (h) where the disclosure is consented to in writing by the other Party.



Without prejudice to any other rights and remedies that the other Party may have, each of the Parties agrees that damages may not be an adequate remedy for a breach of Section 16.4 *[Disclosure of Confidential Information]* and that the other Party will, in such case, be entitled to the remedies of injunction, specific performance or other equitable relief for any threatened or actual breach of Section 16.4 *[Disclosure of Confidential Information]*.

### **16.5 Public Disclosure of Agreement**

Notwithstanding the above Sections 16.3 *[Confidential Information]* and 16.4 *[Disclosure of Confidential Information]*, Design-Builder agrees that the City will be at liberty to disclose all information contained in this Agreement, excepting only any Schedules or portions thereof that Design-Builder has, prior to signing of this Agreement, established to the satisfaction of the City, acting reasonably, contain business information that meets the requirements for non-disclosure under FOIP (the “**Sensitive Information**”). In the event of a request under FOIP for access to any of the Sensitive Information, Design-Builder will be given notice of the request pursuant to FOIP and will be given an opportunity to make representations as to why the Sensitive Information should not be disclosed.

The City acknowledges that the financial, commercial and technical information contained in Design-Builder’s Proposal has been submitted to the City in confidence.

### **16.6 Collection, Use and Disclosure of Personal Information**

Notwithstanding the above Sections 16.3 *[Confidential Information]* and 16.4 *[Disclosure of Confidential Information]*, Design-Builder shall comply, and shall ensure that all Design-Builder Persons comply, with Schedule 18 *[Freedom of Information and Protection of Privacy]*.

### **16.7 Business Opportunities**

- (a) The City reserves for itself the right to all business opportunities (collectively, the “**Business Opportunities**”) including the right to, from time to time:
  - (i) use or develop, or permit the use or development of, commercial and other opportunities (including, for greater certainty, all retail and parking operations and all naming and re-naming rights) on or associated with the Infrastructure, in, around and above the Stations and/or the Stops, and in, around and above the City Lands; and/or
  - (ii) use or develop (including by way of subdivision), or permit the use or development of, or dispose of, portions of the City Lands other than that portion of the City Lands necessary for the performance of the activities within the Project Work, and
- (b) Notwithstanding Section 16.7(a), to the extent that the development of a Business Opportunity constitutes a Change, such development shall be subject to Schedule 13 *[Changes]*.
- (c) Where the City engages, or otherwise permits, an Other Contractor to realize a Business Opportunity, the provisions of Section 5.2 *[Other Work]* shall apply.
- (d) Design-Builder may at any time propose Business Opportunities for the City’s consideration. All such proposals shall describe the Business Opportunity in full with the expected financial and other advantages to both the City and Design-Builder. The City may accept any such proposal in its sole discretion and subject to such terms and conditions as the City may require. Notwithstanding that Design-Builder has proposed a Business Opportunity to the City for its consideration, Design-Builder acknowledges that

the City reserves the right to proceed with such Business Opportunity or any similar Business Opportunity with Design-Builder or with any third party, and may initiate a separate procurement process for the development of any Business Opportunity and Design-Builder shall not be entitled to receive any payment or compensation from the City (in any form) except as expressly set out in this Agreement, even if the City proceeds with such Business Opportunity or any similar Business Opportunity with Design-Builder or any third party.

- (e) Where the City has named the Infrastructure or portions thereof, Design-Builder shall not publicly refer to it except as so named by the City.

## 17. CONTRACT ADMINISTRATION

### 17.1 Contract Administration

- (a) Design-Builder and the City will each have a Representative, appointed in accordance with, and having the rights and responsibilities set out in, Schedule 26 *[Representatives and Key Individuals]*.
- (b) Design-Builder and the City shall jointly establish the committees and working groups contemplated in this Agreement, including:
  - (i) the Construction Joint Committee, on and subject to the terms set out in Section 3.1 *[Construction Joint Committee]* of Schedule 4 *[Design and Construction Protocols]*; and
  - (ii) all committees of the Construction Joint Committee, on and subject to the terms set out in Section 3.1 *[Construction Joint Committee]* of Schedule 4 *[Design and Construction Protocols]*, as sub-committees of the Construction Joint Committee,

and, without limiting any provisions of this Agreement expressly creating a committee or working group, each committee and working group shall have the responsibilities and authorities delegated to it by the City and Design-Builder.

### 17.2 Mutual Cooperation

In administering, interpreting and carrying out their respective obligations under this Agreement, the Parties mutually undertake to deal fairly and in good faith, and to act at all times in a spirit of mutual cooperation.

### 17.3 Conduct of Indemnified Claims

Where either Party to this Agreement is entitled to indemnification, or a claim for compensation for Direct Losses arising from a third party claim against that Party (which for the purposes of this Section 17.3 *[Conduct of Indemnified Claims]* shall be deemed to be a claim for indemnification) under this Agreement, (“**Indemnified Party**”) and determines that an event has occurred giving rise or that may give rise to a right of indemnification in favor of the Indemnified Party (an “**Indemnity Claim**”), the Indemnified Party shall promptly notify the Party obligated to provide indemnification (the “**Indemnifying Party**”) of such Indemnity Claim (a “**Claim Notice**”) describing in reasonable detail the facts giving rise to the claim for indemnification, and shall include in such Claim Notice (if then known) the amount or the method of computation of the amount of such Indemnity Claim; provided that the failure of an Indemnified Party to give timely notice thereof shall not affect any of its rights to indemnification nor relieve the Indemnifying Party from any of its indemnification obligations except to the extent the Indemnifying Party is materially prejudiced by such failure.

Any obligation to provide indemnification under this Agreement shall be subject to the following terms and conditions:

- (a) upon receipt of a Claim Notice the Indemnifying Party shall, at its cost and expense and upon notice to the Indemnified Party within 30 days of its receipt of such Claim Notice (or such shorter time period as the circumstances warrant), assume and control the defence, investigation, compromise and settlement of such Indemnity Claim, including the management of any proceeding relating thereto, and shall employ and engage legal counsel reasonably acceptable to the Indemnified Party; provided that if there exists a material conflict of interest (other than one of a monetary nature) or if the Indemnified Party has been advised by counsel that there may be one or more legal or equitable defences available to it that are different from or additional to those available to the Indemnifying Party that in either case, would make it inappropriate for the same counsel to represent both the Indemnifying Party and the Indemnified Party, then the Indemnified Party shall be entitled to retain its own counsel at the cost and expense of the Indemnifying Party (except that the Indemnifying Party shall not be obligated to pay the fees and expenses of more than one separate counsel, other than local counsel, for all Indemnified Parties, taken together);
- (b) the Indemnified Party may, at its own cost and expense, participate in the defence of the Indemnity Claim, and shall cooperate with the Indemnifying Party in such efforts and make available to the Indemnifying Party all witnesses, records, materials and information in the Indemnified Party's possession, under its control or to which it may have access as may be reasonably required by the Indemnifying Party. The Indemnifying Party will keep the Indemnified Party reasonably informed of the progress of the defence of the Indemnity Claim. If the Indemnifying Party, contrary to clause (a), fails to assume the defence and investigation of the Indemnity Claim, then:
  - (i) the Indemnified Party shall have the right to undertake the defence, investigation, compromise and settlement of the Indemnity Claim on behalf of, and at the cost and expense of and for the account and risk of the Indemnifying Party;
  - (ii) the Indemnifying Party shall cooperate with the Indemnified Party in such efforts; and
  - (iii) the Indemnified Party will keep the Indemnifying Party reasonably informed of the progress of the defence of the Indemnity Claim.

The Indemnifying Party shall not, without the written consent of the Indemnified Party:

- (a) settle or compromise any Indemnity Claim or consent to any final judgment that does not include as an unconditional term thereof the delivery by the claimant or plaintiff of a written release or releases from all liability in respect of such Indemnity Claim of all Indemnified Parties affected by such Indemnity Claim; or
- (b) settle or compromise any Indemnity Claim if the settlement imposes equitable remedies or material obligations on the Indemnified Party other than financial obligations for which such Indemnified Party will be indemnified hereunder. No Indemnity Claim that is being defended in good faith by the Indemnifying Party shall be settled or compromised by the Indemnified Party without the written consent of the Indemnifying Party.

## **18. DISPUTE RESOLUTION**

### **18.1 Dispute Resolution Procedure**

Unless otherwise agreed to in writing between the City and Design-Builder, all Disputes shall be determined in accordance with the Dispute Resolution Procedure set out in Schedule 20 [*Dispute Resolution Procedure*]. The right to refer disagreements to the Dispute Resolution Procedure shall not be limited to provisions of this Agreement that expressly refer to the Dispute Resolution Procedure, and all such express provisions shall be construed as having been included only for greater certainty.

### **18.2 Exception**

Where under the provisions of this Agreement a Party has an unfettered discretion to exercise a right or take an action, the decision of that Party to exercise the right or take the action is not subject to review under the Dispute Resolution Procedure; but where any decision or discretion is expressly required to be made or exercised reasonably (or is otherwise qualified), then the reasonableness (or other qualification) of the decision made or the discretion exercised may be referred to the Dispute Resolution Procedure for determination.

### **18.3 Termination and Dispute Resolution Procedure**

A Party may refer to the Dispute Resolution Procedure for advance determination the question as to whether it has valid grounds for terminating this Agreement (including, without limitation, whether the circumstances described in Section 13.8(f), (g) and (h) have occurred). However, the submission of that question to the Dispute Resolution Procedure shall not prevent either Party from terminating this Agreement in accordance with its provisions prior to determination of that question by the Dispute Resolution Procedure. If either Party has purported to terminate this Agreement in accordance with its provisions, the other Party may submit to the Dispute Resolution Procedure the question of whether such termination was made in accordance with this Agreement, and request either:

- (a) a ruling that this Agreement has not been terminated; or
- (b) the payment of a Termination Payment as determined pursuant to and in accordance with Schedule 27 [*Compensation on Termination*].

### **18.4 Requirements for Subcontracts**

Design-Builder shall ensure that each Subcontract incorporates the provisions of Section 5 [*Consolidation of Proceedings*] of Schedule 20 [*Dispute Resolution Procedure*].

## **19. ADDITIONAL PROJECT TERMS**

### **19.1 Key Individuals**

In accordance with Schedule 26 [*Representatives and Key Individuals*], Design-Builder shall confirm the appointment of its Key Individuals responsible for the Project Work and confirm the roles and responsibilities for these individuals during the Term. Any proposed change to these appointments is subject to the protocols and conditions set out in Schedule 26 [*Representatives and Key Individuals*].

### **19.2 Approvals and Authorizations**

Except for City Permits, and in accordance with the protocols and terms of Schedule 28 [*Project Approvals and Utility Matters*], Design-Builder shall have full responsibility for obtaining the Project Approvals.

### 19.3 Lobbying, Corrupt Practices and Other Prohibited Acts

- (a) The term “**Prohibited Act**” means:
- (i) offering, giving or agreeing to give to the City or any public body (or anyone employed by or acting on their behalf), or to any family member of any 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 Agreement or any other agreement with the City or any Governmental Authority in connection with the Project; or
    - (B) for showing or not showing favour or disfavour to any Person in relation to this Agreement or any other agreement with the City or any Governmental Authority in connection with the Project,provided that this Section 19.3(a)(i) shall not apply to Design-Builder (or a Design-Builder Person) providing consideration to the City or any Governmental Authority in the ordinary course, or as reasonably necessary, to fulfill or comply with the obligations and liabilities of Design-Builder under this Agreement or any other agreement with the City or any Governmental Authority in connection with the Project;
  - (ii) entering into this Agreement or any other agreement with the City 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 Design-Builder, or on its behalf or to its knowledge, to the City or any Governmental Authority (or anyone employed by or acting on their behalf, including a Subcontractor), or to any family member of any such Person, unless, before the relevant agreement is entered into, particulars of any such commission or fee have been disclosed in writing to the City, provided that this Section 19.3(a)(ii) shall not apply to a fee or commission paid by Design-Builder (or anyone employed by or acting on its behalf) to the City or any Governmental Authority 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 Design-Builder under this Agreement or any other agreement with the City or any Governmental Authority in connection with the Project without contravening the intent of this Section 19.3(a)(ii);
  - (iii) breaching or committing any offence under Applicable Law in respect of corrupt, fraudulent acts or criminal behaviour or conduct in relation to this Project or any other agreement with the City or any Governmental Authority in connection with the Project; or
  - (iv) defrauding or attempting to defraud or conspiring to defraud the City or any other Governmental Authority.
- (b) If Design-Builder or any Design-Builder Person commits any Prohibited Act, such Prohibited Act shall be considered a Termination Event for the purposes of this Agreement unless Design-Builder demonstrates to the City’s satisfaction, acting reasonably, that appropriate remedial action has been taken to ensure that the best interests of the Project and the City are protected.
- (c) Nothing contained in this Section 19.3 [*Lobbying, Corrupt Practices and Other Prohibited Acts*] shall prevent Design-Builder 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.

- (d) Design-Builder shall notify the City of the occurrence and details of any Prohibited Act promptly on Design-Builder becoming aware of its occurrence.

#### **19.4 Design-Builder's Reliance on Information**

- (a) Neither the City nor any City Person gives any representation, warranty or undertaking of whatever nature in respect of any Disclosed Data and, specifically (but without limitation), neither the City nor any City Person represents or warrants that the Disclosed Data represents all of the information in its possession or power (either during the conduct of the procurement process for the Project or at the Effective Date) that is or might be relevant or material to or in connection with the Project or the obligations of Design-Builder under this Agreement or under any of the Project Documents.

- (b) It is Design-Builder's responsibility to have conducted its own investigations, analysis and review of the Project, the Disclosed Data, the Lands, the Existing Infrastructure, the Infrastructure and the Project Work and the risks it assumes hereunder, and before the execution of this Agreement, to have taken all steps it considers necessary to satisfy itself as to the accuracy, completeness, sufficiency, fitness for purpose and applicability of any Disclosed Data upon which it places reliance and to assess all risks related to the Project, the Lands, the Infrastructure and the Existing Infrastructure, in relation to the Project Work.

- (c) Except as otherwise expressly provided in Section 19.4(d) and Section 19.4(e):

- (i) Neither the City nor any City Person shall be liable to Design-Builder for, and Design-Builder shall not, and shall ensure that no Design-Builder Person shall, make any claim against the City or any City Person (including any claim in damages, for extensions of time or for additional payments under this Agreement) or seek to recover from the City, any damages, losses, costs, liabilities, expenses or other compensation of any nature which may arise (whether in contract, tort or otherwise) from the adoption, use or application of the Disclosed Data by, or on behalf of, Design-Builder or on grounds:

- (A) of any misunderstanding or misapprehension in respect of any Disclosed Data; or
- (B) that the Disclosed Data (or any part thereof) was incorrect, incomplete, inapplicable or insufficient; or
- (C) that information relating to the Disclosed Data given to Design-Builder by any Person other than the City was inaccurate, incomplete, insufficient or inapplicable,

nor shall Design-Builder be relieved from any of its obligations under this Agreement on any such grounds.

- (ii) Neither the City nor any City Person shall be liable to Design-Builder in respect of any failure, whether before, on or after Commercial Close:

- (A) to disclose or make available to Design-Builder any information, documents or data;

- (B) to review or update the Disclosed Data or any part thereof; or
  - (C) to inform Design-Builder of any inaccuracy, error, omission, defect or inadequacy in the Disclosed Data or any part thereof.
- (d) The City hereby represents and warrants there are no factual errors in the bore hole logs and the field and laboratory test data contained in (and with effect as of the reporting dates contained therein) the following reports:
- (i) Geotechnical Report – 23 Avenue and 111 Street Drainage Early Works – Tunnels South LRT Extension (Century Park to Ellerslie) EG10430D, Wood Report dated June 29, 2022.
  - (ii) Geotechnical Report – 23 Avenue and 111 Street Drainage Early Works – Lift Station South LRT Extension (Century Park to Ellerslie) EG10430D, Wood Report dated June 30, 2022.
  - (iii) Capital Line South Extension (Century Park to Ellerslie Road) Owner's Engineer – Geotechnical Investigation – Twin Brooks Station, Capital Line Partners Report dated January 2023.
  - (iv) Capital Line South Extension (Century Park to Ellerslie Road) Owner's Engineer – Geotechnical Investigation – Anthony Henday Drive LRT Bridge, Capital Line Partners Report dated January, 2023.
  - (v) Capital Line South Extension (Century Park to Ellerslie Road) Owner's Engineer – Geotechnical Investigation – Blackmud Creek LRT Bridge, Capital Line Partners Report dated January, 2023.
  - (vi) Capital Line South Extension (Century Park to Ellerslie Road) Owner's Engineer – Geotechnical Investigation – Llew Lawrence Operations and Maintenance Facility, Capital Line Partners Report dated January, 2023.
  - (vii) Capital Line South Extension (Century Park to Ellerslie Road) Owner's Engineer – Geotechnical Investigation – Heritage Valley North Station, Capital Line Partners Report dated January, 2023.
  - (viii) Capital Line South Extension (Century Park to Ellerslie Road) Owner's Engineer – Geotechnical Investigation – Stormwater Management Facility (SWMF), Capital Line Partners Report dated January, 2023.
  - (ix) Capital Line South Extension (Century Park to Ellerslie Road) Owner's Engineer – Geotechnical Investigation – Utility Complexes, Capital Line Partners Report dated January, 2023.
  - (x) Capital Line South Extension (Century Park to Ellerslie Road) Owner's Engineer - Geotechnical Investigation – 23<sup>rd</sup> Ave Underpass, Capital Line Partners Report dated March 2023.
  - (xi) Capital Line South Extension (Century Park to Ellerslie Road) Owner's Engineer - Geotechnical Investigation – Tracks on Grade, Capital Line Partners Report dated February 2023.

- (xii) Capital Line South Extension (Century Park to Ellerslie Road) Owner's Engineer - Geotechnical Investigation – Elevated Guideway/At-Grade Tracks North of Heritage Valley North Station, Capital Line Partners Report dated March 2023.

For certainty, the Relief Event set out in this Section 10.1.1(b)(v) shall be Design-Builder's sole remedy in respect of any breach of the City's representation and warranty set forth in this Section 19.4(d).

- (e) The City agrees that if, at Commercial Close, except as disclosed in any Disclosed Data or as otherwise disclosed by the City or any City Person, or known by Design-Builder or any Design-Builder Person, there is relevant information in the possession or control of the City which the City has knowingly not disclosed to Design-Builder which, if disclosed to Design-Builder, would make any of the information in the Disclosed Data incorrect, then, to the extent such undisclosed information would reasonably be expected to materially adversely affect Design-Builder's cost of performing the Project Work, such incorrect information shall, subject to and in accordance with Schedule 13 [*Changes*], result in a Change.

## **20. INSURANCE AND PERFORMANCE SECURITY**

### **20.1 General Requirements**

- (a) Design-Builder and the City shall comply with the provisions of Schedule 17 [*Insurance and Performance Security Requirements*].

### **20.2 No Relief from Liabilities and Obligations**

- (a) Neither compliance nor failure to comply with the insurance provisions of this Agreement shall relieve Design-Builder or the City of their respective liabilities and obligations under this Agreement.

### **20.3 Performance Guarantee of DB Guarantor**

- (a) At all times during the Term and, in respect of the provisions described in Section 6, following the Term, Design-Builder shall ensure that a valid and binding Performance Guarantee of DB Guarantor in favour of the City from the DB Guarantor (or a party of comparable financial strength, capacity and stability, as determined by the City acting in its sole discretion) and in the form of guarantee attached as Schedule 31 Form of Performance Guarantee of DB Guarantor, is in place and enforceable by the City.

### **20.4 Performance Letter of Credit**

- (a) As security for Design-Builder's warranty obligations during the Warranty Period, Design-Builder shall deliver, or cause to be delivered, to the City no later than Construction Completion, one or more irrevocable letters of credit (the "**Performance Letter of Credit**") substantially in the form of Schedule 30 [*Letter of Credit*]. The Performance Letter of Credit shall be in an aggregate amount equal to thirty million dollars (\$30,000,000) (the "**Required Amount**"). The Required Amount shall be reduced to an aggregate amount equal to \$10 million dollars (\$10,000,000) and the Performance Letter of Credit will be reduced accordingly after two years have passed from the Construction Completion Date. The City shall, upon receipt of a written request from Design-Builder, after two years have passed from the Construction Completion Date, provide written notice to Design-Builder and the institution issuing the Performance Letter of Credit to reduce the Performance Letter of Credit to such reduced Required Amount.



- (b) The Performance Letter of Credit must be issued by a Permitted Letter of Credit Provider. Design-Builder may at any time replace or substitute the Performance Letter of Credit with another letter of credit issued by any one or more Permitted Letter of Credit Provider(s) and in a form acceptable to and approved by the City, acting reasonably.
- (c) In the event that the Performance Letter of Credit must be renewed at any time, Design-Builder agrees to provide to the City reasonable evidence of the renewal of such Performance Letter of Credit no later than 10 Business Days prior to the renewal date, if any, of such Performance Letter of Credit.
- (d) In the event that Design-Builder does not deliver the Performance Letter of Credit in accordance with Section 20.4(a), the City may withhold from any amount otherwise due to Design-Builder by the City, including without limitation, any release of the Construction Completion Payment, an amount equal to the Required Amount (the "**Performance Letter of Credit Holdback**"), which holdback shall be held in an interest bearing account until such time as Design-Builder delivers the Performance Letter of Credit.
- (e) The City shall release the Performance Letter of Credit Holdback, less the amount of any claims previously satisfied by a draw in accordance with Section 20.4(f) and together with all interest accrued thereon, no later than five days following delivery of the Performance Letter of Credit to the City.
- (f) The City shall be entitled to draw on the Performance Letter of Credit or the Performance Letter of Credit Holdback with respect to the rectification of any Construction Completion Deficiencies, in an amount equal to the amount of the costs incurred by the City for the rectification of Deficiencies or non-compliant items in the Works during the Warranty Period following Construction Completion, together with all other damages suffered by the City, including any costs incurred by the City as a result of Design-Builder's breach of its obligations under this Section 20.4.
- (g) Notwithstanding anything to the contrary in this Section 20.4, the City shall be entitled to draw on the Performance Letter of Credit:
  - (i) upon the failure of Design-Builder to renew the Performance Letter of Credit pursuant to Section 20.4(c);
  - (ii) upon the downgrading of any of the banks or other financial institutions that issued the Performance Letter of Credit below the thresholds set out in Section 20.4(b) where the Performance Letter of Credit has not been replaced by Design-Builder with a replacement Performance Letter of Credit in a form acceptable to the City, acting reasonably, and issued by a Permitted Letter of Credit Provider within 30 calendar days of such downgrading; or
  - (iii) upon the bankruptcy or insolvency of any of the banks or other financial institutions that issued the Performance Letter of Credit,

provided that the City shall provide Design-Builder at least two Business Days prior written notice before drawing on the Performance Letter of Credit pursuant to this Section 20.4(g).
- (h) In the event that the Performance Letter of Credit is drawn down in accordance with Section 20.4(g), the City shall hold the cash proceeds thereof in a segregated interest bearing account (provided that such account must be at a bank that meets the thresholds described in Section 20.4(b) and such cash proceeds shall thereupon stand in place of the Performance Letter of Credit until Design-Builder delivers (or causes the delivery of) a

replacement Performance Letter of Credit to the City. All interest earned on such cash proceeds shall be for the benefit of Design-Builder. The City shall be entitled to withdraw such cash proceeds in the same manner that it is permitted to draw upon the Performance Letter of Credit pursuant to Section 20.4(f). Upon delivery of a replacement Performance Letter of Credit by Design-Builder, the City shall return all remaining cash proceeds and all accrued interest thereon from such segregated bank account to Design-Builder or as Design-Builder may direct within five Business Days.

- (i) The City may make multiple calls on the Performance Letter of Credit in accordance with this Section 20.4.
- (j) Unless the Performance Letter of Credit is fully drawn by the City in accordance with the provisions of this Agreement, the City shall, upon receipt of a written request from Design-Builder, release and deliver the Performance Letter of Credit to Design-Builder on the next business day following the receipt of such request; provided that such request shall not be made prior to the expiry of the Warranty Period.
- (k) In lieu of the provision of the Performance Letter of Credit, Design-Builder may propose an alternative form of comparable liquid security which the City may accept or reject in its discretion. If the City accepts the proposed alternate form of liquid security, such amendments shall be made to the foregoing provisions of this Section 20.4[*Performance Letter of Credit*] as may be reasonably required and as the Parties shall agree.
- (l) In the event that the City obtains funds (the “**Draw Amount**”) as a result of a call by the City on the Performance Letter of Credit and, pursuant to a final determination under Schedule 20 [*Dispute Resolution Procedure*] subsequent to the time of such call by the City, it is determined that such call was in breach of the terms and conditions of this Agreement or that the Draw Amount (or a portion thereof) exceeded the amount that the City was entitled to draw pursuant to the terms and conditions of this Agreement, the City shall repay such Draw Amount (or portion thereof, as applicable) and the Direct Losses of Design-Builder that Design-Builder can demonstrate resulted directly from such wrongful or excess call within five Business Days of such final determination under Schedule 20 [*Dispute Resolution Procedure*]; provided, however, that such repayment by the City shall be conditional upon (and take place concurrently with) the restoration of the Performance Letter of Credit (if and to the extent that the Performance Letter of Credit has not been released by such date in accordance with the terms and conditions of this Agreement) having a face amount equal to the Draw Amount (or applicable part thereof).

## 21. GENERAL PROVISIONS

### 21.1 Limitations on Assignment

Design-Builder will not assign, transfer or otherwise dispose of any interest in this Agreement or a Subcontract, except:

- (a) by way of a sub-contract that is not a subcontract of all or substantially all of the obligations under this Agreement; or
- (b) with the written consent of the City, which may be given or withheld in the City's discretion, and

provided that in the case of an assignment under 21.1(b) above the assignee assumes all the obligations of Design-Builder under this Agreement. Notwithstanding any other provision of this Agreement, Design-Builder shall not assign, transfer or otherwise dispose of any interest in this Agreement to a Person that is

a Restricted Party. Design-Builder shall also comply with Section 21.5 [*Costs of Request for Consent*] to the extent applicable to the proposed assignment, transfer or disposition.

## **21.2 Limitations on Change in Ownership**

No Change in Ownership of Design-Builder, or any Person owning, directly or indirectly, beneficially or otherwise, any of the shares or units or any other ownership interest in Design-Builder or any such Person, shall be permitted to occur, except in respect of a transaction referred to in Section 21.3(b), where the Person acquiring the ownership interest is a Restricted Person.

## **21.3 Limitations on Change in Control**

No Change in Control of Design-Builder will be permitted (whether by Design-Builder or otherwise) to occur during the Term, except:

- (a) arising from any bona fide open market transaction in any shares or other securities of Design-Builder, Affiliate, or of any Holding Company, effected on a recognized public stock exchange; or
- (b) otherwise with the written consent of the City, which may be given or withheld in the City's discretion.

Design-Builder shall comply with the requirements of Section 21.5 [*Costs of Request for Consent*] to the extent applicable to the change of control event.

## **21.4 Factors the City May Consider**

In determining whether to provide its consent under Section 21.1(b) or Section 21.3(b), and without limiting the City's discretion thereunder, it will be reasonable for the City to refuse its consent if:

- (a) the proposed assignee or the new party in control of Design-Builder, as the case may be, or any of their Affiliates, is a Restricted Person or a Person who has been found by a lawful authority to have committed, or who is being investigated at the time, in respect of a Prohibited Act with the City, any Governmental Authority or any other Person unless Design-Builder and the proposed assignee have demonstrated to the City's satisfaction, acting reasonably, that appropriate remedial action has been taken to properly manage this circumstance or development;
- (b) by reference to the qualification requirements and criteria applied by the City in the selection of Bidders to participate in the RFP stage of the public procurement process leading to Commercial Close (including the confirmation of any applicable Performance Security), the proposed assignee or the new party in control of Design-Builder, as the case may be, is, in the reasonable opinion of the City, not sufficiently creditworthy or financially stable to perform or support and cause the performance of Design-Builder's obligations under this Agreement or if the value of any Performance Security might be impaired or diminished as a consequence of the proposed assignment or Change in Control;
- (c) the assignment or Change in Control could, in the reasonable opinion of the City, have a material adverse effect on the Project, the City or the Infrastructure;
- (d) the City is of the opinion that the proposed assignment or Change in Control might hinder or prevent Design-Builder from achieving Construction Completion by the Target Construction Completion Date or might have a material adverse effect on the critical path;

- (e) by reference to the qualification requirements and criteria applied by the City in the selection of Bidders to participate in the RFP stage of the public procurement process leading to Commercial Close (including the confirmation of any applicable Performance Security), the proposed assignee or the new party in control of Design-Builder, as the case may be, is, in the reasonable opinion of the City, not reasonably, technically or commercially capable of performing or causing the performance of the Design-Builder obligations under this Agreement.

### **21.5 Costs of Request for Consent**

If Design-Builder requests consent to an assignment, transfer or disposition pursuant to Section 21.1 [*Limitations on Assignment by Design-Builder*] or to a Change in Control pursuant to Section 21.3 [*Limitations on Change in Control*], Design-Builder will pay the City's reasonable internal administrative and personnel costs and all reasonable out-of-pocket costs in connection with considering any such request. At the time of such request, Design-Builder will make a payment to the City in the amount of \$15,000 as an advance against (and not in satisfaction of) its obligations under this Section 21.5 [*Costs of Requests for Consent*]. After the City renders its decision, the City will either refund any over payment or invoice Design-Builder for any additional amounts owing under this Section 21.5 [*Costs of Requests for Consent*] and Design-Builder will promptly pay such amount to the City. Within 30 Business Days after the City renders its decision, the City will either refund any overpayment or invoice Design-Builder for any additional amounts owing under this Section 21.5 [*Costs of Requests for Consent*] and Design-Builder will promptly pay such amount to the City. Concurrently with providing such refund or invoice the City will provide Design-Builder with a breakdown of the City's costs in connection with its consideration of Design-Builder's request for consent.

### **21.6 Design-Builder Persons, Subcontractors**

- (a) Design-Builder will, as between itself and the City, be responsible for, and not relieved of its obligations hereunder by, the acts, omissions and Legal Fault of each Design-Builder Person and all references in this Agreement to any act, omission or Legal Fault of Design-Builder will be construed accordingly to include any such act, omission or Legal Fault of or committed by a Design-Builder Person.
- (b) Without limiting clause (a), the City acknowledges that Design-Builder shall carry out the Design and the Construction by contracting such obligations to Subcontractors pursuant to Subcontracts who in turn may contract all or part of their obligations under any Subcontract to one or more Subcontractors. Notwithstanding the use of Subcontractors, Design-Builder:
  - (i) will not be relieved or excused from any of its obligations or liabilities under this Agreement; and
  - (ii) will remain principally liable to the City for the due observance and performance of all the covenants, obligations, agreements and conditions of this Agreement that are to be observed and performed by Design-Builder.
- (c) In respect of the Project, Design-Builder will not contract with, or allow any of its Subcontractors to contract with, any Person that is a Restricted Person.

### **21.7 Assignment by City**

The City may assign, transfer, dispose of or otherwise alienate any interest in this Agreement or any agreement in connection with this Agreement to which Design-Builder and the City are parties:

- (a) as may be required to comply with Applicable Law;

- (b) to a corporation, all of the shares of which are owned by the City, provided that in such event, the City shall remain liable for all its obligations under this Agreement;
- (c) to a regional services commission created under the Municipal Government Act (Alberta), or other similar entity, provided that in such event, the City shall remain liable for all its obligations under this Agreement;
- (d) to any minister or agency of the Province of Alberta or the Government of Canada having the legal capacity, power, authority and ability to become a party to and to perform the obligations of the City under this Agreement; or
- (e) with the prior written consent of Design-Builder.

### **21.8 Applicable Law and Jurisdiction**

This Agreement shall be governed by the laws in force in Alberta, including the federal laws of Canada applicable therein. Subject to Section 18 [*Dispute Resolution*], Alberta courts shall have exclusive jurisdiction over all matters arising in relation to this Agreement, and each Party accepts the jurisdiction of Alberta courts.

### **21.9 Amendment and Waiver**

No amendment of this Agreement is effective unless made in writing and signed by a duly authorized representative of each of the City and Design-Builder. No waiver of any provision of this Agreement is effective unless made in writing, and any such waiver has effect only in respect of the particular provision or circumstance stated in the waiver. No representation by either of the Parties with respect to the performance of any obligation under this Agreement is capable of giving rise to an estoppel unless the representation is made in writing.

### **21.10 Additional Assurances**

The City and Design-Builder each agree to from time to time do all such acts and provide such further assurances and instruments as may reasonably be required in order to carry out the provisions of this Agreement according to their spirit and intent; but this Section 21.10 [*Additional Assurances*] shall not in any event be construed as obligating the City to amend or enact any statute or regulation.

### **21.11 Counterparts**

This Agreement may be executed in counterparts, in which case (i) the counterparts together shall constitute one agreement, and (ii) communication of execution by e-mail of a pdf copy shall constitute good delivery.

### **21.12 Joint and Several**

Where two or more Persons execute this Agreement as Design-Builder, the liability under this Agreement of such Persons executing this Agreement shall be joint and several.

### **21.13 No Derogation of City's Separate Obligations**

Design-Builder acknowledges and agrees that although the City is a Party to this Agreement, the City is and shall remain an independent planning authority and municipality with all requisite powers and discretion provided under Applicable Law.

## 21.14 Interpretation

In this Agreement, unless the context otherwise requires, capitalized terms will have the meanings set out in Schedule 1 *[Definitions and Interpretation]*. This Agreement will be interpreted and construed in accordance with the provisions set out in Schedule 1 *[Definitions and Interpretation]*.

## 21.15 Order of Precedence

- (a) In the event of any ambiguity, conflict or inconsistency between or among any of the provisions of this Agreement, the provisions shall govern in the following order of precedence with each taking precedence over those listed subsequently:
- (i) the provisions of amendments in writing to this Agreement signed by the Parties and Change Order Confirmations shall govern and take precedence only over those specific provisions of this Agreement expressly amended thereby;
  - (ii) any provision establishing a higher standard of safety, reliability, durability, performance, quality or service shall take precedence over a provision establishing a lower standard of safety, reliability, durability, performance, quality or service;
  - (iii) the body of this Agreement;
  - (iv) Schedule 1 Definitions and Interpretation;
  - (v) Schedule 20 Dispute Resolution Procedure;
  - (vi) Schedule 16 Payment Mechanism;
  - (vii) Schedule 4 Design and Construction Protocols;
  - (viii) Schedule 7 Construction Completion, Service Readiness and Final Completion;
  - (ix) Schedule 6 Testing and Commissioning;
  - (x) Schedule 5 Design and Construction Performance Requirements;
  - (xi) Schedule 10 Environmental Performance Requirements
  - (xii) Schedule 17 Insurance and Performance Security Requirements;
  - (xiii) Schedule 13 Changes;
  - (xiv) Schedule 2 Submittal Review Procedure;
  - (xv) Schedule 9 Quality Management;
  - (xvi) Schedule 27 Compensation on Termination;
  - (xvii) Schedule 19 Records and Reports;
  - (xviii) the other Schedules in the order in which they are listed under the heading "Schedules" on pages v to vii of this Agreement; and

- (xix) Schedule 23 Extracts from Bid.
- (b) Subject to Section 21.15(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 Project Work, the provision that applies to the specific part of the Project Work shall govern for that specific part of the Project Work.
- (c) If any ambiguity, conflict or inconsistency is not readily resolved by the foregoing provisions of this Section 21.15, then either Party, upon discovery of same, shall immediately give notice to the other Party's Representative. The City Representative shall, within 10 Business Days after the giving or receipt of such notice, make a determination of which provision governs and give notice of such determination, in writing, to Design-Builder.
- (d) The City and Design-Builder shall comply with the determination of the City Representative pursuant to this Section 21.15 unless the City or Design-Builder disputes the decision of the City Representative in which event such Dispute may be referred for resolution in accordance with Schedule 20 [*Dispute Resolution Procedure*].

#### **21.16 Choice of Language**

It is the express wish of the Parties that this document and any related documents be drawn up and executed in English. Les parties aux présentes ont expressément demandé que ce document et tous les documents s'y rattachant soient rédigés et signés en anglais.

The Parties have therefore signed this Agreement, by their respective duly authorized officers, on the respective dates shown below.

**[EXECUTION PAGE IMMEDIATELY FOLLOWS]**

**CAPITAL LINE DESIGN-BUILD LTD (Design  
Builder and Early Works Contractor)**

Per: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Legally Reviewed and Approved  
as to Form:

\_\_\_\_\_

Approved as to Content:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**CITY OF EDMONTON**

Per: \_\_\_\_\_  
Title: \_\_\_\_\_