

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

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

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PROJECT AGREEMENT

THE CITY OF EDMONTON – VALLEY LINE - STAGE 1

made this 8th day of February, 2016

BETWEEN:

The City of Edmonton

(the “City”)

AND:

TransEd Partners General Partnership

(“Project Co”)

PREAMBLE:

Pursuant to the RFQ process and the RFP process, the City has selected Project Co to design, build, finance, test and commission the Infrastructure and to operate, maintain and rehabilitate, the System.

The City and Project Co therefore agree as follows:

1. KEY CLOSING DOCUMENTS

1.1 Document Deliveries

Concurrently with the Commercial Close:

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

1.2 Project Contracts

Project Co will not:

- (a) terminate, or accept or consent or agree to or permit, the termination of, all or any material part of, any Project Contract except:
 - (i) as required or permitted to do so by the City pursuant to the provisions of this Agreement; or

- (ii) if there is an event of default under a Project Contract and Project Co terminates the Project Contract in order to prevent or cure a Default or a Termination Event hereunder (provided that commercially reasonable alternative measures would not prevent or cure such Default or Termination Event);
- (b) make, or consent or agree to or permit, the making of:
 - (i) any material amendment of any Project Contract, other than amendments that are the direct and reasonable consequence of a Change Directive or Change Order Confirmation; or
 - (ii) a material waiver, release, or suspension by any other party from the performance of any provision by a party to any Project Contract;
- (c) subject to Sections 23.1 [*Limitations on Assignment*], 23.3 [*Factors the City May Consider*] and 23.5 [*Project Co Persons, Subcontractors*] consent or agree to, or permit, any other party to a Project Contract to assign or transfer to any other person any of such party's rights or obligations under a Project Contract;
- (d) enter into, or consent or agree to, or permit, the entering into of, any contract in the nature of the Project Contracts, other than those entered into on or before the Commercial Close and as listed in Schedule 25 [*Completion Documents*];
- (e) breach any of its obligations (or waive or allow to lapse any rights it may have) or permit others to breach any of their obligations (or waive or allow to lapse any rights they may have as per Subsection (b) above) under any Project Contract, that have an adverse effect on Project Co's ability to perform its obligations under this Agreement or that have the effect of increasing any liability of the City, whether actual or potential,

unless Project Co has, at its earliest practicable opportunity, submitted to the City notice of the proposed course of action and any relevant explanatory documentation and the City has consented to such course of action, such consent not to be unreasonably withheld or delayed.

The City will give or deny such consent within: (i) 10 Business Days after receipt of such notice and all relevant documentation, if Project Co is seeking to terminate a Project Contract and such Project Contract may, in accordance with its terms, be terminated immediately; and (ii) 15 Business Days after receipt of such notice and all relevant documentation in all other cases, and if the City fails to give or deny its consent within such time periods it will be deemed to have given its consent.

For the purposes of this Section 1.2 a material amendment, waiver, release or suspension of a provision of a Project Contract means any of those events that does, or would be reasonably expected to:

- (1) alter or modify the allocation of risks or responsibilities of the contracting parties under the contract;
- (2) create a conflict or inconsistency with any term of the Project Agreement or Project Document;

- (3) alter, modify, terminate or replace the Performance Security of a Project Contractor; or
- (4) affect any right or obligation of the City under this Agreement or under a Project Document,

and as a consequence adversely affect, impair or compromise the performance, or the capacity or capability of Project Co or a Project Contractor to perform the Project Requirements or otherwise adversely affect the Project or the City, including increasing any actual or potential liability of the City.

1.3 Costs of Request for Consent

If Project Co requests City consent to a proposed course of action pursuant to Subsections 1.2(a), (c) or (d) [*Project Contracts*], Project Co 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 considering any such request. At the time of such request, Project Co will make a payment to the City in the amount of [redacted] as an advance against (and not in satisfaction of) its obligations under this Section 1.3 [*Costs of Requests for Consent*].

[redacted], Redaction under review, Subject to dept review

Within 30 Business Days after the City renders its decision, the City will either refund any overpayment or invoice Project Co for any additional amounts owing under this Section 1.3 [*Costs of Requests for Consent*] and Project Co will promptly pay such amount to the City. Concurrently with providing such refund or invoice the City will provide Project Co with a breakdown of the City's costs in connection with its consideration of Project Co's request for consent.

1.4 Replacement Project Contract

If any Project Contract at any time lapses, terminates, or otherwise ceases to be in full force and effect (whether by reason of expiry or otherwise), unless the goods, services or rights which were the subject matter of such Project Contract are no longer reasonably required for the Project Work, or have been fully delivered or performed and all liabilities and obligations thereunder fully discharged:

- (a) Project Co will forthwith enter into, or cause to be entered into, a replacement Project Contract or contracts upon the same or substantially similar terms as the contract so replaced (to the extent reasonably practicable); and
- (b) if the City and the relevant party to the Project Contract had entered into a Collateral Agreement with respect to the replaced Project Contract, Project Co will forthwith enter into, or cause the replacement party to the Project Contract to enter into a Collateral Agreement.

1.5 Notices under Project Contracts

If at any time any amendment, whether resulting from a Change Order Confirmation or otherwise, is made to any Project Contract, or a replacement Project Contract (or any agreement which materially affects the interpretation or application of any Project Contract), is entered into, Project Co will deliver to the City a copy of each such amendment or agreement within 10 Business Days of the date after it is made, certified as a true copy by an officer of Project Co. Upon the written request of City, Project Co will deliver

or cause to be delivered to City a copy of any notices delivered or received by Project Co under any of the Project Contracts.

1.6 Project Contracts – Records and Reports

- (a) Consistent with Good Industry Practice, Project Co shall maintain a record of all events, developments or circumstances described in Sections 1.2 [*Project Contracts*] to 1.5 [*Notices Under Project Contracts*] above, including in respect of all matters referred to in Section 1.2(b) whether material or not. Project Co shall provide the City with a summary report in respect of these events, developments, circumstances and matters arising or occurring for each three month period during the Term. These reports, including any nil reports, must be provided to the City within 15 Business Days after the end of each quarter (reporting on the immediately prior three month period) of each calendar year during the Term.
- (b) As provided for in Schedule 25 [*Completion Documents*], the City acknowledges that Project Co provided the City with final drafts of the Project Contracts not less than 15 Business Days prior to Commercial Close in order to provide the City with a reasonable opportunity to satisfy itself that the terms of the Project Contracts are substantially consistent with the Project Agreement and Financial Proposal;
- (c) Project Co shall promptly provide a written report to the City in respect of any development or circumstances that arise that triggers, or could be reasonably expected to trigger after the lapse of time, the right of Project Co or a Project Contractor to exercise a right of termination of a Project Contract, or to suspend a material right or obligation under a Project Contract. This report shall include a description of the development or circumstance and Project Co's planned steps or actions in response, and the known or anticipated timetable for such steps or actions being taken.
- (d) Project Co shall maintain, or cause to be maintained by its Project Contractors, proper records in respect of all Project Contracts and all Subcontracts in relation to the Project and shall provide the City on reasonable request by City with prompt access to: (i) Project Contract records in relation to all matters described in this Section 1 [*Key Closing Documents*] or as otherwise specified in the Project Agreement; and (ii) those Subcontractor records that may pertain to a Dispute involving a Subcontractor to which the City is a party or participant.
- (e) Project Co's failure to provide the City with the forgoing reports or with access to the foregoing records, or Project Co's failure to seek the City's prior written consent in respect of those matters described in Section 1.2 [*Project Contracts*], may result in the application of NPE or Default Points in accordance with Schedule 16 [*Payment Mechanism*].

2. SCOPE OF PROJECT CO OBLIGATIONS

2.1 Overall Obligations

Without limiting any obligations of Project Co in this Agreement, Project Co shall, at its own cost and risk:

- (a) observe and comply with all provisions of this Agreement that apply to Project Co;
- (b) carry out and perform all Project Work activities:
 - (i) in accordance with all terms of all Schedules;
 - (ii) in compliance with Applicable Law, the City Policies and City Regulatory Policies;
 - (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) in compliance with all lawful instructions of Governmental Authorities;
 - (v) so as to satisfy the Project Requirements, including the Proposal Extracts as applicable;
 - (vi) in accordance with Good Industry Practice, including URP Best Practices and Environmental Best Management Practices;
 - (vii) in an efficient, effective, safe, and timely manner;
 - (viii) by establishing or arranging for its own support services and facilities; and
 - (ix) with due regard to the health and safety and security of persons, property and the environment;
- (c) cooperate with the City in the fulfillment of the purposes and intent of this Agreement, provided however that Project Co shall not be under any obligation to perform any of the City's obligations under this Agreement.

2.2 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 Project Co of its obligations under this Agreement are allocated to, and as between the City and Project Co are the exclusive responsibility of, Project Co.

2.3 Project Financing

Project Co shall arrange the Project Financing, as more particularly contemplated in Section 3 *[Financing]*.

2.4 Design and Construction

Project Co shall conduct the Design and Construction in accordance with the Design and Construction Requirements and as more particularly set out in Section 5 [*Design and Construction of the Infrastructure*] and the applicable Schedules, including Schedule 9 [*Quality Management*].

2.5 Operation and Maintenance

Project Co shall conduct the Services in accordance with the O&M Requirements and as more particularly set out in Section 6 [*Operation and Maintenance*] and the applicable Schedules, including Schedule 9 [*Quality Management*].

2.6 Handback

Project Co shall handback the System to the City upon expiry of the Term in accordance with the Handback Requirements and as more particularly set out in Section 8 [*Handback upon Expiry*] and applicable Schedules.

2.7 Responsibility for Project Management and Integration

Project Co 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.

Project Co shall proactively organize Project team alignment sessions utilizing an experienced professional facilitator shortly following the Commercial Close, and on a regularly scheduled basis thereafter during the Term, to promote and foster effective, integrated and collaborative working relationships amongst: (a) the designated senior representatives from Project Co and the Project Contractors 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; and (b) the aforesaid Project Co team and the City Representative and his or her designates.

2.8 Intellectual Property

Project Co shall provide to the City the Intellectual Property Rights, according to the terms of Schedule 8 [*Intellectual Property*].

2.9 Rail Safety and Security

In performing all aspects of the Project Work in accordance with the Project Requirements, Project Co will have due regard to the protection of the safety and security of the Infrastructure, the System, the Passengers and other Persons and property that may be impacted or affected by the performance of the Project Work. Project Co acknowledges that the City has informed Project Co that as of the Effective Date:

- (a) as a Governmental Authority, the City has railway regulatory authority over the Infrastructure, including the operation of System;

- (b) the City has not adopted specific rail safety or security, or other railway design, construction, operation or maintenance, regulations by way of bylaw; and
- (c) the City has addressed rail safety and security, and other railway regulatory matters through the terms of this Agreement, including the Project Requirements.

2.10 Performance During the Term

Project Co shall perform all Project Work during the Term as described in Section 5.7 *[Term]*, subject to Section 5.8 *[Term - Early Completion]*, Section 5.9 *[Term - Late Completion]* and Section 17 *[Termination]*.

3. FINANCING

3.1 Project Financing

The arranging of the Project Financing is the sole responsibility of Project Co.

3.2 Compliance with Senior Financing Agreements

Project Co will keep the Senior Financing Agreements in good standing and will ensure that none of the terms and conditions of the Senior Financing Agreements conflict with or impair the exercise by the City of its rights under this Agreement, the Collateral Agreements or the Direct Lender Agreement or prevent or impair Project Co from performing its obligations under the Project Documents. If at any time Project Co receives a notice or communication from the Senior Lenders that: (a) an event of default, any event entitling the Security Trustee to enforce any security or any other similar event has occurred under the Senior Financing Agreements; or (b) that the Senior Lenders will not advance funds requested by Project Co to perform the Project Work, Project Co will forthwith deliver to the City a copy of such notice.

3.3 Changes to Senior Financing Agreements

Project Co will not without the written consent of the City, not to be unreasonably withheld, or delayed, terminate, amend, assign or otherwise modify the Senior Financing Agreements, or waive or exercise any of its rights under the Senior Financing Agreements or enter into any replacement Senior Financing Agreement or any agreement which affects the interpretation or application of any Senior Financing Agreements if such action would:

- (a) adversely affect Project Co's ability to perform its obligations under this Agreement; or
- (b) have the effect of increasing any liability or potential liability of the City, whether actual or potential.

If at any time any amendment is made to any Senior Financing Agreement or Project Co enters into any replacement Senior Financing Agreement (or any agreement which affects the interpretation or application of any Senior Financing Agreement), Project Co will deliver to the City a copy of each such amendment or agreement within 10 Business Days of the date of its execution or creation, certified as a true copy by an officer of Project Co.

3.4 Direct Lender Agreement

The City and Project Co will enter into a Direct Lender Agreement with the Security Trustee, subject to the following:

- (a) the Direct Lender Agreement to be entered into under this Agreement must be in all material respects in the form prescribed by Schedule 21 [*Direct Lender Agreement*], and must not include any substantive obligations on the part of the City other than as expressly contemplated by Schedule 21 [*Direct Lender Agreement*]; and
- (b) the City will enter into a replacement Direct Lender Agreement on the terms specified in Section 3.4(a) [*Direct Lender Agreement*] at Project Co's request, provided Project Co has arranged cancellation of the Direct Lender Agreement previously in effect, it being understood that no more than one Direct Lender Agreement will be in effect at any time.

4. LAND MATTERS

4.1 Access and Use

The City hereby grants to Project Co a non-exclusive licence to access and use the City Lands, in accordance with this Section 4 [*Land Matters*] and Schedule 14 [*City Lands*], provided that the Future Acquired Lands shall form part of this licence and shall be available to Project Co in the manner and timing specified therefor in Schedule 14 [*City Lands*].

Subject to the parameters and terms of this Section 4 [*Land Matters*] and Schedule 14 [*City Lands*], Project Co shall be entitled to grant non-exclusive sub-licences to access and use the City Lands, to Project Co Persons solely for the purpose performing or supporting the Project Work.

For greater certainty the licence in this Section 4.1 [*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 4.5 [*Additional Lands*];
- (c) applies to the Future Acquired Lands on the date the City notifies Project Co in writing that it has acquired such lands;
- (d) does not apply to Surplus Lands once removed from the licence by the City in accordance with Section 4.16 [*Surrender of Surplus City Lands*];
- (e) applies to the Existing Infrastructure;
- (f) applies to the Existing Maintenance Building, if Project Co elects to temporarily use and occupy this building during the Construction Period in accordance with Section 4.18 [*Occupancy of Buildings*];

- (g) applies to provide Project Co with the exclusive right to temporarily use and occupy, for a specific purpose and limited duration, other vacant buildings or structures owned or held by the City and forming part of the City Lands when confirmed by the City and Project Co in accordance with Section 4.18 *[Occupancy of Buildings]*;
- (h) applies generally to other improvements, buildings, fixtures, and structures owned or held by the City and forming part of the City Lands for the limited purpose of providing Project Co with incidental access to and use of such existing infrastructure (as distinct from the Existing Infrastructure) for the sole purpose of carrying out Project Work activities, including the Deconstruction Work; and
- (i) applies to the Infrastructure developed and constructed by Project Co as part of the Project Work.

4.2 Status of City Lands

Except as otherwise expressly set out in this Agreement:

- (a) subject to Section 13 *[Relief Events]* and Schedule 10 *[Environmental Performance Requirements]*, the condition of, access to and use of the Lands is being provided to Project Co on an “as is” basis;
- (b) subject to Schedule 10 *[Environmental Performance Requirements]* and Section 22.4 *[Project Co’s Reliance on Information]*, 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 representation and warranties in Section 15.1 *[City’s Representations]*;
- (c) none of the rights in the City Lands granted pursuant to Section 4.1 *[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 7.4 *[Other Works]*, Section 4.12 *[Uninterrupted Access and Use]*, and Section 4.18 *[Occupancy of Buildings]* as it relates to the temporary use of certain existing buildings, the rights granted to Project Co hereunder shall be non-exclusive and the City and any Person authorized by the City or with 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 Project Co. Project Co shall not, except as permitted under this Agreement, disrupt the occupation possession or use of the City Lands by these Persons;
- (e) the licence granted to Project Co hereunder is a personal property right and Project Co 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. Notwithstanding the foregoing sentence, solely for the purposes of the obligation of Project Co to comply with Permitted Encumbrances pursuant to Section 4.9 *[No Encumbrances on City Lands]* and to discharge any liens pursuant to Section 4.10 *[Liens]*, the licence granted to Project Co of use and access to, on and over the City Lands, the existing infrastructure owned or held by the City and the Infrastructure pursuant to Section 4.1 *[Access and Use]* shall, for the duration of the Term, be deemed to be a limited “interest in the premises”, and Project Co acknowledges and agrees that no disposition of an interest in the City Lands and the Infrastructure arises as a result of the aforesaid deeming of a limited “interest in the premises” for the limited purpose of this Section 4.2(a);

- (f) none of the rights in the City Lands granted pursuant to this Section 4.2 *[Status of City Lands and Existing Infrastructure]* shall entitle Project Co 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, that can be sold, remain the property of the City. Project Co can use other materials extracted from the City Lands in carrying out the purposes of the Project Work, and dispose and sell for its own account, any other extracted materials that are excess to the Project Requirements;
- (g) subject to Section 13 *[Relief Events]*, any rights Project Co requires to access or use the Adjoining Lands shall be the responsibility of Project Co, with City support in accordance with Section 4.15 *[Community Improvement Program]*, pursuant to the application of the Community Improvement Program and pursuant to the NSR Authorizations; and
- (h) the Identified Encumbrances and the Existing URP Agreements contain certain limitations or restrictions, and associated obligations, which Project Co must comply with 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 URP Matters]*.

4.3 Commencement and Duration

Subject to Section 4.13 *[Access and Use Rights to Cease]*, Project Co’s right to non-exclusive access to and use of the City Lands comes into effect upon Commercial Close and continues until the expiry of the Term or sooner termination of this Agreement. Such right to non-exclusive access and use (together with any sub-licence right of access and use granted by Project Co pursuant to Section 4.1 *[Access and Use]*) automatically terminates upon any termination of this Agreement.

4.4 No Access Fee

No fee or other amount shall be payable by Project Co to the City for its right of access to and use of the City Lands. Project Co shall be liable for municipal property taxes and local improvement levies, or other payments in lieu thereof, in respect of the City Lands to the extent set out in the Property Tax Agreement entered into between the City and Project Co or its designated Project Contractor on the Effective Date.

4.5 Additional Lands

If, despite Project Co's acknowledgement in Section 5.4 [*Construction Within the City Lands*], Project Co determines that Real Property Interests in addition to the City Lands are required for the Project Work (the "Additional Lands"), then:

- (a) Project Co shall, at its earliest practicable opportunity, submit to the City notice of its recommended acquisition by either Project Co, a Project Contractor 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 Project Co's recommendation as to who the acquiring party should be for these Additional Lands.

Unless and until the City has consented, acting reasonably, to the acquisition of the Additional Lands, Project Co shall not acquire, and shall prohibit Project Co Persons from acquiring such Additional Lands. The City will confirm whether it accepts Project Co'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;

- (b) If Project Co requests consent to a proposed acquisition of Additional Lands pursuant to Section 4.5(a) [*Additional Lands*], Project Co 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 considering any such request. At the time of such request, Project Co 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 4.5(b). After the City renders its decision, the City will either refund any overpayment or invoice Project Co for any additional amounts owing under this Section 4.5(b) and Project Co will promptly pay such amount to the City. Concurrently with providing such refund or invoice the City will provide Project Co with a breakdown of the City's costs in connection with its consideration of Project Co's request for consent;
- (c) Where Project Co, or a Project Contractor, is given consent by the City to acquire Additional Lands, rather than the City, Project Co shall, or shall cause the Project Contractor 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. Project Co shall promptly notify the City of any Additional Lands that Project Co or Project Contractor acquire, pursuant to this Section 4.5 [*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, and 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.

The City acknowledges that this Section 4.5 [*Additional Lands*] is not intended to apply to, and does not apply to, Real Property Interests intended to be used by Project Co:

- (i) on a temporary basis during the Construction Period (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.

4.6 Utility, Railway, and Pipeline Matters

The allocation of responsibilities, tasks and risks as between the City and Project Co in relation to the use of the City Lands for URP Work is set out in Schedule 28 [*Project Approvals and URP Matters*] Part B [*Utility, Railway and Pipeline Matters*].

4.7 Required Condition of the Lands and Infrastructure

Project Co 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:

- (a) in the case of the Infrastructure for the Construction Period; and
- (b) in the case of the System for the Term.

Subject to Section 11 [*Insurance, Damage and Destruction*] Project Co shall promptly repair any damage to the City Lands or the Adjoining Lands caused by Project Co or Project Co 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 expected normal wear and tear associated with the Project Work.

Project Co shall surrender its use and occupancy of the Surplus Lands on or following Service Commencement, which may include the Existing Maintenance Building, to the City in accordance with the requirements of Section 4.16 [*Surplus Lands*] and Section 4.18 [*Occupancy of Buildings*] and generally in the same condition as such property was in as of the Effective Date, subject to expected wear and tear having regard to Project Co's permitted uses for such City Lands as set out in this Agreement.

Project Co's responsibilities regarding the maintenance and repair of the Adjoining Lands will be consistent with the foregoing to the extent applicable and as otherwise expressly set out in other

provisions of this Agreement, including Section 4.15 *[Community Improvement Program]* and Section 22.2 *[Approvals and Authorizations]*, including applicable Project Approvals.

4.8 Permitted Use and Injurious Affection

Project Co covenants that it and Project Co Persons:

- (a) will use the City Lands and developed Infrastructure only for the purposes of the Project Work and not for any other purposes;
- (b) will not, from and after Service Commencement, interfere with the City Lands being accessible and the Infrastructure being continuously open and available for the Project Requirements, excepting only such closures or partial closures as are expressly contemplated and authorized by the Project Requirements or as otherwise required or directed by the City, a City Person or Governmental Authority pursuant to Section 4.12 *[Uninterrupted Access and Use]*; and
- (c) will comply with all City protocols for issuing public notices respecting the Construction, as outlined in Section 4.15 *[Community Improvement Program]* and Schedule 5 *[D&C Performance Requirements]*.

The City shall be responsible for and accept all risk of injurious affection or public nuisance claims that may be made by any Person, other than a Project Co Person, by reason of the Project. To the extent such claims disrupt, delay or cause interference with the Project Work, including the Services, or cause Direct Losses to Project Co or a Project Person, Project Co may claim a Relief Event, except to the extent the claim is based on or is attributable to the Legal Fault of Project Co or a Project Co Person. For clarity, Project Co will not be at Legal Fault if it is determined that the Project or the performance of the Project Work according to the terms of the Project Agreement, constitutes a public nuisance or establishes the basis for an injurious affection claim by third parties, without (and only to the extent of) any other Legal Fault of Project Co or a Project Co Person.

4.9 No Encumbrances on City Lands

Other than the Permitted Encumbrances, the City represents and warrants that it has not granted or permitted to be granted, and covenants that it will not grant or permit to be granted, any Encumbrance on the City Lands. The City will not grant or permit to be granted any Encumbrance that results in the City being in breach of its obligations set out in Section 4.12 *[Uninterrupted Access and Use]*.

Subject to Section 4.12 *[Uninterrupted Access and Use]*, and Part B of Schedule 28 *[Project Approvals and URP Matters]* if applicable, Project Co shall recognize and respect the lawful rights of the holders of the 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 Project Co 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.

If any part of the City Lands becomes subject to any Encumbrance that has not been consented to or granted by the City, other than a Permitted Encumbrance or an Encumbrance resulting from any act or omission of the City, then the City shall provide written notice thereof to Project Co, and to the extent it has caused or contributed to the existence of the Encumbrance and to the extent it reasonably can as the Person with occupation and possession of the City Lands and responsibility for Project Work, Project Co or a Project Co Person will immediately take all necessary steps to remove such Encumbrance.

If Project Co fails to remove any such Encumbrance within 15 Business Days (or such longer period as may reasonably be required in the circumstances provided Project Co is proceeding with all due diligence to remove the same) of its coming into existence 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 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 Project Co, and Project Co will on demand by City reimburse all such payments and costs properly attributable to Project Co having regard to the extent the Encumbrance was caused or contributed to by Project Co.

4.10 Liens

Project Co 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 any Applicable Law, including the *Builders' Lien Act* (Alberta), to the extent applicable to the Project Work and the Lands and shall not by any act or omission cause, encourage, suffer or allow any lien or claim under any such statute or in equity to be made against the City or filed or registered against the Lands or the Infrastructure by reason of work, services or materials supplied or claimed to have been supplied to Project Co or anyone claiming through or under Project Co. Project Co shall at its own expense promptly take all steps required to effect a discharge of any lien so filed or registered.

4.11 Ownership of Improvements and Other Project Assets

4.11.1 Ownership of Improvements

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

4.11.2 Ownership of Equipment

Except for the LRVs the Equipment shall become the property of the City at the time of delivery to the City Lands, subject to the terms of any applicable Collateral Agreement. Title to the LRVs shall pass on the

date the Commissioning Certificate has been issued pursuant to the Design and Construction Requirements.

4.11.3 Ownership of Intellectual Property Rights

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

4.11.4 Ownership of Inventory, Tools and Support Vehicles

All tangible personal property other than Equipment, including without limitation, all consumables, tools, equipment, vehicles (other than LRVs), components, spare parts, materials, supplies, inventory items and all miscellaneous goods and chattels used by Project Co or a Project Co 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 Project Co at all times.

4.11.5 Risk of Loss

Notwithstanding the foregoing provisions of Section 4.11 *[Ownership of Improvements and Other Project Assets]*, but subject to Section 11 *[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 Project Co, the Equipment, the Intellectual Property Rights, and the tangible personal property shall reside with Project Co, except to the extent such risk has been expressly retained or transferred to the City according to the terms of this Project Agreement.

4.11.6 City Entitlement to Emission Credits

As provided for in Section 1.1(6) of Schedule 10 *[Environmental Performance Requirements]*, the City owns all GHG and Environmental Benefits.

4.12 Uninterrupted Access and Use

The City covenants that Project Co's access to and use of the City Lands and the Infrastructure pursuant to 4.1 *[Access and Use]* shall be uninterrupted for the duration of this Agreement, shall be without any disturbance or interference from the City or any City Person, and shall be available to enable Project Co to carry out the Design and Construction throughout the Construction Period and to carry out the Services throughout the Operating Period, in each case subject to the following:

- (a) the Permitted Encumbrances (but subject in each case to the obligations of the City under Section 7.4 *[Other Work]* and pursuant to Schedule 28 *[Project Approvals and URP 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 5.5 *[Stop Work Order]* to direct Project Co to cease any Project Work; the City's rights under Section 7.4 *[Other Work]* and Schedule 27 *[Expansion Protocols]* to undertake additional improvements or

expansion; the City's right under Section 14.4 *[Access, Inspection and Testing]*; Section 7.7 *[City's Access to Lands]* of Schedule 4 *[Design and Construction Protocols]*; Section 19.7 *[Business Opportunities]* to access and use the Lands and Infrastructure and the City's step-in rights under Section 16.6 *[City's Remedial Rights]*;

- (c) performance of the City Works;
- (d) any express restriction or limitation on Project Co's access to or use of the Lands, including Section 1-3.1 *[Construction Constraints]* of Schedule 5 *[D&C Performance Requirements]* and Section 1.9.1 *[Restricted Periods for Vegetation Clearing]* of Schedule 10 *[Environmental Performance Requirements]*; and
- (e) Project Co's responsibilities for prevention of intrusion, trespass and unauthorized access, pursuant to Schedule 29 *[Security Matters]*.

4.13 Access and Use Rights to Cease

Upon any termination of this Agreement, Project Co 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 Project Co fails to comply with this Section 4.13 *[Access and Use Rights to Cease]*, then 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 during the Term, the City shall permit Project Co reasonable access and use of the City Lands, as soon as reasonably practical and during the 1 month period (or such longer period Project Co demonstrates is reasonably required) following termination of this Agreement, to demobilize and remove any of Project Co's equipment and materials from the City Lands, subject to the applicable Handback Requirements, and Project Co shall, in the event the Project Agreement is terminated pursuant to Section 17.2(a) *[Termination by City]* for a Termination Event, indemnify the City against any Direct Losses incurred by the City in consequence of Project Co 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 Project Agreement, Project Co 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 Project Co caused or contributed to the Direct Losses.

4.14 City Lands and Existing Infrastructure Adequate

Subject to, and without limiting Project Co's rights under this Project Agreement, including pursuant to Section 15.1 *[City's Representations]*, and Section 13 *[Relief Events]* and Section 22.4 *[Project Co's Reliance on Information]* by entering into this Agreement, Project Co shall be deemed to have made those enquiries, reviews and assessments in respect of the City Lands, Adjoining Lands, Off-Site Lands, and Existing Infrastructure as of the Financial Submission Date in relation to the performance of its obligations under this Agreement that were considered necessary by Project Co to have satisfied itself with its assessment of these interests and to accept all risks and related responsibilities relating to the City Lands, Existing Infrastructure and the Infrastructure (except as expressly provided to the contrary in this Agreement) including:

- (a) the adequacy of the rights of access to and through the Lands for the Project Work, having regard in part to the anticipated utilization of the Adjoining Lands and Off-Site Lands in accordance with Section 4.15 [*Community Improvement Program*] and the NSR Authorizations described in Section 5.1 [*Regulatory Approvals*] of Schedule 28 [*Approvals, Permits and Authorizations*] Part A [*Project Approvals*];
- (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 Existing Infrastructure, including the existence of Contamination and Hazardous Substances;
- (f) geotechnical conditions generally; and
- (g) site conditions of the Adjoining Lands and any other lands outside the City Lands, which may be affected by the Construction.

4.15 Community Improvement Program

Except for the NSR Lands and the Off-Site Lands for which access and use rights have been created or granted by other means as provided for in Section 4.19 [*NSR and Off-Site Lands*], Project Co acknowledges that in order to complete the Construction, temporary access and remedial construction may be required to property outside of the City Lands, and that temporary access easements and remedial construction agreements have not been obtained by the City since the extent to which such property will be impacted and the scope and timelines of such temporary access and remedial construction will need to be determined in the field and attended to by Project Co in the course of planning and completing the Project Work.

The foregoing Real Property Interests (and rights of access and use) that are outside of the City Lands shall be considered *Adjoining Lands* for the purposes of this Agreement and subject to Section 13 [*Relief Events*], if applicable, Project Co will be responsible for all such temporary access and remedial construction in respect of the foregoing Adjoining Lands, and will utilize the following community relations and communications process in managing the access to and use of these lands (the “**Community Improvement Program**”):

- (a) prior to the start of Construction, Project Co shall determine 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 which will require some scope of encroachment or access to, on or over the Adjoining Lands to support the Project Work;

- (b) prior to entering any Adjoining Lands Project Co will complete a comprehensive photographic record of the site and coordinate all required rights of temporary access with the owners and occupiers of such property;
- (c) Project Co shall provide reasonable alternative pedestrian and vehicular access to the Adjoining Lands when existing access has been impaired by the Construction in order to maintain reasonably continuous access at all times;
- (d) not less than 20 Business Days prior to the start of Construction or other related use or access on or over Adjoining Lands Project Co shall issue to all owners and occupiers of such property, information bulletins approved by the Communications Working Group;
- (e) not less than 5 Business Days before Construction commences on, or immediately adjacent to, Adjoining Lands, Project Co shall issue updated construction bulletins disclosing the starting date and ending date of such Construction, the scope of work, the name of Project Co, designated phone number and email address of Project Co and the City's Representative, and Project Co Representative shall re-issue bulletins 48 hours prior to any changes to affected accesses or the Construction Schedule;
- (f) the Communications Working Group may determine and direct from time to time in respect of certain locations that the information bulletins referred to in subparagraphs (d) and (e) above be issued by or in the name of the City and possibly to owners or occupiers of other properties that are adjacent to, or in the immediate vicinity of the City Lands, or are otherwise impacted by the Project Work;
- (g) Project Co will make all reasonable effort to minimize interference, disturbance or encroachment within or on the Adjoining Lands affected by the Construction;
- (h) Project Co shall remediate or repair the condition of these Adjoining Lands (including to tie back in, match existing surface treatments, maintain existing grades or improve drainage patterns to meet the Design and Construction Requirements) any landscaping, improvements, structures and encroachments in respect of the Adjoining Lands that are affected by the Construction to no less than their existing condition prior to Construction, or better where it may be required to improve drainage patterns to meet the Design and Construction Requirements; and
- (i) Project Co shall adhere to and follow applicable Good Industry Practice in carrying out and performing all Project Work in relation to these Adjoining Lands, including in a cooperative manner to the extent reasonably possible in the circumstances.

and such process shall be conducted in a manner consistent with Project Co's obligations set out in Schedule 12 *[Public Communications and Public Engagement]*.

To support and facilitate the application and utilization of the foregoing Community Improvement Program by Project Co in respect of applicable Adjoining Lands in the performance of the Project Work, the City shall, subject to Section 13.6 *[Designated Changes in Laws, Policies and Permits]*:

- (j) provide updates to Project Co in a timely manner of changes the City has made to City Policies or City Regulatory Policies that may apply to or otherwise affect the Community Improvement Program;
- (k) provide updates to Project Co in a timely manner of any material changes the City may make as a matter of sustained or prevalent practice in the application of the same or substantially similar programs in respect of other City capital projects; and
- (l) on request by the Project Co Representative, provide to Project Co suggestions regarding the steps, actions or manner in which Project Co might proceed with the application or utilization of the program in any particular circumstance.

4.16 Surrender of Surplus City Lands

Notwithstanding any other provision in this Agreement, at any time and from time to time on or after the Service Commencement Date, the City may, after reasonable consultation with Project Co and upon 30 Business Days' notice (the "**Surrender Notice**") to Project Co:

- (a) determine, acting reasonably, which City Lands or portions thereof, can be deleted or surrendered from the City Lands subject to the licence granted to Project Co pursuant to Section 4.1 [*Access and Use*] on the basis such City Lands or portions thereof are surplus to and no longer required by Project Co for the outstanding Project Work to be performed after the Service Commencement Date (the "**Surplus Lands**");
- (b) on the expiry of the 30 day notice period, or such further period as the City may specify in the Surrender Notice, amend the Site Plans and the licence granted to Project Co pursuant to Section 4.1 [*Access and Use*] to reflect the determination contemplated by this Section 4.16(a);
- (c) as may be applicable at the time, confirm to Project Co its right to access and use these Surplus Lands for the sole and limited purpose of performing any residual, outstanding or contingent obligations Project Co may have under the Project Agreement, including its obligations under Section 4.7 [*Required Condition of the Lands and Infrastructure*] and any environmental management obligations under Schedule 10 [*Environmental Requirements*]; and
- (d) on the effective date of the surrender the Surplus Lands shall thereafter be treated as Adjoining Lands for the purposes of this Agreement if and to the extent Project Co accesses, uses, occupies or possess such lands in the performance of Project Requirements.

(collectively, the "**Site Amendments**"),

provided that the Site Amendments will not have a material adverse effect on Project Co's ability to perform its obligations under this Agreement.

If Project Co does not believe the City has engaged in reasonable consultation prior to making its determination, or does not believe the City has made a reasonable determination of which City Lands are surplus, Project Co may within 5 Business Days of its receipt of the Surrender Notice refer these matters to an expedited Dispute resolution process pursuant to Section 1.4 [*Fast Track Referee Process*] of Schedule 20 [*Dispute Resolution Procedure*]. During the administration of the Dispute the City will not make any claims or exercise any recourse rights or remedies against Project Co or Project Co Persons on the basis that the lands in question are no longer City Lands subject to the Section 4.1 [*Land Licence*].

If it is determined, or acknowledged by the City, that the Site Amendment is having or did have an adverse impact on Project Co's ability to perform its obligations under the Agreement, whether the impact is material or not, or whether the City acted reasonably or not in requiring the surrender, Project Co shall be entitled to claim a Relief Event. The City's decision to remove the Surplus Lands from the Project Co land licence however shall be final and binding unless the City voluntarily decides to reverse or modify its decision or a determination is made through the Dispute Resolution Procedure that the removal will have a material adverse impact to Project Co's performance of the Project Work.

4.17 Development Charges

- (a) Subject to this Section 4.17 [*Development Charges*], the City shall be responsible for paying certain 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 as follows (the "**Development Charges**"):
- (i) amounts due and payable to the *Planning Branch*, in respect of the Permanent Area Contributions (PAC) of the City;
 - (ii) amounts due and payable to the *Planning Branch*, in respect of the Sanitary Servicing Strategy Expansion Assessment (EA) of the City; and
 - (iii) amounts due and payable to the *Planning Branch*, in respect of the Sanitary Sewer Trunk Charge (SSTC) of the City,

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 Project Co is responsible pursuant to Schedule 28 [*Project Approvals and URP Matters*]. Project Co acknowledges and agrees that this Section 4.17 [*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 that are the responsibility of Project Co under this Agreement.

- (b) Promptly, but not less than 10 Business Days, prior to Project Co making an application for a Project Approval for which a Development Charge may become due and payable, Project Co 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, including the application for such Project Approval, as

applicable, as may be required by City Representative to assess and validate the payment that has become due;

- (ii) the amount of the Development Charge, including working papers setting forth the basis for and computation of the amount of the Development Charge;
 - (iii) the date on which the Development Charge is due and payable;
- (c) Not less than 5 Business Days prior to a Development Charge being due and payable in accordance with a Project Approval, the City acting through the City's Representative shall pay or otherwise satisfy the Development Charge directly in accordance with Section 4.17(d) *[Development Charges]*.
- (d) The City shall:
- (i) make the foregoing payment under the 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 Project Co.
- (e) Without altering or impairing the consultation, cooperation and coordination obligations for Project Co and City contemplated in Section 6 *[Consultation, Cooperation and Coordination]* of Schedule 28 *[Project Approvals and URP Matters]* Part A *[Project Approvals]*, in undertaking its obligations in this Section 4.17 *[Development Charges]*, Project Co shall act with due consideration for the necessary time and information required by the City to review, investigate, arrange for payment of, negotiate and/or challenge the payment of Development Charges, to the extent permissible under Applicable Laws.
- (f) Any refund, partial rebate or credit granted relating to the Development Charges shall be for the benefit of the City.
- (g) For greater certainty, the City may review and audit and review the Development Charges, a Project Approval associated with a Development Charge and/or any other information or documentation submitted by Project Co to the City pursuant to this Section 4.17 *[Development Charges]* in accordance with Section 14.7 *[General Audit Obligations]*.

4.18 Occupancy of Buildings

Project Co may elect to access, use and exclusively occupy the Existing Maintenance Building for storage or similar limited purposes during the Construction Period by providing the City with written notice of this decision not later than 6 months following the Effective Date. Project Co may also identify other unoccupied City owned or held buildings or structures within the City Lands which Project Co determines it could use and occupy on an exclusive but temporary basis to support the performance of specific Project Work activities. For these other unoccupied City owned buildings Project Co may propose to the

City at any time during the Term, and the City may agree at its discretion, to grant to Project Co the temporary exclusive use and occupation of such specifically identified buildings or structures by Project Co by written confirmation signed by the City Representative and the Project Co Representative.

Where pursuant to this Section 4.18 [*Occupancy of Buildings*] Project Co elects or is granted access, use and temporary exclusive occupancy of the City's buildings, such access, use and occupancy will be subject to the terms of this Agreement that are applicable to City Lands and relevant to the occupation and use of buildings and the related lands. The City may require that Project Co carry-out a pre and post occupancy inspection report in respect of the buildings Project Co may elect and be permitted to occupy. The City will have ongoing rights of access and inspection of these buildings upon 24 hours prior written notice to Project Co. The City may terminate Project Co's right of exclusive use to these buildings upon 30 days written notice.

4.19 NSR and Off-Site Lands

- (a) **NSR Lands:** Project Co shall be responsible for investigating, assessing, and obtaining the necessary rights of access, use and occupancy in respect of the NSR Lands from the applicable Governmental Authorities to support the performance of the Project Work in accordance with the Project Requirements. The NSR Lands shall be treated as Adjoining Lands for the purposes of this Agreement, except that Section 4.15 [*Community Improvement Program*] shall have no application to the NSR Lands;
- (b) **Off-Site Lands:** In performing required testing, monitoring and similar incidental, periodic or temporary activities or tasks on or in relation to the Off-Site Lands as part of the Project Requirements, Project Co shall establish and confirm access, use and occupancy rights in respect of such lands based on either:
 - (i) a specific grant or authorization in writing by the City of an interest or right based on a specifically identified Real Property Interest held by the City ("**City Grant**");
 - (ii) Project Co obtaining a written authorization or grant directly from the property owner (the "**Property Authorizations**"); or
 - (iii) in the absence of a Property Authorization or City Grant Project Co shall rely upon the application of the Community Improvement Program pursuant to Section 4.15 [*Community Improvement Program*] in respect of those Off-Site Lands where Project Co's access is expected to be temporary, incidental, infrequent and with little or no impact on the lands in question;
- (c) **Off-Site Lands Protocols:** In establishing and confirming access, use and occupancy rights to Off-Site Lands Project Co and City shall take the following steps and actions:
 - (i) Within 60 days following the Effective Date Project Co shall provide the City with a written summary (the "**Offsite Summary**") that provides a description of the Off-Site Land locations Project Co requires for the performance of related Project Requirements;

- (ii) within 15 days of its receipt of the Offsite Summary the City will respond in writing to Project Co confirming whether the City has a Real Property Interest in relation to one or more of the Off-Site Land locations that will support a City Grant which the City intends to proceed with;
- (iii) if the City does not confirm to Project Co within the foregoing time that it will be proceeding with a City Grant then Project Co shall proceed to investigate and assess whether it might obtain a Property Authorization directly from the property owner of the Off-Site Lands for the location in question;
- (iv) if neither a City Grant or Property Authorization can be established and confirmed in writing to Project Co by the City or the property owner within 90 days of the date of the Offsite Summary, then Project Co shall rely upon the application of the Community Improvement Program to gain access to use the Off-Site Land locations as contemplated by Section 4.19(b)(iii) [*NSR and Off-Site Lands*];
- (v) for each Off-Site Lands location that Project Co may be seeking a Property Authorization for, Project Co may request, and the City may consider, whether the City's participation or involvement in seeking the Property Authorization will be appropriate and helpful. If such an assessment is made by the Parties, the City will participate in the process if requested by Project Co and provide reasonable support in the form of input and guidance, letters of support and encouragement, direction to a City representative to attend certain meetings with Project Co and the property owner and with such other similar support or assistance to Project Co as may be appropriate for any particular location in the circumstances;
- (vi) Project Co shall use commercially reasonable efforts to grant to the City by way of sub-licence, assignment or other form of authorization a right to also access, use and occupy the Off-Site Lands according to the terms of the assessment described in the preceding subparagraph for the unexpired term of the Property Authorization;
- (vii) if Project Co is not able to obtain a City Grant or a Property Authorization within 90 days of its issuance of the Offsite Summary, and demonstrates to the City that the Community Improvement Program will not reasonably provide Project Co with the necessary access, use, or occupancy rights required to perform or complete Project Work because of an uncooperative property owner and this delays, hinders, or prevents Project Co from performing or complying with its related Project Requirements, Project Co shall be entitled to claim a Relief Event in accordance with Section 13 [*Relief Events*];
- (viii) Project Co shall use reasonable commercial efforts consistent with Good Industry Practice to use the least intrusive and lowest adverse impact means and

methods as are reasonably possible in accessing, using and working on the Off-Site Lands.

5. DESIGN AND CONSTRUCTION OF THE INFRASTRUCTURE

5.1 Project Co's Obligations

Project Co shall perform and carry out the Design and Construction 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.

5.2 Design and Construction Requirements

Notwithstanding any other provision of this Agreement, Project Co'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 7 [*Modifications and Change Orders*], Schedule 13 [*Changes*] or as otherwise expressly permitted in accordance with this Agreement. If Project Co 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.

5.3 Project Co Solely Responsible for Costs

Except as expressly set out in this Agreement, Project Co is solely responsible for paying all costs, fees and charges of any nature whatsoever required to complete the Design and Construction, excepting only:

- (a) the costs, fees and charges of the City's own personnel, consultants and professional advisors (excluding the Independent Certifier), in respect of the City acting as a counterparty to any Project Document, but not in any other capacity including the City acting as a Governmental Authority;
- (b) the costs, fees and charges of any mediation or arbitration pursuant to the Dispute Resolution Procedure, which are specifically provided for in Schedule 20 [*Dispute Resolution Procedure*];
- (c) any costs, fees, charges or payments expressly to be made by the City under the provisions of this Agreement.

The City shall not be obligated to pay any costs, fees or charges in relation to the Design or Construction except as expressly set out in Section 9 [*Payment*], Schedule 16 [*Payment Mechanism*] or elsewhere in this Agreement.

5.4 Construction Within the Lands

Project Co 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.

5.5 Stop Work Order

The City may at any time direct Project Co 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 13.1 [*Relief Event Defined*], constitute a Relief Event under Section 13.1.1(a)(iii) [*Relief Event Defined*].

5.6 Service Commencement

- (a) Without impairing Section 5.8 [*Term – Early Completion*], and notwithstanding Section 5.9 [*Term – Late Completion*], the City and Project Co intend that Service Commencement Date shall not occur before the Target Service Commencement Date, as such date may be adjusted in accordance with this Agreement. In no event shall the Service Commencement Date occur before the Target Service Commencement Date or later than the Long Stop Date, as such dates may be adjusted in accordance with this Agreement.
- (b) The requirements for, and achievement of, Service Commencement are as set out in Section 14 [*Service Commencement*] of Schedule 4 [*Design and Construction Protocols*].
- (c) Without limiting the rights and remedies of the City in respect of Service Commencement:
 - (i) where Project Co has delivered an Advance Start-up Notice in accordance with Section 14.1 [*Advance Start-up Notice*] of Schedule 4 [*Design and Construction Protocols*] which confirms an anticipated Service Commencement Date which is prior to the then current Target Service Commencement Date:
 - (A) the anticipated Service Commencement Date specified in the Advance Start-up Notice shall, subject to further adjustment in accordance with this Agreement, be deemed to be the Target Service Commencement Date; and
 - (B) the provisions of Section 5.8 [*Term – Early Completion*] or Section 5.9 [*Term – Late Completion*], if applicable, shall, subject to further adjustment in accordance with this Agreement, utilize the Target Service Commencement Date determined pursuant to Section 5.6(c)(i)(A) [*Service Commencement*].
 - (ii) NPE Points and/or Default Points shall continue to be applicable notwithstanding any failure to achieve Service Commencement on the Target Service

Commencement Date, as it may be adjusted in accordance with this Agreement;
and

- (iii) the City may at any time require monitoring, rectification and/or exercise step-in rights as contemplated in Section 16.6 [*City's Remedial Rights*].
- (d) Notwithstanding issuance of the Certificate of Service Commencement for the System, Project Co shall not commence Passenger Service until directed to do so by the City. Where the Independent Certifier has issued the Certificate of Service Commencement but the City has not directed Project Co to commence Passenger Service:
 - (i) Project Co shall not commence Passenger Service, but shall otherwise perform all other aspects of the Services and the rights and obligations of the City and of Project Co in this Agreement shall in all other respects remain the same, including the commencement of the Operating Period and the City's obligation to make Operating Period Payments, but without making any deductions related to the failure to provide the Passenger Service or the failure to satisfy the Service Performance Measures; and
 - (ii) the City may at any time after the Service Commencement Date require Project Co to commence Passenger Service by providing at least 5 Business Days prior notice to Project Co stating the date on which Passenger Service is to commence. Following receipt of notice from the City, Project Co shall commence Passenger Service on the date specified in such notice and the City shall thereafter be entitled to make deductions in accordance with this Agreement where, and to the extent, that Project Co fails to provide Passenger Service or does not satisfy the Service Performance Measures.

For greater certainty, the Service Level used for the calculation of the Operating Period Payments applicable under this Section 5.6(d)(i) [*Service Commencement*] shall be the Service Level offering the lowest level of service and System Capacity (i.e. Service Level A).

5.7 Term

Unless this Agreement is terminated early in accordance with its terms, the Term shall commence on the Effective Date and shall expire on the earlier of:

- (a) December 14, 2050; or
- (b) 30 years from such earlier Target Service Commencement Date as may be established in accordance with Section 5.6(c) [*Service Commencement*] of this Agreement.

5.8 Term - Early Completion

Where an early Target Service Commencement Date is established in accordance with Section 5.6(c) [*Service Commencement*]:

- (a) the Term shall expire 30 years from the early Target Service Commencement Date established in accordance with Section 5.6(c) *[Service Commencement]*, with the result that the Operating Period shall never exceed 30 years; and
- (b) the Payment schedule shall be adjusted and amended accordingly.

5.9 Term - Late Completion

In the event that the Service Commencement Date occurs on a date which is later than the Target Service Commencement Date, as such date may be adjusted in accordance with this Agreement:

- (a) the Expiry Date shall not be extended, with the result that the Operating Period shall be less than 30 years; and
- (b) Schedule 16 *[Payment Mechanism]* shall not be adjusted or amended, except that:
 - (i) Project Co is not entitled to any Operating Period Payment for any month(s) prior to the month in which Service Commencement is achieved but subject to the provisions of Sections 7 *[Modifications and Change Orders]*, 12.1(d) *[Force Majeure During Construction Period]*, Section 13.2 *[Relief Event During Construction Period]* and Section 3.13 *[No Indemnification for Insured Claims]* of Schedule 17 *[Insurance Requirements]*; and
 - (ii) Project Co is entitled to a *pro rata* Operating Period Payment for the month in which Service Commencement is achieved, based on the number of days from and including the day Service Commencement is achieved until the end of that month;

it being the mutual intent of the parties that in such event, both the Operating Period and the aggregate amounts of Operating Period Payments payable over the Term shall be reduced in accordance with the foregoing.

6. OPERATION AND MAINTENANCE

6.1 Commencement of Services

Project Co shall perform and carry out the Services in accordance with this Agreement, including the O&M Requirements.

6.2 O&M Requirements

Notwithstanding any other provision of this Agreement, Project Co's obligation to conduct the Services in accordance with the O&M Requirements is absolute, and cannot be modified or waived except by amendment of the O&M Requirements made in accordance with Section 7 *[Modifications and Change Orders]*, Schedule 13 *[Changes]* or as otherwise expressly permitted in accordance with this Agreement. If Project Co asserts that any aspect of the O&M Requirements is uncertain or ambiguous, either party

may require that the interpretation of that aspect of the O&M Requirements be determined by the Dispute Resolution Procedure if they are not able to resolve the matter through their respective Representative.

6.3 Project Co Solely Responsible for Services Costs

Except as expressly set out in this Agreement, Project Co is solely responsible for paying all costs, fees and charges of any nature whatsoever required to perform the Services, excepting only:

- (a) the 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, but not in any other capacity including the City acting as a Governmental Authority;
- (b) the costs, fees and charges of any mediation or arbitration pursuant to the Dispute Resolution Procedure, which are specifically provided for in Schedule 20 [*Dispute Resolution Procedure*];
- (c) any costs, fees, charges or payments expressly to be made by the City under the provisions of this Agreement.

The City shall not be obligated to pay any costs, fees or charges in relation to the Services except as expressly set out in Section 9 [*Payment*], Schedule 16 [*Payment Mechanism*] or elsewhere in this Agreement.

7. MODIFICATIONS AND CHANGE ORDERS

7.1 Modification During Construction Period

If during the Construction Period, 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 Project Co (including without limitation any arrangement proposed by Project Co under Section 7.1(b) [*Modifications During Construction Period*] and agreed to by the City), Project Co shall be entitled to payment from the City, on a progress basis, as part of the Construction Period 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;
- (b) if Project Co anticipates that the Change will delay Service Commencement, but is of the opinion the delay can be avoided or mitigated through extraordinary measures, Project Co may propose to the City that such extraordinary measures be taken by Project Co at the City's expense; and
- (c) except as otherwise agreed between the City and Project Co, if the Change will increase or decrease the cost to Project Co of carrying out the O&M Requirements, then the Operating Period Payments in Schedule 16 [*Payment Mechanism*] shall be adjusted in accordance with Schedule 13 [*Changes*] and as set out in the applicable Change Order Confirmation.

Project Co 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]*.

7.2 Modification During Operating Period

If during the Operating Period, the City wishes to modify the Project or the Project Requirements, it shall proceed as provided in Schedule 13 *[Changes]* and the Operating Period Payments in Schedule 16 *[Payment Mechanism]* shall be adjusted in accordance with Schedule 13 *[Changes]* and as set out in the applicable Change Order Confirmation. Project Co 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]*.

7.3 Minor Works

The City may require Minor Works in accordance with Schedule 13 *[Changes]*.

7.4 Other Work

7.4.1 City Responsibilities; Other Works

Where the City:

- (a) enters into a contract with an Other Contractor in respect of Other Works;
- (b) undertakes Other 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,

the City will:

- (d) cooperate with Project Co and Other Contractors in relation to the coordination and scheduling of the Project Work and Other Works;
- (e) participate, upon reasonable request, in coordination and scheduling meetings between Project Co 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
- (g) make commercially reasonable efforts to require the Other Contractors performing such Other Works to:
 - (i) meet with Project Co and to comply, and perform the Other Works in accordance, with Project Co's reasonable scheduling and coordination protocols;

- (ii) comply, and perform the Other Works in accordance, with Project Co's reasonable site rules, access control protocols and instructions relating to health, safety and security, to the extent that such Other Works are being performed on a worksite for which Project Co or a Project Contractor has been designated "Prime Contractor" in accordance with Schedule 11 [*Project Safety Requirements*];
- (iii) cooperate, and participate, with Project Co, the City and Other Contractors in the coordination and scheduling of the Project Work and the Other Works; and
- (iv) provide property damage (if applicable) and liability insurance coverage as would be required by a prudent owner similarly situated, and coordinate such insurance with the insurance coverage of Project Co.

7.4.2 Project Co Responsibilities; Other Works

In connection with Other Works, Project Co shall:

- (a) cooperate with the City and Other Contractors, so as to permit the efficient performance of the Other Works, while minimizing the impact to the Project Work;
- (b) use commercially reasonable efforts to coordinate and schedule the Other 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 [*Project 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) provide reasonable and timely access to the City Lands, the NSR Lands and any Additional Lands in order to permit Other Contractors to perform the Other Works;
- (e) afford 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;
- (f) 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;
- (g) make Project Co's site rules, access control protocols and instructions relating to health, safety and security available to the City and Other Contractors; and
- (h) where part of the Project Work is affected by or depends upon, for its proper execution, Other 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 of which Project Co has knowledge. Failure or delay by Project Co to so report will be taken into account in the

determination of any claim for relief under Section 13.1 [*Relief Event Defined*], if and to the extent such failure or delay, has prejudiced the City's ability to rectify the deficiency or mitigate its impact.

7.4.3 Cooperation; Other Works

For the purpose of Section 7.4.1 [*City Responsibilities; Other Works*] and 7.4.2 [*Project Co Responsibilities; Other 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 and the Project Work;
- (b) establishing mutually acceptable protocols for the effective and efficient coordination and scheduling of Other Works and the Project Work;
- (c) accommodating reasonable requests for adjustments to scheduled activities as required to permit the effective and efficient performance of the Project Work and Other Works;
- (d) providing timely information regarding design, construction, operations, maintenance and other activities as is necessary for the effective and efficient performance of the Project Work and the Other Works;
- (e) providing timely response to inquiries and requests, including reasonable requests for commentary on relevant designs; and
- (f) taking reasonable steps to avoid disputes.

7.4.4 Other Works Relief Event

For clarification, if Project Co is prevented, hindered or delayed from performing its obligations under this Agreement by reason of the Other Works Project Co may claim a Relief Event if the City is in breach of its obligations under this Section 7.4 [*Other Work*] or as a result of the Legal Fault of the City, a City Person, or Other Contractor in relation to the Other Works (Section 13.1.1(a) [*Included Events*]) or otherwise for the acts and omissions of an Other Contractor (Section 13.1.1(c)(i) [*Included Events*]) and regardless of whether or not the City has complied with its Section 7.4 [*Other Work*] obligations.

7.5 Change of Service Levels

During the Term, the City may direct Project Co to increase or decrease the Service Levels in accordance with the terms set out in Schedule 7 [*O&M Performance Requirements*].

7.6 System Expansion and New Lines

During the Term, the City may at its discretion undertake or proceed with a New Line project in accordance with the terms set out in Schedule 27 [*Expansion Protocols*].

8. HANDBACK UPON EXPIRY

8.1 Handback Requirements

Upon expiry of the Term, Project Co shall leave the System in the condition required by the Handback Requirements set out in Appendix 7-A [*Handback Requirements*] of Schedule 7 [*O&M Performance Requirements*].

9. PAYMENT

9.1 Payment by City

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

- (a) the Payment as set out in Schedule 16 [*Payment Mechanism*];
- (b) amounts owing under Section 4 [*Land Matters*];
- (c) amounts owing under Section 12 [*Force Majeure*];
- (d) amounts owing under Section 13 [*Relief Events*];
- (e) the Termination Payments as set out in Section 18 [*Termination Payments*];
- (f) NOT USED;
- (g) amounts owing under Schedule 10 [*Environmental Performance Requirements*];
- (h) amounts owing under Schedule 13 [*Changes*];
- (i) amounts owing under Schedule 15 [*Independent Certifier*];
- (j) amounts owing under Schedule 17 [*Insurance Requirements*]; and
- (k) amounts owing under Schedule 20 [*Dispute Resolution Procedure*],

in accordance with the provisions of this Agreement.

9.2 Limitations on Payments

- (a) Other than the payments expressly provided for in this Agreement, Project Co 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 Project Co of any of its obligations under this

Agreement, nor shall it operate to relieve Project Co from the performance of any of its obligations under this Agreement which have not been performed.

9.3 Payment Procedure

- (a) The City shall not be obligated to make any payment to Project Co unless all material reporting obligations to be satisfied by Project Co under this Agreement (whether or not described as being conditions to making such payment) have been satisfied by Project Co, including:
- (i) submission of reports pursuant to Section 3.2.1 [*Monthly Progress Report*] of Schedule 4 [*Design and Construction Protocols*];
 - (ii) submission of reports pursuant to Section 4 [*Operational Performance Reporting*] of Schedule 7 [*O&M Performance Requirements*]; and
 - (iii) submission of any required reporting pursuant to Schedule 10 [*Environmental Performance Requirements*].

For the purposes of this Section 9.3 [*Payment Procedure*] “material reporting obligations” are limited to those reports that are reasonably required by the City to properly assess, determine and validate its payment obligations to Project Co under this Agreement.

- (b) Payments by the City shall be made in accordance with this Section and/or Section 16.6 [*Payment Reporting, Administration and Invoicing*] of Schedule 16 [*Payment Mechanism*], as applicable.
- (c) 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).
- (d) If the due date is not a Business Day, then the electronic transfer shall be made on the Business Day immediately succeeding such day.
- (e) 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 due within 30 days of receipt or deemed receipt of an invoice therefor.

9.4 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), Project Co 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 Project Co.

- (b) Subject to Section 4.4 [*No Access Fee*] and Section 4.17 [*Development Charges*], the City shall pay or otherwise be responsible for, when due and payable, all property taxes, local improvement levies and Development Charges 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 Project Co 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 Project Co 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 Project Co pursuant to paragraph 168(3) of the *Excise Tax Act* (Canada) does not include any GST amounts already paid by the City to Project Co.
- (d) Subject to Section 9.4(e) [*Taxes*], in each Payment invoice provided by Project Co to the City, Project Co 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 Payment 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 Project Co under this Agreement.
- (f) Project Co shall not undertake any action or transaction that, if undertaken, would cause or result in Project Co ceasing to be a partnership for purposes of the *Income Tax Act* (Canada) or any Partner becoming a Non-Resident without the City’s prior written consent, which consent may be withheld in the City’s discretion.
- (g) Project Co 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 Project Co under this Agreement or under any other Project Document.
- (h) If (i) Project Co 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 Project Co 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 Project Co on or after the date on which (A) Project Co 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 Project Co, 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 Project Co on the due date of the related amount payable.

- (i) If (i) Project Co becomes a Non-Resident, or (ii) the City or any City Party is or becomes required by Applicable Law to deduct and withhold any amount in respect of Taxes on or in respect of any amounts paid or credited to Project Co or a Project Co Person by the City or any City Party under this Agreement or under any of the Project Documents, Project Co 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 Project Co 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**”).

Payment under this indemnification shall be made within 30 days from the date the City makes written demand for it. A certificate containing reasonable detail as to the amount of Indemnifiable Taxes and Associated Liabilities submitted to Project Co by the City shall be conclusive evidence, absent manifest error, of the amount due from Project Co to the City. The City shall be entitled to exercise its rights of set off under Section 9.5 [*Set-off*] against any amounts owing under this indemnification.

- (j) If Section 182 of the *Excise Tax Act* (Canada) is applicable to any amount payable under this Project Agreement, such payment will be increased by an amount such that after remitting the applicable GST Project Co will be in the same position as it would have been if Section 182 of the *Excise Tax Act* (Canada) were not applicable.
- (k) Project Co 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 Project Co and Project Co is entitled to claim such credits or incentives.
- (l) *GST Adjustment*
- (i) The City will pay to Project Co amounts equal to any GST or similar taxes (e.g. HST, if applicable), incurred by Project Co 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 Project Co or a Sub-Contractor in the course of carrying out the Project Work or otherwise performing Project Co's obligations under this Agreement, to the extent that Project Co 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 Submission Date related to such taxes, and only to the extent necessary to leave Project Co in no better or worse position than before such change in Applicable Law.

- (ii) Project Co will pay to the City, directly or by way of set-off against Construction Period Payments or Operating Period Payments, amounts equal to any GST or similar taxes (e.g. HST, if applicable), incurred by Project Co 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 Project Co or a Sub-Contractor in the course of carrying out the Project Work or otherwise performing Project Co's obligations under this Agreement, to the extent that Project Co 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 Submission Date related to such taxes, and only to the extent necessary to leave Project Co in no better or worse position than before such change in Applicable Law.

9.5 Set-off

The City is entitled to set off against any Payment or other amount due and payable by the City to Project Co hereunder only an amount:

- (a) finally determined (that is, no longer subject to the Dispute Resolution Procedure) to be payable by Project Co to the City under this Agreement; or
- (b) paid by the City under and in accordance with any statute in respect of any lien arising from any act or omission of Project Co, or any Project Co Person, in relation to the Design and Construction or the Services.

The City, upon becoming aware that it is or may become obligated to pay and before paying an amount contemplated by clause (b) such that a right of set-off may arise under clause (b), shall give Project Co such advance notice as may be practicable in the circumstances having regard to any applicable reference dates or time frames in this Agreement (without exposing the City to any risk of being obliged to pay more than the original amount contemplated by clause (b)), with a view to affording Project Co an opportunity to dispute (provided the City is satisfied the dispute is bona fide), or make arrangements to remove or eliminate, the lien or claim.

9.6 Interest on Overdue Payments

Except as otherwise provided in Section 17.5(b)(i) [*Consequences of Termination*], any amount payable under this Agreement and not paid when it becomes due shall bear interest at Prime plus 2%, 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 Prime plus 2%, without compounding, shall be payable from the date when such amount ought to have been paid until the date (or dates) of payment.

9.7 Disputed Amounts

A party will pay any undisputed portion of any disputed amount payable to the other party in accordance with this Agreement but any disputed portion or amount will not be payable until the Dispute is resolved in accordance with the Dispute Resolution Procedure. In the event that Project Co disputes the amount of any Payment, Project Co shall bring such dispute to the attention of the City within 45 days after the date the Payment is received, failing which, in the absence of manifest error, Project Co shall be estopped from later disputing the correctness of the amount so paid.

9.8 Payments by Project Co

Project Co will pay the City amounts Project Co is expressly obligated to pay under the Agreement, including:

- (a) amounts owing under Section 16.1 [*Project Co's Indemnity*];
- (b) amounts owing under Section 18 [*Termination Payments*];
- (c) amounts owing under Schedule 10 [*Environmental Performance Requirements*];
- (d) amounts owing under Schedule 13 [*Changes*];
- (e) amounts owing under Schedule 15 [*Independent Certifier*];
- (f) amounts owing under Schedule 16 [*Payment Mechanism*];
- (g) amounts owing under Schedule 17 [*Insurance Requirements*]; and
- (h) amounts owing under Schedule 20 [*Dispute Resolution Procedure*],

in accordance with the provisions of this Agreement.

9.9 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 18 [*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 affected or entitled Party may make written demand for such payments from time to time after being 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 Project Co as the case may be, shall make such payment by a lump sum amount to be due and payable within 30 days unless:

- (c) the Parties mutually agree to an adjustment to either (or both) of the Construction Period Payments and the Operating Period Payments as the means of structuring the payment; or
- (d) the City requests in writing that Project Co make commercially reasonable efforts to obtain financing for such payment amount and have the same paid for by way of amendment to the Construction Period Payments or Operating Period Payments or both. If the City makes such a request, then the City shall be deemed to have issued a Change Enquiry in accordance with Section 2.1 [*Initiating a Change Enquiry*] of Schedule 13 [*Changes*] to this effect. For clarity, if after making commercially reasonable efforts to obtain financing as contemplated by this subparagraph (d), Project Co is unable to obtain commitments to provide the financing, the City will be required to make the payment in question by lump sum and the City shall not have the right to use a Change Directive to compel such financing.

When preparing the Change Estimate, in response to the foregoing City Request, Project Co shall take into consideration that as a result of the City's request it is intended that Project Co shall be in no better or worse position at the Expiry Date than had the payments been made on a lump sum basis in accordance with this Section 9.9.

10. PAYMENT ADJUSTMENTS AND OTHER MODIFICATIONS

10.1 Payment Adjustments

Project Co acknowledges and agrees that the amount of any Payment may be adjusted pursuant to Schedule 16 [*Payment Mechanism*] and such adjustments are integral to the provisions of this Agreement.

10.2 Timely Notice

Each of the City and Project Co shall notify the other in a timely manner upon becoming aware of circumstances that give rise to a Payment Adjustment. Failure by either party to give such notice in a

timely manner shall not in any event disqualify the City from claiming the Payment Adjustment, but either Party may assert against the other a claim for any Direct Losses resulting from the failure to give notice in a timely manner.

11. INSURANCE, DAMAGE AND DESTRUCTION

11.1 Insurance Requirements

Subject to Section 5 [*Uninsurability*] of Schedule 17 [*Insurance Requirements*], Project Co shall take out, maintain in force and renew, or cause to be taken out, maintained in force or renewed, insurance for the Project as set out in Schedule 17 [*Insurance Requirements*].

11.2 Agreement not Affected by Damage or Destruction

Except as otherwise expressly provided, the partial destruction or damage or complete destruction by fire or other casualty of the Infrastructure shall not permit either party to terminate this Agreement or entitle Project Co to surrender possession of the Infrastructure or to demand any increase in any amounts payable to Project Co under this Agreement and all of the provisions of this Agreement, including Section 12 [*Force Majeure*] and Section 13 [*Relief Events*] shall continue to apply.

11.3 Project Co's Obligations – Damage or Destruction

This Section 11.3 shall not apply if Section 12.3 [*Procedures on Force Majeure Event*] applies. Subject to Section 11.4 [*Project Co's Obligations – Material Damage or Destruction*] and without prejudice to Section 13 [*Relief Events*], if all or any part of the Infrastructure is damaged or destroyed Project Co shall repair, replace or restore the part of the Infrastructure so damaged or destroyed in accordance with the Design and Construction Requirements subject only to:

- (a) Applicable Law; and
- (b) the City agreeing to pay to Project Co:
 - (i) the amount, if any, by which the cost of such repair, replacement or restoration exceeds the sum of (i) Insurance Proceeds actually recovered by Project Co for such risk; (ii) Insurance Receivables for such risk; and (iii) any deficiency between the amounts described in clauses (i) and (ii) and the amount of such Direct Losses that is recoverable under the types and limits of insurance required under this Agreement but will not be paid by the relevant insurer(s) by reason unrelated to exclusions from such coverage; or
 - (ii) if no insurance coverage is required under this Agreement for such risk, or no Insurance Proceeds or Insurance Receivables will be paid or payable for such risk under such coverage due to exclusions therefrom, an amount equal to the total costs of such repair, replacement or restoration.

Subject to the terms of any Change Order Confirmation issued pursuant to Section 11.4 [*Project Co's Obligations – Material Damage or Destruction*], the City shall pay such amounts promptly upon receipt of

one or more invoices from Project Co confirming that the works or services in connection with such repair, replacement or restoration have been performed by or on behalf of Project Co.

For the purposes of this Section 11.3, reference to the Infrastructure shall not include the Early Handover Items after the time of handover of each such Early Handover Item to the City in accordance with this Agreement.

11.4 Project Co's Obligations - Material Damage or Destruction

Notwithstanding the occurrence of the Relief Event described in Section 13.1.1(d)(iii) *[Other]* and subject to the parties' rights to terminate this Agreement in accordance with the provisions of Section 11.5 *[City's Election Not to Reinstate]*, 11.6 *[Insufficient Insurance]* or 11.7 *[Economic Reinstatement Test During Construction]* or otherwise, if the Infrastructure suffers damage or destruction that is likely to cost more than \$10 Million (index linked) to repair, replace and restore:

- (a) the City shall be deemed to have issued a Change Enquiry pursuant to Section 2.1 *[Initiating a Change Enquiry]* of Schedule 13 *[Changes]* on the date of such damage or destruction for the repair, replacement or restoration of such damage or destruction, provided that the City shall be entitled to issue a revised Change Enquiry in respect of such damage or destruction, including if the City has decided that the Infrastructure is not required to be reinstated in the same form as prior to the damage or destruction;
- (b) the use of Schedule 13 *[Changes]* under this Section 11.4 is for convenience and does not imply that such repair, replacement or restoration is a Change; rather, the City's and Project Co's rights, responsibilities, obligations and liabilities in respect of such damage and destruction shall be governed by the relevant provisions of this Agreement, including Project Co's obligation to repair, replace or restore the Infrastructure pursuant to Sections 11.3 *[Project Co's Obligations – Damage or Destruction]* and 11.10 *[Standards of Replacement, Repair or Reconstruction]*, the application of insurance proceeds pursuant to Sections 11.8 *[Application of Insurance Proceeds If No Termination]* and 11.9 *[Application of Insurance Proceeds In Case of Termination]*. Once a determination is made as to the responsibility for the repair, replacement or restoration of such damage and destruction, a Change Order Confirmation will be issued if applicable; and
- (c) in addition to the information required pursuant to Section 2.3(a) *[Change Estimate Requirements]* of Schedule 13 *[Changes]*, any Change Estimate issued in respect of such damage or destruction shall include the following information as is applicable to such Change Enquiry or deemed Change Enquiry, in sufficient detail to demonstrate to the City's reasonable satisfaction:
 - (i) those matters and items that are the responsibility, obligation or liability of the City and those matters and items that are the responsibility, obligation or liability of Project Co;
 - (ii) the terms and timetable or (if not then established) the reasonably anticipated terms and timetable upon which the repair, replacement or restoration is to be

effected (including the date upon which the Infrastructure is reasonably expected to become fully operational or the Project Work is to be fully performed or provided);

- (iii) details of any Insurance Proceeds and Insurance Receivables, and claims made under the insurance required to be maintained under this Agreement, in respect of such damage or destruction;
- (iv) a description of the impact that the damage, destruction, repair, replacement or restoration will have on the revenues of Project Co under this Agreement; and
- (v) the total cost or (if not then established) the reasonably anticipated total cost to implement such Change Enquiry.

Project Co shall not undertake any material remedial work under this Section 11.4 except in accordance with a Change Order Confirmation issued pursuant hereto, other than any emergency work required to stabilize other parts of the Infrastructure or to facilitate the continued provision of the Project Work to other parts of the Infrastructure.

If requested by the City, the persons (and if applicable, a suitable parent entity thereof acceptable to the City) retained by Project Co to design and carry out any repair, replacement or restoration under this Section 11.4 shall, as a condition to its retainer and prior to commencing any repair, replacement or restoration or design work in connection therewith, enter into a construction contract with Project Co in a form agreeable to the City, acting reasonably, and a direct agreement with the City in substantially the same form as the applicable Collateral Agreement.

For the purposes of this Section 11.4, reference to the Infrastructure shall not include the Early Handover Items after the time of handover of each such Early Handover Item to the City in accordance with this Agreement.

11.5 City's Election Not to Reinstate

Subject to the City's rights under Section 11.6 [*Insufficient Insurance*] and Section 17.4 [*Termination Upon Force Majeure*], the City may, by notice to Project Co not later than 30 days after receipt of the Change Estimate pursuant to Section 11.4 [*Project Co's Obligations – Material Damage or Destruction*], terminate this Agreement and pay compensation to Project Co in accordance with Section 18.8 [*Termination for Convenience or by Project Co*].

11.6 Insufficient Insurance

If:

- (a) the Infrastructure during the Construction Period, or the System during the Operating Period, is completely or materially destroyed;
- (b) the cost to repair, replace or restore the Infrastructure during the Construction Period, or the System during the Operating Period, exceeds the sum of (i) Insurance Proceeds

actually recovered by Project Co for the risk that caused the destruction; (ii) Insurance Receivables for such risk; and (iii) any deficiency between the amounts described in clauses (i) and (ii) and the cost of such repair, replacement or restoration that is available for payment under the insurance coverage required under this Agreement but will not be paid by the relevant insurer(s) by reason unrelated to exclusions from such coverage; and

- (c) neither Project Co (with reasonable evidence satisfactory to the City of assured finance for such) nor the City (or both) has agreed to pay the amount by which the cost to repair, replace or restore the Infrastructure exceeds the sum of the amounts described in clauses (b)(i), (ii) and (iii) of this Section,

at any time on or after 30 days after delivery of the Change Estimate to the City pursuant to Section 11.4 [*Project Co's Obligations – Material Damage or Destruction*], either party may, by notice to the other party, terminate this Agreement, in which case:

- (d) the City shall pay compensation to Project Co in accordance with Section 18.6 [*Force Majeure Termination – Construction Period*] or Section 18.7 [*Force Majeure Termination – Operating Period*], as applicable.

For the purpose of Section 11.3 [*Project Co's Obligations – Damage or Destruction*] and this Section 11.6 [*Insufficient Insurance*], the reference to Insurance Proceeds, Insurance Receivables and any other amounts available for payment under insurance coverage is:

- (e) in respect of insurance required to be obtained by Project Co, the sum of (i) Insurance Proceeds actually recovered by Project Co for such risk; and (ii) Insurance Receivables for such risk, prior to any deductibles for which Project Co is responsible pursuant to Schedule 17 [*Insurance Requirements*].

11.7 Economic Reinstatement Test During Construction

If prior to Service Commencement the Infrastructure suffers damage or destruction that is likely to cost more than * of costs and expenses that are not covered by Insurance Proceeds, to repair, replace and restore, and on the forecast Service Commencement Date following such reinstatement the Loan Life Cover Ratio would be less than 1.15:1, Project Co may, by notice to the City, terminate this Agreement in which case the City shall pay compensation to Project Co in accordance with Section 18.6 [*Force Majeure Termination – Construction Period*].

11.8 Application of Insurance Proceeds If No Termination

Unless a party has terminated this Agreement (including pursuant to Section 11.5 [*City Election Not to Reinststate*], 11.6 [*Insufficient Insurance*] or 11.7 [*Economic Reinstatement Test During Construction*], Project Co shall cause all:

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

- (c) amounts which the City has agreed to pay as contemplated in Section 11.3(b) [*Project Co's Obligations – Damage or Destruction*]; and
- (d) amounts which the City or Project Co has agreed to pay to cover the amount by which the cost to repair, replace or restore the Infrastructure exceeds the Insurance Proceeds and Insurance Receivables with respect to complete or substantial destruction,

to be applied to the reinstatement of the Infrastructure in accordance with the terms of this Agreement and the terms of the Insurance Trust Agreement to the extent applicable.

11.9 Application of Insurance Proceeds In Case of Termination

If a party has terminated this Agreement pursuant to Section 11.5 [*City Election Not to Reinstale*], 11.6 [*Insufficient Insurance*] or 11.7 [*Economic Reinstatement Test During Construction*]:

- (a) any Insurance Proceeds received prior to the date on which the City must make the Termination Payment by Project Co in respect of damage to the Infrastructure and not already applied to the repair of such damage shall first be applied towards 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, Project Co shall assign to the City the benefit of all Insurance Receivables which have been taken into account in calculating the Termination Payment.

11.10 Standards of Replacement, Repair or Reconstruction

Any replacement, repair, or reconstruction of the Infrastructure or any part thereof pursuant to the provisions of Sections 11.3 [*Project Co's Obligations – Damage or Destruction*] or 11.4 [*Project Co's Obligations – Material Damage or Destruction*] shall be made or done in compliance with Schedule 4 [*Design and Construction Protocols*] and/or the Design and Construction Specifications to the extent specified in Section 11.3 [*Project Co's Obligations – Damage or Destruction*] or Section 11.4 [*Project Co's Obligations – Material Damage or Destruction*], subject to the terms of any Change Order Confirmation or agreement made between the City and Project Co to revise the Design and Construction Requirements as they pertain to any replacement, repaired or reconstructed Infrastructure.

11.11 Mitigation

Project Co and the City shall take all reasonable steps to mitigate the effects of any risks or claims covered by this Section 11 [*Insurance, Damage and Destruction*] (including minimizing the amount of any costs and expenses which might result).

11.12 Effect on Indemnity and Force Majeure

The foregoing provisions of this Section 11 [*Insurance, Damage and Destruction*] shall not affect:

- (a) Project Co's obligations pursuant to Section 16.1 [*Project Co's Indemnity*]; and

- (b) the parties' rights to terminate this Agreement pursuant to Section 17.4 [*Termination Upon Force Majeure*].

12. FORCE MAJEURE

12.1 Force Majeure During Construction Period

If a Force Majeure Event occurs during the Construction Period, then notwithstanding any other provision of this Agreement:

- (a) to the extent that and for so long as either Party is prevented, hindered or delayed by the Force Majeure Event from performing any obligation under this Agreement, that party is relieved from any liability or consequence under this Agreement arising from its inability to perform that obligation in a timely manner (other than an obligation to make a payment under Section 12.1(d) [*Force Majeure During Construction Period*]);
- (b) if the Force Majeure Event or if multiple concurrent Force Majeure Events causes Project Co to be prevented, hindered or delayed in performing all or a material part of the Design and Construction for an aggregate period of at least 21 days, then the date in Section 16.7(g) [*Termination Events*], the Target Service Commencement Date and Long Stop Date shall be adjusted commensurately by the period during which Project Co is prevented, hindered or delayed by the Force Majeure Event from performing all or a material part of the Design and Construction, but the Expiry Date will not be extended;
- (c) no non-performance of any obligation under this Agreement shall give rise to a Termination Event, to the extent that and for so long as performance of the obligation is prevented, hindered or delayed by the Force Majeure Event;
- (d) where the Target Service Commencement Date is adjusted as set out in Section 12.1(b) above, if by reason of the Force Majeure Event, Service Commencement is delayed until beyond the Target Service Commencement Date (as it was immediately prior to adjustment in accordance with Section 12.1(b) above) (the "**FM Reference Date**"), then:
 - (i) the City shall upon Service Commencement pay to Project Co its Direct Losses resulting from Service Commencement being delayed beyond the FM Reference Date by the Force Majeure Event;
 - (ii) to the extent that the Direct Losses resulting from Service Commencement being delayed beyond the FM Reference Date, by the Force Majeure Event, can reasonably be determined prior to Service Commencement, from and after the applicable FM Reference Date, the City shall make advance payment to Project Co on account of such Direct Losses, it being mutually anticipated by the Parties that the Direct Losses included in such advance payment will include at least an amount equal to each Capital Payment that would have been payable had Service Commencement been achieved on the applicable FM Reference Date, subject to Project Co's obligation to take reasonable steps to mitigate the delay and to mitigate its Direct Losses; and

- (iii) notwithstanding that advance payment to Project Co of the Direct Losses resulting from Service Commencement being delayed beyond the applicable FM Reference Date by the Force Majeure Event, will not start until the applicable FM Reference Date, if prior to the applicable FM Reference Date Project Co incurs Direct Losses that cannot reasonably be financed until the applicable FM Reference Date by the Project Financing, then the City shall make advance payment to Project Co on account of such Direct Losses as soon as reasonably practicable following notification by Project Co to the City that such Direct Losses have been incurred by Project Co;

The Parties acknowledge that pursuant to the terms of this Agreement, the Target Service Commencement Date may be subject to multiple adjustments throughout the Construction Period and that such adjustments may result in the Target Service Commencement being earlier or later than the original Target Service Commencement Date of December 15, 2020. As such, the Direct Losses, if any, resulting from each adjustment of the Target Service Commencement Date shall be determined separately by reference to the applicable FM Reference Date.

For clarity, the City will not pay the Service Commencement Payment at the applicable FM Reference Date but will make advance Payments to offset any additional Project Financing costs incurred due to the delay in the Service Commencement Payment as a result of the Force Majeure Event. For the purposes of this calculation the additional Project Financing costs will be determined based on the Senior Financing Agreements.

- (e) no Direct Losses are payable under 12.1(d) to the extent that the Direct Losses are covered (or would have been covered but for Project Co's failure to comply with Section 11 [*Insurance, Damage and Destruction*]) by insurance maintained by or for the benefit of Project Co;
- (f) no Payment Adjustment, NPE Points or Default Points shall be applicable, to the extent that and for so long as the relevant Project Co performance was prevented, hindered or delayed by the Force Majeure Event; and
- (g) if Project Co anticipates that the Force Majeure Event will delay Service Commencement, but is of the opinion the delay can be avoided or mitigated through extraordinary measures, Project Co may propose to the City that such extraordinary measures be taken by Project Co at the City's expense.

12.2 Force Majeure During Operating Period

If a Force Majeure Event occurs during the Operating Period, then notwithstanding any other provision of this Agreement:

- (a) to the extent that and for so long as either Party is prevented, hindered or delayed by the Force Majeure Event from performing any obligation under this Agreement, that party is

relieved from any liability or consequence under this Agreement arising from its inability to perform that obligation in a timely manner;

- (b) no Payment Adjustment, NPE Points or Default Points shall be applicable, to the extent that and for so long as the relevant performance was prevented, hindered or delayed by the Force Majeure Event;
- (c) no non-performance of any obligation under this Agreement shall give rise to a Termination Event, to the extent that and for so long as performance of the obligation is prevented, hindered or delayed by the Force Majeure Event;
- (d) if and for so long as all or any substantial portion of the System is closed to Passengers as a result of the Force Majeure Event, then the Operating Period Payment excluding the Capital Payment and the Major Rehabilitation Payment shall abate proportionately during the period of closure due to the Force Majeure Event, and in that event:
 - (i) subject to subclause (ii), the proportionate abatement shall be based on the proportionate scope or level of Services actually performed in relation to the scope and level required to be performed under the Agreement had the Force Majeure Event not occurred;
 - (ii) the proportionate abatement shall take into account any Insurance Proceeds and Insurance Recoveries under insurance maintained or required to be maintained by or on behalf of Project Co under Section 11 [*Insurance, Damage and Destruction*] in respect thereof; and
 - (iii) if Project Co demonstrates to the satisfaction of the City, acting reasonably, that the actual reduction in Project Co's costs of performing the Services is other than as set out in subclause (i), then the proportionate abatement shall be the actual reduction in costs as demonstrated by Project Co to the satisfaction of the City, acting reasonably; and
- (e) no relief or payment shall be available under this Section 12.2 to the extent that such relief, abatement or payment is covered (or would have been covered but for Project Co's failure to comply with Section 11 [*Insurance, Damage and Destruction*]) by insurance maintained by or for the benefit of Project Co.

12.3 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. The Party providing notice shall, within 10 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 circumstances from which the Force Majeure Event arises;

- (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 in this Agreement; and
 - (v) details of any measures which Party proposes to adopt to mitigate the consequences of such Force Majeure Event.
- (b) As soon as possible, but in any event within 3 Business Days, of the Party providing notice receiving, or becoming aware of, any supplemental information which may further substantiate or support its claim, it shall submit further particulars based on such information to the other party.
- (c) The other party shall, after receipt of written details under Sections 12.3(a)(iii) [*Procedure on Force Majeure Event*] or 12.3(b) [*Procedure on Force Majeure Event*], be entitled by written notice to require the other Party to provide such further supporting particulars as it may reasonably consider necessary. The Party providing notice shall afford the other party reasonable facilities for investigating the validity of its claim, including on-site inspection.
- (d) If a Party is (or claims to be) affected by a Force Majeure Event, it shall, and shall require its respective Project Co 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.
- (e) To the extent that a Party does not comply with its obligations under this Section 12.3 [*Procedure on Force Majeure Event*], such failure shall be taken into account in determining its entitlement to relief.
- (f) This clause (f) shall not apply if either Section 11.4 [*Project Co's Obligations – Material Damage or Destruction*] or Section 11.6 [*Insufficient Insurance*] applies. In accordance with Section 11.3, Project Co shall repair, replace or restore that part of the Infrastructure during the Construction Period, or of the System during the Operating Period, damaged or destroyed by a Force Majeure Event to the extent that:
- (i) such damage or destruction is insured against or was required to be insured against by Project Co; and

- (ii) the City in its discretion, having regard to the nature and extent of the damage or destruction and acting reasonably, agrees to pay for the repair, replacement or restoration to the extent not covered by (i).

To the extent that neither (i) nor (ii) applies, these circumstances shall, subject to Section 13.1 [*Relief Event Defined*], constitute a Relief Event under Section 13.1.1 [*Included Events*] (but without prejudice to any termination right arising under Section 17.4 [*Termination Upon Force Majeure*]).

12.4 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 Project Co nor the City shall have the right to claim relief (as provided for in this Section 12 [*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 Project Co, the Project Requirements expressly require or contemplate that Project Co 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 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;
- (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; or
- (d) the Force Majeure Event or its consequences and impacts are covered by a Change Order Confirmation issued pursuant to Section 11.4 [*Project Co's Obligations – Material Damage or Destruction*].

13. RELIEF EVENTS

13.1 Relief Event Defined

13.1.1 Included Events

In this Agreement, “**Relief Event**” means any of the following events, conditions, or circumstances:

- (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 (excluding URP Companies);

- (ii) if the City has not acquired the required Real Property Interests in the City Lands described in Schedule 14 *[City Lands]*, including in the Future Acquired Lands, by such date as is specified in the Schedule;
- (iii) a stop work order is issued without proper cause by the City as contemplated by and pursuant to Section 5.5 *[Stop Work Order]*;
- (iv) in the circumstances specified in Section 16.6(b)(ix) *[Step-in Rights]*, any Remedial Action taken by the City which was not the responsibility of Project Co hereunder;
- (v) where the City directs Project Co to proceed with a matter in Dispute under Section 7.8(c) *[Inspection]* of Schedule 4 and the Dispute is determined in favour of Project Co;
- (vi) where the City exercises its rights under Section 7.8 *[Inspection]* of Schedule 4 *[Design and Construction Protocols]* and upon inspection it is determined there are no Deficiencies, Early Handover Deficiencies or other Nonconformities in the relevant part of the Infrastructure;
- (vii) if the City has not obtained the City Permits by such date as is specified in and as required pursuant to Schedule 28 *[Project Approvals and URP Matters]* Part A *[Project Approvals]* or maintained the same for the period required under this Agreement;
- (viii) in the circumstances specified in Section 12.3(f) *[Procedure on Force Majeure Event]*, a failure by the City to agree to pay for the repair, replacement or restoration of the Infrastructure or System, as applicable, within a timeframe that is reasonable having regard to the circumstances;
- (ix) the wrongful removal by the City of Surplus Lands from the lands licence granted to Project Co as provided for in Section 4.16 *[Surrender of Surplus City Lands]*;
- (x) the City has breached its obligations with respect to Other Work as provided for in Section 7.4 *[Other Work]*;
- (xi) the City's failure to perform its facilitator or support obligations in relation to the Project Approvals Project Co is required to obtain as set out in Schedule 28 *[Project Approvals and URP Matters]*;
- (xii) the City grants, permits or creates an Encumbrance on the City Lands during the Term which does not qualify as a Permitted Encumbrance;
- (xiii) the transfer or placement by City or City Persons of snow or ice onto the Infrastructure or the System;

- (xiv) in the circumstances provided for in Section 3.3 of Schedule 20 [*Dispute Resolution*] where the City directs Project Co to carry out additional work and the related Dispute is decided in Project Co's favour.

(b) **Site Conditions:**

- (i) any Contamination or Hazardous Substances except: (A) Contamination or Hazardous Substances described in Section 1.12(9) [*Contaminated Sites*] or Section 1.13(6) [*Hazardous Substances and Waste Management*] of Schedule 10 [*Environmental Performance Requirements*] and (B) any Contamination or Hazardous Substances described in Section 11.3 [*Contamination and Hazardous Substances*] of Schedule 28 [*Project Approvals and URP Matters*] Part B [*Utility, Railway and Pipeline Matters*];
- (ii) the presence in, under or on the City Lands, of Historical Resources, which presence could not have been ascertained by Project Co or Project Co Persons by the exercise of Standard Due Diligence prior to the Financial Submission Date;
- (iii) the presence on or around the City Lands of animal or plant species protected by Environmental Laws, which presence could not have been ascertained by Project Co or Project Co Persons by the exercise of Standard Due Diligence prior to the Financial Submission Date;
- (iv) factual errors in the borehole log data contained in the reports listed in Section 22.4(e) [*Project Co's Reliance on Information*], and subject to the limitations and qualifications specified in Section 22.4(d) [*Project Co's Reliance on Information*];
- (v) the existence of latent defects in respect of the Specified Existing Infrastructure (excluding URP Infrastructure) that could not have been ascertained by Project Co or Project Co Persons by the exercise of Standard Due Diligence prior to the Financial Submission Date;
- (vi) without limiting the application of subparagraph (i) above, the existence of undisclosed Hazardous Substances in existing infrastructure (including Existing Infrastructure) that could not have been ascertained by Project Co or Project Co Persons by the exercise of Standard Due Diligence prior to the Financial Submission Date;
- (vii) without limiting the application of subparagraph (i) above, the existence of undisclosed Contamination or Hazardous Substances migrating from Adjoining Lands to the City Lands that could not have been ascertained by Project Co or Project Co Persons by the exercise of Standard Due Diligence prior to the Financial Submission Date;
- (viii) the existence of disclosed Contamination or Hazardous Substances migrating from any Lands that increases the scope of Project Co's remediation obligations

to a scope that could not have been reasonably anticipated from the Disclosed Data or by the exercise of Standard Due Diligence prior to the Financial Submission Date; or

- (ix) any URP Work Relief Events as set out in and subject to the terms of Section 8 [URP Work Relief Events] of Schedule 28 [Project Approvals and URP Matters] Part B [Utility, Railway and Pipeline Matters],
- (x) during the Operating Period only, if the outdoor ambient temperature in the Edmonton City Centre, as reported by Environment Canada, falls below -40°C (without wind-chill) or above $+40^{\circ}\text{C}$ (each, a “**Temperature Exceedance**”);
- (xi) the occurrence or existence of any Encumbrances, other than Permitted Encumbrances, that pertain to the City Lands;
- (xii) the occurrence or presence of a subsurface void or abandoned coal mine during Construction of the Mined Tunnel which has an adverse impact on the construction of the Mined Tunnel.
- (xiii) the bursting of a City water main or storm sewer located on the valley slopes of the NSR during the Construction Period or Operating Period to the extent due to causes unrelated to Project Co's activities in relation to the performance of the Project Work or unrelated to the Legal Fault of Project Co or Project Co Persons, that results in a material adverse impact on the slope stabilization measures installed pursuant to the requirements of Section 4-3.3.2 [Geotechnical] and Section 4-3.6.2 [Geotechnical] of Schedule 5 [D&C Performance].
- (xiv) the occurrence of a landslide away from the slope zone stabilized pursuant to the requirements of Section 4-3.3.2 [Geotechnical] of Schedule 5 [D&C Performance] to the extent due to causes unrelated to Project Co's activities in relation to the performance of the Project Work or unrelated to the Legal Fault of Project Co or Project Co Persons, which then propagates and results in material adverse impacts on the integrity or serviceability of the North River Bank Cut and Cover Tunnel, the North River Bank Tunnel Approach or the Tawatinâ Bridge.
- (xv) the occurrence of slope failure on the north or south banks of the NSR within the City Lands prior to Project Co commencing any Construction activities on these slopes.
- (xvi) the occurrence of slope failure on the south bank of the NSR at the Connors Road Trackway whose scarps (steep surface on the undisturbed ground at the upper edge of the failed part of the slope) are located north of the northern limit of the City Lands.
- (xvii) the occurrence of slope failure within the limits of City Lands on the north or south banks of the NSR as a result of the actions of a third party not affiliated with Project Co.

(c) **Third Party Events:**

- (i) an act or omission of an Other Contractor engaged in the performance of Other Works that: (1) interferes with or disrupts Project Co's ability to perform the Project Work; or (2) damages the Project Work;
- (ii) any interference or disruption with Project Work by persons claiming aboriginal title or treaty rights in respect of all or any part of the Lands;
- (iii) a general strike or other labour disruption in Alberta that is applicable broadly to the transportation construction, maintenance or operation sectors in Alberta or that is specifically directed at the City, but excluding any strike or labour disruption by Project Co Persons against Project Co which is not part of the foregoing scope of general strike or labour disruption;
- (iv) for injurious affection or public nuisance claims as provided for in Section 4.8 [*Permitted Use and Injurious Affection*];
- (v) an order granted by a Court directly resulting from:
 - (A) a challenge to the selection process under which Project Co was awarded the opportunity to enter into this Agreement;
 - (B) a third party claim of an interest in the City Lands or a portion thereof other than in respect of Permitted Encumbrances or Future Utility Work;
 - (C) any other proceeding brought by a third party against the City or to which the City is a party;
 - (D) any proceeding brought against Project Co or a Project Contractor, provided the proceeding relates to the nature of the Construction or the Services;
- (vi) the claims or actions of an uncooperative private owner on Adjoining Land, notwithstanding the proper application and administration of the Community Improvement Program by Project Co;
- (vii) any interference with Project Co 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.
- (viii) subject to Section 13.8 [*CEAA Assessment*] a required regulatory environmental assessment in respect of the Project arising from:

- (A) any decision by a court of competent jurisdiction that Construction of the Infrastructure is a “designated project” under the *Canadian Environmental Assessment Act, 2012* (the “**CEAA**”);
- (B) any order issued by the federal Minister of Environment under Section 14(2) of the *Canadian Environmental Assessment Act, 2012* designating Construction of the Infrastructure; or
- (C) a direction or order under Section 44 or 47 of the *Environmental Protection and Enhancement Act (Alberta)* (the “**EPEA**”)

except where such decision or order arises as a result of activities or actions (whether planned or actually carried out) by Project Co in circumstances where it was *reasonably* foreseeable that such activities or actions could lead to such decision or order being issued; and Project Co could reasonably have carried out Construction of the Infrastructure in compliance with the provisions of this Agreement without such activities or actions.

- (ix) the cost of repairs to the System as a result of vandalism or graffiti total more than \$200,000 (index linked), during any one calendar year of the Operating Period.

(d) **Other:**

- (i) a Designated Change in Law or a change to a City Regulatory Policy or City Permit in the circumstances described in Section 13.6 [*Designated Change in Laws, Policies and Permits*];
- (ii) where the total aggregate Stop Time for any single Trip exceeds 150 seconds and as a result the Travel Time exceeds the maximum one way Travel Time specified in Section 5.2 [*Travel Times*] of Schedule 7 [*O&M Performance Requirements*];
- (iii) damage and destruction to which Section 11.4 [*Project Co’s Obligations – Material Damage or Destruction*] applies, except to the extent covered by a Change Order Confirmation in respect thereof, and only in respect of the period from the occurrence of such damage and destruction until the earlier of the issuance of such Change Order Confirmation or the termination of this Agreement pursuant to Section 11.5 [*City’s Election Not to Reinstate*], 11.6 [*Insufficient Insurance*] or 11.7 [*Economic Reinstatement Test During Construction*] or otherwise; and
- (iv) any other matter expressly defined as a Relief Event in this Agreement;

13.1.2 Exclusions from Relief Events

Notwithstanding any other provision of this Agreement, including the definition of Relief Event in Schedule 1 *[Definitions and Interpretations]*, Project Co shall have no right to claim relief (as provided for in this Section 13) *[Relief Events]* from any liability or consequence arising from its inability to perform the obligation that is prevented, hindered or delayed by the Relief Event to the extent that:

- (a) the Project Requirements expressly require or contemplate that Project Co was or is expected to perform the obligations in question notwithstanding the occurrence of the Relief Event;
- (b) Project Co 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;
- (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 Project Co, or a Project Co Person;
- (d) the Relief Event or its consequences and impacts are covered by (or would have been covered but for Project Co's failure to comply with Section 11 [Insurance, Damage and Destruction]) insurance placed by or on behalf of Project Co in respect of such Relief Event or the related consequences or impacts.

13.2 Relief Event During Construction Period

If a Relief Event occurs during the Construction Period, then notwithstanding any other provision of this Agreement:

- (a) to the extent that and for so long as Project Co is prevented, hindered or delayed by the Relief Event from performing any obligation under this Agreement, Project Co is relieved from any liability or consequence under this Agreement arising from its inability to perform that obligation in a timely manner;
- (b) if the Relief Event, or if multiple concurrent Relief Events when taken together directly cause, Project Co to be prevented, hindered or delayed in performing all or a material part of the Design and Construction for an aggregate period of at least 10 days, and each such Relief Event directly causes Project Co to be prevented, hindered or delayed in performing all or a material part of the Design and Construction for a period of at least two days, then the Target Service Commencement Date, Long Stop Date and the date in Section 16.7(g) *[Termination Events]* shall be adjusted commensurately by the period during which Project Co is prevented, hindered or delayed by the Relief Event from performing all or a material part of the Design and Construction, but the Expiry Date will not be extended;
- (c) no non-performance of any obligation of Project Co under this Agreement shall give rise to a Termination Event, to the extent that and for so long as performance of the obligation is prevented, hindered or delayed by the Relief Event;

- (d) where the Target Service Commencement Date is adjusted as set out in Section 13.2(b) above, if by reason of the Relief Event, Service Commencement is delayed until beyond the Target Service Commencement Date (as it was immediately prior to adjustment in accordance with Section 13.2(b) above) (the "**RE Reference Date**"), then:
- (i) the City shall upon Service Commencement pay to Project Co its Direct Losses resulting from Service Commencement being delayed beyond the RE Reference Date by the Relief Event;
 - (ii) to the extent that the Direct Losses resulting from Service Commencement being delayed beyond the RE Reference Date by the Relief Event, can reasonably be determined prior to Service Commencement, from and after the applicable RE Reference Date, the City shall make advance payment to Project Co on account of such Direct Losses, it being mutually anticipated by the Parties that the Direct Losses included in such advance payment will include at least an amount equal to each Capital Payment that would have been payable had Service Commencement been achieved on the applicable RE Reference Date, subject to Project Co's obligation to take reasonable steps to mitigate the delay and to mitigate its Direct Losses; and
 - (iii) notwithstanding that advance payment to Project Co of the Direct Losses resulting from Service Commencement being delayed beyond the RE Reference Date by the Relief Event, will not start until the applicable RE Reference Date, if prior to the applicable RE Reference Date Project Co incurs Direct Losses that cannot reasonably be financed until the applicable RE Reference Date by the Project Financing, then the City shall make advance payment to Project Co on account of such Direct Losses as soon as reasonably practicable following notification by Project Co to the City that such Direct Losses have been incurred by Project Co.

The Parties acknowledge that pursuant to the terms of this Agreement, the Target Service Commencement Date may be subject to multiple adjustments throughout the Construction Period and that such adjustments may result in the Target Service Commencement being earlier or later than the original Target Service Commencement Date of December 15, 2020. As such, the Direct Losses, if any, resulting from each adjustment of the Target Service Commencement Date shall be determined separately by reference to the applicable RE Reference Date.

For clarity, the City will not pay the Service Commencement Payment at the applicable RE Reference Date but will make advance Payments to offset any additional Project Financing costs incurred due to the delay in the Service Commencement Payment as a result of the Relief Event. For the purposes of this calculation the additional Project Financing costs will be determined based on the Senior Financing Agreements;

- (e) if Project Co anticipates that the Relief Event will delay Service Commencement, but is of the opinion the delay can be avoided or mitigated through extraordinary measures,

Project Co may propose to the City that such extraordinary measures be taken by Project Co at the City's expense;

- (f) 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 Project Co increases Project Co's net cost of carrying out the Design and Construction by at least * then subject to Section 13.4 [*Procedure on Relief Event*] and subject in every case to Project Co's obligation to take reasonable steps to mitigate the increase in its costs, and without duplicating any amount payable under Section 13.2(d), the City shall, as soon as practicable following receipt from Project Co of appropriate documentation establishing the amount payable, pay to Project Co, without duplication:
 - (i) if the effect of the Relief Event is tantamount to a change in the Design and Construction Requirements, the amount that would have been payable by the City if the change in the Design and Construction Requirements had been a Change governed by Section 7.1 [*Modification During Construction Period*] and requested by the City pursuant to a Change Directive; and
 - (ii) in any other case, Project Co's reasonable Direct Losses;
- (g) no Payment Adjustment, NPE Points or Default Points shall be applicable, to the extent that and for so long as the relevant performance was prevented, hindered or delayed by the Relief Event; and
- (h) no Direct Losses are payable under this Section 13.2 [*Relief Event During Construction Period*] to the extent that the Direct Losses are covered (or would have been covered but for Project Co's failure to comply with Section 11 [*Insurance, Damage and Destruction*]) by insurance placed by or on behalf of Project Co.

13.3 Relief Event During Operating Period

Subject to Section 13.5 [*Temperature Exceedance*] if a Relief Event occurs during the Operating Period, then notwithstanding any other provision of this Agreement:

- (a) to the extent that and for so long as Project Co is prevented, hindered or delayed by the Relief Event from performing any obligation under this Agreement, Project Co is relieved from any liability or consequence under this Agreement arising from its delay in performing that obligation in a timely manner;
- (b) no Payment Adjustment, NPE Points or Default Points shall be applicable, to the extent that and for so long as the relevant performance was prevented, hindered or delayed by the Relief Event;
- (c) no non-performance of any obligation of Project Co under this Agreement shall give rise to a Termination Event, to the extent that and for so long as performance of the obligation is prevented, hindered or delayed by the Relief Event;

- (d) if the Relief Event, when aggregated with the effect of any other Relief Event occurring in the same calendar year and not previously claimed for by Project Co, will increase Project Co's net cost of carrying out the O&M Requirements by at least* over the remainder of the Term, then subject to Section 13.4 [*Procedure on Relief Event*] and subject in every case to Project Co's obligation to take reasonable steps to mitigate the increase in its costs, and without duplication:
- (i) if the effect of the Relief Event is tantamount to a change in the O&M Requirements, then the Operating Period Payments shall be adjusted as if the change in the O&M Requirements had been a Change governed by Section 7.2 [*Modification During Operating Period*] and requested by the City pursuant to a Change Directive; and
 - (ii) in any other case, the City shall pay to Project Co Project Co's reasonable Direct Losses arising from the Relief Event,

but no increase to the Operating Period Payments shall be made or damages shall be payable under this Section 13.3 [*Relief Event During Operating Period*] to the extent that such increase or damages are covered (or would have been covered but for Project Co's failure to comply with Section 11 [*Insurance, Damage and Destruction*]) by insurance placed by or on behalf of Project Co.

13.4 Procedure on Relief Event

- (a) Project Co shall provide written notice to the City within 5 Business Days of becoming aware of the occurrence of a Relief Event. Project Co shall, within 10 Business Days after such notification, provide further written details to the City which shall include:
- (i) a statement of which Relief Event the claim is based upon;
 - (ii) details of the circumstances from which the Relief Event arises;
 - (iii) details of the contemporary records which Project Co 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 may have upon Project Co or the Project Work; and
 - (v) details of any measures which Project Co proposes to adopt to mitigate the consequences of such Relief Event.
- (b) As soon as possible but in any event within 3 Business Days of Project Co receiving, or becoming aware of, any supplemental information which may further substantiate or support Project Co's claim, Project Co shall submit further particulars based on such information to the City.

- (c) The City shall, after receipt of written details under Sections 13.4(a)(iii) [*Procedure on Relief Event*] or 13.4(b) [*Procedure on Relief Event*], be entitled by written notice to require Project Co to provide such further supporting particulars as the City may reasonably consider necessary. Project Co shall afford the City reasonable facilities for investigating the validity of Project Co's claim, including on-site inspection.
- (d) If Project Co is (or claims to be) affected by a Relief Event, Project Co shall, and shall require all Project Co 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 the Project Work to the extent possible; and
 - (iii) to resume performance of its obligations under this Agreement affected by the Relief Event as soon as practicable.
- (e) To the extent that Project Co does not comply with its obligations under this Section 13.4 [*Procedure on Relief Event*], such failure shall be taken into account in determining Project Co's entitlement to relief.

13.5 Temperature Exceedance

Where the Relief Event is a Temperature Exceedance, then notwithstanding any other provision of this Agreement:

- (a) to the extent that and for so long as Project Co is prevented, hindered or delayed by the Relief Event from performing any obligation under this Agreement, Project Co is relieved from any liability or consequence under this Agreement arising from its delay in performing that obligation in a timely manner;
- (b) no Payment Adjustment, NPE Points or Default Points shall be applicable, to the extent that and for so long as the relevant performance was prevented, hindered or delayed by the Relief Event;
- (c) no non-performance of any obligation of Project Co under this Agreement shall give rise to a Termination Event, to the extent that and for so long as performance of the obligation is prevented, hindered or delayed by the Relief Event; and
- (d) 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 Project Co increases Project Co's cost of carrying out Operations by at least* then subject to Section 13.4 [*Procedure on Relief Event*] and subject in every case to Project Co's obligation to take reasonable steps to mitigate the increase in its costs, the City shall, as soon as practicable following receipt from Project Co of appropriate documentation

* , Redaction under review, Subject to dept review

establishing the amount payable, pay Project Co's reasonable Direct Losses arising from the Relief Event,

but no damages shall be payable under this Section 13.5(d) [Temperature Exceedance] to the extent that such damages are covered (or would have been covered but for Project Co's failure to comply with Section 11 [Insurance, Damage and Destruction]) by insurance maintained by or for the benefit of Project Co,

provided that Operations have otherwise continued in compliance with the O&M Requirements except to the extent that the Temperature Exceedance prevented such Operation.

13.6 Designated Change in Laws, Policies and Permits

- (a) The purpose of this Section 13.6 [*Designated Change in Laws, Policies, and City Permits*] is to clarify and confirm the allocation of risk and responsibility between Project Co and the City with respect to changes that may occur after the Financial Submission Date regarding Applicable Laws, Project Approvals and City Policies, and City Regulatory Policies.
- (b) A Designated Change in Law made after the Financial Submission Date which applies to Project Co or the Project Work shall constitute a Relief Event, subject to the requirements of Section 13.1 [*Relief Event Defined*].
- (c) Any change to a City Policy made after the Financial Submission Date that specifically requires a higher or different standard of performance or higher or different quality of material in the performance of the Project Work shall constitute a Change in accordance with Section 7.1 [*Modification During Construction Period*] or 7.2 [*Modification During Operating Period*], as applicable, and Schedule 13 [*Changes*].
- (d) Any change to the terms, conditions or requirements of a City Regulatory Policy after the Financial Submission Date that applies to Project Co or the Project Work shall constitute a Relief Event, subject to the requirements of Section 13.1 [*Relief Event Defined*].
- (e) Any change to the terms, conditions or requirements or cancellation or revocation of a City Permit after the Financial Submission Date that applies to Project Co or the Project Work shall constitute a Relief Event, subject to the requirements of Section 13.1 [*Relief Event Defined*].

13.7 City Entitlement to Cost Savings

The Parties acknowledge that the City has accepted the financial risk to Project Co of certain changes to Applicable Laws; City Policies; City Regulatory Policies or City Permits occurring after the Financial Submission Date by granting one or more Relief Events under Section 13.1 If as a consequence of a change to any such Applicable Laws; City Policies; City Regulatory Policies or City Permits occurring after the Financial Submission Date a lower, different or reduced scope of Project Requirement applies to some portion of the Project Work still to be performed with the result that, after taking into account any netting under Section 13.2(f) or other similar previous adjustment in favour of the City, Project Co can

realize a net cost saving in the overall cost of the affected portion of the Project Work, such cost saving shall be passed on and accrue to the benefit of the City provided that during the Operating Period, savings that are realized over the term should be deducted from monthly service payments as savings are realized, not in a lump sum.

Project Co shall proactively monitor these developments and report on such cost saving impacts in its Monthly Progress Reports. The amount of the cost saving shall be deducted from the next applicable payment due and owing by the City to Project Co in accordance with Section 9.1 [*Payment by City*] and Schedule 16 [*Payment Mechanism*].

13.8 Environmental Assessments

If an environmental assessment is triggered for this Project as provided for in Section 13.1.1(c)(viii), then:

- (a) the City may on written notice to Project Co within 90 days from receiving a written communication from the responsible Governmental Authority decide to terminate this Agreement pursuant to Section 17.4 [*Termination Upon Force Majeure*];
- (b) the City may decide to proceed with the Project and proceed with the required assessment and related proceedings and issue a Change Enquiry for related support and assistance from Project Co; and
- (c) if the City proceeds under subparagraph (b) above and a final decision under CEAA or EPEA has not been issued to the City within 18 months from the date on which a notice of commencement of the assessment was posted on the CEAA Agency website, or a direction or order was issued by the Province, the City or Project Co may elect to terminate this Agreement pursuant to Section 17.4 [*Termination for Force Majeure*].

14. PROJECT CO'S REPRESENTATIONS AND OBLIGATIONS

14.1 Project Co's Representations

The Partners represent and warrant to the City on a joint and several basis that, as of the Commercial Close:

- (a) Project Co is a general partnership, duly created and validly existing under the laws of the Province of Alberta and, pursuant to its partnership agreement, 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 Project Co pursuant to this Agreement;
- (b) the execution of this Agreement and all other documents, instruments and agreements required to be executed and delivered by Project Co pursuant to this Agreement, and the completion of the transactions contemplated by this Agreement, have been duly authorized by all necessary partnership action on the part of Project Co, and this Agreement has been duly executed and delivered by Project Co pursuant to its

partnership agreement and constitutes a legal, valid and binding obligation of Project Co 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) Project Co is a “special purpose vehicle” that has not carried on business other than directly in relation to, in anticipation of, and for the purposes of this Agreement;
- (d) except as set out in that Schedule 24 [*Project Co’s Ownership Information*], there is as at the date of this Agreement no outstanding offer, agreement or other arrangement pursuant to which:
 - (i) 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 Project Co; or
 - (ii) the partnership agreement governing Project Co will be amended or otherwise altered;
- (e) all required third party consents to the execution by Project Co 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;
- (f) Project Co’s Proposal, to the extent it consists of statements of fact, is at the time of the 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 the Commercial Close);
- (g) Project Co, either in Project Co’s Proposal 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 Project Co, its Partners, its intended Subcontractors, and the Project Financing and Project Co 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 Project Co having regard to the information requested by the City in the RFP; and
- (h) Project Co is registered under Division V of Part IX of the Excise Tax Act (Canada) and its registration number is S.16

BDC TransEd (Nova Scotia) Co. represents on a several (and not on a joint or joint and several) basis that:

- (i) it is a duly incorporated and validly existing unlimited liability company under the laws of the Province of Nova Scotia and has full power and capacity to enter into, carry out the transactions contemplated by and duly observe and perform, as a Partner, all of Project Co’s obligations contained in this Agreement and all other documents, instruments and

agreements required to be executed and delivered by Project Co pursuant to this Agreement;

- (j) the execution by it of this Agreement and all other documents, instruments and agreements required to be executed and delivered by Project Co pursuant to this Agreement, and the completion of the transactions contemplated by this Agreement, in each case as a Partner, have been duly authorized by all necessary corporate action, and this Agreement has been duly executed and delivered by it as a Partner and constitutes its legal, valid and binding obligation as a Partner 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;
- (k) its information set out in Schedule 24 [*Project Co's Ownership Information*] is true and correct and, except as set out in that Schedule 24 [*Project Co'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 it;
- (l) all required third party consents to its execution of, and performance of its obligations under, this Agreement, in each case as a Partner, have been received, other than the Project Approvals that Project Co is to obtain or cause to be obtained and other approvals contemplated herein to be obtained following the date of this Agreement in connection with the Project Work; and
- (m) it has, either in Project Co's Proposal or in formal communications with the City under the RFP, made accurate and true disclosure to the City of all facts and circumstances regarding it.

Fengate Partner represents on a several (and not on a joint or joint and several) basis that:

- (n) Fengate (TransEd) LP is a limited partnership, duly created and validly existing under the laws of the Province of Ontario and has full power and capacity to enter into, carry out the transactions contemplated by, and duly observe and perform, all of Project Co's obligations contained in this Agreement and all other documents, instruments and agreements required to be executed and delivered by Project Co pursuant to this Agreement;
- (o) Fengate (TransEd) GP Inc. is a duly incorporated and validly existing corporation under the laws of the Province of Ontario and has full power and capacity to enter into, carry out the transactions contemplated by and duly observe and perform, all of the obligations of the Fengate Partner as a Partner contained in this Agreement and all other documents, instruments and agreements required to be executed and delivered by the Fengate Partner as a Partner pursuant to this Agreement;

- (p) the execution by it of this Agreement and all other documents, instruments and agreements required to be executed and delivered by Project Co pursuant to this Agreement, and the completion of the transactions contemplated by this Agreement, in each case as a Partner, have been duly authorized by all necessary corporate action on the part of Fengate (TransEd) GP Inc. and by all necessary partnership action on the part of Fengate (TransEd) LP, and this Agreement has been duly executed and delivered by the Fengate Partner, on its behalf as a Partner, and constitutes the legal, valid and binding obligation of the Fengate Partner, as a Partner, 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;
- (q) the information set out in Schedule 24 *[Project Co's Ownership Information]* for Fengate (TransEd) GP Inc. and Fengate (TransEd) LP is true and correct and, except as set out in that Schedule 24 *[Project Co'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 Fengate (TransEd) GP Inc. or Fengate (TransEd) LP;
- (r) all required third party consents to its execution of this Agreement and performance of its obligations as a Partner under this Agreement have been received, other than the Project Approvals that Project Co is to obtain or cause to be obtained and other approvals contemplated herein to be obtained following the date of this Agreement in connection with the Project Work; and
- (s) either in Project Co's Proposal or in formal communications with the City under the RFP, it has made accurate and true disclosure to the City of all facts and circumstances regarding the Fengate Partner.

Bombardier Partner represents on a several (and not on a joint or joint and several) basis that:

- (t) Bombardier TransEd Holdings LP is a limited partnership, duly created and validly existing under the laws of the Province of Manitoba and has full power and capacity to enter into, carry out the transactions contemplated by, and duly observe and perform all of Project Co's obligations contained in this Agreement and all other documents, instruments and agreements required to be executed and delivered by Project Co pursuant to this Agreement;
- (u) Bombardier TransEd Holdings GP Inc. is a duly incorporated and validly existing corporation under the laws of the Province of Manitoba and has full power and capacity to enter into, carry out the transactions contemplated by and duly observe and perform, all of the obligations of the Bombardier Partner as a Partner contained in this Agreement and all other documents, instruments and agreements required to be executed and delivered by the Bombardier Partner as a Partner pursuant to this Agreement;

- (v) the execution by the Bombardier Partner of this Agreement and all other documents, instruments and agreements required to be executed and delivered by Project Co pursuant to this Agreement, and the completion of the transactions contemplated by this Agreement, in each case as a Partner, have been duly authorized by all necessary corporate action on the part of Bombardier TransEd Holdings GP Inc. and by all necessary partnership action on the part of Bombardier TransEd Holdings LP, and this Agreement has been duly executed and delivered by the Bombardier Partner, as a Partner, and constitutes the legal, valid and binding obligation of the Bombardier Partner, as a Partner, 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;
- (w) the information set out in Schedule 24 [*Project Co's Ownership Information*] for Bombardier TransEd Holdings GP Inc. and Bombardier TransEd Holdings LP is true and correct and, except as set out in that Schedule 24 [*Project Co'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 Bombardier TransEd Holdings GP Inc. or Bombardier TransEd Holdings LP;
- (x) all required third party consents to its execution of this Agreement and performance of its obligations as a Partner under this Agreement have been received, other than the Project Approvals that Project Co is to obtain or cause to be obtained and other approvals contemplated herein to be obtained following the date of this Agreement in connection with the Project Work; and
- (y) either in Project Co's Proposal or in formal communications with the City under the RFP, it has made accurate and true disclosure to the City of all facts and circumstances regarding the Bombardier Partner.

EllisDon Partner represents on a several (and not on a joint or joint and several) basis that:

- (z) EllisDon TransEd Inc. is a corporation, EllisDon TransEd holdings Limited Partnership is a limited partnership, and EllisDon TransEd General Partnership is a general partnership, in each case duly created and validly existing under the laws of the Province of Ontario and has full power and capacity to enter into, carry out the transactions contemplated by, and duly observe and perform all of Project Co's obligations contained in this Agreement and all other documents, instruments and agreements required to be executed and delivered by Project Co pursuant to this Agreement;
- (aa) EllisDon TransEd Holdings Inc. is a duly incorporated and validly existing corporation under the laws of the Province of Ontario and has full power and capacity to enter into, carry out the transactions contemplated by and duly observe and perform, all of the obligations of EllisDon Partner as a Partner contained in this Agreement and all other

documents, instruments and agreements required to be executed and delivered by EllisDon Partner as a Partner pursuant to this Agreement;

- (bb) the execution by the EllisDon Partner of this Agreement and all other documents, instruments and agreements required to be executed and delivered by Project Co pursuant to this Agreement, and the completion of the transactions contemplated by this Agreement, in each case as a Partner, have been duly authorized by all necessary corporate action on the part of each of EllisDon TransEd Inc. and EllisDon TransEd holdings Inc. and all necessary partnership action on the part of each of EllisDon TransEd Holdings Limited Partnership and EllisDon TransEd General Partnership, and this Agreement has been duly executed and delivered by the EllisDon Partner, as a Partner, and constitutes the legal, valid and binding obligation of the EllisDon Partner, as a Partner, 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;
- (cc) the information set out in Schedule 24 [*Project Co's Ownership Information*] for EllisDon TransEd Inc., EllisDon TransEd Holdings Inc., EllisDon TransEd holdings Limited Partnership and EllisDon TransEd General Partnership is true and correct and, except as set out in that Schedule 24 [*Project Co'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 EllisDon TransEd Inc., EllisDon TransEd Holdings Inc., EllisDon TransEd holdings Limited Partnership or EllisDon TransEd General Partnership;
- (dd) all required third party consents to its execution of this Agreement and performance by it of its obligations under this Agreement, as a Partner, have been received, other than the Project Approvals that Project Co is to obtain or cause to be obtained and other approvals contemplated herein to be obtained following the date of this Agreement in connection with the Project Work; and
- (ee) either in Project Co's Proposal or in formal communications with the City under the RFP, it has made accurate and true disclosure to the City of all facts and circumstances regarding the EllisDon Partner.

14.2 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*], Project Co shall provide to the City the following reporting in relation to any aspect of the business of Project Co the Project Work or Project Documents to the City:

- (a) supplemental reports requested from time to time by the City, acting reasonably;

- (b) throughout both the Construction Period and the Operating Period, copies of its quarterly financial statements and annual audited financial statements (each of which may be delivered in confidence), in each case prepared in accordance with generally accepted accounting principles;
- (c) without limiting any obligations under Section 3.3 [*Changes to Senior Financing Agreements*], copies of all financial reporting with respect to Project Co (in addition to the reporting under clause (b)) provided from time to time by Project Co to any lender providing all or any part of the Senior Debt Financing;
- (d) 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
- (e) timely responses to any inquiry reasonably made by the City in relation to any aspect of the business of Project Co, 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 [Public Communications and Engagement]; and to facilitate the proper exercise of the City's review, inspection, audit, and other Step-in 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, Project Co may deliver such information in confidence and expressly mark or label the parts of the information as confidential according to Section 19.3 [*Confidential Information*]. The City will be deemed to be acting unreasonably for the purposes of this Section 14.2 if the City's request for supplemental reporting as contemplated by 14.2(d); and 14.2(e) above would require Project Co 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 Project Co to incur incremental costs in excess of this threshold must be made pursuant to Schedule 13 [*Changes*].

14.3 Records and Reports

Project Co shall comply with the requirements of Schedule 19 [*Records and Reports*].

14.4 Access, Inspection and Testing

- (a) Without prejudice to Project Co's rights under Section 4.12 and Section 7.4, Project Co 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) the Lands; and
 - (ii) on reasonable prior notice, any site occupied by Project Co or a Project Contractor, or to which Project Co or a Project Contractor has access, where plant, goods, products, commodities, materials, supplies, machinery, equipment,

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apparatus or other tangible property to be used in the Project Work, including the Services, are fabricated or stored,

for the purpose of inspecting the Lands or any plant, goods, products, commodities, materials, supplies, machinery, equipment, apparatus or other tangible property to be used in the Project Work, including the Services, so as to be able to determine compliance by Project Co with the terms of this Agreement, and such access shall not of itself be construed as constituting disturbance or interference with Project Co'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. Project Co shall provide reasonable cooperation (but without obligation to incur expense or material disruption or delay) 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 4.12 and Section 7.4, 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, Project Co 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 Transit 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;
 - (iv) third parties pursuant to a Permitted Encumbrance, for the purpose of accessing their facilities or infrastructure located on the Lands;

- (v) the Independent Certifier, for the purpose of performing its obligations pursuant to Schedule 15 [*Independent Certifier*];
 - (vi) 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;
 - (vii) all 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
 - (viii) any URP Companies, for the purposes of performing URP Work or accessing their facilities or infrastructure within the Lands; and
- (c) In exercising their access rights under Section 14.4(b) [*Access, Inspection and Testing*], each Person referred to therein (except in the case of access rights for Emergency Services) shall:
- (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, Project Co from time to time; and
 - (iii) if reasonably required by Project Co, be accompanied by a representative of Project Co.

14.5 Safety and Security

Project Co shall observe and comply with all safety and security requirements specifically set out in Schedule 11 [*Project Safety Requirements*] or in Schedule 29 [*Security Matters*].

14.6 [Intentionally Deleted]

14.7 General Audit Obligations

- (a) Project Co shall provide and shall cause each Project Contractor to provide to the City all information, reports, documents, records and the like, in the possession of, or available to, Project Co as the City may reasonably require from time to time for any purpose in connection with this Agreement. Project Co shall use commercially reasonable efforts to ensure that, for such purpose, all such information, reports, documents, records and the like in the possession of, or available to the Project Contractor shall be available to Project Co and Project Co shall include relevant terms in all Project Contracts to this effect.
- (b) Project Co shall also provide to the City, and shall require each Project Contractor, 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 14.7(a) [*General Audit*

Obligations] which subsequently come into the possession of, or become available to, Project Co or each Project Contractor, 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.

- (c) Project Co 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 Project Contractor from any Governmental Authority in relation to any of the Project Work and Project Co shall include relevant terms in all Project Contracts to this effect.
- (d) Project Co shall promptly notify the City of any actions, suits, proceedings, or investigations commenced, pending or threatened against Project Co or, to Project Co's knowledge, any Project Contractor at law or in equity before any Governmental Authority or arbitral body (whether or not covered by insurance) that individually or in the aggregate could result in any material adverse effect on the business, properties, or assets or the condition, financial or otherwise, of Project Co or in any impairment of its ability to perform its obligations under this Agreement.
- (e) All information, reports, documents and records in the possession of, or available to, Project Co 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 Project Co's normal places of business unless the City and Project Co 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 Project Co shall cooperate with, and shall require each Project Contractor 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 Project Co under Section 14.7(e) [*General Audit Obligations*] 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 Project Co required to be provided to or available to the City hereunder, upon reasonable notice and at reasonable times. Project Co shall fully cooperate with the City and its auditors in the conduct of any audits, including by making available all such records and accounts in existence at that time as they may require to perform a full and detailed audit, and Project Co further agrees to promptly review and settle with 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, Project Co shall provide such information, reports, documents and records as the City's auditors may reasonably require.

- (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.

14.8 General Duty of Project Co to Mitigate

In all cases under this Agreement where Project Co is entitled to receive from the City any compensation in addition to the payments described in Section 9 [*Payment*], Direct Losses or extensions of time, or other relief from its performance obligations, including as contemplated by Section 12.1(d) [*Force Majeure During Construction Period*], Project Co will use all reasonable commercial efforts to mitigate such amount required to be paid by the City to Project Co, or the length of the extension of time or delay in performance. Upon request from the City, Project Co will 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 Project Co to meet its mitigation obligations under this Section 14.8 [*General Duty of Project Co to Mitigate*] and any other provision of this Agreement that applies to the circumstance in question. For greater certainty, any costs incurred by Project Co in complying with this Section 14.8 [*General Duty of Project Co to Mitigate*] may form part and be included in a claim for compensation.

15. CITY'S REPRESENTATIONS AND OBLIGATIONS

15.1 City's Representations

The City represents and warrants to Project Co, 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*], except for the lands described in Schedule 14 [*City Lands*] as the "*Future Acquired Lands*", and as confirmed in Section 4.9 [*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*];

- (e) the City has the power, right and authority to grant Project Co the license to the City Lands as set out in Section 4.1 [*Access and Use*]; and
- (f) the confirmation set out in Section 22.4(c) [*Project Co's Reliance on Information*] is true and correct.

15.2 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 Representative, as a member of the City LRT D&C Department 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 Representative;
- (b) City Drainage, EPCOR Water and EPCOR Power, shall be considered and treated as arm's length *Utility Companies* for the purposes of this Agreement, including Schedule 28 [*Project Approvals and URP Matters*] Part B [*Utility, Railway and Pipeline Matters*];
- (c) Other City officials, departments, offices, agencies and representatives shall be considered as arm's length *Governmental Authorities*, including as rail regulatory authorities.

15.3 City Duty to Mitigate

In all cases under this Agreement where the City is entitled to receive from Project Co any compensation, costs or damages, but not in any other case, City will use all reasonable commercial efforts to mitigate such amount required to be paid by Project Co to City (or deducted by City) under this Agreement.

City will have no further implied obligation to mitigate, implied or otherwise under Applicable Laws, except as set out in this Section 15.3 [*City Duty to Mitigate*] or as otherwise expressly set out in this Agreement. Upon request from Project Co, City will promptly submit a detailed description, supported by all such documentation as Project Co may reasonably require, of the measures and steps taken, by City to meet its mitigation obligations under this Section 15.3 [*City Duty to Mitigate*].

15.4 Project Co Recourse

The City acknowledges and agrees that Project Co shall be entitled to claim and/or otherwise initiate and carry out proceedings against any third party (including System users) that causes or contributes to any damage to the System or otherwise causes or contributes to any Project Co loss. The City shall, in response to any reasonable request by Project Co and at Project Co's cost, provide all reasonable information and assistance to enable Project Co to assert and manage any such claims and/or proceedings.

16. DEFAULT, REMEDIES AND TERMINATION EVENTS

16.1 Project Co's Indemnity

Subject to Section 16.3 [*Calculation of and Limitation on Claims*], Project Co shall indemnify and hold harmless the City and the City Persons against all Direct Losses, arising from:

- (a) Project Co's breach of, or non-compliance with, any provision of this Agreement or a Project Document;
- (b) the Legal Fault of Project Co or any Project Co Person;
- (c) subject to Section 4.2(b) of Schedule 8 [*Intellectual Property*] any third party claim alleging infringement by Project Co or a Project Co Person, in relation to the Project Work, of any Intellectual Property Rights of third parties;
- (d) subject to the limitation set out in the last paragraph of this Section 16.1 any physical loss of or damage to all or any part of the Infrastructure or to any equipment, assets or other property related thereto;
 - (i) any physical loss or damage to all or any part of the Infrastructure or to any equipment, assets or other property related thereto occurring during the Construction Period; and
 - (ii) any physical loss of or damage to all or any part of the System or to any equipment, assets or other property related thereto occurring during the Operating Period;
- (e) subject to the limitation set out in the last paragraph of this Section 16.1 [*Project Co's Indemnity*] the death or personal injury of any person;
- (f) subject to the limitation set out in the last paragraph of this Section 16.1 [*Project Co's Indemnity*] any physical loss of or damage to property or assets of any third party;
- (g) subject to Section 4.8 [*Permitted Use and Injurious Affection*] 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 Project Co or a Project Co 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 Laws;
- (h) Contamination and Hazardous Substances for which Project Co is responsible pursuant to Schedule 10 [*Environmental Performance Requirements*];
- (i) the breach by Project Co of, or non-compliance by Project Co with, Project Approvals or Applicable Law, or the failure of Project Co to obtain all necessary Project Approvals in accordance with this Agreement;

- (j) subject to the limitation set out in the last paragraph of this Section 16.1 [*Project Co's Indemnity*] 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;
- (k) any obligations of Project Co to satisfy judgments and pay costs resulting from 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;
- (l) any other matter for which Project Co 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 to the City as required under this Agreement or other Legal Fault of the City or a City Person or compliance by Project Co with a lawful instruction or direction by the City or City Person.

Subject to Section 16.3 [*Calculation of and Limitation on Claims*], Project Co's indemnity to the City and City Persons arising under clauses (d), (e), (f) and (j) of this Section shall be limited to the sum of (1) Insurance Proceeds actually recovered by Project Co in respect of such Direct Losses; (2) Insurance Receivables in respect of such Direct Losses; and (3) any deficiency between the amounts described in clauses (1) and (2) and the amount of such Direct Losses that is recoverable under the types and limits of insurance required under this Agreement but will not be paid by the relevant insurer(s) by reason unrelated to exclusions from such coverage, or, in the case of clause (1), if Project Co has failed to obtain or cause to obtain such insurance coverage required under this Agreement, an amount equal to the Insurance Proceeds that would have been payable under such insurance had coverage been obtained pursuant to this Agreement, and to the extent that the Direct Losses under the relevant claims exceed the sum calculated in accordance with the foregoing formula, the City waives further recourse to Project Co for any such excess Direct Losses and hereby releases Project Co from all further liability in respect of such excess Direct Losses; provided however the foregoing limitations shall not apply to the extent such Direct Losses arise by reasons of any:

- (a) fraudulent acts, criminal acts or willful or intentional misconduct of Project Co or any Project Co Person; or
- (b) Project Co's breach of, or non-compliance with, any provision of this Agreement or a Project Document.

16.2 No Separate City Indemnity

Subject to Section 16.3 [*Calculation of and Limitation on Claims*], through the Relief Event provisions of Section 13 [*Relief Events*] the City shall compensate and provide various forms of relief to Project Co and the Project Co Persons in respect of:

- (a) the City's breach of this Agreement, or other Legal Fault of the City or City Person as contemplated in Section 13.1.1(a)(i) [*Included Events*]; or
- (b) other matters for which the City has specifically accepted responsibility to provide relief to Project Co set out in Section 13.1 [*Relief Event Defined*],

subject to the associated conditions, requirements and limitations of Section 13 [*Relief Events*]. Certain claims may survive the termination or expiry of this Agreement as provided for in Section 17.6 [*Survival of Rights and Obligations*].

16.3 Calculation of and Limitation on Claims

*, Redaction under review, Subject to dept review

16.4 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 Payment Adjustment.
- (b) Every right to claim damages or indemnification or reimbursement under this Agreement shall be construed so that recovery is without duplication to any other amount recoverable under this Agreement, and shall not be construed in such manner as would allow a party to recover the same loss twice.

- (c) If the City elects to terminate this Agreement pursuant to Sections 16.7(g), (h) or (i) *[Termination Events]* the City shall be compensated for such events in the manner provided for Section 18.2 *[Construction Period Termination]*.

16.5 Exclusivity of Termination Provisions

Neither party shall have any right to terminate this Agreement except as expressly set out in Sections 11.5 *[City's Election Not to Reinstate]*, 11.6 *[Insufficient Insurance]*, 13.8 *[Environmental Assessments]*, 17.2 *[Termination by City]*, 17.3 *[Termination by Project Co]* or 17.4 *[Termination upon Force Majeure]*; 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.

16.6 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 5.5 *[Stop Work Order]*; (ii) to make Payment Adjustments and/or to accord NPE Points and/or 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 Project Co has failed to comply, in any material respect, with the requirements of this Agreement, the City may, without prejudice to any other right or remedy available to it, by notice to Project Co, increase the level and frequency of monitoring of and reporting from Project Co from that set out in this Agreement to such level as the City considers reasonable taking into account the nature of the relevant defect or failure until such time as Project Co 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 Rights.** If at any time during either the Construction Period or the Operating Period the City reasonably believes that it needs to take action in relation to the Project Work:
 - (i) because a serious risk exists to public health, safety, security or to the environment;
 - (ii) in order to discharge a statutory duty or enable performance by any other Governmental Authority of a statutory duty;
 - (iii) if necessary in order to prevent Project Co, Project Contractors or their Subcontractors from 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) where the City reasonably believes that Project Co, a Project Contractor, or Key Individual is identified to be 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;

- (v) if there is undue interference by the Project Work with the City's other transit operations; or
- (vi) Project Co has subsisting ten (10) or more Default Point(s) at any time during the Term or upon the occurrence of a Default Event at any time during the Term;

then the City may, subject to Section 16.6 [*City's Remedial Rights*] and upon notice to Project Co (which notice shall specify all 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:

- (vii) the City will provide Project Co with written notice of its intentions to exercise its rights under this Section 16.6 [*City's Remedial Rights*] and provide Project Co an opportunity to promptly respond to this notice and advise the City of Project Co'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 Project Co 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.
- (viii) after providing the notice described in the preceding sub-paragraph and considering the Project Co response, if any, the City may either:
 - (A) if it considers that there is sufficient time and that it is likely that Project Co will be willing and able to provide assistance, require Project Co to take such steps as are necessary or expedient to perform the Remedial Action, and Project Co will use all commercially reasonable efforts to comply with the City's requirements as soon as reasonably practicable; or
 - (B) if it considers there is not sufficient time, or that Project Co 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 will carry out such steps as quickly as is practicable, and in such manner as will minimize interference with Project Co's performance of its obligations under this Agreement; and

- (ix) if either:
 - (A) the need for the Remedial Action does not arise as a result of any breach or non-performance by Project Co of its obligations under this Agreement, or
 - (B) the City exercises its rights pursuant to this Section 16.6 [*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 subject to Section 13.1 [*Relief Event Defined*].

- (c) **Rectification Rights.** If the City gives notice of Remedial Action to Project Co under Section 16.6(b) [*City's Remedial Rights*] and Project Co either:

- (i) does not confirm, within five (5) 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 (5) Business Days, accept or reject, acting reasonably; or
- (ii) fails to perform the Remedial Action as 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 Project Co 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 applicable Project Co 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 Project Co under Section 16.6(b) [*City's Remedial Rights*], any suspension of the right and obligation of Project Co to provide any Project Work will cease and such right and obligation will once again be in full force and effect.

- (d) **Ongoing Performance.** The exercise by the City of any of its rights under this Section 16.6 [*City's Remedial Rights*] will not reduce or affect in any way Project Co's responsibility in respect of the Project Work.
- (e) **Deferral of Rights.** Project Co 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 16.6 [*City's Remedial Rights*] until Project Co 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 Project Co be entitled, as applicable, to claim a Relief Event, Change or refer any Dispute for resolution in accordance with Schedule 20 *[Dispute Resolution Procedure]*.

- (f) **Project Contracts.** Project Co will ensure that the provisions contained in all applicable Project Contracts will not prevent or inhibit the City from exercising its rights under this Section 16.6 *[City's Remedial Rights]*.

16.7 Termination Events

The following shall constitute Termination Events, except where solely caused directly and specifically by 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:

- (a) if Project Co 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 Project Co (other than by one or more Senior Lenders or any trustee or representative on behalf of such Senior Lender), unless the appointment is canceled within 21 days;
- (c) if any material part of the property of Project Co is seized or attached and such seizure or attachment is not successfully contested by Project Co within 21 days;
- (d) if Project Co ceases active business operations;
- (e) if Project Co carries on any business unrelated to the subject matter of this Agreement and does not cease to carry on such business within two (2) Business Days of receiving notice to do so from the City (in which context neither (i) any lending between Project Co, its Partners and any of their shareholders or any subsidiaries of their shareholders, nor (ii) any other non-arm's-length financial transactions, shall be considered to be carrying on a business unrelated to the subject matter of this Agreement);
- (f) if, during the Construction Period, Project Co (by its own actions, and not merely by the actions of the Design Builder unless Project Co fails to diligently take action in response to abandonment of the Design or Construction by the Design Builder) abandons the Design or Construction;
- (g) if it is determined by the Independent Certifier that by the date that is 30 months after the Commercial Close, the Percent Completion for Construction Period Payment is less than 20%;
- (h) if Project Co fails to achieve Service Commencement by the Long Stop Date;
- (i) if at any time after the date that is one year before the Target Service Commencement Date it is determined by arbitration pursuant to the Dispute Resolution Procedure that

there is no reasonable possibility of Project Co achieving Service Commencement by the Long Stop Date;

- (j) if during the Operating Period Project Co (by its own actions, and not merely by the actions of the Services Contractor unless Project Co fails to diligently take action in response to abandonment of the Services by the Services Contractor) abandons the business of carrying out the Services;
- (k) *, Redaction under review, Subject to dept review

- (l) if after Service Commencement Project Co, other than:
 - (i) for purposes expressly contemplated by Schedule 7 [*O&M Performance Requirements*]; or
 - (ii) for reasons of public safety, exercised on a temporary basis;takes any steps to exclude or limit the public from lawfully using the Infrastructure or the System or to prevent the performance by the City of any statutory duty; or
- (m) if Project Co, 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.
- (n) Project Co, a Project Contractor or Key Individual is identified to be a Restricted Person or has committed a Prohibited Act that is not appropriately managed or remedied by Project Co to the City's satisfaction, acting reasonably, as provided for in Section 16.6 [*City's Remedial Rights*];
- (o) Project Co has subsisting twenty (20) or more Default Points at any time during the Term;

- (p) where any provision of this Agreement expressly provides for a right of termination in favour of the City by reason of Project Co Default.

17. TERMINATION

17.1 Direct Lender Agreement

All rights to terminate this Agreement, and all Termination Payments required to be made under Section 18 [*Termination Payments*], are in every case subject to the provisions of the Direct Lender Agreement.

17.2 Termination by City

The City may terminate this Agreement by notice to Project Co:

- (a) upon or within a reasonable time (having regard to the provisions of the Direct Lender Agreement, and having regard to Section 21.3 [*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 Project Co, 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 11.5 [*City's Election Not to Reinstate*], Section 11.6 [*Insufficient Insurance*], or Section 13.8 [*Environmental Assessments*] have arisen.

No notice of termination under this Section 17.2 [*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.

17.3 Termination by Project Co

Subject to Section 17.4 [*Termination Upon Force Majeure*], Project Co may terminate this Agreement by notice to the City only if:

- (a) the City has failed to pay any amount due to Project Co under this Agreement (except to the extent that such amount is disputed in good faith through the Dispute Resolution Procedure) and does not remedy such failure within 21 days of Project Co providing the City with notice to do so;
- (b) during the Construction Period, a Relief Event directly causes Project Co to be unable to perform all or a material part of the Design and Construction for a continuous 360 day period;
- (c) the City is in breach of Section 23.6 [*Assignment by City*]; or
- (d) the conditions set out in Section 11.6 [*Insufficient Insurance*] have arisen.

17.4 Termination Upon Force Majeure

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

- (a) during the Construction Period, any Force Majeure Event directly causes Project Co 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;
- (b) during the Operating Period, any Force Majeure Event directly causes Project Co to be unable to perform all or a material part of the Services for an aggregate of 120 days falling within any 180 day period; or
- (c) the conditions set out in Section 13.8 *[Environmental Assessments]* have arisen,

except that this Section 17.4 shall not apply if:

- (d) a termination right is available under any of Section 11.5 *[City's Election Not to Reinstate]*, or 11.6 *[Insufficient Insurance]*; or
- (e) none of Sections 11.4 *[Project Co's Obligations – Material Damage or Destruction]*, 11.5 *[City's Election Not to Reinstate]*, or 11.6 *[Insufficient Insurance]* applies and the Infrastructure during the Construction Period, or the System during the Operating Period, is damaged or destroyed and such damage or destruction is insured against (or is required to be insured against) by Project Co, or to the extent that such damage or destruction is not insured against (or required to be insured against), Project Co (with reasonable evidence satisfactory to the City of assured finance for such) or the City (or both) has agreed to pay the amount by which the cost to repair, replace or restore the Infrastructure or System, as applicable, exceeds the amount of such insurance or required insurance.

17.5 Consequences of Termination

Upon any termination of this Agreement under Sections 17.2 *[Termination by City]*, 17.3 *[Termination by Project Co]* or 17.4 *[Termination Upon Force Majeure]*:

- (a) the Operating Period Payment (except for, in the case of a termination under Section 17.4 *[Termination Upon Force Majeure]*, the applicable Capital Payment) for the month during which the termination occurs shall be pro-rated according to the number of days in that month up to and including the day when termination occurs;
- (b) the City shall as soon as practicable:
 - (i) pay to Project Co the amount of the Termination Payment under the pertinent Section of Section 18 *[Termination Payments]*, together with interest thereon (it being acknowledged and agreed that interest on portions of the Termination Payment paid in advance shall only accrue from the date of termination until the date of the advanced payment) at Prime from the date of the termination until the

date of payment (which rate of interest shall be, in the case of a termination under Section 18.8 *[Termination for Convenience or by Project Co]*, without prejudice to any right of Project Co to claim damages under Section 18.8 *[Termination for Convenience or by Project Co]*); or

- (ii) enter into any alternative arrangement in respect of the Termination Payment that is provided for in the Direct Lender Agreement; and
- (c) upon the City providing confirmation to Project Co that it is obligated to pay the Termination Payment under the pertinent Section of Section 18 *[Termination Payments]* (or in lieu of such payment to enter into any alternative arrangement provided for in the Direct Lender Agreement), then Project Co shall, upon request by the City and at no cost to the City, hand over to the City copies of all records of any kind whatsoever that pertain to Project Co's performance of, or may otherwise facilitate the City or its contractors assuming responsibility for performing, the Design and Construction Requirements (if the termination is prior to Service Commencement) or the O&M Requirements (if the termination is after Service Commencement); provided that Project Co shall have no obligation to hand over copies of records exempted pursuant to Schedule 18 *[Freedom of Information and Protection of Privacy]*;
- (d) in so far as title shall not have already passed to the City pursuant to this Agreement, Project Co shall 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 Project Co or a Project Co 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 Project Co to the City, Project Co 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 Project Co if this Agreement had not been terminated;
- (e) if termination is prior to the Service Commencement, without limiting Section 17.5(d) *[Consequences of Termination]*, in so far as any transfer will be necessary to fully and effectively transfer property to the City, Project Co will 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 construction materials on-hand to be used for the Infrastructure and, if the City so elects:
 - (i) all construction plant and Equipment (other than those referred to in Section 17.5(e)(ii) *[Consequences of Termination]*) on the Lands shall remain available to the City for the purposes of completing the Design and Construction; and

- (ii) all other construction plant and Equipment not on the Lands shall remain available to the City for the purposes of completing the Project, subject to payment by the City of the relevant Subcontractor's reasonable charges;
- (f) Project Co shall offer to sell (and if the City so elects, execute such sale) to the City at a fair value (determined as between a willing vendor and willing purchaser, with any disputes as to such fair value being resolved in accordance with the Dispute Resolution Procedure), free from all Encumbrances, all or any part of the stocks of material and other assets, road vehicles, construction equipment, spare parts and other moveable property owned by Project Co and dedicated to or predominantly used in respect of the Infrastructure, and reasonably required by the City in connection with the Services;
- (g) subject to the rights and obligations set forth in Schedule 8 [*Intellectual Property*], the City will be entitled to retain all defined Intellectual Property which may, thereafter be used by the City in accordance with the licences granted herein;
- (h) Project Co shall use commercially reasonable efforts to assign, or otherwise transfer, to the City, free from all Encumbrances (other than the Permitted Encumbrances and any Encumbrances caused or consented to by the City), the benefit of all manufacturers' warranties, including all documentation in respect thereof, in respect of mechanical and electrical and equipment used or made available by Project Co under this Agreement and included in the Infrastructure;
- (i) to the extent permitted by Applicable Law and their respective terms, Project Co will assign all Project Approvals to the City;
- (j) Project Co will deliver to the City all records required to be kept by Project Co hereunder (Project Co having the right to retain copies thereof), unless such documents are:
 - (i) required by Applicable Law to be retained by Project Co, 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;
- (k) if the City so elects, Project Co shall ensure that any of the subcontracts between Project Co and a Subcontractor (including the Collateral Agreements), and any other instrument entered into between any such Subcontractor and Project Co for securing the performance by such Subcontractor of its obligations in respect of the Project Work or to protect the interests of Project Co, shall be novated or assigned to the City or its nominee, provided that any such novation or assignment of a subcontract with any Subcontractor shall be made to the City pursuant to, and subject to, the terms of any applicable Collateral Agreement. Project Co shall make provision in all subcontracts to

which it is a party to ensure that the City shall be in a position to exercise its rights, and Project Co be in a position to perform its obligations, under this Section 17.5 *[Consequences of Termination]*;

- (l) Project Co 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 are performed;
- (m) Project Co shall as soon as practicable remove from the Lands all property belonging to Project Co that is not acquired or retained by the City pursuant to this Section 17.5 *[Consequences of Termination]* or otherwise, and, if Project Co 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 Project Co;
- (n) Project Co shall forthwith 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 17.5 *[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;
- (o) Project Co shall as soon as practicable vacate the Lands and, without limiting Project Co's obligations under this Agreement, shall leave the Lands and the Infrastructure in a safe, clean and orderly condition; and
- (p) whether or not the Termination Payment is calculated based on Section 18.4 *[Payment Based on Sale of Contractual Rights]*, if the City wishes to conduct a competition prior to the effective date of any termination of this Agreement under Sections 17.2 *[Termination by City]*, 17.3 *[Termination by Project Co]* or 17.4 *[Termination Upon Force Majeure]* with a view to entering into an agreement for the provision of services, which may or may not be the same as, or similar to, the Project Work, following the expiry of this Agreement, Project Co shall, subject to payment of Project Co's reasonable costs, cooperate with the City fully in such competition process, including by:
 - (i) providing any information which the City may reasonably require to conduct such competition, including all information not otherwise transferred to the City, other than Sensitive Information; and
 - (ii) reasonably assisting the City by allowing any or all participants in such competition process unrestricted access to the Lands and the Infrastructure.

17.6 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 Project Co under Section 17.5 [*Consequences of Termination*];
- (c) the right of Project Co to receive, and the obligation of the City to make the Termination Payment specified in Section 18 [*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 19.3 [*Confidential Information*] 19.4 [*Disclosure of Confidential Information*] and 19.5 [*Public Disclosure of Agreement*];
- (e) the rights and obligations set out in Schedule 8 [*Intellectual Property*] and Schedule 10 [*Environmental Performance Requirement*] that expressly or by necessary implication survive termination of this Agreement;
- (f) the right of Project Co to be paid its outstanding Direct Losses from the City in respect of Force Majeure Events or Relief Events for which the City is liable to pay compensation for such Direct Losses under this Agreement in respect of claims made by Project Co prior to the termination of the Agreement;
- (g) the right of Project Co to be paid its Direct Losses resulting from third party claims against Project Co or a Project Co Person made after termination of the Agreement for which the City is liable to pay compensation for such direct Losses pursuant to Section 13 [*Relief Events*] and as if the Relief Event occurred during the Term; and
- (h) the rights and obligations of the Parties in relation to the Dispute Resolution Procedure set out in Section 21 [*Dispute Resolution*] to the extent required to resolve any Disputes in respect of the foregoing.

18. TERMINATION PAYMENTS

18.1 Termination Payments Defined Terms

All defined terms used in this Section 18 [*Termination Payments*] are located in Schedule 1.

18.2 Construction Period Termination

Upon a Construction Period Termination, the City shall pay to Project Co a Termination Payment equal to the Construction Period Capital Amount less:

- (a) the aggregate of the Construction Period Payments received by Project Co;
- (b) the reasonable cost to the City, established by competitive bidding process (and including out-of-pocket costs incurred by the City in relation to that process), of completing the Design and Construction for a project having no greater scope than the Project as provided in this Agreement and the Design and Construction Requirements, where the competitive bidding process is premised on:
 - (i) a design-build or conventional contract with progress payments and standard industry warranty;
 - (ii) use of as much of Project Co's designs as is practicable; and
 - (iii) a duty on the part of the City to mitigate the cost of completing the Design and Construction and thereby minimize the amount deductible under this clause (b); and
- (c) *, Redaction under review, Subject to dept review

plus any outstanding balance related to a Change that was financed by Project Co in accordance with Section 9.9(d) [*Lump Sum Payments*] of the Project Agreement.

18.3 Operating Period Termination

Upon an Operating Period Termination, the City shall by notice to Project Co elect to pay to Project Co either a Termination Payment under Section 18.4 [*Payment Based on Sale of Contractual Rights*] or a Termination Payment under Section 18.5 [*Payment of Fair Market Value*]. If the City fails to make such election by notice to Project Co within ten (10) Business Days after an Operating Period Termination, then the City shall be irrevocably deemed to have elected to make a Termination Payment under Section 18.5 [*Payment of Fair Market Value*].

If the City elects to pay a Termination Payment under Section 18.4 [*Payment Based on Sale of Contractual Rights*], the City shall as soon as practicable thereafter (but in any event within 180 days) solicit expressions of interest in order to assess whether there are likely to be two suitable bidders (in which context, "suitable" shall be determined having regard to a bidder's relevant practical experience, appropriate qualifications, technical competence and resources available to it, including financial resources and subcontracts, all having regard to the obligations to be performed under this Agreement). If the City fails to elicit within such 180 day period at least two bona fide expressions of interest from suitable potential bidders, it shall immediately re-elect to pay a Termination Payment under Section 18.5 [*Payment of Fair Market Value*].

Between the time of the Operating Period Termination and the making of the Termination Payment, the City shall make advance payments to Project Co against the Termination Payment in accordance with and subject to the following:

- (a) the advance payments shall be made monthly, at the times and in the amounts that would have been payable by the City as the Capital Payment had this Agreement not been terminated; and
- (b) if the City reasonably concludes that making or continuing to make the advance payments may result in a negative net balance owing by the City on account of the Termination Payment, then the City shall have no obligation to make or continue to make (as the case may be) the advance payments.

In the event the City, pursuant to clause (b), ceases to make or continue to make (as the case may be) the advance payments, then the City shall immediately re-elect to pay a Termination Payment under Section 18.5 [*Payment of Fair Market Value*], unless either (i) Project Co agrees otherwise, or (ii) the bidding process has by the date of such cessation already progressed to receipt of final bids.

18.4 Payment Based on Sale of Contractual Rights

If upon an Operating Period Termination the City elects a Termination Payment under this Section 18.4 [*Payment Based on Sale of Contractual Rights*], then the following provisions shall apply:

- (a) the City shall within 12 months after the Operating Period Termination obtain at least two bona fide, fully committed bids, each from a suitable bidder (having regard to the same criteria as set out in Section 18.3 [*Operating Period Termination*]), for acquiring all rights and obligations (both present and future) of Project Co under this Agreement as if this Agreement had not been terminated;
- (b) the City shall conduct the bidding process so as to obtain the maximum cash purchase price (but otherwise, to the extent practicable, generally in accordance with its usual procurement processes), and shall select the winning bidder accordingly;
- (c) the City shall, as soon as practicable (having regard to clause (a)), implement and complete the bidding process and enter into an agreement with, and collect the purchase price from, the winning bidder;
- (d) upon receiving the purchase price from the winning bidder, the City shall pay to Project Co a Termination Payment consisting of:
 - (i) the purchase price received by the City from the winning bidder; less
 - (ii) the City's reasonable costs reasonably incurred in establishing and conducting the bidding process and entering into the new agreement;
- (e) if the City fails to:
 - (i) within 12 months after the Operating Period Termination, obtain two bids in accordance with clause (a); or

- (ii) within 18 months after the Operating Period Termination, enter into an agreement with, and collect the purchase price from, the winning bidder;

then the City shall be deemed to have elected to make a Termination Payment under Section 18.5 [*Payment of Fair Market Value*] rather than under this Section 18.4 [*Payment Based on Sale of Contractual Rights*];

- (f) subject to clause (g), no bid shall be capable of acceptance by the City unless it would result in an amount greater than zero payable to Project Co under Section 18.4 [*Payment Based on Sale of Contractual Rights*], having regard to any advance payments made by the City pursuant to Section 18.3 [*Operating Period Termination*]; and
- (g) if acceptance of the winning bid would not result in an amount greater than the amount described in clause (f), the City may accept or not accept the bid, but in either event the City shall be deemed to have re-elected to pay a Termination Payment under Section 18.5 [*Payment of Fair Market Value*] in lieu of a Termination Payment under Section 18.4 [*Payment Based on Sale of Contractual Rights*].

18.5 Payment of Fair Market Value

If upon an Operating Period Termination the City elects a Termination Payment under this Section 18.5 [*Payment of Fair Market Value*], or if by Section 18.3 [*Operating Period Termination*] or Section 18.4(e) or (g) [*Payment Based on Sale of Contractual Rights*] is deemed to have elected a Termination Payment under this Section 18.5 [*Payment of Fair Market Value*], then the following provisions shall apply:

- (a) the City and Project Co shall seek to arrive at agreement on the fair market value of Project Co's rights and obligations under this Agreement, calculated:
 - (i) as of the date of the Operating Period Termination and as if this Agreement had not been terminated and no Termination Event had occurred or was imminent;
 - (ii) on the assumption that the purchaser would be responsible for curing any existing default (or, in the case of an Incurable Default, taking the remedial action contemplated by Section 16.7(m)(iii) [*Termination Events*]) by Project Co under this Agreement;
 - (iii) on the assumption of a willing and qualified purchaser and Project Co as a willing vendor; and
 - (iv) having regard to the future Payments expected for the duration of the Term, the costs of curing or taking required remedial action in respect of any existing default, and the projected costs of carrying out the Services without incurring Payment Adjustments, including a reasonable allowance for contingencies;
- (b) if the City and Project Co have not within 30 days after the election (or deemed election) arrived at agreement under clause (a), then the fair market value of Project Co's rights

and obligations under this Agreement shall be determined by the Dispute Resolution Procedure, applying the same assumptions as set out in clause (a); and

- (c) upon the fair market value of Project Co's rights and obligations under this Agreement being determined under clause (a) or clause (b), the City shall pay to Project Co as a Termination Payment an amount consisting of the fair market value so determined, less:
 - (i) the City's reasonable costs reasonably incurred of calculating the fair market value; and
 - (ii) the City's reasonable costs, or the City's reasonable pre-estimate thereof, of selecting and entering into a new agreement with a new provider of services in lieu of Project Co's performance of the Services under this Agreement.

18.6 Force Majeure Termination - Construction Period

Upon a Force Majeure Termination during the Construction Period, the City shall pay to Project Co a Termination Payment equal to:

- (a) the lesser of:
 - (i) the Construction Period Capital Amount less the Construction Period Payments that Project Co has received;
 - (ii) the amount actually expended (including any irrevocable commitment to purchase and pay for materials not readily returnable or readily deployable other than on the Design and Construction provided arrangements are made satisfactory to the City acting reasonably, to transfer to the City ownership of such materials free and clear of any security interests) in furtherance of the Design, Construction and Project Financing by Project Co, and the reasonable demobilization costs of Project Co and its Subcontractors, less the amount of any Construction Period Payments that Project Co has received; for clarity, the amount actually expended will include interest on the Senior Debt Financing accrued due and unpaid on the date of the Force Majeure Termination; and
 - (iii) the Total Capital Cost Amount less the Construction Period Payments that Project Co has received;
- (b) less, in either case, all Insurance Proceeds in respect of the applicable Losses, if any legally claimable by Project Co as a result of events occurring prior to the Force Majeure Termination; and
- (c) plus any outstanding balance related to a Change that was financed by Project Co in accordance with Section 9.9(d) [*Lump Sum Payments*] of the Project Agreement, provided that the Termination Payment is determined as per clause (a)(i) or (a)(iii) of this Section.

18.7 Force Majeure Termination - Operating Period

Upon a Force Majeure Termination during the Operating Period, the City shall pay to Project Co a Termination Payment equal to the Operating Period Capital Amount less:

- (a) all principal repaid on the Senior Debt Financing prior to the Force Majeure Termination plus any amounts that could have been repaid based on any cash, cash equivalents or reserves (including loans or investments by Project Co) available for repayment of or held as security for the Senior Debt Financing as at the date of the Force Majeure Termination (but excluding reserves in the form of surety bonds or letters of credit or similar instruments unless they are secured by cash, financial instruments or securities; and further provided that if any surety bonds, letters of credit or similar instruments have been drawn and the proceeds used, prior to the Force Majeure Termination, to repay principal on the Senior Debt Financing, such principal repayments shall not be included under this clause (a) to the extent that the reimbursement obligations remain outstanding);
- (b) all distributions on or return of Equity (including, in the case of subordinated debt, all payments of principal and interest) made prior to the Force Majeure Termination, and all such distributions that Project Co, immediately prior to the Force Majeure Termination, could have made (on the basis of free cash in hand and any cash equivalents, investments, or reserves accessible by Project Co) but had not yet made; but not exceeding, in aggregate, the amount of the Equity and for the purposes of this subsection 18.7(b) the foregoing amounts shall be considered Direct Losses of Project Co; and
- (c) all Insurance Proceeds, if any, legally claimable by Project Co as a result of events occurring prior to the Force Majeure Termination,

plus any outstanding balance related to a Change that was financed by Project Co in accordance with Section 9.9(d) [*Lump Sum Payments*] of the Project Agreement.

18.8 Termination for Convenience or by Project Co

Upon a Termination for Convenience or a Termination by Project Co, the City shall pay to Project Co a Termination Payment calculated as follows:

- (a) the Redemption Payment; plus (without duplication);
- (b) Project Co's reasonable Direct Losses, and any damages with respect to loss of bargain (including return on Equity), in each case, calculated having regard to the principles set out in Section 16.3 [*Calculation of and Limitation on Claims*]; less
- (c) if the Termination for Convenience or Termination by Project Co occurs during the Construction Period, any amount of the Project Financing that has been drawn or, in the case of bond financing, issued, whether or not available to Project Co, but not yet expended on the Project.

For greater certainty, the intention of clauses (a) and (c) is to ensure that the payment required to be made by the City under this Section (without taking into account any amounts payable under clause (b)) will be an amount sufficient to enable Project Co (having regard to any part of the Senior Debt Financing drawn or issued but not yet expended on the Project to fully repay the Senior Debt Financing, provided any premiums on early repayment are within the parameters indicated within the definition of "Redemption Payment").

18.9 Set-off Against Termination Payments

The City may set off against any Termination Payment the amounts of any Payment Adjustments triggered prior to the termination and not set off against a Payment provided that where Section 18.8 [*Termination for Convenience or by Project Co*] applies the City shall be entitled to claim a set-off only to the extent that the net Termination Payment is not reduced below the amount of the Redemption Payment.

18.10 Negative Amounts

If the amount of the Termination Payment calculated under any of Sections 18.2 [*Construction Period Termination*], 18.4 [*Payment Based on Sale of Contractual Rights*] or 18.5 [*Payment of Fair Market Value*] is a negative number, the City shall be entitled to claim that amount (stated as a positive number) from Project Co and Project Co shall remit such payment within 15 Business Days of the making of such claim.

18.11 Rescue Financing

Notwithstanding the definitions of "Construction Period Capital Amount" and "Operating Period Capital Amount" and the definition of "Senior Debt Financing" in Schedule 1 [*Definitions and Interpretation*], if the City expressly and by express reference to this Section 18.11 [*Rescue Financing*] so agrees, in consideration of Project Co raising financing in addition to the amount of the Project Financing in order to enable completion of the Design and Construction, then the amount of such additional financing up to a maximum of 10% of the initial amount of the Senior Debt Financing shall be known as "**Rescue Financing**", and in that event:

- (a) the Construction Period Capital Amount and the Operating Period Capital Amount shall be adjusted so as to include the value of the Rescue Financing; and
- (b) for the purposes of the Redemption Payment, the Rescue Financing shall be deemed to be part of the Senior Debt Financing.

18.12 Delivery of Information

Upon any termination of this Agreement, each party shall as soon as practicable deliver to the other 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.

Upon the initial closing of the Senior Debt Financing, Project Co shall deliver to the City particulars of:

- (a) the amount of the Senior Debt Financing;

- (b) the basis for determining the amount by which the Senior Debt Financing by its terms can be redeemed in advance of its maturity;
- (c) any hedging transactions material or potentially material to any Termination Payment that may in future become payable under this Agreement; and
- (d) the Original Spread as defined in the definition of "Canada Call Redemption Feature" in Section 1 *[Definitions and Interpretation]* as well as the benchmark yield to which the Original Spread is applied, including full details on how it was determined;

and after the initial closing of the Senior Debt Financing, Project Co shall deliver to the City particulars of any material changes in or additions to the information delivered under clause (a), within five (5) Business Days of those changes or additions being effected.

19. COMMUNICATIONS

19.1 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 fax transmission or e-mail, to the following respective addresses:

- (a) 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

- (b) if to Project Co:

TransEd Partners General Partnership
#220, 8616-51 Avenue
Edmonton, AB T6E 6E6
Attention: George Morschauer, 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

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

19.2 Public Announcements, Communications and Engagement

- (a) 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 *[Public Communications and Public Engagement]*. Subject to Schedule 12 *[Public Communications and Public Engagement]*, Project Co shall not make, and except for disclosure as may be required pursuant to applicable stock exchange rules and securities laws, and shall not cause or permit any Project Co Person to make, any public announcement relating to this Agreement except as approved in advance by the City, acting reasonably.
- (b) To the extent there is a requirement, duty or obligation to consult with or accommodate First Nation or aboriginal groups in respect of any approval, authorization, or decision of any Governmental Authority, then (a) Project Co shall ensure that the Design & Construction Communications and Public Involvement Plan and the Operations & Maintenance Communications Plan, as applicable, includes a section that provides for a coordinated consultation plan; (b) to the extent this duty or obligation has been delegated to Project Co by the Governmental Authority other than the City, Project Co will carry out and perform these consultation tasks and obligations with diligence having regard to the overall best interests of the Project and will keep the City informed in a timely manner of the status and progress of these consultations; (c) to the extent the City has been delegated this duty or obligation, Project Co shall provide the City with such information, assistance and support as the City may reasonably require for the City to perform these tasks or obligations in a timely manner and consistent with the protocols and procedures provided for in Schedule 28 *[Project Approvals and URP Matters]*.

If the reasonably incurred aggregate costs of Project Co providing cooperation and assistance to the City pursuant to this Section 19.2* Project Co shall be entitled to require the City to issue a Change pursuant to Schedule 13 *[Changes]* if the City requires further assistance or support for Project Co or a Project Co Person.

*, Redaction under review, Subject to dept review

19.3 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 Project

Co Persons, in the case of Project Co) 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 at the time of disclosure to it, as demonstrated by written records;
- (d) was received by the receiving party from a third party who had a lawful right to disclose the information.

19.4 Disclosure of Confidential Information

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

- (a) the City or Project Co 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 Project Co may, subject to obtaining confidentiality restrictions similar to those set out in this Agreement:
 - (i) provide to the Senior Lenders and other potential lenders, equity providers, underwriters, arrangers, investment dealers, monoline insurers, hedgers and their respective advisors or agents such documents and other information as are reasonably required by them in connection with raising financing for the Project or complying with the terms of the Senior Financing Agreements or related agreements; and
 - (ii) provide to a Project Contractor and its advisors, or provide or cause to be provided to other third parties, Confidential Information which is necessary to enable Project Co to perform, or to cause to be performed, its obligations under this Agreement;
- (b) as required by FOIP or Applicable Laws;
- (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, Project Co acknowledges that the Contribution Agreement Parties may be subject to FOIP, *Access to Information Act* (Canada) or other Applicable Laws 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 Project Co 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, in accordance with this Agreement for the operation, maintenance or improvement of the Project in the event of, or following, termination of this Agreement; or
- (h) where the disclosure is consented to 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 19.4 *[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 19.4 *[Disclosure of Confidential Information]*.

19.5 Public Disclosure of Agreement

Notwithstanding the above Sections 19.3 *[Confidential Information]* and 19.4 *[Disclosure of Confidential Information]*, Project Co agrees that the City will be at liberty to disclose all information contained in this Agreement, excepting only any Schedules or portions thereof that Project Co 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, Project Co 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 Project Co's Proposal has been submitted to the City in confidence.

19.6 Collection, Use and Disclosure of Personal Information

Notwithstanding the above Sections 19.3 *[Confidential Information]* and 19.4 *[Disclosure of Confidential Information]*, Project Co shall comply, and shall ensure that all Project Co Persons comply, with Schedule 18 *[Freedom of Information and Protection of Privacy]*.

19.7 Business Opportunities

- (a) The City may from time to time (collectively, the "**Business Opportunities**"):
 - (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 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

the City reserves for itself the right to all Business Opportunities.

- (b) Notwithstanding Section 19.7(a) [*Business Opportunities*], 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 7.4 [*Other Work*] shall apply.
- (d) Project Co 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 Project Co. 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 Project Co has proposed a Business Opportunity to the City for its consideration, Project Co acknowledges that the City reserves the right to proceed with such Business Opportunity or any similar Business Opportunity with Project Co or with any third party, and may initiate a separate procurement process for the development of any Business Opportunity and Project Co shall not be entitled to receive any payment or compensation from the City (in any form), even if the City proceeds with such Business Opportunity or any similar Business Opportunity with Project Co or any third party.
- (e) Where the City has named the Infrastructure or portions thereof, Project Co shall not publicly refer to it except as so named by the City.

20. CONTRACT ADMINISTRATION

20.1 Contract Administration

- (a) Project Co 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) Project Co and the City shall jointly establish the committees and working groups contemplated in this Agreement, including:
 - (i) the Construction Period Joint Committee, on and subject to the terms set out in Section 3.1 [*Construction Period Joint Committee*] of Schedule 4 [*Design and Construction Protocols*];

- (ii) the Operating Period Joint Committee on and subject to the terms set out in Section 2 [*Operating Period Joint Committee*] of Schedule 7 [*O&M Performance Requirements*];
- (iii) the Commissioning Sub-committee on and subject to the terms set out in Section 10.2(a) [*Commissioning Sub-Committee*] of Schedule 4 [*Design and Construction Protocols*], as a sub-committee of the Construction Period Joint Committee;
- (iv) the Fire Life Safety Sub-committee, the Safety and Security Sub-committee and the System Change and Operations Review Sub-committee, on and subject to the terms set out in Section 3.1 [*Construction Period Joint Committee*] of Schedule 4 [*Design and Construction Protocols*] and Section 2 [*Operating Period Joint Committee*] of Schedule 7 [*O&M Performance Requirements*], as sub-committees of the Construction Period Joint Committee and the Operating Period Joint Committee; and
- (v) the Communications Working Group on and subject to the terms set out in Section 1.3 [*Communications Working Group*] of Schedule 12 [*Public Communications and Public Engagement*],

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 Project Co.

20.2 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.

20.3 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 20.3 [*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:

- (c) 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
- (d) 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.

21. DISPUTE RESOLUTION

21.1 Dispute Resolution Procedure

Unless otherwise agreed to in writing between the City and Project Co, 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.

21.2 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.

21.3 Termination and Dispute Resolution Procedure

A party may refer to the Dispute Resolution Procedure for advance determination the question of whether it has grounds for terminating this Agreement (including, without limitation, whether the circumstances described in Section 16.7(g), (h) and (i) [*Termination Events*] 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) an award of damages for wrongful repudiation of this Agreement.

21.4 Payments Where Amount in Dispute

Where the amount of any payment required to be made under this Agreement (including without limiting the generality of the foregoing the amount of any Termination Payment) is in dispute, the party required to make the payment shall pay such portion of the payment as it does not dispute in good faith.

21.5 Requirements for Project Contracts

Project Co shall ensure that each Project Contract incorporates the provisions of Schedule 20 [*Dispute Resolution Procedure*].

22. ADDITIONAL PROJECT TERMS

22.1 Key Individuals

In accordance with Schedule 26 *[Representatives and Key Individuals]*, Project Co 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 (including resignations, terminations, retirements or substitutions) or to the described roles and responsibilities must be presented to and discussed with the City and approved by the City in accordance with the protocols and terms set out in Schedule 26 *[Representatives and Key Individuals]*.

22.2 Approvals and Authorizations

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

22.3 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 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 22.3(a)(i) shall not apply to Project Co (or a Project Co 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 Project Co 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 Project Co, 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 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 22.3(a)(ii) shall not apply to a fee or commission paid by Project Co (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 Project Co 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 22.3(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 Project Co or any Project Co Person (including a Key Individual) commits any Prohibited Act, such Prohibited Act shall be considered a Termination Event for the purposes of this Agreement unless Project Co 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 22.3 [*Lobbying, Corrupt Practices and Other Prohibited Acts*] shall prevent Project Co or any other person from paying any proper commission, fee or bonus whether to its employees within the agreed terms of their employment or otherwise and such commission fee or bonus shall not constitute a Prohibited Act.
- (d) Project Co shall notify the City of the occurrence and details of any Prohibited Act promptly on Project Co becoming aware of its occurrence.

22.4 Project Co's Reliance on Information

- (a) It is Project Co's responsibility to have conducted its own investigations, analysis and review of the Project, 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 and applicability of any Disclosed Data upon which it places reliance and to assess all risks related to the Project, the Lands, the existing infrastructure, the Infrastructure in relation to the Project Work. Provided, however, that in respect of the Disclosed Data set out in Section 22.4(e), the City acknowledges that Project Co is relying on the City's representation and warranty and may therefore limit the scope or nature of its independent investigations or validations of this data.
- (b) Except as otherwise provided in Section 22.4:
- (i) The City shall not be liable to Project Co for, and Project Co shall not seek to recover from the City, any damages, losses, costs, liabilities or expenses which

may arise (whether in contract, tort or otherwise) from the adoption, use or application of the Disclosed Data by, or on behalf of, Project Co.

- (ii) The City does not give any warranty or undertaking of whatever nature in respect of the Disclosed Data and, specifically (but without limitation), the City does not warrant that the Disclosed Data represents all of the information in its possession or power (either during the conduct of the procurement process for this Agreement or at the Commercial Close) relevant or material to or in connection with the Project Work or the obligations of Project Co under this Agreement.
- (iii) The City shall not be liable to Project Co in respect of any failure, whether before, on or after the Commercial Close:
 - (A) to disclose or make available to Project Co any information, documents or data;
 - (B) to review or update the Disclosed Data; or
 - (C) to inform Project Co of any inaccuracy, error, omission, defect or inadequacy in the Disclosed Data.
- (iv) Project Co acknowledges and confirms it shall not be entitled to and shall not make any claim against the City (whether in contract, tort or otherwise), including, without limitation, any claim in damages, for extensions of time or for additional payments under this Agreement on the grounds:
 - (A) of any misunderstanding or misapprehension in respect of the Disclosed Data;
 - (B) that the Disclosed Data was incorrect, incomplete, insufficient or inapplicable; or
 - (C) that incorrect or insufficient information relating to the Disclosed Data given to it by any Person other than the City was inaccurate, incomplete, insufficient or inapplicable,

nor shall Project Co be relieved from any of its obligations under this Agreement on any such grounds.

- (c) To the extent the City's Representative has knowledge, the City confirms that there are no facts or information relating to the Disclosed Data which the City has intentionally not disclosed to Project Co and which, if learned by Project Co, would reasonably be expected to materially affect Project Co's evaluation of the risks Project Co is assuming pursuant to this Agreement.
- (d) To the extent the City expressly provides a representation and warranty in respect of specified Disclosed Data, the City acknowledges that Project Co may in the course of

performing the Project Work and its obligations under this Agreement rely upon the accuracy of such data (but not the interpretation or application of such data), provided however, that Project Co's only recourse or remedy for any inaccuracy in this specified Disclosed Data shall be limited to claiming a Relief Event and provided Project Co shall have no such recourse or remedy in respect of:

- (i) errors and omissions that a reasonable and prudent professional (of the relevant discipline) would detect on a careful examination and proper interpretation of the report but without carrying out any independent investigation or other validation of the data;
 - (ii) errors and omissions notified to Project Co by the City before the Financial Submission Date;
 - (iii) reports that expressly disclaim reliance by the reader and to the extent of the disclaimer; provided that Project Co shall be permitted to place the same reliance upon the accuracy of the data as the City, notwithstanding a general disclaimer of reliance by persons other than the City, and provided further any general disclaimer regarding the accuracy of data, or the right of the reader (even if the City) to rely on the same, that the City is specifically providing a warranty in respect of in subparagraph (e) below, shall not apply to Project Co for the purposes of this Section; and
 - (iv) reliance on a report if this Agreement expressly requires Project Co to verify the content of the document, to the extent so required.
- (e) For greater certainty, the only Disclosed Data for which the City has provided any representation or warranty in respect of, or for which the City acknowledges that Project Co may be placing reliance in the determination of rights and obligations under this Agreement, is in respect of the reports and information described below. The City hereby represents and warrants there are no factual errors in the bore hole log data contained in (and with effect as of the reporting dates contained therein) the following reports:
- (i) ***River Valley Geo-Tech Reports:***
 - Edmonton Southeast LRT Extension: Quarters to Connors Road – an Overall Appraisal of Geotechnical Conditions along the LRT Alignment
 - Southeast LRT Quarters Tunnel – Geotechnical Considerations for Tunnelling Options
 - Progress Report No. 1: Additional Geotechnical Investigation, Southeast LRT Extension – Quarters Tunnel
 - Edmonton Southeast LRT Extension: Connors Road Pedestrian Bridge – Preliminary Geotechnical Assessment and Recommendations

- Progress Report No. 2: Additional Geotechnical Investigation, Southeast LRT Extension – Quarters Tunnel
- Edmonton Light Rail Transit – Valley Line Stage 1: Quarters to Cloverdale – Preliminary Assessment of the Stability of the South Valley Slope Along Connors Road
- Edmonton Light Rail Transit – Valley Line Stage 1: Bridge Crossing of North Saskatchewan River – Preliminary Geotechnical Assessment and Recommendations
- Edmonton Light Rail Transit – Valley Line Stage 1: Tunnel and Portals Geotechnical Data Report

(ii) **Corridor Reports:**

- Southeast to West LRT Extensions: AECOM Intrusive Geotechnical Investigation, Preliminary Geotechnical Report – Final

(iii) **General:**

- Edmonton's Southeast Light Rail Transit: Quarters to Cloverdale – Preliminary Assessment of the Stability of the South Valley Slope Along Connors Road
- Edmonton Light Rail Transit – Valley Line Stage 1: Historic Waste Dump in Louise McKinney Park Geotechnical Investigation
- Edmonton Light Rail Transit – Valley Line Stage 1: Short Term Construction Access Road on North Riverbank Preliminary Geotechnical Investigation and Slope Assessment
- Edmonton Light Rail Transit – Valley Line Stage 1: Geotechnical Instrumentation Monitoring Summary Report No. 1

(iv) **Borehole Testing Program During RFP:**

- Edmonton Light Rail Transit – Valley Line Stage 1, Summary of Results of RFP Borehole Investigations – Geotechnical Program
- Edmonton Light Rail Transit – Valley Line Stage 1, Summary of Results of RFP Borehole Investigations – Environmental Program

23. GENERAL PROVISIONS

23.1 Limitations on Assignment

Project Co will not assign, transfer or otherwise dispose of any interest in this Agreement or a Project Contract, except:

- (a) as security for any loan made to Project Co under any Senior Financing Agreement and provided the Senior Lenders enter into the Direct Lender Agreement;
- (b) in connection with the exercise of rights of the Senior Lenders pursuant to the Senior Financing Agreements and in accordance with the Direct Lender Agreement;
- (c) NOT USED;
- (d) by way of a sub-contract that is not a subcontract of all or substantially all of the obligations under the Project Contract; or
- (e) otherwise:
 - (i) prior to the day (the "**Transfer Restriction Date**") that is 2 years after Service Commencement, with the written consent of the City, which may be given or withheld in the City's discretion, and
 - (ii) after the Transfer Restriction Date, with the written consent of the City, which will not be unreasonably withheld or delayed,

provided that in the case of an assignment under 23.1(b) or 23.1(e) above the assignee assumes all the obligations of Project Co under this Agreement. Project Co shall also comply with Sections 1.2 [*Project Contracts*] and Section 1.3 [*Costs of Request for Consent*] to the extent applicable to the proposed assignment, transfer or disposition.

23.2 Limitations on Change in Control

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

- (a) in connection with the exercise of rights of the Security Trustee under the Senior Financing Agreements in accordance with the Direct Lenders Agreement;
- (b) arising from any bona fide open market transaction in any shares or other securities of Project Co, Project Contractor, Affiliate, Partner or of any Holding Company of a Partner, effected on a recognized public stock exchange;
- (c) in connection with a Permitted Transaction;
- (d) subject to obtaining the City's written consent which will not be unreasonably withheld or delayed, arising from a bona fide private market transaction in respect of the whole of a

business enterprise through the sale, transfer, assignment or other disposition of all or substantially all of the assets, shares, securities or other equity interests of a Project Contractor, Affiliate, Partner or of any Holding Company of a Partner carrying on or having control of the business enterprise; and

- (e) otherwise:
 - (i) prior to the Transfer Restriction Date, with the written consent of the City, which may be given or withheld in the City's discretion; and
 - (ii) after the Transfer Restriction Date, with the written consent of the City, which will not be unreasonably withheld or delayed.

In respect of a Change of Control of Project Co to which Section 23.2(e)(i) applies prior to the Transfer Restriction Date, the City shall be entitled to receive a 50 percent share of any equity gain arising from such Change of Control.

Project Co shall also comply with the requirements of Section 1.3 *[Costs of Request for Consent]* to the extent applicable to the change of control event.

23.3 Factors the City May Consider

In determining whether to provide its consent under Section 23.1(e)(ii) *[Limitation on Assignment]* or 23.2(d) or (e)(ii) *[Limitations on Changes in Control]*, 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 Project Co, 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 Project Co 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 Proponents 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 Project Co, 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 Project Co's obligations under this Agreement;
- (c) the assignment or Change in Control could, in the reasonable opinion of the City, have a material adverse impact or effect on the City, the Infrastructure or the System; or
- (d) by reference to the qualification requirements and criteria applied by the City in the selection of Proponents 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 Project Co, 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 Project Co obligations under this Agreement.

23.4 Costs of Request for Consent

If Project Co requests consent to an assignment, transfer or disposition pursuant to Section 23.1 *[Limitations on Assignment by Project Co]* or to a Change in Control pursuant to Section 23.2 *[Limitations on Change of Control]*, Project Co 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, Project Co 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 23.4 *[Costs of Requests for Consent]*. After the City renders its decision, the City will either refund any over payment or invoice Project Co for any additional amounts owing under this Section 23.4 *[Costs of Requests for Consent]* and Project Co 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 Project Co for any additional amounts owing under this Section 1.3 *[Costs of Requests for Consent]* and Project Co will promptly pay such amount to the City. Concurrently with providing such refund or invoice the City will provide Project Co with a breakdown of the City's costs in connection with its consideration of Project Co's request for consent.

23.5 Project Co Persons, Subcontractors

- (a) Project Co 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 Project Co Person and all references in this Agreement to any act, omission or Legal Fault of Project Co will be construed accordingly to include any such act, omission or Legal Fault of or committed by a Project Co Person.
- (b) Without limiting clause (a), the City acknowledges that Project Co shall carry out the Design, the Construction and the Services by contracting such obligations to the Project Contractors pursuant to Project Contracts who in turn may contract all or part of their obligations under any Project Contract to one or more Subcontractors. Notwithstanding the use of Project Contractors or Subcontractors, Project Co:
 - (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 Project Co.

For clarification, any assignment or subcontracting of all or substantially all of a Project Contract (including all or substantially all of the LRV Supply rights and obligations under

the Design-Build Agreement) is subject to the consent of the City, not to be unreasonably withheld or delayed.

- (c) In respect of the Project, Project Co will not contract with, or allow any of its Project Contractors or any Subcontractors to contract with, any Person that is a Restricted Person.

23.6 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 Project Co 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 Project Co.

23.7 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 21 [*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.

23.8 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 Project Co. 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.

23.9 Additional Assurances

The City and Project Co 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 23.9 *[Additional Assurances]* shall not in any event be construed as obligating the City to amend or enact any statute or regulation.

23.10 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 fax transmission shall constitute good delivery.

23.11 Joint and Several

Where two or more persons execute this Agreement as Project Co, the liability under this Agreement of such persons executing this Agreement shall be joint and several.

23.12 No Derogation of City's Separate Obligations

Project Co 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.

23.13 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]*.

For the purposes of the Project Documents, wherever a Partner is defined as a corporate entity acting in its capacity as a general partner or representative partner of a partnership (whether a general or limited partnership), all references to such Partner shall be deemed to include the partnership or partnerships, and their partners, on whose behalf such Partner acts.

23.14 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.

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: