

**SCHEDULE 10**

**INDEPENDENT CERTIFIER AGREEMENT**

**THIS AGREEMENT** is made as of the 21<sup>st</sup> day of June, 2016

**BETWEEN:**

**THE CITY OF WINNIPEG**

(the “City”)

**AND:**

**PLENARY ROADS** [REDACTED]  
[REDACTED]

**PLENARY ROADS** [REDACTED]  
[REDACTED]

and

**PCL** [REDACTED]  
[REDACTED],

(“Project Co”)

**AND:**

**WTP PROPERTY CONSULTANTS LTD.,**

operating as WT Partnership, a corporation incorporated under the laws of the Province of  
British Columbia

(the “Independent Certifier”)

**WHEREAS:**

- A. The City and Project Co (collectively, the “**PA Parties**” and each, a “**PA Party**”) have entered into an agreement on the 21<sup>st</sup> day of June, 2016 to design, build, finance, operate and maintain the New Infrastructure as set out in the agreement, as such agreement may be amended, supplemented or replaced from time to time in accordance with the terms thereof (the “**Project Agreement**”).
- B. Pursuant to the terms of the Project Agreement, the PA Parties wish to appoint the Independent Certifier, and the Independent Certifier wishes to accept such appointment, to perform certain services in connection with the Project Agreement.
- C. The PA Parties and the Independent Certifier wish to enter into this Independent Certifier Agreement in order to record the terms by which the Independent Certifier shall perform such services.

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

## **SECTION A DEFINITIONS**

### **A1. Capitalized Terms**

A1.1 Capitalized terms used in the Independent Certifier Agreement have the meanings set out in the Project Agreement, unless otherwise expressed in this Independent Certifier Agreement.

### **A2. Definitions**

A2.1 In this Independent Certifier Agreement, the following terms shall have the following meanings:

- (a) **“Certification Services”** means:
  - (i) all of the functions and obligations described in the Project Agreement as being the responsibility of the Independent Certifier;
  - (ii) all of the functions and obligations conferred on the Independent Certifier under this Independent Certifier Agreement, including the functions described in Appendix A to this Independent Certifier Agreement; and
  - (iii) all other things or tasks which the Independent Certifier must do to comply with its obligations under this Independent Certifier Agreement;
- (b) **“Certification Services Variation”** is any change to the Certification Services;
- (c) **“Change in Control”** means, with respect to a person:
  - (i) any Change in Ownership, where the effect of such change is to result in control of the decisions made by or on behalf of such person subsequently being with a different entity or entities than prior to such change;
  - (ii) any other change in respect of the power to elect a majority of the directors of the person or otherwise control the decisions made on behalf of such person; or
  - (iii) any other change of direct or indirect power or authority through any contractual right or other power or interest with or over a person to influence, direct, cause to change or prevent from changing the approval of a decision, direction of the management, actions or policies of such person, to direct or cause the direction of the management, actions or policies of such person;

- (d) **“Change in Ownership”** means, with respect to a person, any change in ownership, whether beneficial or otherwise, of any of the shares or units of ownership of such person, or in the direct or indirect power to vote or transfer any of the shares or units of ownership of such person;
- (e) **“Contract Material”** means all material:
  - (i) provided to the Independent Certifier or created or required to be created by either PA Party; and
  - (ii) provided by or created or required to be created by the Independent Certifier as part of, or for the purpose of, performing the Certification Services,  
  
including documents, equipment, reports, technical information, plans, charts, drawings, calculations, tables, schedules and data (stored and recorded by any means);
- (f) **“Fee”** means the fees payable by the City and Project Co to the Independent Certifier for the Certification Services, as such fees are specified and made payable in accordance with Appendix B to this Independent Certifier Agreement;
- (g) **“Initial Term”** has the meaning given in Section J1.1(c) of this Independent Certifier Agreement;
- (h) **“Intellectual Property”** means any and all intellectual property rights, whether subsisting now or in the future, including rights of any kind in inventions, patents, copyright, trademarks, service marks, industrial designs, integrated circuit topography rights, applications for registration of any of the foregoing, and know-how, trade secrets, confidential information and trade or business names;
- (i) **“PA Parties”** and **“PA Party”** have the meaning given in the Recitals;
- (j) **“Project Agreement”** has the meaning given in the Recitals; and
- (k) **“Renewal Term”** has the meaning given in Section J1.2 of this Independent Certifier Agreement.

## SECTION B INTERPRETATION

### B1. Interpretation

- B1.1 In this Independent Certifier Agreement, unless the context indicates a contrary intention:
- (a) words denoting the singular number include the plural and vice versa;
  - (b) words denoting individuals include corporations and vice versa;

- (c) headings are for convenience only and do not affect interpretation;
- (d) references to Clauses, Sections or Parts are references to Clauses, Sections or Parts of this Independent Certifier Agreement;
- (e) references to this Independent Certifier Agreement or any contract, agreement or instrument are deemed to include references to this Independent Certifier Agreement or such other contract, agreement or instrument as amended, novated, supplemented, varied or replaced from time to time;
- (f) references to any party to this Independent Certifier Agreement includes its successors or permitted assigns;
- (g) words denoting any gender include all genders;
- (h) references to any legislation or to any section or provision of any legislation include any statutory modification or re-enactment of any statutory provision substituted for legislation, section or provision, and ordinances, by laws, regulations and other statutory instruments issued under that legislation, section or provision;
- (i) a reference to “\$” is to Canadian currency;
- (j) the terms “including” and “include” mean “including” or “include” (as applicable) without limitation;
- (k) if a word or phrase is defined, then other parts of speech and grammatical forms of that word or phrase have a corresponding meaning; and
- (l) unless otherwise indicated, all time periods will be strictly construed.

## **B2. Obligations and Exercise of Rights by PA Parties**

- B2.1 The obligations of the PA Parties under this Independent Certifier Agreement shall be several.
- B2.2 Except as specifically provided for in this Independent Certifier Agreement or the Project Agreement, the rights of the PA Parties under this Independent Certifier Agreement shall be jointly exercised by the PA Parties.

## **SECTION C ROLE OF THE INDEPENDENT CERTIFIER**

### **C1. Engagement**

- C1.1 The PA Parties hereby appoint the Independent Certifier, and the Independent Certifier hereby accepts such appointment, to carry out the Certification Services in accordance with this Independent Certifier Agreement. The Independent Certifier shall perform the Certification Services in accordance with this Independent Certifier Agreement.

- C1.2 Nothing in this Independent Certifier Agreement will be interpreted as giving the Independent Certifier any responsibility for performance of the design or construction, or for the certifications of the professionals of record.
- C1.3 Neither PA Party shall, without the prior written consent of the other PA Party, enter into any separate agreement with the Independent Certifier in connection with the Project, and Project Co shall ensure that no Project Co Party enters into any separate agreement with the Independent Certifier in connection with the Project.
- C1.4 The Independent Certifier shall make such observations and evaluations of any Design and Construction pursuant to a Change Order in order to certify any monthly progress payment to Project Co of the value of work performed, provided the Independent Certifier shall be entitled to a Certification Services Variation Order pursuant to Section I4 and I5 of this Independent Certifier Agreement.

**C2. Acknowledgement of Independent Certifier**

- C2.1 The Independent Certifier hereby acknowledges in favour of the PA Parties that it has received a copy of the Project Agreement.

**C3. Standard of Care**

- C3.1 The Independent Certifier must exercise the standard and skill, care and diligence in the performance of the Certification Services that would be expected of an expert professional experienced in providing services in the nature of the Certification Services for projects similar to the Project.

**C4. Duty of Independent Judgment**

- C4.1 In exercising its Certification Services, the Independent Certifier must:
- (a) act impartially, honestly and independently in representing the interests of both PA Parties in accordance with the terms of the Project Agreement and this Independent Certifier Agreement;
  - (b) act reasonably and professionally;
  - (c) act in a timely manner:
    - (i) in accordance with the times prescribed in this Independent Certifier Agreement and the Project Agreement; or
    - (ii) where no times are prescribed, within 10 days or such earlier time so as to enable the PA Parties to perform their respective obligations under the Project Agreement; and
  - (d) act in accordance with the joint directions of the PA Parties provided that the directions are not inconsistent with the other terms of this Independent Certifier Agreement or the terms of the Project Agreement and do not vary or prejudice the Independent Certifier's authority or responsibilities or the exercise by the

Independent Certifier of its professional judgment under this Independent Certifier Agreement.

- C4.2 Although the Independent Certifier may take account of any opinions or representations made by the PA Parties, the Independent Certifier shall not be bound to comply with any opinions or representations made by either of them in connection with any matter on which the Independent Certifier is required to exercise its professional judgment.
- C4.3 The Independent Certifier acknowledges that the PA Parties may rely on the Certification Services, including determinations, findings and certifications made by the Independent Certifier, and accordingly, the Independent Certifier will use its best skill and judgment in providing the Certification Services.

**C5. Authority to Act**

C5.1 The Independent Certifier:

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

**C6. Knowledge of the PA Parties' Requirements**

C6.1 The Independent Certifier warrants that:

- (a) it has informed and will be deemed to have informed itself fully of the requirements of the Project Agreement;
- (b) it will inform itself fully of the requirements of such other documents and materials as may become relevant from time to time to the performance of the Certification Services;
- (c) without limiting Sections C6.1(a) or C6.1(b) of this Independent Certifier Agreement, it has and will be deemed to have informed itself fully of all time limits and other requirements for any Certification Service which the Independent Certifier carries out under the Project Agreement and this Independent Certifier Agreement;
- (d) it has and will be deemed to have informed itself completely of the nature of the work necessary for the performance of the Certification Services and the means of access to and facilities at the Lands and the Infrastructure including restrictions on any such access or protocols that are required; and

- (e) it has satisfied itself as to the correctness and sufficiency of its proposal for the Certification Services and that the Fee covers the cost of complying with all of the obligations under this Independent Certifier Agreement and of all matters and things necessary for the due and proper performance and completion of the Certification Services.

## **C7. Co-ordination and Information by Independent Certifier**

C7.1 The Independent Certifier must:

- (a) fully cooperate with the PA Parties;
- (b) carefully co-ordinate the Certification Services with the work and services performed by the PA Parties;
- (c) without limiting its obligations under Sections C4 and C7.1(b) of this Independent Certifier Agreement, perform the Certification Services so as to avoid unreasonably interfering with, disrupting or delaying the work and services performed by the PA Parties; and
- (d) provide copies to the PA Parties of all reports, communications, certificates and other documentation that it provides to either PA Party.

## **C8. Conflict of Interest**

C8.1 The Independent Certifier warrants that:

- (a) at the date of this Independent Certifier Agreement, no conflict of interest exists or is likely to arise in the performance of its obligations under this Independent Certifier Agreement, and the Independent Certifier further warrants that it has not been retained as technical advisor to the Lenders or as an advisor to either of the PA Parties or any of their respective related entities in respect of the Project Agreement (including, but not limited to, acting as a transaction advisor to either PA Party); and
- (b) if, during the term of this Independent Certifier Agreement, any such conflict or risk of conflict of interest arises, the Independent Certifier will notify the PA Parties immediately in writing of that conflict or risk of conflict and take such steps as may be required by either of the PA Parties to avoid or mitigate that conflict or risk.

## **C9. Independent Certifier Personnel**

C9.1 The Independent Certifier shall make reasonable efforts to ensure that the individuals listed in Appendix C remain involved in the performance of the Certification Services and, in particular, will not, for the duration of this Independent Certifier Agreement, require or request any such person to be involved in any other project on behalf of the Independent Certifier if, in the reasonable opinion of the PA Parties, such involvement would have a material adverse effect on the performance of the Certification Services.

- C9.2 The Independent Certifier shall ensure that all of its personnel providing the Certification Services shall:
- (a) have demonstrated competence services comparable to the Certification Services of comparable infrastructure to the Infrastructure and in having completed such comparable services to the Certification Services of comparable infrastructure to the Infrastructure;
  - (b) have an understanding of the appropriate standards, guidelines, best practices, and policies related to services comparable to the Certification Services for comparable infrastructure to the Infrastructure; and
  - (c) have an understanding of any documentation to be provided pursuant to this Independent Certifier Agreement and the Project Agreement, including not only the start-up procedures and operator training, but any pre-Substantial Completion and post-Substantial Completion activities.
- C9.3 The Independent Certifier shall ensure that its team lead providing the Certification Services shall possess a current professional designation of not less than membership in The Association of Professional Engineers and Geoscientists of Manitoba (APEGM) or such similar professional designation recognized in North America.
- C9.4 The Independent Certifier shall furnish the City with evidence satisfactory to the City of any such personnel's compliance with the foregoing requirements within a reasonable time prior to the proposed commencement of the Certification Services.

**C10. Minimize Interference**

- C10.1 The Independent Certifier shall perform the Certification Services in such a way as to minimize any undue interference with the progress of the Design and Construction.

**SECTION D ROLE OF THE PA PARTIES**

**D1. Assistance**

- D1.1 The PA Parties agree to cooperate with and provide reasonable assistance to the Independent Certifier to familiarize the Independent Certifier with all necessary aspects of the Project to enable the Independent Certifier to carry out its obligations under this Independent Certifier Agreement.

**D2. Instructions in Writing**

- D2.1 Unless otherwise provided in this Independent Certifier Agreement or the Project Agreement, all instructions to the Independent Certifier by the PA Parties shall be given in writing and accepted or endorsed by both of the PA Parties.

**D3. Information and Services**

- D3.1 The PA Parties shall make available to the Independent Certifier, as soon as practicable from time to time, all information, documents and particulars necessary for the Independent Certifier to carry out the Certification Services, including such information,



documents and particulars required in order for the Independent Certifier to determine whether Substantial Completion and Final Completion have occurred, and shall provide copies of all such information, documents and particulars to the other party hereto.

**D4. Additional Information**

D4.1 If any information, documents or particulars are reasonably required to enable the Independent Certifier to perform the Certification Services and have not been provided by the PA Parties, then:

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

**D5. Right to Enter and Inspect**

D5.1 Upon giving reasonable notice to the Project Co Representative, the Independent Certifier (and any person authorized by it) may enter and inspect the Lands, the Design and Construction or the Infrastructure at any reasonable time in connection with the exercise or proposed exercise of rights under this Independent Certifier Agreement, subject to:

- (a) observance of the reasonable rules of Project Co as to safety and security for the Lands, the Design and Construction, or the Infrastructure;
- (b) not causing unreasonable delay to the carrying out of the Design and Construction by reason of its presence on the Lands or the Infrastructure; and
- (c) not causing any damage to the Lands, the Design and Construction or the Infrastructure.

**D6. PA Parties Not Relieved**

D6.1 Neither PA Party shall be relieved from performing or observing its obligations, or from any other liabilities, under the Project Agreement as a result of either the appointment of, or any act or omission by, the Independent Certifier.

**D7. PA Parties not Liable**

D7.1 On no account will a PA Party be liable to another PA Party for any act or omission by the Independent Certifier whether under or purportedly under a provision of the Project Agreement, this Independent Certifier Agreement or otherwise, provided that any such act or omission shall not extinguish, relieve, limit or qualify the nature or extent of any right or remedy of either PA Party against or any obligation or liability of either PA Party to the other PA Party which would have existed regardless of such act or omission.

## **SECTION E CERTIFICATION QUALITY PLAN**

### **E1. Certification Quality Plan**

E1.1 The Independent Certifier must:

- (a) develop and implement a certification quality plan identifying the processes and outcomes of the Certification Services that complies with all requirements of the Independent Certifier's quality assurance accreditation, and is otherwise satisfactory to each of the City Representative and the Project Co Representative;
- (b) within 14 days after the date of this Independent Certifier Agreement, provide such certification quality plan to each of the City Representative and the Project Co Representative;
- (c) if satisfactory to each of the City Representative and the Project Co Representative, implement such certification quality plan; and
- (d) if not satisfactory to each of the City Representative and the Project Co Representative, within seven days after receiving notice thereof from either PA Party to that effect, revise and resubmit the certification quality plan to each of the City Representative and the Project Co Representative, and implement it if satisfactory to each of the City Representative and the Project Co Representative.

### **E2. Certification Quality Plan not to Relieve Independent Certifier**

E2.1 The Independent Certifier will not be relieved of any responsibilities or obligations in respect of the performance of the Certification Services and will remain solely responsible for them notwithstanding:

- (a) the obligation of the Independent Certifier to develop and implement a certification quality plan; or
- (b) any comment or direction upon, review or acceptance of, approval to proceed with or request to vary any part of the certification quality plan by either the City Representative or the Project Co Representative.

## **SECTION F SUSPENSION**

### **F1. Notice**

F1.1 The Certification Services (or any part) may be suspended at any time by the PA Parties:

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

- (b) in any other case, by the PA Parties giving seven days joint notice in writing to the Independent Certifier.

## **F2. Costs of Suspension**

F2.1 The Independent Certifier will:

- (a) subject to the Independent Certifier complying with Article 9, be entitled to recover the extra costs incurred by the Independent Certifier by reason of a suspension directed under Section F1.1(b) of this Independent Certifier Agreement valued as a Certification Services Variation under Section I; and
- (b) have no entitlement to be paid any costs, expenses, losses or damages arising from a suspension under Section F1.1(a) of this Independent Certifier Agreement.

## **F3. Recommencement**

F3.1 The Independent Certifier must immediately recommence the carrying out of the Certification Services (or any part) on receipt of a joint written notice from the PA Parties requiring it to do so.

## **SECTION G INSURANCE AND LIABILITY**

### **G1. Independent Certifier's Insurance**

G1.1 The Independent Certifier must have in place at all times during the term of this Independent Certifier Agreement:

- (a) professional liability insurance:
  - (i) in the amount of \$2,000,000 per claim and \$4,000,000 in the aggregate, a deductible of not more than \$25,000 per claim and from an insurer and on terms satisfactory to each of the PA Parties; and
  - (ii) covering liability which the Independent Certifier might incur as a result of a breach by it of its obligations owed by the Independent Certifier in a professional capacity to the PA Parties, or either of them, under or in connection with this Independent Certifier Agreement or the provision of the Certification Services; and
- (b) commercial general liability insurance in the amount of \$5,000,000 per claim and in the aggregate, no deductible for personal injury or bodily injury, a deductible of not more than \$5,000 per occurrence for property damage and from an insurer and on terms satisfactory to each of the PA Parties.

G1.2 The Independent Certifier must provide copies of its insurance policies to each of the PA Parties upon execution of this Independent Certifier Agreement, and, at least five Business Days prior to the expiry date of any such insurance policy, the Independent Certifier must provide evidence of the renewal of any such insurance policy satisfactory to the PA Parties, acting reasonably.

## **G2. Workers' Compensation Insurance**

- G2.1 The Independent Certifier must, at its own cost and at all times during the term of this Independent Certifier Agreement, insure its liability (including its common law liability) as required under any applicable workers compensation statute or regulation in relation to its employees engaged in the Certification Services.

## **SECTION H PAYMENT FOR SERVICES**

### **H1. Payment of Fee**

- H1.1 In consideration of the Independent Certifier performing the Certification Services in accordance with this Independent Certifier Agreement, each PA Party shall pay one-half of the Fee to the Independent Certifier in accordance with the payment schedule specified in Appendix B.
- H1.2 The obligation of each PA Party to pay one-half of the Fee to the Independent Certifier is a several obligation, and neither PA Party shall have any liability in respect of the non-payment by the other PA Party of any fees or costs payable by such other PA Party under this Independent Certifier Agreement.
- H1.3 The Fee includes all taxes (except for GST), overheads and profit, all labour and materials, insurance costs, travel, hospitality, food and incidental expenses, and all other overhead including any fees or other charges required by law to perform the Certification Services.
- H1.4 The PA Parties acknowledge and agree that if any approved amount due and payable by the PA Parties to the Independent Certifier in excess of \$100,000 is outstanding for more than 60 days, the Independent Certifier shall not have any obligation to make any certification under the Project Agreement.

## **SECTION I CERTIFICATION SERVICES VARIATIONS**

### **I1. Notice of Certification Services Variation**

- I1.1 If the Independent Certifier believes, other than a "Certification Services Variation Order" under Section I4.3 of this Independent Certifier Agreement, that any direction by the PA Parties constitutes or involves a Certification Services Variation it must:
- (a) within seven days after receiving the direction and before commencing work on the subject matter of the direction, give notice to the PA Parties that it considers the direction constitutes or involves a Certification Services Variation; and
  - (b) within 21 days after giving the notice under Section I1.1(a) of this Independent Certifier Agreement, submit a written claim to each of the City Representative and the Project Co Representative which includes detailed particulars of the claim, the amount of the claim and how it was calculated.
- I1.2 Regardless of whether the Independent Certifier considers that such a direction constitutes or involves a Certification Services Variation, the Independent Certifier must continue to perform the Certification Services in accordance with this Independent

Certifier Agreement and all directions, including any direction in respect of which notice has been given under this Section I1.

## **I2. No Adjustment**

- I2.1 If the Independent Certifier fails to comply with Section I1 of this Independent Certifier Agreement, the Fee will not be adjusted as a result of the relevant direction.

## **I3. External Services**

- I3.1 In the event that external personnel or consultants are required for expert opinion with respect to a Certification Services Variation, then, with the prior written approval of the PA Parties, any additional fees relating to such external personnel or consultants will be payable by the PA Parties at the agreed upon amount.

## **I4. Certification Services Variation Procedure**

- I4.1 The City Representative and the Project Co Representative may jointly issue a document titled “Certification Services Variation Price Request” to the Independent Certifier which will set out details of a proposed Certification Services Variation which the PA Parties are considering.
- I4.2 Within seven days after the receipt of a “Certification Services Variation Price Request”, the Independent Certifier must provide each of the City Representative and the Project Co Representative with a written notice in which the Independent Certifier sets out the effect which the proposed Certification Services Variation will have on the Fee.
- I4.3 Each of the City Representative and the Project Co Representative may then jointly direct the Independent Certifier to carry out a Certification Services Variation by written document titled “Certification Services Variation Order” which will state either that:
- (a) the Fee is adjusted as set out in the Independent Certifier’s notice; or
  - (b) the adjustment (if any) to the Fee will be determined under Section I5 of this Independent Certifier Agreement.

## **I5. Cost of Certification Services Variation**

- I5.1 Subject to Section I2 of this Independent Certifier Agreement, the Fee will be adjusted for all Certification Services Variations or suspensions under Section F1.1(b) of this Independent Certifier Agreement carried out by the Independent Certifier by:
- (a) the amount (if any) stated in the “Certification Services Variation Order” in accordance with Section I4.3 of this Independent Certifier Agreement;
  - (b) if Section I5.1(a) of this Independent Certifier Agreement is not applicable, an amount determined pursuant to the fee schedule in Appendix B; or
  - (c) where such rates or prices are not applicable, a reasonable amount to be agreed between the PA Parties and the Independent Certifier or, failing agreement, determined by the City Representative and the Project Co Representative jointly.

I5.2 Any reductions in the Fee shall be calculated on the same basis as any increases.

## **SECTION J TERM AND TERMINATION**

### **J1. Term**

J1.1 Subject to earlier termination, this Independent Certifier Agreement will commence on the date of the Project Agreement and continue in full force until the earlier of:

- (a) completion of the Certification Services set forth herein;
- (b) the termination of the Project Agreement;
- (c) the fifth anniversary of the date of this Independent Certifier Agreement (the “**Initial Term**”), unless renewed in accordance with Section J1.2; or
- (d) such other date as may be mutually agreed between the PA Parties and the Independent Certifier.

J1.2 The Initial Term may be renewed, in the PA Parties’ discretion, for up to six five year renewal terms (each, a “**Renewal Term**”) by the PA Parties providing written notice to the Independent Certifier not less than 120 days prior to the expiration of the Initial Term or Renewal Term, as applicable.

### **J2. Notice of Breach**

J2.1 If the Independent Certifier commits a breach of this Independent Certifier Agreement, the PA Parties may give written notice to the Independent Certifier:

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

### **J3. Termination for Breach**

J3.1 If the Independent Certifier fails to rectify the breach within the period specified in the notice issued under Section J2 of this Independent Certifier Agreement, the PA Parties may, without prejudice to any other rights of the PA Parties or either of them, immediately terminate this Independent Certifier Agreement.

### **J4. Termination for Financial Difficulty or Change in Control**

J4.1 The PA Parties may, without prejudice to any other rights which the PA Parties or either of them may have, terminate this Independent Certifier Agreement immediately if:

- (a) events have occurred or circumstances exist which, in the opinion of the PA Parties, may result in or have resulted in an insolvency or a Change in Control of the Independent Certifier; or

- (b) the Independent Certifier has communications with its creditors with a view to entering into, or enters into, any form of compromise, arrangement or moratorium of any debts whether formal or informal, with its creditors.

#### **J5. Termination for Convenience**

J5.1 Notwithstanding anything to the contrary in this Independent Certifier Agreement, the PA Parties may, at any time, jointly terminate this Independent Certifier Agreement upon 30 days' written notice to the Independent Certifier. The PA Parties and the Independent Certifier agree that, notwithstanding the 30 days' notice of termination, the Independent Certifier shall continue on a day-to-day basis thereafter until a new Independent Certifier is appointed.

#### **J6. Independent Certifier's Rights upon Termination for Convenience**

J6.1 Upon a termination under Section J5 of this Independent Certifier Agreement, the Independent Certifier will:

- (a) be entitled to be reimbursed by the PA Parties for the value of the Certification Services performed by it to the date of termination; and
- (b) not be entitled to any damages or other compensation in respect of the termination and (without limitation) any amount in respect of:
  - (i) the lost opportunity to earn a profit in respect of the Certification Services not performed at the date of termination; and
  - (ii) any lost opportunity to recover overheads from the turnover which would have been generated under this Independent Certifier Agreement but for it being terminated.

#### **J7. Procedure upon Termination**

J7.1 Upon completion of the Independent Certifier's engagement under this Independent Certifier Agreement or earlier termination of this Independent Certifier Agreement (whether under Section J3, Section J4 or Section J5 of this Independent Certifier Agreement or otherwise), the Independent Certifier must:

- (a) cooperate with the PA Parties with respect to the transition of the Certification Services to a replacement certifier;
- (b) deliver to the PA Parties all Contract Material and all other information concerning the Project held or prepared by the Independent Certifier during the execution of work under this Independent Certifier Agreement; and
- (c) as and when required by the PA Parties, meet with them and such other persons nominated by them with a view to providing them with sufficient information to enable the PA Parties to execute the Project or the persons nominated to provide the Certification Services.

**J8. Effect of Termination**

J8.1 Except as otherwise expressly provided in this Independent Certifier Agreement, termination of this Independent Certifier Agreement shall be without prejudice to any accrued rights and obligations under this Independent Certifier Agreement as at the date of termination (including the right of the PA Parties to recover damages from the Independent Certifier).

**J9. Survival**

J9.1 Termination of this Independent Certifier Agreement shall not affect the continuing rights and obligations of the PA Parties and the Independent Certifier under Section G, Section H, Section K, Sections J6, J7, J8 and L7 of this Independent Certifier Agreement and this Section J9 or under any other provision which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

**SECTION K INDEMNITY**

**K1. PA Parties to Save Independent Certifier Harmless**

K1.1 The PA Parties hereby indemnify and save the Independent Certifier completely harmless from any actions, causes of action, suits, debts, costs, damages, expenses, claims and demands whatsoever, at law or in equity, arising directly or indirectly in whole or in part out of any action taken by the Independent Certifier within the scope of its duties or authority hereunder.

K1.2 The indemnity provided under this Section K1 of this Independent Certifier Agreement shall not extend:

- (a) to any breach of this Independent Certifier Agreement, or any part or parts hereof, by the Independent Certifier, its employees, servants, agents or persons for whom it is in law responsible, or any negligent or unlawful act or omission or willful misconduct of the Independent Certifier, its employees, servants or persons for whom it is in law responsible (in respect of which the Independent Certifier shall indemnify the PA Parties, as referred to in Section K2 of this Independent Certifier Agreement);
- (b) to any action taken by the Independent Certifier outside the scope of authority set forth in this Independent Certifier Agreement, or any part or parts hereof; or
- (c) to any debt, cost, expense, claim or demand for which insurance proceeds are recoverable by the Independent Certifier.

K1.3 This indemnity shall survive the termination of this Independent Certifier Agreement.

**K2. Independent Certifier to Save PA Parties Harmless**

K2.1 The Independent Certifier hereby indemnifies and saves the PA Parties, and their affiliated entities, subsidiaries and their respective directors, officers, employees, agents, permitted successors and assigns, completely harmless from any actions, causes of



action, suits, debts, costs, damages, expenses, claims and demands whatsoever, at law or in equity, arising directly or indirectly in whole or in part out of any breach of this Independent Certifier Agreement, or any part or parts hereof, by the Independent Certifier, its employees, servants, agents or persons for whom it is in law responsible, or any negligent or unlawful act or omission or willful misconduct of the Independent Certifier, its employees, servants or persons for whom it is in law responsible.

K2.2 The indemnity provided under this Section K2 to a PA Party shall not extend:

(a) to any negligent or unlawful act or omission or willful misconduct of such PA Party, its employees, servants or persons for whom it is in law responsible (in respect of which such PA Parties shall indemnify the Independent Certifier, as referred to in Section K1 of this Independent Certifier Agreement); or

(b) to any debt, cost, expense, claim or demand for which insurance proceeds are recoverable by such PA Party.

K2.3 This indemnity shall survive the termination of this Independent Certifier Agreement.

### **K3. Conduct of Claims**

K3.1 Claims made by a third person against a party having, or claiming to have, the benefit of an indemnity pursuant to this Independent Certifier Agreement shall be conducted in accordance with the conduct of claims procedure described in Appendix D – Conduct of Claims to this Independent Certifier Agreement.

## **SECTION L GENERAL**

### **L1. Entire Agreement**

L1.1 Except where provided otherwise in this Independent Certifier Agreement, this Independent Certifier Agreement constitutes the entire agreement between the parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings, whether oral, written, express or implied, concerning the subject matter of this Independent Certifier Agreement.

### **L2. Negation of Employment**

L2.1 The Independent Certifier, its officers, directors, members, employees, servants and agents and any other persons engaged by the Independent Certifier in the performance of the Certification Services will not by virtue of this Independent Certifier Agreement or the performance of the Certification Services become in the service or employment of the PA Parties for any purpose.

L2.2 The Independent Certifier will be responsible for all matters requisite as employer or otherwise in relation to such officers, directors, members, employees, servants and agents and other persons who are engaged by the Independent Certifier.

**L3. Waiver**

- L3.1 No waiver made or given by a party under or in connection with this Independent Certifier Agreement shall be binding or effective unless the waiver is in writing, signed by an authorized representative of the party giving such waiver, and delivered by such party to the other parties. No waiver made with respect to any right, power or remedy in one instance will be deemed to be a waiver with respect to any other instance involving the exercise of such right, power, or remedy or with respect to any other right, power, or remedy.
- L3.2 Failure by any party to exercise any of its rights, powers or remedies hereunder or its delay to do so shall not constitute a waiver of those rights, powers or remedies. The single or partial exercise of a right, power or remedy shall not prevent its subsequent exercise or the exercise of any other right, power or remedy.

**L4. Notices**

- L4.1 All notices, requests, demands, instructions, certificates, consents and other communications required or permitted under this Independent Certifier Agreement shall be in writing (whether or not “written notice” or “notice in writing” is specifically required by the applicable provision of this Independent Certifier Agreement) and served by sending the same by registered mail or by hand, (in each case, with a copy by electronic transmission), as follows:

If to the City:

The City of Winnipeg  
Winnipeg Transit  
Asset Management Office  
414A Osborne Street  
Winnipeg, MB R3L 2A1

Attn.: Jesse Crowder, P.Eng., Project Manager  
Email: [jcrowder@winnipeg.ca](mailto:jcrowder@winnipeg.ca)

With a copy to:

The City of Winnipeg  
Winnipeg Transit  
Office of the Director  
421 Osborne Street  
Winnipeg, MB R3L 2A2

Attn.: Dave Wardrop, Director  
Email: [dwardrop@winnipeg.ca](mailto:dwardrop@winnipeg.ca)

If to Project Co:

Plenary Roads [REDACTED]  
Address: 400 Burrard Street, Suite 2000,  
Vancouver, BC V6C 3A6

Attn.: Brian Clark, Senior Vice President  
Email: [Brian.Clark@plenarygroup.com](mailto:Brian.Clark@plenarygroup.com)

If to the Independent Certifier: WT Partnership  
First Canadian Place  
100 King Street West, Suite 5600  
Toronto, ON M5X 1C9

Attn. : Philip Nixon  
Email: [philip.nixon@wtpnorthamerica.com](mailto:philip.nixon@wtpnorthamerica.com)

L4.2 Any party to this Independent Certifier Agreement may, from time to time, change any of its contact information set forth in Section L4.1 of this Independent Certifier Agreement by prior notice to the other Parties, and such change shall be effective on the Business Day that next follows the recipient party's receipt of such notice unless a later effective date is given in such notice.

L4.3 Subject to Sections L4.4 and L4.5 of this Independent Certifier Agreement:

- (a) a notice given by registered mail shall be deemed to have been received on the third Business Day after mailing; and
- (b) a notice given by hand delivery shall be deemed to have been received on the day it is delivered.

L4.4 If the party giving the notice knows or ought reasonably to know of difficulties with the postal system which might affect negatively the delivery of mail, any such notice shall not be mailed but shall be made or given by personal delivery in accordance with this Section L4.

L4.5 If any notice delivered by hand is so delivered either on a day that is not a Business Day or on a Business Day after 4:00 p.m. (recipient's local time), then such notice shall be deemed to have been received by such recipient on the next Business Day.

## **L5. Transfer and Assignment**

L5.1 The Independent Certifier:

- (a) must not assign, transfer, mortgage, charge or encumber any right or obligation under this Independent Certifier Agreement without the prior written consent of the PA Parties, which each PA Party may give or withhold in its absolute discretion; and
- (b) agrees that any assignment, transfer, mortgage, charge or encumbrance will not operate to release or discharge the Independent Certifier from any obligation or liability under this Independent Certifier Agreement.

L5.2 For the purposes of this Section L5, an assignment will be deemed to have occurred where there is a Change in Control of the Independent Certifier after the date of this Independent Certifier Agreement.

L5.3 Each of the PA Parties may assign, transfer, mortgage, charge or encumber any right or obligation under this Independent Certifier Agreement in accordance with the terms of the Project Agreement.

## **L6. Governing Laws and Jurisdictions**

- L6.1 This Independent Certifier Agreement shall be governed by and construed in accordance with the laws of Manitoba and the laws of Canada applicable therein and shall be treated in all respects as a Manitoba contract, without regard to conflict of laws principles.
- L6.2 The PA Parties and the Independent Certifier agree that the courts of the Province of Manitoba and all courts competent to hear appeals therefrom shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Independent Certifier Agreement and hereby irrevocably attorn to the exclusive jurisdiction of such courts.

## **L7. Confidentiality**

- L7.1 The Independent Certifier must ensure that:
- (a) neither it nor any of its officers, directors, members, employees, servants and agents disclose, or otherwise make public, any Contract Material or any other information or material acquired in connection with or during the performance of the Certification Services without prior written approval of the PA Parties; and
  - (b) no Contract Material is used, copied, supplied or reproduced for any purpose other than for the performance of the Certification Services under this Independent Certifier Agreement.
- L7.2 The PA Parties may at any time require the Independent Certifier to give and to arrange for its officers, directors, members, employees, servants and agents engaged in the performance of the Certification Services to give written undertakings, in the form of confidentiality agreements on terms required by the PA Parties, relating to the non-disclosure of confidential information, in which case the Independent Certifier must promptly arrange for such agreements to be made.

## **L8. Contract Material**

- L8.1 The PA Parties and the Independent Certifier agree that the Independent Certifier does not and will not have any rights, including any Intellectual Property, in any Contract Material provided to the Independent Certifier or created or required to be created by either PA Party.
- L8.2 As between the PA Parties and the Independent Certifier, all title and ownership, including all Intellectual Property, in and to the Contract Material created or required to be created by the Independent Certifier as part of, or for the purposes of performing the Certification Services, is hereby assigned jointly to the PA Parties on creation, or where such title, ownership and Intellectual Property cannot be assigned before creation of the Contract Material, it will be assigned to the PA Parties on creation. In addition, to the extent that copyright may subsist in such Contract Material so created by the Independent Certifier, the Independent Certifier hereby waives all past, present and future moral rights therein and the Independent Certifier shall ensure that any agent or employee of Independent Certifier shall have waived all such moral rights. The PA

Parties acknowledge and agree that as between the PA Parties, title, ownership and other rights to the foregoing shall be governed by the Project Agreement.

- L8.3 The Independent Certifier will do all such things and execute all such documents as reasonably requested by either of the PA Parties in order to confirm or perfect the assignment of Intellectual Property in the Contract Material referred to in Section L8.2 of this Independent Certifier Agreement.

#### **L9. Public Disclosure of Project Agreement and Project Information**

- L9.1 The PA Parties and the Independent Certifier acknowledge and agree that this Independent Certifier Agreement, including any appendices hereto, may be made available upon request to the City under FIPPA, subject to the applicable provisions of FIPPA.

- L9.2 The Independent Certifier agrees that the City will be at liberty to make public disclosure of this Independent Certifier Agreement, excepting only any appendices or portions thereof that the Independent Certifier has, prior to signing of this Independent Certifier Agreement, established to the satisfaction of the City, acting reasonably, would be exempted from disclosure under the provisions of FIPPA with respect to the governing business interests of third parties.

- L9.3 Notwithstanding Section L9.2, where a compelling public interest in the disclosure of the information clearly outweighs the public interest in limiting the disclosure of the information supplied by the Independent Certifier, the Independent Certifier acknowledges and agrees that the City may disclose such information.

#### **L10. Amendment**

- L10.1 This Independent Certifier Agreement may not be varied, amended or supplemented except by an agreement in writing signed by duly authorized representatives of the PA Parties and the Independent Certifier and stating on its face that it is intended to be an amendment, restatement or other modification, as the case may be, to this Independent Certifier Agreement.

#### **L11. Severability**

- L11.1 Each provision of this Independent Certifier Agreement shall be valid and enforceable to the fullest extent permitted by law. If the courts of a competent jurisdiction shall declare any provision of this Independent Certifier Agreement invalid, unenforceable or illegal, such provision may be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Independent Certifier Agreement. If any such provision of this Independent Certifier Agreement is invalid, unenforceable or illegal, the parties shall, acting in good faith, promptly negotiate new provisions to eliminate such invalidity, unenforceability or illegality and to restore this Independent Certifier Agreement as near as possible to its original intent and effect.

**L12. Enurement**

L12.1 This Independent Certifier Agreement shall enure to the benefit of, and be binding on, each of the parties and their respective successors and permitted transferees and assigns.

**L13. Counterparts**

L13.1 This Independent Certifier Agreement may be executed in counterparts, in which case (i) the counterparts together shall constitute one agreement, and (ii) communication of execution by Portable Document Format (PDF) transmission shall constitute good delivery.

**IN WITNESS WHEREOF** the parties have executed this Independent Certifier Agreement as of the date first above written.

**THE CITY OF WINNIPEG**

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

Name: Brian Bowman, J.D, B.A. (Adv), CPA  
(Hon.), CGA (Hon)

Title: Mayor

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

Name: Richard Kachur

Title: City Clerk

We have authority to bind the City

Approved as to Financial Details:

Approved:

\_\_\_\_\_  
Michael Ruta, FCA  
Chief Financial Officer

\_\_\_\_\_  
Douglas D. McNeil, P.Eng.  
Chief Administrative Officer

Certified as to Contract Details:

Certified as to Contract Details:

\_\_\_\_\_  
Dave Wardrop, CPA, CMA, P.Eng.  
Director of Transit

\_\_\_\_\_  
Lester Deane, P.Eng.  
Director of Public Works

Reviewed as to Business Terms:

Reviewed as to Business Terms:

\_\_\_\_\_  
Scott Payne  
Project Manager  
Manager, Asset Management Office  
Winnipeg Transit

\_\_\_\_\_  
Brad Neirinck, P.Eng.  
Manager of Engineering  
Public Works Department

Legally Reviewed and Certified as to Form:

\_\_\_\_\_  
Lisa R. Rowswell, Solicitor  
for Director of Legal Services and City Solicitor

**PLENARY ROADS** [REDACTED]  
[REDACTED]  
[REDACTED]

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

Name:

Title:

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

Name:

Title:

We have authority to bind the corporation.



PCL [REDACTED]  
[REDACTED]  
[REDACTED]

Per: \_\_\_\_\_  
Name: Lee Clayton  
Title: Director

I have authority to bind the corporation.

**WTP PROPERTY CONSULTANTS LTD.**

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

Name: Philip Nixon

Title: Director

I have authority to bind the corporation.

## APPENDIX A

### CERTIFICATION SERVICES

Without limiting the other provisions of this Independent Certifier Agreement and the Project Agreement, the Independent Certifier shall provide the following:

1. Receive and monitor drawings and documents related to the development of the design as necessary for the Independent Certifier to be informed as to the progress of the Design and Construction and to provide an opinion in the event of a Dispute related to the development of the design.
2. Receive and monitor progress reports as necessary for the Independent Certifier to be informed as to the progress of the Design and Construction.
3. Review information relating to Relief Events.
4. Review information relating to Change Orders, Change Order Confirmations, Change Order Directives and claims as necessary for the Independent Certifier to be informed as to the changes in scope, time and compensation.
5. In accordance with Section V1.8 of the Project Agreement, attend meetings and participate, as necessary, in the activities of the Design and Construction Committee.
6. Prior to any certification, consider the views and comments of both Project Co and the City in relation to the satisfaction of the conditions for certification.
7. Conduct periodic visual inspections of the Design and Construction as necessary for the Independent Certifier to complete the Certification Services.
8. Review relevant documentation provided to the Independent Certifier pursuant to the Project Agreement.
9. Upon receipt of notice from Project Co requesting the issuance of a Substantial Completion Certificate or Final Completion Certificate, consider such request and, within the time period set out in the Project Agreement and in accordance with the Project Agreement, either:
  - (a) issue the applicable certificate; or
  - (b) issue a report detailing the matters that the Independent Certifier considers are required to be performed prior to issuing the applicable certificate.
10. Upon notice from Project Co that the matters required to be performed prior to issuing the applicable certificate have been completed, re-inspect the Design and Construction or re-consider the matters specified to be performed, and repeat the procedures in Section 6 of this Appendix A until the issuance of the applicable certificate.
11. Prepare, in consultation with Project Co and the City, as soon as reasonably practicable and, in any event within, the time period specified in Section G3.1 of the Project Agreement, the

Deficiency List, which Deficiency List will include an estimate of the cost and the time for rectifying the deficiencies and a schedule for the completion and rectification of the deficiencies.

12. After Substantial Completion, reconcile Project Co invoices for expenditure recovery against the budgets of the City.
13. Provide any determinations contemplated in the Project Agreement, which determinations may be subject to final resolution between the PA Parties pursuant to Schedule 7 - Dispute Resolution Procedure to the Project Agreement.
14. Participate in and give the PA Parties and their counsel reasonable cooperation, access and assistance (including providing or making available documents, information and witnesses for attendance at hearings and other proceedings) in connection with any proceedings between the PA Parties that relate to the Certification Services.
15. Provide advice on other matters that may arise that both PA Parties may jointly require.

## APPENDIX B

### INDEPENDENT CERTIFIER FEE

#### A. Disbursements and Travel Expenses

Total Fixed Fee and Hourly Rates shall be all inclusive and include all labour and materials, insurance costs, travel, hospitality, food and incidental expenses, disbursements (examples: duplicating delivery and communications) and all other overhead including any fees or other charges required by law.

The Independent Certifier shall not be reimbursed for any travel, hospitality, food or incidental expenses incurred.

#### B. Total Fixed Fee for all Certification Services

The maximum amount that shall be paid by the PA Parties to the Independent Certifier for all Certification Services listed in Appendix A (other than Certification Services identified in items (13), (14) and (15) of Appendix A) shall not exceed, in aggregate, the total fixed fee of \$██████████ (excluding GST and PST) (the “**Total Fixed Fee**”).

The Total Fixed Fee shall be paid monthly in arrears, subject to the PA Parties receiving invoices reflecting the Certification Services which is in form and substance satisfactory to the PA Parties.

#### C. Hourly Rate for Certification Services

The Independent Certifier will be reimbursed for Certification Services identified in items (13), (14) and (15) of Appendix A at the following blended hourly rate for a professional performing Certification Services: \$██████ per hour (excluding GST and PST) (the “**Hourly Rate**”).

The provision of Certification Services identified in item (15) of Appendix A of this Independent Certifier Agreement must be pre-approved by the PA Parties in writing. If the PA Parties decide to proceed with such Certification Services, the Independent Certifier will be reimbursed at the Hourly Rate.

The fee for the Certification Services identified in items (13), (14) and (15) of Appendix A shall be paid monthly in arrears, subject to the PA Parties receiving invoices reflecting the Certification Services which are in form and substance satisfactory to the PA Parties.

**APPENDIX C**

**INDEPENDENT CERTIFIER PERSONNEL**

The following personnel shall be involved in the performance of the Certification Services:

<u>Name</u>	<u>Title</u>

## APPENDIX D

### CONDUCT OF CLAIMS

This Appendix D shall apply to the conduct of claims, made by a third person against a party having, or claiming to have, the benefit of an indemnity pursuant to this Independent Certifier Agreement. The party having, or claiming to have, the benefit of the indemnity is referred to as the “**Beneficiary**” and a party giving the indemnity is referred to as an “**Indemnifier**”.

1. If the Beneficiary receives any notice, demand, letter or other document concerning any claim for which it appears that the Beneficiary is, or may become entitled to, indemnification under Section K of the Independent Certifier Agreement, the Beneficiary shall give written notice to each Indemnifier potentially obligated in respect thereof, as soon as reasonably practicable and in any event within 10 Business Days of receipt of the same. Such notice shall specify with reasonable particularity, to the extent that information is available, the factual basis for the claim and the amount of the claim.

2. Subject to Sections 3, 4 and 5 of this Appendix D, on the giving of such notice by the Beneficiary, where it appears that the Beneficiary is or may be entitled to indemnification from an Indemnifier in respect of all, but not part only, of the liability arising out of the claim, such Indemnifier shall (subject to providing the Beneficiary with a secured indemnity to the Beneficiary’s reasonable satisfaction against all costs and expenses that the Beneficiary may incur by reason of such action) be entitled to dispute the claim in the name of the Beneficiary at the Indemnifier’s own expense and take conduct of any defence, dispute, compromise, or appeal of the claim and of any incidental negotiations. The Beneficiary shall give such Indemnifier all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim. The Beneficiary shall have the right to employ separate counsel in respect of such claim and the reasonable fees and expenses of such counsel shall be to the account of the Indemnifier only where representation of both the Indemnifier and the Beneficiary by common counsel would be inappropriate due to any actual or potential conflicting interests between the Indemnifier and the Beneficiary. If and to the extent that both the City and Project Co are given notice in respect of the same claim, they shall cooperate in the conduct of the claim and give each other such reasonable access and assistance as may be necessary or desirable for purposes of considering, resisting and defending such claim.

3. With respect to any claim conducted by an Indemnifier:

- (a) the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;
- (b) the Indemnifier shall not bring the name or reputation of the Beneficiary into disrepute;
- (c) the Indemnifier shall not pay, compromise or settle such claims without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed;
- (d) the Indemnifier shall not admit liability or fault to any third party without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed; and

- (e) the Indemnifier shall use commercially reasonable efforts to have the Beneficiary named as a beneficiary under any release given by the persons bringing the claim to which this Section 3 relates.

4. The Beneficiary shall be free to pay or settle any such claim on such terms as it thinks fit and without prejudice to its rights and remedies under this Independent Certifier Agreement if:

- (a) none of the Indemnifiers is entitled to take conduct of the claim in accordance with Section 2;
- (b) none of the Indemnifiers notifies the Beneficiary of its intention to take conduct of the relevant claim as soon as reasonably practicable and in any event within 10 Business Days of the notice from the Beneficiary under Section 1 or each of the Indemnifiers notifies the Beneficiary that it does not intend to take conduct of the claim; or
- (c) none of the Indemnifiers complies in any material respect with Section 3.

5. The Beneficiary shall be free at any time to give notice to the applicable Indemnifier that the Beneficiary is retaining or taking over, as the case may be, the conduct of any defence, dispute, compromise or appeal of any claim, or of any incidental negotiations, to which Section 2 applies. For greater certainty, the Independent Certifier acknowledges and agrees that where the City is the Beneficiary, the City may retain or take over such conduct in any matter involving Personal Information (as it is defined in the Project Agreement) or any matter involving public policy. On receipt of such notice the applicable Indemnifier shall promptly take all steps necessary to transfer the conduct of such claim to the Beneficiary, and shall provide to the Beneficiary all relevant documentation and all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim. If the Beneficiary gives any notice pursuant to this Section 5, then the applicable Indemnifier shall be released from any liabilities arising under the applicable indemnity hereunder in respect of the applicable claim.

6. If an Indemnifier pays to the Beneficiary an amount in respect of an indemnity and the Beneficiary subsequently recovers, whether by payment, discount, credit, saving, relief or other benefit or otherwise, a sum or anything else of value (the “**Recovery Amount**”) which is directly referable to the fact, matter, event or circumstances giving rise to the claim under the indemnity, the Beneficiary shall forthwith repay to that Indemnifier whichever is the lesser of:

- (a) an amount equal to the Recovery Amount less any out-of-pocket costs and expenses properly incurred by the Beneficiary in recovering the same; and
- (b) the amount paid to the Beneficiary by such Indemnifier in respect of the claim under the relevant indemnity;

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



7. Any person taking any of the steps contemplated by this Appendix D shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Independent Certifier Agreement.

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