

THE CITY OF EDMONTON
PROJECT AGREEMENT
VALLEY LINE LRT – STAGE 1

Schedule 15

Independent Certifier

***Edmonton Valley Line LRT – Stage 1
Project Agreement – Execution Version
Schedule 15 – Independent Certifier
Date: February 8, 2016***

SCHEDULE 15

INDEPENDENT CERTIFIER

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SCHEDULE 15

INDEPENDENT CERTIFIER

1. APPOINTMENT

Promptly, but not more than thirty (30) days, following the Effective Date, Project Co and the City will conduct a competitive procurement process to jointly appoint a person (or firm of persons) (the “*Independent Certifier*”), who:

- (a) is qualified and experienced with respect to the design and construction of light rail projects similar to the Project;
- (b) is a Professional Engineer;
- (c) is qualified and experienced with respect to progress measurement and assessment of light rail projects similar to the Project;
- (d) is qualified and experienced with respect to contract administration, construction engineering, and civil, mechanical, electrical and systems engineering and other relevant matters associated with the design, construction, operation and maintenance of light rail projects similar to the Project;
- (e) is qualified and experienced with respect to large-scale landscaping, reforestation and naturalization projects or, subject to Section 3.9(c) [*Independent Certifier Personnel*] of Appendix 15A [*Independent Certifier Agreement*], has entered into, or will enter into, a subcontract or similar arrangement with a person (or firm) with such qualifications and experience; and
- (f) is independent from both the City and Project Co (and who will be impartial to the Parties),

to provide certification services for the benefit of the Parties throughout the Construction Period.

The competitive procurement process will be managed and administered by the City in accordance with its procurement policies. Project Co shall cooperate and assist the City with the development of the procurement documents and evaluation criteria used to select the Independent Certifier and shall participate in the evaluation of procurement responses.

The Parties will enter into an agreement with the Independent Certifier on the terms generally as set out in Appendix 15A [*Independent Certifier Agreement*].

2. INDEPENDENT CERTIFIER SERVICES

The services to be provided by the Independent Certifier are described in the Independent Certifier Agreement.

3. CHANGES IN TERMS

Neither the City nor Project Co shall, without the other's prior approval (not to be unreasonably withheld or delayed):

- (a) waive, settle, compromise or otherwise prejudice any rights or claims which the other may from time to time have against the Independent Certifier; or
- (b) vary the terms of the Independent Certifier Agreement or the services performed, or to be performed, by the Independent Certifier.

4. PERFORMANCE OF OBLIGATIONS

Each of the City and Project Co shall perform its respective obligations arising under, or in connection with, the Independent Certifier Agreement.

5. COOPERATION

The City and Project Co agree to cooperate with each other generally in relation to all matters within the scope of, or in connection with, the Independent Certifier and the Independent Certifier Agreement. All instructions, inspection and meeting notices and representations issued or made by either the City or Project Co to the Independent Certifier shall be simultaneously copied to the other for information purposes, and in the case of inspections or meetings, both the City and Project Co shall be entitled to attend such inspections performed by, or meetings involving, the Independent Certifier.

6. INFORMATION

Project Co and the City shall provide the Independent Certifier with any information the Independent Certifier reasonably requires for the purpose of providing the services described in the Independent Certifier Agreement.

7. APPOINTMENT AND REPLACEMENT

If for any reason during the term of the Independent Certifier Agreement the Independent Certifier is unable or unwilling to continue to perform the Independent Certifier services or if the Independent Certifier's appointment has been terminated by the City and Project Co, then unless otherwise agreed, Project Co and the City will promptly conduct a competitive procurement process to jointly appoint a replacement Independent Certifier. The competitive procurement process will be conducted in accordance with the procedures set out in Section 1 *[Appointment]* of this Schedule 15 *[Independent Certifier]*.

8. PERMITTED ACCESS

Project Co and the City will give the Independent Certifier access to the Lands, the Project Work and the Infrastructure as the Independent Certifier reasonably requests in order to be fully informed as to the progress of the Project Work and the performance of the Infrastructure, including:

- (a) access to the Lands and the work in progress; and
- (b) access to the Lands and the Infrastructure, including all monitoring and recording equipment, as necessary to:
 - (1) verify the performance of the Project Work; and
 - (2) inspect the Project Work, certify Completion of the Tawatinâ Bridge SUP, Completion of each Early Handover Item, Completion of the Kâhasinîskâk Bridge and Service Commencement and perform the functions assigned to the Independent Certifier under Section 1.19 [*Completion and Handback of Landscaping, Native Forest Restoration and Naturalization*] of Schedule 10 [*Environmental Performance Requirements*],

and Project Co will:

- (c) provide the Independent Certifier with access to drawings, specifications, schedules, records, and other documents or data relating to the Project Work, including such information that is being produced by or in the possession of Project Co, any Project Contractor or Subcontractor, including the Design Builder and any of the foregoing information produced by or in the possession of the Design Builder with respect to the Light Rail Vehicle Supply;
- (d) provide the Independent Certifier with access to all plant, goods, products, commodities, materials, supplies, machinery, equipment, apparatus and other tangible property:
 - (1) intended to form, or actually forming, part of the Infrastructure, including the LRVs; or
 - (2) intended to be incorporated into, or permanently affixed to, the Lands or acts incorporated into, or permanently affixed to, the Lands,

whether located within or outside of the Lands;
- (e) permit the Independent Certifier to attend all Design and Construction meetings during the Construction Period, except to the extent Project Co and the City expressly otherwise agree;
- (f) permit the Independent Certifier to attend and observe all Commissioning activities; and
- (g) keep the Independent Certifier fully informed as to the progress of the Project Work, including giving notice in accordance with Good Industry Practice of any part of the Project Work before it becomes covered up or unavailable for inspection.

9. NO RESPONSIBILITY FOR PROJECT WORK

Nothing in this Agreement (including this Schedule 15 [*Independent Certifier*]) or the Independent Certifier Agreement will be interpreted as giving the Independent Certifier any responsibility or authority for any aspect of the Project Work, or as relieving Project Co of its responsibility for the Project Work, as set out in this Agreement, and none of Project Co, the Design Builder nor any Subcontractor will be entitled to rely on any review, acceptance, approval or confirmation that the Independent Certifier may give with respect to the Project Work.

10. PARTIES NOT RELIEVED

Neither Project Co, nor the City, will be relieved from performing or observing its obligations, or from any other liabilities, under this Agreement as a result of either the appointment of, or any act or omission by, the Independent Certifier.

11. PARTIES NOT LIABLE

On no account will Project Co or the City be liable to the other for any act or omission by the Independent Certifier whether under or purportedly under a provision of this Agreement, the Independent Certifier Agreement or otherwise, provided that any such act or omission will not extinguish, relieve, limit or qualify the nature or extent of any right or remedy of either Party against or any obligation or liability of either Party to the other Party which would have existed regardless of such act or omission.

APPENDIX 15A

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APPENDIX 15A

INDEPENDENT CERTIFIER AGREEMENT

THIS AGREEMENT is made as of the ▼ day of ▼, 2016

AMONG:

The City of Edmonton

(the “City”)

AND:

TransEd Partners General Partnership

(“Project Co”)

AND:

▼

(the “Independent Certifier”)

WHEREAS:

- A. the City and Project Co have entered into the Project Agreement;
- B. the City and Project Co wish to appoint the Independent Certifier, and the Independent Certifier wishes to accept such appointment, to perform certain services in connection with the Project Agreement; and
- C. the City, Project Co and the Independent Certifier wish to enter into this Agreement in order to record the terms by which the Independent Certifier will perform such services.

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

1. Definitions

1.1 Definitions

In this Agreement including the recitals and Schedules, unless the context indicates a contrary intention, terms which are defined in the Project Agreement (and not otherwise defined in this Agreement) will have meanings given to them in the Project Agreement and the following terms will have the following meanings:

“**Fee**” means the fees payable by the PA Parties to the Independent Certifier for the Functions, as such fees are specified and made payable in Schedule 2 [*Fee*] of this Agreement;

“Functions” means:

- (a) all of the functions and obligations conferred on the Independent Certifier under the Project Agreement, including any requirement to have particular training, qualifications, certifications, experience or expertise;
- (b) all of the functions and obligations conferred on the Independent Certifier under this Agreement, including the functions described in Schedule 1 *[Functions]* of this Agreement; and
- (c) all other things or tasks which the Independent Certifier is required to do to comply with its obligations under this Agreement;

“Functions Variation” means any change to the Functions;

“Intellectual Property” means any and all intellectual property rights throughout the world, whether subsisting now or in the future, including rights of any kind in inventions, patents, copyright, trademarks, service marks, industrial designs, integrated circuit topography rights, applications for registration of any of the foregoing, and know-how, trade secrets, confidential information and trade or business names;

“PA Party” means the City or Project Co, as applicable;

“Project Agreement” means that certain agreement entitled “Project Agreement” and made between the City and Project Co as of the 8th day of February, 2016 with respect to: (i) the design, construction, financing testing and commissioning of the Infrastructure, including LRV supply; (ii) the operation, maintenance and lifecycle rehabilitation of the System; and (iii) other ancillary work and services, as the same may be amended, supplemented or replaced from time to time; and

“Project Material” means all material:

- (a) provided to the Independent Certifier that is created by or required to be created by any PA Party; and
- (b) provided by or created by or required to be created by the Independent Certifier as part of, or for the purpose of, performing the Functions,

including documents, equipment, reports, technical information, plans, charts, drawings, calculations, tables, schedules and data (stored and recorded by any means).

“Subconsultant” has the meaning ascribed to such term in Section 3.9(c)(iii) of this Agreement.

2. Interpretation

2.1 Interpretation

The division of this Agreement into Sections, the insertion of headings and the provision of a table of contents are for convenience only, do not form a part of this Agreement and will not be used to affect the

construction or interpretation of this Agreement. The word "including" will not be construed as limiting the general term or statement immediately preceding. Unless otherwise specified:

- (a) each reference in this Agreement to "Section" and "Schedule" is to a Section of, and a Schedule to, this Agreement;
- (b) each reference to a statute is deemed to be a reference to that statute and any successor statute, and to the regulations made under that statute and any successor statute, as amended or re-enacted from time to time;
- (c) words importing the singular include the plural and vice versa and words importing gender include all genders;
- (d) references to time of day or date mean the local time or date in Edmonton, Alberta;
- (e) all references to amounts of money mean lawful currency of Canada; and
- (f) an accounting term has the meaning assigned to it, and all accounting matters will be determined, in accordance with Canadian GAAP consistently applied.

2.2 Obligations and Exercise of Rights by the PA Parties

The obligations of the PA Parties under this Agreement will be several. Except as specifically provided for in this Agreement, the rights of the PA Parties under this Agreement will be jointly exercised by each of the PA Parties.

3. Role of the Independent Certifier

3.1 Engagement

The PA Parties hereby appoint the Independent Certifier, and the Independent Certifier hereby accepts such appointment, to carry out the Functions in accordance with this Agreement. The Independent Certifier will perform the Functions in accordance with this Agreement.

3.2 Acknowledgement by Independent Certifier

The Independent Certifier hereby acknowledges in favour of the PA Parties that it has received a copy of the Project Agreement.

3.3 Standard of Care

The Independent Certifier will exercise the standard and skill, care and diligence in the performance of the Functions that would be expected of an expert professional experienced in providing services in the nature of the Functions for projects similar to the Project.

3.4 Duty of Independent Judgment

In exercising the Functions, the Independent Certifier will act:

- (a) impartially, honestly and independently;
- (b) reasonably and professionally; and
- (c) in a timely manner:
 - (i) in accordance with the times prescribed in this Agreement or the Project Agreement, as applicable; or
 - (ii) where no times are prescribed, within five Business Days or such earlier time so as to enable the PA Parties to perform their respective obligations under the Project Agreement.

Although the Independent Certifier should take account of any opinions or representations made by the PA Parties, the Independent Certifier will not be bound to comply with any opinions or representations made by either of them in connection with any matter on which the Independent Certifier is required to exercise its professional judgment.

The Independent Certifier acknowledges that as set out under the Project Agreement, the Independent Certifier's certifications will be final and binding on the PA Parties in respect of the issuance of the Certificate of Service Commencement, and that the Independent Certifier will use its best skill and judgment in providing the Functions and making any certifications.

A PA Party may dispute any other decision made by the Independent Certifier, including any list of Service Commencement Deficiencies or list of incomplete Design and Construction that must be completed prior to Service Commencement.

3.5 Authority to Act

The Independent Certifier:

- (a) is an independent consultant and is not, and will not purport to be, a partner, joint venturer or agent of any PA Party;
- (b) other than as may be expressly set out in the Project Agreement, has no authority to give any directions to a PA Party or its officers, employees, contractors, consultants or agents; and
- (c) has no authority to waive or alter any terms of the Project Agreement, nor to discharge or release a PA Party from any of its obligations under the Project Agreement unless jointly agreed in writing by the PA Parties.

3.6 Knowledge of the PA Parties' Requirements

The Independent Certifier warrants that:

- (a) it has and will be deemed to have informed itself fully of the requirements of the Project Agreement;
- (b) it will inform itself fully of the requirements of such other documents and materials as may become relevant from time to time to the performance of the Functions;
- (c) without limiting Sections 3.6(a) or 3.6(b), it has and will be deemed to have informed itself fully of all time limits and other requirements for any Function which the Independent Certifier carries out under the Project Agreement and this Agreement;
- (d) it has and will be deemed to have informed itself fully of the nature of the work necessary for the performance of the Functions and the locations of, means of access to, and facilities available for, performance of the Functions, including restrictions on any such access or protocols that are required; and
- (e) it has satisfied itself as to the correctness and sufficiency of its proposal for the Functions and that the Fee covers the cost of complying with all of the obligations under this Agreement and of all matters and things necessary for the due and proper performance and completion of the Functions.

3.7 Co-ordination by Independent Certifier

The Independent Certifier will:

- (a) fully co-operate with the PA Parties;
- (b) carefully co-ordinate the Functions with the work and services performed by the PA Parties;
- (c) without limiting its obligations under Sections 3.4 and 3.7(b), perform the Functions so as to avoid unreasonably interfering with, disrupting or delaying the work and services performed by the PA Parties;
- (d) provide copies to all PA Parties of all reports, communications, certificates and other documentation that it provides to any PA Party; and
- (e) without limiting Section 3.7(d), provide copies of any inspection and meeting notices:
 - (i) received by the Independent Certifier, to the PA Parties forthwith upon receipt thereof; or
 - (ii) issued by the Independent Certifier, simultaneously to both PA Parties,

so as to enable the PA Parties a reasonable opportunity to attend such inspections or meetings involving the Independent Certifier.

3.8 Conflict of Interest

The Independent Certifier warrants that:

- (a) at the date of signing this Agreement, no conflict of interest exists or is likely to arise in the performance of its obligations under this Agreement; and
- (b) if, during the term of this Agreement, any such conflict or risk of conflict of interest arises, the Independent Certifier will notify the PA Parties immediately in writing of that conflict or risk of conflict and take such steps as may be required by each of the PA Parties to avoid or mitigate that conflict or risk.

The Independent Certifier covenants to not enter into any agreement or relationship which could reasonably be expected to result in a conflict of interest in the performance of its obligations under this Agreement.

3.9 Independent Certifier Personnel

- (a) Subject to Section 3.9(b) and 3.9(c), the Independent Certifier will use the partners, directors or employees described in Schedule 3 [*Independent Certifier Personnel*] of this Agreement in connection with the performance of the Functions and such persons' services will be available for so long as may be necessary to ensure the proper performance by the Independent Certifier of the Functions. Such persons will have full authority to act on behalf of the Independent Certifier for all purposes in connection with this Agreement.
- (b) None of the persons listed in Schedule 3 [*Independent Certifier Personnel*] will be removed or replaced unless he/she ceases to work as a partner in, or director or employee of, the Independent Certifier or he/she is unable to work because of death or illness. The Independent Certifier will notify the PA Parties of any such circumstances and will be responsible for finding a replacement who will previously have been approved in writing by the PA Parties.
- (c) Where the Independent Certifier considers that the partners, directors or employees described in Schedule 3 [*Independent Certifier Personnel*] of this Agreement do not possess all of the experience or expertise necessary for the proper performance of the Functions, the Independent Certifier shall provide prompt written notice to the PA Parties detailing:
 - (i) the specific Functions for which the partners, directors or employees described in Schedule 3 [*Independent Certifier Personnel*] of this Agreement do not possess the necessary experience or expertise;

- (ii) the specific experience or expertise required for the proper performance of the applicable Functions; and
- (iii) the persons or firms proposed to be retained by the Independent Certifier (each a “**Subconsultant**”), including details of their relevant expertise and experience, the terms of their proposed engagement and the Subconsultant’s proposed compensation terms.

The Independent Certifier shall not engage the services of a Subconsultant without first obtaining the written approval of the PA Parties, such approval not to be unreasonably withheld. The Independent Certifier agrees that:

- (iv) the terms of this Agreement shall in all events be binding upon the Independent Certifier regardless of the existence of any inconsistent or contrary terms in any agreement between the Independent Certifier and any Subconsultant whether or not and without regard to the fact that the PA Parties may have directly or indirectly had notice of any such inconsistent term;
- (v) the Independent Certifier shall require each Subconsultant to comply with the terms and conditions of this Agreement to the extent applicable to the specific Functions performed by the Subconsultant; and
- (vi) the Independent Certifier is responsible and liable for the Functions performed by, and for the acts and omissions of, each Subconsultant and its personnel to the same degree as if the Functions were performed by, or the acts or omissions were those of, the Independent Certifier or its partners, directors or employees.

No agreement between the Independent Certifier and a Subconsultant creates any contractual or other legal relationship between any of the PA Parties and the Subconsultant.

4. Role of the PA Parties

4.1 Assistance

The PA Parties agree to co-operate with and provide reasonable assistance to the Independent Certifier to familiarize the Independent Certifier with all necessary aspects of the Project to enable the Independent Certifier to carry out its obligations under this Agreement.

4.2 Instructions in Writing

All instructions to the Independent Certifier by the PA Parties will be given jointly in writing.

4.3 Information and Services

The PA Parties will each make available to the Independent Certifier, as soon as practicable from time to time, all information, documents and particulars necessary for the Independent Certifier to carry out the

Functions, including such information, documents and particulars required in order for the Independent Certifier to:

- (a) determine the progress of the Project Work;
- (b) determine whether the End of Active Reclamation has occurred for each NSRV Segment and whether the Vegetation Handback Requirements have been satisfied; and
- (c) determine whether or not the criteria for Completion of the Tawatinâ Bridge SUP, Completion of each Early Handover Item, Completion of the Kâhasinîskâk Bridge and Service Commencement have been achieved,

and will provide copies of all such information, documents and particulars to the other PA Party.

4.4 Additional Information

If any information, documents or particulars are reasonably required to enable the Independent Certifier to perform the Functions and have not been provided by Project Co or the City, as the case may be, then:

- (a) the Independent Certifier will give notice in writing to Project Co or the City, as the case may be, of the details of the information, documents or particulars demonstrating the need and the reasons why they are required; and
- (b) Project Co or the City, as the case may be, will arrange the provision of the required information, documents or particulars.

4.5 Right to Enter and Inspect

Upon giving reasonable notice to Project Co, the Independent Certifier (and any person authorized by it) may enter and inspect the Lands, the Infrastructure and the location of any work in progress at any reasonable time in connection with the exercise or proposed exercise of rights under this Agreement, subject to:

- (a) observance of the reasonable rules of Project Co and the City as to safety and security for the Lands, the Infrastructure and work in progress;
- (b) not causing unreasonable delay to the carrying out of the Project Work by reason of its presence at the Lands, the Infrastructure or the location of any work in progress; and
- (c) not causing any damage to the Lands, the Infrastructure or work in progress.

5. Suspension

5.1 Notice

The Functions (or any part) may be suspended at any time by the PA Parties:

- (a) if the Independent Certifier fails to comply with its obligations under this Agreement, immediately by the PA Parties giving joint notice in writing to the Independent Certifier; or
- (b) in any other case, by the PA Parties giving seven days joint notice in writing to the Independent Certifier.

5.2 Costs of Suspension

The Independent Certifier will:

- (a) subject to the Independent Certifier complying with Section 8, be entitled to recover the extra costs incurred by the Independent Certifier by reason of a suspension directed under Section 5.1(b) valued as a Functions Variation under Section 8; and
- (b) have no entitlement to be paid any costs, expenses, losses or damages arising from a suspension under Section 5.1(a).

5.3 Recommencement

The Independent Certifier will immediately recommence the carrying out of the Functions (or any part) on receipt of a joint written notice from the PA Parties requiring it to do so.

6. Insurance and Liability

6.1 Independent Certifier's Insurance

- (a) The Independent Certifier shall, at its cost, have in place:
 - (i) Commercial General Liability Insurance covering the services and operations of the Independent Certifier for bodily injury and/or property damage with policy limits of not less than Two Million Dollars (\$2,000,000.00) per occurrence; and
 - (ii) Professional Liability Insurance covering the services provided by the Independent Certifier with policy limits of not less than Two Million Dollars (\$2,000,000) per claim and in the aggregate.
- (b) The Independent Certifier shall:
 - (i) ensure that each of the insurance policies described in Section 6.1(a) is in a form and with insurers acceptable to the City and Project Co;
 - (ii) ensure that applicable policies of insurance required to be taken out by Independent Certifier contain an endorsement to the effect that the insurer will not affect any adverse material change or amendment to the policy or any cancellation of the policy without first giving at least 30 days prior written notice by registered mail to the City and Project Co;

- (iii) ensure that the Commercial General Liability policy contains a cross liability and severability of interest clause and may be primary and non-contributory with any similar insurance coverage (primary or excess) maintained by the City or Project Co;;
- (iv) be responsible for the payment of all premium and deductible amounts relating to the insurance policies;
- (v) maintain in force the Commercial General Liability insurance as stipulated in this clause from the date of this Agreement until the expiry or termination of this Agreement;
- (vi) maintain in force the Professional Liability Insurance from the date of this Agreement until 36 months after the expiry or termination of this Agreement;
- (vii) endorse the Commercial General Liability Insurance to include the City and Project Co as additional insureds;
- (viii) endorse the Commercial General Liability Insurance to include a Waiver of Subrogation in favor of the City and Project Co;
- (ix) provide copies of each of the insurance policies described in Section 6.1(a) to each of the PA Parties upon request; and
- (x) provide evidence of renewal of each of the insurance policies described in Section 6.1(a) to each of the PA Parties not less than thirty days prior to the expiry dates of the policies. At the option of the PA Parties evidence of insurance may be provided by an insurance certificate issued by the Independent Certifier's insurance broker.

6.2 Workers' Compensation Insurance

The Independent Certifier will, at its own cost and at all times during the term of this Agreement, insure its liability (including its common law liability) as required under any applicable workers compensation statute or regulation in relation to its employees engaged in the Functions.

7. Payment for Services

7.1 Fee

- (a) In consideration of the Independent Certifier performing the Functions in accordance with this Agreement, the PA Parties will pay the Independent Certifier the Fee.
- (b) The Fee includes all taxes (except for Goods and Services Tax), disbursements and expenses (including accommodation, car rental, equipment and travel expenses), overheads and profit to perform the Functions.

7.2 Payment of Fee

- (a) The PA Parties will each pay half the Fee to the Independent Certifier in accordance with the payment schedule specified in Schedule 2 [*Fee*]. The obligation on Project Co and the City to each pay half of the Fee to the Independent Certifier is not subject to joint and several liability and neither the City nor Project Co will have any liability whatsoever for the non-payment by the other of any fees or costs payable by such other party under this Agreement.
- (b) Project Co acknowledges and agrees that if any amount due and payable by Project Co to the Independent Certifier is outstanding, the Independent Certifier will not have any obligation to Project Co to make any certification under the Project Agreement.

7.3 Non-Resident Withholding Tax

- (a) Before paying the Independent Certifier, the PA Parties shall determine if a non-resident withholding tax is applicable. If required, the PA Parties may withhold and remit the withholding tax to the relevant government authority. This remission is considered payment in accordance with Section 7 of this Agreement and the amount of the withholding tax remitted will constitute a payment to the Independent Certifier.

7.4 Audit Rights

- (a) The PA Parties, jointly and severally, may audit all Project Material, including all financial and related records associated with the Functions provided pursuant to this Agreement.
- (b) The Independent Certifier shall at all times during the term of this Agreement and for a period of six (6) years after termination or expiry of this Agreement, in accordance with Section 9, keep and maintain in accordance with Canadian GAPP, all Project Material.
- (c) The Independent Certifier shall at all reasonable times make Project Material available for inspection and review by an auditor appointed by either, or both, of the PA Parties (the "Auditor"), and will provide such copies or extracts requested by the Auditor.
- (d) The Auditor may at all reasonable times without prior notice, initiate a financial or operational audit and the Independent Certifier will facilitate access to property and cooperate fully with the Auditor or any person performing duties for the Auditor.
- (e) The Auditor may in the Auditor's discretion appoint experts, professionals and others including without limitation, quantity surveyors, accountants, engineers, scientists, lawyers, actuaries, tradesmen, appraisers or insurance personnel to provide services to the Auditor for any audit authorized by the terms of this Agreement.
- (f) The Independent Certifier must expressly include the provisions in this Section 7.4 in any agreement entered into by the Independent Certifier relating to its rights, duties or obligations under this Agreement.

- (g) Costs of any audits conducted under the authority of this Section 7.4 and not addressed elsewhere will be borne by the PA Party(ies) that initiated the applicable audit.
- (h) Nothing in this Section shall be construed so as to restrict, limit, revoke, or abridge any other express or implied rights, powers, or obligations the PA Parties may have in law or equity.

8. Functions Variations

8.1 Notice of Functions Variation

- (a) If the Independent Certifier believes, other than a “Functions Variation Order” under Section 8.3, that any direction by the PA Parties constitutes or involves a Functions Variation it will:
 - (i) within 7 days after receiving the direction and before commencing work on the subject matter of the direction, give notice to the PA Parties that it considers that the direction constitutes or involves a Functions Variation; and
 - (ii) within 21 days after giving the notice under Section 8.1(a)(i), submit a written claim to each of the City and Project Co which includes detailed particulars of the claim, the amount of the claim and how it was calculated.
- (b) Regardless of whether the Independent Certifier considers that such a direction constitutes or involves a Functions Variation, the Independent Certifier will continue to perform the Functions in accordance with this Agreement and all directions, including any direction in respect of which notice has been given under this Section.

8.2 No Adjustment

If the Independent Certifier fails to comply with Section 8.1, the Fee will not be adjusted as a result of the relevant direction.

8.3 Functions Variation Procedure

- (a) the City and Project Co may jointly issue a document titled “Functions Variation Price Request” to the Independent Certifier which will set out details of a proposed Functions Variation which the PA Parties are considering.
- (b) Within 7 days after the receipt of a “Functions Variation Price Request”, the Independent Certifier will provide each of the City and Project Co with a written notice in which the Independent Certifier sets out the effect which the proposed Functions Variation will have on the Fee.
- (c) Each of the City and Project Co may then jointly direct the Independent Certifier to carry out a Functions Variation by written document titled “Functions Variation Order” which will state either that:

- (i) the Fee is adjusted as set out in the Independent Certifier's notice; or
- (ii) the adjustment (if any) to the Fee will be determined under Section 8.4.

8.4 Cost of Functions Variation

- (a) Subject to Section 8.2, the Fee will be adjusted for all Functions Variations or suspensions under Section 5.1(b) carried out by the Independent Certifier by:
 - (i) the amount (if any) stated in the "Functions Variation Order" in accordance with Section 8.3(c);
 - (ii) if Section 8.4(a)(i) is not applicable, an amount determined pursuant to the fee schedule for Functions Variations in Schedule 2 [Fee]; or
 - (iii) where such rates or prices are not applicable, a reasonable amount to be agreed between the PA Parties and the Independent Certifier or, failing agreement, determined by the City and Project Co jointly, acting reasonably.
- (b) Any reductions in the Fee will be calculated on the same basis as any increases.

9. TERM AND TERMINATION

9.1 Term

Subject to earlier termination, this Agreement will commence on the date of this Agreement and continue in full force until:

- (a) the latest of the following dates:
 - (i) three (3) years after the issuance of the Certificate of Service Commencement;
 - (ii) three (3) years after correction by Project Co of all Service Commencement Deficiencies; or
 - (iii) the date on which a report under Section 1.19(10)(a) or Section 1.19(10)(b) *[Completion and Handback of Landscaping, Native Forest Restoration and Naturalization]* of Schedule 10 *[Environmental Performance Requirements]* has been delivered for all areas described in Section 1.19(6) *[Completion and Handback of Landscaping, Native Forest Restoration and Naturalization]* of Schedule 10 *[Environmental Performance Requirements]*; or
- (b) such later date as may be mutually agreed between the PA Parties and the Independent Certifier.

9.2 Notice of Breach

If the Independent Certifier commits a breach of this Agreement, the PA Parties may give written notice to the Independent Certifier:

- (a) specifying the breach; and
- (b) directing its rectification in the period specified in the notice, being a period not less than 7 days from the date of service of the notice.

9.3 Termination for Breach

If the Independent Certifier fails to rectify the breach within the period specified in the notice issued under Section 9.2, the PA Parties may, without prejudice to any other rights of the PA Parties or either of them, jointly terminate this Agreement immediately.

9.4 Termination for Financial Difficulty

The PA Parties may, without prejudice to any other rights which the PA Parties or either of them may have, jointly terminate this Agreement immediately if:

- (a) events have occurred or circumstances exist which, in the opinion of the PA Parties, may result in or have resulted in insolvency or the control of the Independent Certifier passing to another body or corporation; or
- (b) the Independent Certifier has communications with its creditors with a view to entering into, or enters into, any form of compromise, arrangement or moratorium of any debts whether formal or informal, with its creditors.

9.5 Termination for Convenience

Notwithstanding anything to the contrary in this Agreement, the PA Parties may at any time jointly terminate this Agreement upon 30 days written notice to the Independent Certifier.

9.6 Independent Certifier's Rights upon Termination for Convenience

Upon a termination under Section 9.5, the Independent Certifier will:

- (a) be entitled to be reimbursed by the PA Parties for the value of the Functions performed by it to the date of termination; and
- (b) not be entitled to any damages or other compensation in respect of the termination and (without limitation) any amount in respect of:
 - (i) the lost opportunity to earn a profit in respect of the Functions not performed at the date of termination; and

- (ii) any lost opportunity to recover overheads from the turnover which would have been generated under this Agreement but for it being terminated.

9.7 Procedure upon Termination

Upon completion of the Independent Certifier's engagement under this Agreement or earlier termination of this Agreement (whether under Sections 9.3, 9.4 or 9.5 or otherwise) the Independent Certifier will:

- (a) co-operate with the PA Parties;
- (b) hand to the PA Parties all Project Material and all other information concerning the Project held or prepared by the Independent Certifier; and
- (c) as and when required by the PA Parties, meet with them and such other persons nominated by them with a view to providing them with sufficient information to enable the PA Parties to execute the Project or the persons nominated to provide the Functions.

9.8 Effect of Termination

Except as otherwise expressly provided in this Agreement, termination of this Agreement will be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination (including the right of Project Co and the City to recover damages from the Independent Certifier).

9.9 Survival

Termination of this Agreement will not affect the continuing rights and obligations of Project Co or the City and the Independent Certifier under Sections 6, 7, 9.6, 9.7, 9.8, 10, 11.5, 11.9, 11.10 and this Section 9.9 or under any other Section which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

10. INDEMNITY

10.1 Indemnity

The Independent Certifier will indemnify and save harmless the PA Parties, and each of them, and their respective employees, agents, officers and directors from and against any and all losses incurred or suffered by any of them by reason of, resulting from, in connection with, or arising out of:

- (a) the breach of any representation, warranty, covenant, term, duty or obligation of the Independent Certifier set out in or arising under this Agreement or the Project Agreement; or
- (b) any act or omission of the Independent Certifier in connection with the subject matters of this Agreement.

11. General

11.1 Entire Agreement

This Agreement and the Project Agreement constitute the entire agreement between the PA Parties and the Independent Certifier and supersede all communications, arrangements and agreements, either oral, written, made or entered into prior to the date of this Agreement between the PA Parties and the Independent Certifier with respect to the subject matter of this Agreement.

11.2 Negation of Employment

- (a) The Independent Certifier, its officers, employees, servants and agents and any other persons engaged by the Independent Certifier in the performance of the Functions will not by virtue of this Agreement or the performance of the Functions become in the service or employment of the PA Parties for any purpose.
- (b) The Independent Certifier will be responsible for all matters requisite as employer or otherwise in relation to such officers, employees, servants and agents and other persons who are engaged by the Independent Certifier.

11.3 Compliance with Laws

- (a) The Independent Certifier shall comply with all relevant federal, provincial and municipal legislation, codes, bylaws and regulations applicable to the Functions. Where there are two or more laws, bylaws, regulations or codes applicable to the Functions, the more restrictive shall apply.
- (b) If the Independent Certifier performs the Functions contrary to any applicable laws, bylaws, regulations, codes and orders of any authority having jurisdiction, the Independent Certifier shall be responsible for and shall correct any violations thereof and shall bear all resulting costs, expenses, penalties and damages. If either, or both, of the PA Parties is required to do anything or take any steps or pay any sums to rectify such noncompliance, the PA Parties, or the applicable PA Party, may subtract the cost of such rectifications from any monies owed to the Independent Certifier. Such action shall not be deemed a waiver of any action that the PA Parties may pursue to collect any monies paid that exceed the monies owed to the Independent Certifier.

11.4 Waiver

Failure by any PA Party or the Independent Certifier to enforce a provision of this Agreement will not be construed as a waiver by that PA Party or the Independent Certifier of any right in respect of that provision, or any other provisions of this Agreement.

11.5 Freedom of Information and Protection of Privacy

- (a) The Independent Certifier agrees that for the purposes of the Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F-25 ("FOIP Act"), the City's employees include

any person who performs a service for the City including an appointee, volunteer, student, or under a contract or agency relationship with the City, and the Independent Certifier is therefore, pursuant to the FOIP Act, deemed to be a City employee for the purposes of the FOIP Act. The Independent Certifier agrees that the FOIP Act applies to all information or records within the Independent Certifier's custody or control that is collected or created for the purposes of this Agreement. This Article survives the term of this Agreement.

- (b) After receipt of FOIP request, the Independent Certifier will provide to the City and Project Co any Project Material within seven (7) calendar days of notification by the City.

11.6 Notices

Any document which is to be or may be issued or given to or served upon Project Co, the City or the Independent Certifier under this Agreement will be deemed to have been sufficiently issued or given to or served if it is:

- (a) delivered or sent by commercial courier, upon receipt; or
- (b) sent by e-mail or fax, upon confirmation of a successful transmission by a transmission report received by the sender,

to the addresses set out below:

- (c) if to the City:

LRT Design & Construction, Integrated Infrastructure Services, City of Edmonton
1200, MNP Tower 10235 - 101 Street
Edmonton, Alberta T5J 3E9
Attention: Brad Smid, Valley Line Project Director
Fax: 780 496 2803
Email: brad.smid@edmonton.ca

With a copy to:

Law Branch, Corporate Services Department, City of Edmonton
9th Floor, Chancery Hall, #3 Sir Winston Churchill Square
Edmonton, Alberta T5J 2C3
Attention: Claudia Pooli, Barrister & Solicitor
Fax: 780 496 7267
Email: claudia.pooli@edmonton.ca

- (d) if to Project Co:

TransEd Partners General Partnership
#220, 8618-51 Avenue
Edmonton, AB T6E 6E6

Attention: George Morschauser, Project Co's Representative
Fax: 780 468 6566
Email: gbmorsch@bechtel.com

With a copy to:

TransEd Partners General Partnership
c/o Fengate Infrastructure SPV Services Inc.
2275 Upper Middle Road E., Suite 700
Oakville, Ontario L6H 0C3
Email: fengatenotice@fengate.com

- (e) if to the Independent Certifier:

[•]

Any party may change its address for notice by notice given to the other parties in accordance with this Section.

11.7 Transfer and Assignment

- (a) The Independent Certifier:
- (i) will not assign, transfer, mortgage, charge or encumber any right or obligation under this Agreement without the prior written consent of the PA Parties, which each PA Party may give or withhold in its absolute discretion; and
 - (ii) agrees that any assignment, transfer, mortgage, charge or encumbrance will not operate to release or discharge the Independent Certifier from any obligation or liability under this Agreement.
- (b) For the purposes of this Section, an assignment will be deemed to have occurred where there is a Change in Control of the Independent Certifier after the date of this Agreement.
- (c) Each of the PA Parties may assign, transfer, mortgage, charge or encumber any right or obligation under this Agreement in accordance with the terms of the Project Agreement.

11.8 Governing Laws and Attornment

This Agreement will be governed by and construed in accordance with the laws of the Province of Alberta and the federal laws of Canada applicable therein without regard to conflicts of law principles that would apply a different body of law, and the City, Project Co and the Independent Certifier hereby irrevocably submit and attorn to the exclusive jurisdiction of the courts of that Province and all courts competent to hear appeals therefrom with respect to any action, suit, proceeding or dispute in connection with this Agreement.

11.9 Confidentiality

- (a) The Independent Certifier will ensure that:
 - (i) neither it nor any of its officers, employees, servants, Subconsultants and agents disclose, or otherwise make public, any Project Material or any other information or material acquired in connection with or during the performance of the Functions without prior written approval of the PA Parties; and
 - (ii) no Project Material is used, copied, supplied or reproduced for any purpose other than for the performance of the Functions under this Agreement.
- (b) The PA Parties may at any time require the Independent Certifier to give and to arrange for its officers, employees, servants, Subconsultants and agents engaged in the performance of the Functions to give written undertakings, in the form of confidentiality agreements on terms required by the PA Parties, relating to the non-disclosure of confidential information, in which case the Independent Certifier will promptly arrange for such agreements to be executed and delivered.

11.10 Project Material

- (a) The PA Parties and the Independent Certifier agree that the Independent Certifier does not and will not have any rights, including any Intellectual Property, in any Project Material provided to the Independent Certifier or created or required to be created by any PA Party.
- (b) All title and ownership, including all Intellectual Property, in and to the Project Material created or required to be created by the Independent Certifier as part of, or for the purposes of performing the Functions, is hereby assigned jointly to the City and Project Co on creation, or where such title, ownership and Intellectual Property cannot be assigned before creation of the Project Material, it will be assigned to the City and Project Co on creation. In addition, to the extent that copyright may subsist in such Project Material so created by the Independent Certifier, the Independent Certifier hereby waives all past, present and future moral rights therein and the Independent Certifier will ensure that any agent, Subconsultant or employee of Independent Certifier will have waived all such moral rights.
- (c) The Independent Certifier will do all such things and execute all such documents as reasonably requested by either of the PA Parties in order to confirm or perfect the assignment of Intellectual Property in the Project Material referred to in Section 11.8(b).

11.11 Time of the Essence

Time will be of the essence of this Agreement and of the transactions contemplated by this Agreement.

11.12 Amendment

No change or modification of this Agreement will be valid unless it is in writing and signed by each party to this Agreement.

11.13 Severability

If any provision of this Agreement will be declared invalid, unenforceable or illegal by the courts of any jurisdiction to which it is subject, such provision may be severed and such invalidity, unenforceability or illegality will not prejudice or affect the validity, enforceability or legality of the remaining provisions of this Agreement.

11.14 Enurement

Subject to the restrictions on transfer contained in this Agreement, this Agreement will enure to the benefit of and be binding on the parties and their respective heirs, executors, administrators, successors and assigns.

11.15 Counterparts

This Agreement may be executed in any number of counterparts and all counterparts taken together will constitute one and the same instrument.

11.16 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.

IN WITNESS WHEREOF the City, Project Co and the Independent Certifier have executed this Agreement.

Signed for the City:

CITY OF EDMONTON

Legally Reviewed and
Approved as to Form:

Law Branch – C. Pooli
Approved as to Content:

LRT Design & Construction – B. Smid

Per: _____

As represented by Linda Cochrane,
Acting City Manager

Date: _____

TRANSED PARTNERS GENERAL PARTNERSHIP, by its partners:

Date:

FENGATE (TRANSED) GP INC., in its capacity as general partner of **FENGATE (TRANSED) LP**

by: _____
Name:
Title:

Date:

BDC TRANSED (NOVA SCOTIA) CO.

by: _____
Name:
Title:

Date:

ELLISDON TRANSED HOLDINGS INC., in its capacity as general partner of **ELLISDON TRANSED HOLDINGS LIMITED PARTNERSHIP**, in its capacity as managing partner of **ELLISDON TRANSED GENERAL PARTNERSHIP**

by: _____
Name:
Title:

Date:

BOMBARDIER TRANSED GP INC., in its capacity as general partner of **BOMBARDIER TRANSED HOLDINGS LP**

by _____
Name:
Title:

Name:
Title:

[INDEPENDENT CERTIFIER]:

By: _____

Name:

Title:

By: _____

Name:

Title:

SCHEDULE 1

FUNCTIONS

The Independent Certifier will, subject to the provisions of the Project Agreement, provide the services as set out below. In the event of a conflict between any provision of this Agreement, including this Schedule 1, and a provision of the Project Agreement, the Project Agreement will prevail.

1. GENERAL

1.1 The Independent Certifier will do everything expressed in, or reasonably to be implied from, the Project Agreement as the functions of the Independent Certifier.

1.2 Without limiting the other provisions of this Agreement and the Project Agreement, and without prejudice to the generality of Section 1.1 *[General]* of this Schedule, in order for the Independent Certifier to perform in accordance with the standards required of the Independent Certifier under this Agreement, the Independent Certifier shall, amongst other things, provide the following services and perform the following functions:

(a) throughout the Construction Period, the Independent Certifier will:

- (i) consult with the Design Builder and others involved in the Design; and
- (ii) conduct inspections of the Construction; and
- (iii) consult with the LRV Representative and conduct inspections of the LRVs,

as the Independent Certifier determines is required for purposes of the Independent Certifier's functions under the Project Agreement;

(b) no later than 10 Business Days after receiving each monthly report pursuant to Section 16.6.3 *[Monthly Reports for Payments During the Construction Period]* of Schedule 16 *[Payment Mechanism]* of the Project Agreement prepare and deliver to the City and Project Co a monthly written report containing a description of:

- (i) the Design and Construction completed in the previous month;
- (ii) the progress of the Design and Construction relative to the updated Construction Schedule; and
- (iii) any elements of the Infrastructure that for any reason vary from the requirements of the Project Agreement, with particular reference to the requirements of Schedule 4 *[Design and Construction Protocols]* and Schedule 5 *[D&C Performance Requirements]* of the Project Agreement; and

(c) no later than 5 Business Days after receiving the monthly report pursuant to Section 16.6.3 *[Monthly Reports for Payments During the Construction Period]* of Schedule 16 *[Payment*

Mechanism] of the Project Agreement (or such other time as may be applicable in the case of payment under Section 16.6.1 [*Obligation to Make Construction Period Payments*] of Schedule 16 [*Payment Mechanism*] of the Project Agreement) prepare and deliver to the City and Project Co a draft certificate (the “**Draft Independent Certifier Payment Certificate**”) showing:

- (i) the monetary value of the Construction work used to determine the percentage calculated in accordance with Section 16.2.1 [*Percent Completion for Construction Period Payments*] of Schedule 16 [*Payment Mechanism*] of the Project Agreement;
 - (ii) the Percent Completion for Construction Period Payment during the applicable month (or portion thereof, as the case may be) in accordance with Section 16.2.1 [*Percent Completion for Construction Period Payments*] of Schedule 16 [*Payment Mechanism*] of the Project Agreement;
 - (iii) the LRV payment milestones, as described in Section 16.2.2 [*Payment for LRVs*] of Schedule 16 [*Payment Mechanism*], completed during the applicable month;
 - (iv) any amounts to be credited or deducted from the Payment during the Construction Period pursuant to Section 16.3 [*Construction Period Payment Adjustments*] of Schedule 16 [*Payment Mechanism*] of the Project Agreement during the applicable month (or portion thereof, as the case may be);
 - (v) with respect to any month(s) in which an application for the Certificate of Service Commencement is made by Project Co, prepare a complete list of Service Commencement Deficiencies, with associated estimated cost to correct such deficiencies, as contemplated in Section 16.2.3 [*Service Commencement Payment*] of Schedule 16 [*Payment Mechanism*] of the Project Agreement;
 - (vi) the amount of the Contaminated Soil Remittance Payment payable by the City pursuant to Section 16.3.6 [*Contaminated Soil Remittance Payments*] of Schedule 16 [*Payment Mechanism*] of the Project Agreement;
 - (vii) any other amounts payable by the City pursuant to this Agreement in respect of the performance of the Project Work; and
 - (viii) a summary of the remaining cost to complete the Construction based on progress to-date and any Change Order Confirmations approved in accordance with Schedule 13 [*Changes*].
- (d) no later than 8 Business Days after receiving the monthly report pursuant to Section 16.6.3 [*Monthly Reports for Payments During the Construction Period*] of Schedule 16 [*Payment Mechanism*] of the Project Agreement (or such other time as may be applicable in the case of payment under Section 16.6.1 [*Obligation to Make Construction Period Payments*] of Schedule 16 [*Payment Mechanism*] of the Project Agreement) prepare and deliver to the City and Project Co a certificate (the “**Independent Certifier Payment Certificate**”) with final

certification of the items included in the Draft Independent Certifier Payment Certificate and listed in Section 1.2 (b) above.

2. SERVICE COMMENCEMENT

No later than 10 Business Days after application by Project Co for a Certificate of Service Commencement and satisfaction of the other requirements in Section 14.5 [*Inspection for Service Commencement*] of Schedule 4 [*Design and Construction Protocols*] of the Project Agreement, the Independent Certifier will, in cooperation with Project Co and the City, make an inspection of the Infrastructure, verify completion of all requirements for Service Commencement and review the basis for Project Co's application for Service Commencement. Within 5 Business Days after commencement of the inspection under Section 14.5 [*Inspection for Service Commencement*] of Schedule 4 [*Design and Construction Protocols*] of the Project Agreement the Independent Certifier will either:

- (a) issue the Certificate of Service Commencement for the Infrastructure, stating the Service Commencement Date, to the City and Project Co; or
- (b) notify Project Co and the City of its decision not to issue the Certificate of Service Commencement and state the reasons in detail for such decision, including what further work may be required to achieve Service Commencement.

3. OTHER REQUIREMENTS

- (a) Independent Certifier shall perform the inspection(s) and reviews(s) and, if applicable, issue the Tawatinâ Bridge SUP Completion Certificate, the Kâhasinîskâk Bridge Completion Certificate and each Early Handover Item Completion Certificate in accordance with Section 13 [*Completion*] of Schedule 4 [*Design and Construction Protocols*].
- (b) Independent Certifier shall perform the inspection(s) and issue the report(s) contemplated in Sections 1.19(4), 1.19(5) and 1.19(9) of Schedule 10 [*Environmental Performance Obligations*] of the Project Agreement.
- (c) No later than 10 Business Days after the date that is two years after Commercial Close, report to the City the percentage completion of the Construction as of the date that is two years after Commercial Close.
- (d) Upon request, to participate in facilitated Project team alignment sessions organized by Project Co on no more than an annual basis during Construction to promote and foster effective, integrated, and collaborative working relationships between Project Co, the City and the Independent Certifier.

SCHEDULE 2

FEE

SCHEDULE 3

INDEPENDENT CERTIFIER PERSONNEL