

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

Schedule 27
Compensation on Termination

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SCHEDULE 27

COMPENSATION ON TERMINATION

1. DEFINITIONS

1.1 Definitions

In this Schedule 27 [*Compensation on Termination*], unless the context indicates a contrary intention, terms which are defined in the Agreement (and not otherwise defined in this Schedule 27 [*Compensation on Termination*]) shall have meanings given to them in the Agreement and the following terms shall have the following meanings:

- (a) “**City Default Termination Sum**” has the meaning given in Section 2.1(b).
- (b) “**City Payment Date**” has the meaning given in Section 5.1(c)(i).
- (c) “**Design-Builder Default Termination Sum**” has the meaning given to it in Section 3.1(b).
- (d) “**Design-Builder Payment Date**” has the meaning given to it in Section 5.1(d).
- (e) “**Employee Termination Payments**” means termination payments which are required under Applicable Law to be made to employees of Design-Builder or any Design-Builder Party as a direct result of terminating the Agreement (provided that Design-Builder or the relevant Design-Builder Party shall take commercially reasonable steps to mitigate its loss) and provided that, in calculating such amount, no account should be taken of any liabilities and obligations of Design-Builder or the relevant Design-Builder Party arising out of:
 - (i) contracts of employment or other agreements or arrangements entered into by Design-Builder or the relevant Design-Builder Party to the extent that such contracts of employment, agreements or arrangements were not entered into in connection with the Project; or
 - (ii) contracts of employment or other agreements or arrangements entered into by Design-Builder or the relevant Design-Builder Party other than in the ordinary course of business and on commercial arm’s length terms, save to the extent that amounts would have arisen if such contracts or other agreements or arrangements had been entered into in the ordinary course of business and on commercial arm’s length terms.
- (f) “**Invoice Date**” means the date that is the later of:
 - (i) the date on which the City receives an invoice from Design-Builder for the relevant termination sum; and
 - (ii) the date on which the City receives the supporting evidence required pursuant to Section 5.1(a).
- (g) “**Non-Default Rate**” means, with respect to a termination payment to be made pursuant to Section 5.1(c)(i) or Section 5.1(d) and a specified period of time, (i) such amount multiplied by (A) such period of time in days divided by the actual number of days in the current year multiplied by (B) Prime.
- (h) “**Non-Default Termination Sum**” has the meaning given in Section 4.1(b).

- (i) **“Subcontractor Losses”** means, subject to Design-Builder’s obligations under the Agreement to limit any compensation to Subcontractors, the amount reasonably and properly payable by Design-Builder to each Subcontractor under the terms of the Subcontract as a direct result of the termination of the Agreement (including any reasonable commercial breakage fee), provided that such amount shall be reduced to the extent that Design-Builder or the Subcontractor fails to take commercially reasonable steps to mitigate such amount; provided, however, that, no account should be taken of any liabilities and obligations of Design-Builder to the relevant Subcontractor arising out of:
- (i) any loss of overhead or profit of such Subcontractor relating to any period or costs after the Termination Date (save to the extent the same are properly included in any reasonable commercial breakage fee set out in any of the Subcontracts);
 - (ii) agreements or arrangements entered into by Design-Builder or the Subcontractor to the extent that such agreements or arrangements were not entered into in connection with those parties’ obligations in relation to the Project; or
 - (iii) agreements or arrangements entered into by Design-Builder or the Subcontractor other than in the ordinary course of business and on commercial arm’s length terms, save to the extent that amounts would have arisen if such agreements or arrangements had been entered into in the ordinary course of business and on commercial arm’s length terms.

2. COMPENSATION ON TERMINATION FOR CITY DEFAULT OR CONVENIENCE

2.1 Compensation

- (a) If Design-Builder terminates the Agreement pursuant to Section 14.2 [*Termination By Design-Builder*] of the Agreement or the City terminates the Agreement pursuant to Sections 14.1(b) of the Agreement, the City shall pay to Design-Builder the City Default Termination Sum.
- (b) The **“City Default Termination Sum”** shall be an amount equal to the aggregate of:
- (i) any amount payable by the City to Design-Builder in accordance with Sections 9.1(c), 10.2.1(c) or 10.2.2(c) of the Agreement;
 - (ii) the Employee Termination Payments and the Subcontractor Losses;
 - (iii) any reasonable costs properly incurred by Design-Builder to wind up its operations; and
 - (iv) any Direct Losses incurred by the Design-Builder arising out of the termination, which are not otherwise recovered pursuant to Sections 2.1(b)(i)-(ii)(iii) above;

LESS, the aggregate (without double counting) of the following, to the extent it is a positive amount:

- (v) all credit balances on any bank accounts held by or on behalf of Design-Builder on the Termination Date and the value of any insurance proceeds due to Design-Builder or to which Design-Builder would have been entitled had insurance been maintained in accordance with the requirements of the Agreement (save where such insurance proceeds are to be applied in reinstatement, restoration or replacement, or, in the case of third party legal liability, in satisfaction of the claim, demand, proceeding or liability or where the City is required to procure insurances and to make proceeds available to Design-Builder under the Agreement and it has failed to do so) or sums due and payable from third parties other than sums wholly unrelated to the Project Work, the Project and the Agreement (but only when received from third parties) but excluding any claims under

any Subcontracts or claims against other third parties which have not been determined or have been determined but not yet paid, provided that, in such case, Design-Builder shall assign any such rights and claims under the Subcontracts or claims against other third parties (other than claims against other third parties wholly unrelated to the Project Work, the Project and the Agreement) to the City and, at no additional cost to Design-Builder, give the City reasonable assistance in prosecuting such claims;

- (vi) to the extent realized before the Invoice Date, the fair market value of any other assets and rights of Design-Builder (other than those transferred to the City pursuant to the Agreement) less liabilities of Design-Builder properly incurred in carrying out its obligations under the Agreement as at the Termination Date, provided that no account should be taken of any liabilities and obligations of Design-Builder arising out of:
 - (A) agreements or arrangements entered into by Design-Builder to the extent that such agreements or arrangements were not entered into in connection with Design-Builder's obligations in relation to the Project; or
 - (B) agreements or arrangements entered into by Design-Builder other than in the ordinary course of business and on commercial arm's length terms, save to the extent that liabilities and obligations would have arisen if such agreements or arrangements had been entered into in the ordinary course of business and on commercial arm's length terms; and
- (vii) amounts which the City is entitled to set off pursuant to Section 7.6 [*Set-off*] of the Agreement.
- (c) To the extent that such assets and rights referred to in Section 2.1(b)(vi) are not realized and applied pursuant thereto, Design-Builder shall, on payment of the City Default Termination Sum, assign such assets and rights to the City.
- (d) The City shall pay the City Default Termination Sum in accordance with Section 5 [*General*].

3. COMPENSATION ON TERMINATION FOR DESIGN-BUILDER DEFAULT

3.1 Compensation

- (a) If the City terminates the Agreement pursuant to Section 14.1(a) of the Agreement, the City shall pay to Design-Builder the Design-Builder Default Termination Sum.
- (b) The "**Design-Builder Default Termination Sum**" shall be an amount equal to the Total Capital Cost Amount, as adjusted in accordance with the terms of the Agreement as of the Termination Date, less the aggregate, without duplication, of each of the following:
 - (i) any amount of the Payments paid by the City on or before the Termination Date, provided that for the purposes of this (i), the amount of such Payments shall not take into account any holdbacks or Construction Payment Adjustments deducted therefrom;
 - (ii) the City's estimate of the cost to complete the Project Work, including the cost to remedy any defective or deficient Project Work determined on a reasonable basis in consultation with the City's consultants and including all reasonable and proper costs incurred by the City in re-tendering the Project Work or any portion thereof;
 - (iii) the City's estimate of the aggregate of all Direct Losses suffered, sustained or incurred by the City as a result of, in respect of, or arising out of the event or events which resulted in the termination of the Agreement and arising out of the termination together with all costs

of entering into a new construction contract to complete the Project Work, including any warranty obligations for the Project Work in place and to be performed, on substantially the same terms and conditions as the Agreement;

- (iv) the Legislative Holdback required to be maintained by the City as at the time the Design-Builder Default Termination Sum is required to be made, which amount will be paid by the City in accordance with the PPCLA; and
 - (v) amounts which the City is entitled to set off pursuant to Section 7.6 [*Set-off*] of the Agreement.
- (c) To the extent that any amounts that the City has estimated or determined pursuant to Sections 3.1(b)(ii) or 3.1(b)(iii) are in excess of what is required by the City to complete the Project Work or compensate for Direct Losses, or the Legislative Holdback, as applicable, the City shall promptly return such excess amounts to or to the order of Design-Builder.
- (d) The City shall pay the Design-Builder Default Termination Sum in accordance with Section 5 [*General*].

4. CONSEQUENCES OF NON-DEFAULT TERMINATION

4.1 Consequences

- (a) If the City terminates the Agreement pursuant to Section 8.4 [*City's Election not to Reinstate*] or either Party terminates the Agreement pursuant to Section 14.3 [*Termination Upon Force Majeure or Limited Relief Event*] of the Agreement, the City shall pay to Design-Builder the Non-Default Termination Sum.
- (b) The "**Non-Default Termination Sum**" shall be an amount equal to the aggregate of:
- (i) any amount payable by the City to Design-Builder in accordance with Sections 9.1(c), 10.2.1(c) or 10.2.2(c) of the Agreement;
 - (ii) the Employee Termination Payments and the Subcontractor Losses (but excluding therefrom any claims for loss of profit);
 - (iii) any reasonable costs properly incurred by Design-Builder to wind up its operations; and
 - (iv) any Direct Losses incurred by the Design-Builder arising out of the termination, which are not otherwise recovered pursuant to Sections 4.1(b)(i)-(iii) above;

LESS, the aggregate (without double counting) of the following, to the extent it is a positive amount:

- (v) all credit balances on any bank accounts held by or on behalf of Design-Builder on the Termination Date and the value of any insurance proceeds due to Design-Builder or to which Design-Builder would have been entitled had insurance been maintained in accordance with the requirements of the Agreement (save where such insurance proceeds are to be applied in reinstatement, restoration or replacement, or, in the case of third party legal liability, in satisfaction of the claim, demand, proceeding or liability or where the City are required to procure insurances and to make proceeds available to Design-Builder under the Agreement and it has failed to do so) or sums due and payable from third parties other than sums wholly unrelated to the Project Work, the Project and the Agreement (but only when received from third parties), but excluding any claims under any Subcontracts or claims against other third parties which have not been

determined or have been determined but not yet paid, provided that, in such case, Design-Builder shall assign any such rights and claims under the Subcontracts or claims against other third parties (other than claims against other third parties wholly unrelated to the Project Work, the and the Agreement) to the City and, at no additional cost to Design-Builder, give the City reasonable assistance in prosecuting such claims; and

- (vi) to the extent realized before the Invoice Date, the fair market value of any other assets and rights of Design-Builder (other than those transferred to the City pursuant to the Agreement) less liabilities of Design-Builder properly incurred in carrying out its obligations under the Agreement as at the Termination Date, provided that no account should be taken of any liabilities and obligations of Design-Builder arising out of:
 - (A) agreements or arrangements entered into by Design-Builder to the extent that such agreements or arrangements were not entered into in connection with Design-Builder's obligations in relation to the Project; or
 - (B) agreements or arrangements entered into by Design-Builder other than in the ordinary course of business and on commercial arm's length terms, save to the extent that liabilities and obligations would have arisen if such agreements or arrangements had been entered into in the ordinary course of business and on commercial arm's length terms; and
- (vii) amounts which the City are entitled to set off pursuant to Section 7.6 *[Set-off]* of the Agreement.
- (c) To the extent that such assets and rights referred to in Section 4.1(b)(vi) are not realized and applied pursuant thereto, Design-Builder shall, on payment of the Non-Default Termination Sum, assign such assets and rights to the City.
- (d) The City shall pay the Non-Default Termination Sum in accordance with Section 5 *[General]*.

5. GENERAL

5.1 Payment and Interest Following Termination

- (a) In respect of the termination payments to be made pursuant to either Section 2 *[Compensation on Termination For City Default or Convenience]* or Section 4 *[Consequences of Non-Default Termination]*, as soon as practicable after, and, in any event, within 30 days after, the Termination Date, Design-Builder shall give to the City an invoice for the relevant termination sum and sufficient supporting evidence, reasonably satisfactory to the City, justifying the amount of the relevant termination sum including a detailed breakdown of each of the individual items comprising such sum.
- (b) In respect of the termination payments to be made pursuant Section 3 *[Compensation on Termination for Design-Builder Default]*, as soon as practicable, and in any event, within 120 days after the Termination Date, the City shall calculate and notify Design-Builder of the Design-Builder Default Termination Sum under Section 3.1(b), and shall deliver to Design-Builder sufficient supporting evidence reasonably satisfactory to Design-Builder.
- (c) The City shall:
 - (i) pay to Design-Builder the relevant termination payment within 60 days after the Invoice Date or the date of delivery of the Notice described in Section 5.1(b), as applicable (the "**City Payment Date**"), together with interest for the period from (but excluding) the Termination Date to (and including) the City Payment Date at the No-Default Rate,

provided that all demobilization of the Project Work as required under this Agreement has been completed;

- (ii) in respect of the termination payments to be made pursuant to either Section 2 [*Compensation on Termination For City Default or Convenience*] or Section 4 [*Consequences of Non-Default Termination*], pay interest on the relevant termination sum (or any part of such sum that remains outstanding) from the date which is 60 days following the Invoice Date until the date of payment at the rate set out in Section 7.7 [*Interest on Overdue Payments*] of the Agreement; and
 - (iii) in respect of the termination payment to be made pursuant to Section 3 [*Compensation on Termination for Design-Builder Default*], if the applicable termination sum is positive, pay interest on the relevant termination sum (or any part of such sum that remains outstanding) from the date which is 60 days following the date of delivery of the Notice referred to in Section 5.1(b) until the date of payment at the rate set out in Section 7.7 [*Interest on Overdue Payments*] of the Agreement.
- (d) In respect of the termination payment to be made pursuant to Section 3 [*Compensation on Termination for Design-Builder Default*], if the applicable termination sum is negative, the City shall have no obligation to make any payment to Design-Builder and Design-Builder shall, within 60 days following the date of delivery of the Notice referred to in Section 5.1(b) (the “**Design-Builder Payment Date**”), pay to the City the amount by which such termination sum is negative together with interest for the period from (but excluding) the Termination Date to (and including) the Design-Builder Payment Date at the No-Default Rate, failing which Design-Builder shall thereafter also pay interest thereon until the date of payment at the rate set out in Section 7.7 [*Interest on Overdue Payments*] of the Agreement. The maximum amount payable by the Design-Builder to the City pursuant to this Section 5.1(d) is \$100,000,000 (index-linked).

5.2 Costs

- (a) The costs and expenses to be taken into account in the calculation of all termination sums due pursuant to this Schedule 27 [*Compensation on Termination*] shall only be such costs and expenses to the extent that they are reasonable and proper in quantum and shall have been or will be reasonably and properly incurred.

5.3 Undisputed Amounts

- (a) If the calculation of any termination amount is disputed then any undisputed amount shall be paid in accordance with this Section 5 [*General*] and the disputed amount shall be dealt with in accordance with Schedule 20 [*Dispute Resolution Procedure*].