

SCHEDULE 17

CHANGE ORDERS

SECTION A GENERAL

A1. Capitalized Terms

A1.1 Capitalized terms used in this Schedule 17 have the meanings set out in the Project Agreement, unless otherwise expressed in this Schedule 17.

A2. Definitions

A2.1 In this Schedule 17, the following terms have the following meanings:

- (a) **“Change Order”** means a variation, addition, reduction, substitution, modification, deletion, removal or other change, other than one which does not have a material effect, to the whole or any part of the Design and Construction, the OMR Services or the Technical Requirements;
- (b) **“Change Order Confirmation”** means a written confirmation provided by the City of the Estimate, and, if applicable, of any adjustments to Project Co’s Design and Construction Schedule and/or Monthly Payments in Schedule 14 - Payment Mechanism;
- (c) **“Change Order Directive”** means a written instruction and description of a proposed Change Order, designated as a “Change Order Directive” and signed by the City, directing Project Co to immediately proceed with the work associated with the Change Order;
- (d) **“Change Order Enquiry”** means a written notice and description of a proposed Change Order including where applicable the method of procurement for the Change Order;
- (e) **“Construction Equipment Cost”** means the cost of use of rented or owned construction equipment, including the cost of loading, transporting, unloading, erecting, maintaining, dismantling and removing equipment at the rates under an equipment rates schedule approved in writing by the City prior to the commencement of work or procurement associated with the Change Order, or in the absence of such a rate schedule, actual cost of invoices by an arm’s length third party;
- (f) **“Design Cost”** means the cost of design work required in connection with a Change Order including consultant fees and associated expenditures at rates under a rate schedule approved in writing by the City prior to the commencement of work or procurement associated with the Change Order, or in the absence of such a rate schedule, actual cost of invoices for design work by an arm’s length third party;
- (g) **“Direct Labour Cost”** means the base wage costs of employees under a wage schedule approved in writing by the City prior to the commencement of work or procurement associated with the Change Order, or in the absence of such a wage schedule, the salaries or wages paid under the applicable collective

agreement, or in the absence of any collective agreement, the actual cost of salaries and wages, excluding Payroll Burden Cost and all superintendent's or foreman's wages or other personnel responsible for supervision of the work;

- (h) **“Dispute”** has the meaning given in Section C3.7 of this Schedule 17;
- (i) **“Estimate”** means a detailed breakdown, estimate and other information attributable to a Change Order prepared by Project Co in accordance with and meeting the requirements of Section C3 of this Schedule 17;
- (j) **“Materials Cost”** means the cost of materials, supplies, small equipment and tools (excepting such small equipment and tools owned by personnel), including the cost of transporting, unloading, erecting, maintaining, dismantling and removing same, less any rebates, refunds, returns from sale of surplus materials and supplies and trade discounts (other than prompt payment discounts);
- (k) **“Overhead Cost”** means:
 - (i) in respect of Change Orders issued during the Construction Period, the costs of Project Co, subcontractors and sub-subcontractors performing the work attributable to a Change Order related to:
 - (A) operation and maintenance of head offices, branch offices, and site offices;
 - (B) administration at head offices, branch offices, and site offices;
 - (C) general management, legal, audit, and accounting services;
 - (D) procurement administration;
 - (E) financing and other bank charges;
 - (F) bonding and insurance;
 - (G) salaries and other compensation of off-site personnel;
 - (H) salaries and other compensation of on-site superintendents and other supervisory personnel;
 - (I) planning, estimating, and scheduling of work;
 - (J) expendable and non-expendable small tools not owned by personnel, including maintenance thereof, and consumables;
 - (K) recruitment and training of on-site staff; and
 - (L) other costs of a similar nature not included with the Total Cost of Materials and Labour; and
 - (ii) in respect of Change Orders issued during the OMR Period, the costs of Project Co, subcontractors and sub-subcontractors performing the work

attributed to a Change Order related to the items listed in subclauses (A) to (E), (G) and (I) to (L) above;

- (l) **“Own Forces Work”** has the meaning given in Section D4.1(a) of this Schedule 17;
- (m) **“Payroll Burden Cost”** means the statutory charges and benefits costs additional to Direct Labour Cost and the payments made to or on behalf of the employees for holiday pay, Workers’ Compensation Board assessments, Employment Insurance and Canada Pension Plan payments;
- (n) **“Subcontractor Work”** has the meaning given in Section D4.1(b) of this Schedule 17;
- (o) **“Temporary Work Cost”** means the cost of temporary structures, facilities, services, controls, and other temporary items used in conjunction with the performance of the work associated with a Change Order, including maintenance, dismantling and removal, less any residual value after dismantling and removal;
- (p) **“Third Party Input”** has the meaning given in Section C2.1 of this Schedule 17;
- (q) **“Total Cost of Materials and Labour”** means the sum of costs directly related to and necessarily and properly incurred by Project Co, subcontractors and sub-subcontractors in performing the work attributed to a Change Order, including:
 - (i) Materials Cost;
 - (ii) Total Labour Cost;
 - (iii) Temporary Work Cost;
 - (iv) Construction Equipment Cost;
 - (v) Design Cost; and
 - (vi) in respect only of Change Orders issued during the OMR Period, bonding and insurance and salaries and other compensation of on-site superintendents and other supervisory personnel,but excluding Overhead Cost and profit; and
- (r) **“Total Labour Cost”** means the sum of Direct Labour Cost and Payroll Burden Cost.

SECTION B GENERAL PROVISIONS

B1. Change Order

B1.1 Subject to the provisions of this Schedule 17 and without invalidating the Project Agreement, the City may from time to time propose or require Project Co to carry out

and implement a Change Order. Project Co shall not be entitled to any payment, compensation or extension of time for a Change Order except in accordance with the Project Agreement and this Schedule 17. A Change Order shall not be regarded as confirming an extension to the Scheduled Substantial Completion Date unless expressly stipulated. If the Parties cannot agree on whether a matter is a Change Order, then:

- (a) if such disagreement is during the Construction Period, the disagreement shall be submitted to the Independent Certifier for recommendation, and if either Party does not agree with the Independent Certifier's recommendation, the disagreement shall be determined in accordance with the Dispute Resolution Procedure; or
- (b) if such disagreement is during the OMR Period, the disagreement shall be determined in accordance with the Dispute Resolution Procedure.

B2. Valuation and Payments for Reductions or Avoided Costs

- B2.1 If a Change Order involves any reduction in the Project and results in net savings in costs (in the context of a reduction in the Design and Construction taking into consideration, without limitation, to any reasonable make whole premiums, hedging or other breakage costs, or prepayment fees and all reasonable redemption implementation costs reasonably incurred by Project Co as a result of any adjustments to debt service payments that are directly attributable and limited to the reduction in the Project) to Project Co for completing the Project, then the value of all such savings shall be reflected in a lump sum payment to the City or in adjustments to the Capital Payments, the OMR Payments and/or the Substantial Completion Payment to the extent as determined by the Parties, acting reasonably.
- B2.2 Project Co shall not be entitled to claim for any losses, costs or damages for fixed overhead or profit due to the reduction, deletion or removal of any part of the Project, except to the extent that any of such amounts would have been incurred by Project Co and included in the Capital Payments, the OMR Payments and/or the Substantial Completion Payment payable by the City after the date on which any part of the Project is reduced, deleted or removed.

SECTION C CHANGE ORDER ENQUIRY PROCESS

C1. Initiating a Change Order Enquiry

- C1.1 If the City proposes or requires a Change Order, it shall deliver to Project Co a Change Order Enquiry. The Change Order Enquiry shall describe the proposed Change Order with sufficient detail to enable Project Co to prepare an Estimate.

C2. Project Co's Delivery of Estimate

- C2.1 As soon as practicable and in any event not more than 15 Business Days after receipt of a Change Order Enquiry, or such longer period as the Parties acting reasonably mutually agree, Project Co shall deliver to the City an Estimate prepared in accordance with and meeting the requirements of Section C3 of this Schedule 17. If Project Co is of the reasonable opinion that the accuracy of the Estimate will benefit from certain third party design work or third party detailed cost estimating (excluding design work or detailed cost estimating done by the subcontractors listed in Schedule 6 –

Subcontractors and Key Individuals) (the “**Third Party Input**”), Project Co may propose to the City that the Third Party Input be arranged by Project Co at the City’s expense. If the City gives its written agreement to such proposal, which written agreement may be expressly subject to any terms and conditions that the City deems appropriate, then such Third Party Input expenses shall be paid by the City whether or not the Change Order Enquiry is ultimately withdrawn, or deemed to have been withdrawn, by the City. In deciding to give its written agreement, the City shall give consideration to the reasonableness of the Third Party Input expenses and the reasonableness of the assurances given by Project Co that the sum of the Estimate with the Third Party Input plus the Third Party Input expenses may be materially less than an Estimate without the Third Party Input.

C3. Estimate Requirements

C3.1 The Estimate shall include such of the following information as is applicable, sufficient to demonstrate to the City’s reasonable satisfaction:

- (a) the steps Project Co will take to implement the Change Order, in such detail as is reasonable and appropriate in all the circumstances;
- (b) any impact on Substantial Completion and any impact on Project Co’s Design and Construction Schedule (failure to provide this information with the Estimate will disallow Project Co from claiming compensation from the City for delays to the Scheduled Substantial Completion Date from the Change Order);
- (c) an estimate of and explanation for the reasonable incremental financing costs and reasonable breakage costs or make whole premiums on financing;
- (d) any impact on Project Co’s ability to perform the OMR Services including any impact on the Monthly Payments;
- (e) any subcontractors required in addition to or in substitution for those listed in Schedule 6 – Subcontractors and Key Individuals;
- (f) the estimated Total Cost of Materials and Labour, Overhead Cost and profit attributable to the Change Order;
- (g) any permits that are required to be obtained or amended attributable to the Change Order, and the estimated time for obtaining or amending same;
- (h) the proposed methods of certification of any Technical Requirements required by the Change Order if not currently contemplated within the provisions of the Project Agreement; and
- (i) any other impact of the Change Order on the Project Agreement,

in each case, together with such supporting information and justification as is reasonably required.

C3.2 In preparing an Estimate, Project Co shall include sufficient information to demonstrate that:

- (a) Project Co has used commercially reasonable efforts, including the use of invitational tenders or competitive tenders if appropriate or required, to oblige its subcontractors to minimize any increase in costs and to maximize any reduction in costs;
 - (b) the full amount of any and all expenditures that have been reduced or avoided have been taken into account and applied in total to reduce the amount of all Change Order costs;
 - (c) Project Co has mitigated or will mitigate the impact of the Change Order, including on Project Co's Design and Construction Schedule for completion of the Project and the performance of the OMR Services;
 - (d) in considering the impact of the Change Order on the Monthly Payments, if applicable, Project Co has considered, where the Change Order will increase the OMR Services or the OMR Requirements, the Total Cost of Materials and Labour attributable to such increase, including anticipated renewals;
 - (e) Project Co will perform all work associated with a Change Order in accordance with the scheduling requirements with respect to Project Co's access to the Lands described in Schedule 18 - Technical Requirements, if applicable; and
 - (f) Project Co is in compliance with all Applicable Law with respect to invitational tenders, quotations or competitive tenders.
- C3.3 Project Co shall use commercially reasonable efforts to obtain the best value for money when procuring any work, services, supplies, materials or equipment required by the Change Order and shall use commercially reasonable efforts to comply with prevailing Good Industry Practice in relation to any such procurement to a standard no less than Project Co would apply if all costs incurred were to its own account.
- C3.4 As soon as practicable, and in any event not more than 15 Business Days after the City receives an Estimate, including any consequential changes to the Estimate resulting from a modification, Project Co and the City shall discuss and seek to agree on the Estimate and, if applicable, an adjustment to Project Co's Design and Construction Schedule or the Monthly Payments in Schedule 14 – Payment Mechanism.
- C3.5 If the City would be required by Applicable Law to require Project Co to seek invitational tenders or to competitively tender any contract in relation to the proposed Change Order, then the City may include in the Change Order Enquiry a requirement that Project Co seek and evaluate invitational tenders or quotations, or seek and evaluate competitive tenders, for the proposed Change Order in preparing the Estimate.
- C3.6 The City may modify a Change Order Enquiry in writing, at any time prior to the agreement between the Parties referred to in (d), above, in which case Project Co shall, as soon as practicable and in any event not more than 10 Business Days after receipt of such modification or such longer period as the Parties acting reasonably mutually agree, notify the City in writing of any consequential changes to the Estimate and, if applicable, to an adjustment to Project Co's Design and Construction Schedule or the Monthly Payments in Schedule 14 - Payment Mechanism.

C3.7 If the Parties cannot agree on an Estimate provided pursuant to a Change Order Enquiry, and, if applicable, an adjustment to Project Co's Design and Construction Schedule or the Monthly Payments in Schedule 14 - Payment Mechanism (a "**Dispute**"), then:

- (a) in the case of such a Dispute on or before Final Completion, the Dispute shall be submitted to the Independent Certifier for recommendation, and if either Party does not agree with the Independent Certifier's recommendation the Dispute shall be determined in accordance with the Dispute Resolution Procedure; or
- (b) in the case of such a Dispute after Final Completion, the Dispute shall be determined in accordance with the Dispute Resolution Procedure.

C4. Change Order Confirmation

C4.1 As soon as practicable, and in any event not more than 10 Business Days (unless an extension is agreed to by Project Co, acting reasonably) after the date the Estimate, and, if applicable, an adjustment to Project Co's Design and Construction Schedule or the Monthly Payments in Schedule 14 - Payment Mechanism, were agreed to, the City shall either:

- (a) issue a Change Order Confirmation; or
- (b) withdraw the Change Order Enquiry by written notice to Project Co.

C4.2 If the City does not issue a Change Order Confirmation within 10 Business Days (or such extended period as may have been agreed to) after the date the Estimate and, if applicable, an adjustment to Project Co's Design and Construction Schedule or the Monthly Payments in Schedule 14 - Payment Mechanism, were agreed to, then the Change Order Enquiry shall be deemed to have been withdrawn.

C4.3 If a Change Order Confirmation is not issued in respect of any Change Order Enquiry for which Project Co has used commercially reasonable efforts to produce a fair and reasonable Estimate, the City shall reimburse Project Co for all direct costs reasonably and properly incurred by Project Co in connection with preparing the Estimate. Project Co shall promptly provide the City with any information or documentation requested by the City to substantiate Project Co's costs.

C4.4 Upon the Change Order Confirmation being issued:

- (a) the Parties shall as soon as practicable thereafter do all acts and execute all documents necessary to implement the Change Order, including provision for payment to Project Co in the amount set out in the Estimate, and, if applicable, implementation of an adjustment to Project Co's Design and Construction Schedule or the Monthly Payments in Schedule 14 - Payment Mechanism; and
- (b) Project Co shall as soon as practicable thereafter implement the Change Order as provided for in the Change Order Confirmation.

C5. Project Co Grounds for Objection

- C5.1 Project Co may only refuse to deliver an Estimate if Project Co can demonstrate within the period for delivery of an Estimate that:
- (a) the proposed Change Order would have a material and adverse effect on the performance of the Design and Construction or the OMR Services (except those aspects of the Design and Construction or OMR Services which have been specified as requiring amendment in the Change Order Enquiry) in a manner not compensated pursuant to this Schedule 17;
 - (b) the implementation of the Change Order would be a departure from Good Industry Practice;
 - (c) the proposed Change Order would, if implemented, result in a change in the essential nature of the New Infrastructure;
 - (d) the implementation of the proposed Change Order would be contrary to Applicable law; or
 - (e) the proposed Change Order would, if implemented, render the insurance policies required under this Project Agreement void or voidable, unless the City agrees to provide replacement security satisfactory to Project Co, acting reasonably.
- C5.2 If Project Co refuses to provide an Estimate on the grounds set out in Section C5.1, Project Co shall, within the period for delivery of an Estimate specified or agreed pursuant to Section C2.1, deliver to the City a written notice specifying the grounds upon which Project Co rejects the Change Order and the details thereof.

SECTION D CHANGE ORDER DIRECTIVE PROCESS

D1. Initiating a Change Order Directive

- D1.1 At any time and from time to time (including whether or not the City has made a Change Order Enquiry, or Project Co fails to provide an Estimate, or an Estimate is not promptly agreed upon by the Parties, or there is a Dispute), if the City wishes to proceed immediately with a Change Order the City shall issue a Change Order Directive. The Change Order Directive shall describe the Change Order with sufficient detail to enable Project Co to prepare an Estimate and to proceed immediately with the work associated with the Change Order.
- D1.2 If the City would be required by Applicable Law to require Project Co to seek invitational tenders or to competitively tender any contract in relation to the proposed Change Order, then the City may include in the Change Order Directive the requirement that Project Co must seek and evaluate invitational tenders or quotations, or seek and evaluate competitive tenders, in relation to the Change Order.

D2. Proceeding with Work

- D2.1 Project Co will proceed to immediately implement the work associated with the Change Order including the appropriate method of procurement, if applicable, upon receipt of the Change Order Directive.

D3. Estimate and Change Order Confirmation

D3.1 If Project Co has not previously done so, Project Co shall:

- (a) as soon as practicable and in any event not more than 15 Business Days after the issuance of the Change Order Directive, or such longer period as the Parties acting reasonably mutually agree, provide an Estimate to the City prepared in accordance with and meeting the requirements of Section C3 of this Schedule 17;
- (b) as soon as practicable, and in any event not more than 15 Business Days after the City receives an Estimate or such longer period as the Parties acting reasonably mutually agree, Project Co and the City shall discuss and seek to agree on the Estimate and, if applicable, an adjustment to Project Co's Design and Construction Schedule or the Monthly Payments in Schedule 14 - Payment Mechanism;
- (c) as soon as practicable, and in any event not more than 10 Business Days (unless an extension is agreed to by Project Co, acting reasonably) after the date the Estimate was agreed to, the City shall issue a Change Order Confirmation; and
- (d) as soon as practicable after the City has issued the Change Order Confirmation the Parties will do all acts and execute all documents necessary to further the Change Order, including provision for payment to Project Co in the amount set out in the Estimate and, if applicable, implementation of an adjustment to Project Co's Design and Construction Schedule or the Monthly Payments in Schedule 14 - Payment Mechanism.

D3.2 Pending issuance of the Change Order Confirmation, the undisputed value of the work performed by Project Co pursuant to the Change Order Directive, as the Parties acting reasonably mutually agree, will be invoiced by Project Co and will be paid by the City monthly on a progress basis and all such amounts paid will be accounted for in determining the Total Cost of Materials and Labour under Section D4 of this Schedule 17.

D4. Valuation of Change Order Directive

D4.1 If the City has issued a Change Order Directive and the City and Project Co have not been able to reach agreement on the Estimate and, if applicable, an adjustment to Project Co's Design and Construction Schedule or the Monthly Payments in Schedule 14 - Payment Mechanism, then adjustments to Project Co's Design and Construction Schedule or the Monthly Payments in Schedule 14 shall be determined by the Dispute Resolution Procedure, applying the criteria set out in Section C3.2(d) of this Schedule 17 and having regard to the manner in which value and payment are determined in Sections D4.1(a) and D4.1(b) of this Schedule 17, and the work attributable to the Change Order shall be valued and payment to Project Co shall be determined as follows:

- (a) for the work associated with the Change Order Directive that is to be performed by Project Co's own forces or by the subcontractors identified in Schedule 6 – Subcontractors and Key Individuals, that portion of the work associated with the

Change Order (the “**Own Forces Work**”) shall be valued as the Total Cost of Materials and Labour for the Own Forces Work, plus:

28(1)(c)(i)(ii)(iii) (i) for Overhead Costs, an additional ■% of the Total Cost of Materials and Labour for the Own Forces Work; and

28(1)(c)(i)(ii)(iii) (ii) for profit, an additional ■% of the sum of the Total Cost of Materials and Labour for the Own Forces Work and the amount determined in accordance with Section D4.1(a)(i) of this Schedule 17.

(b) for the work associated with the Change Order Directive that is to be performed by a subcontractor of Project Co (other than the subcontractors identified in Schedule 6 – Subcontractors and Key Individuals) pursuant to a contract between Project Co and such subcontractor, that portion of the work associated with the Change Order (the “**Subcontractor Work**”) shall be valued as the Total Cost of Materials and Labour for the Subcontractor Work, plus:

28(1)(c)(i)(ii)(iii) (i) for Overhead Costs of the subcontractors performing the Subcontractor Work, an additional ■% of the Total Cost of Materials and Labour for the Subcontractor Work;

28(1)(c)(i)(ii)(iii) (ii) for profit for the subcontractors performing the Subcontractor Work, an additional ■% of the sum of the Total Cost of Materials and Labour for the Subcontractor Work and the amount determined in accordance with Section D4.1(b)(i) of this Schedule 17; and

28(1)(c)(i)(ii)(iii) (iii) for Project Co’s work (including without limitation Overhead Costs and profit) on the Subcontractor Work, an amount equal to ■% of the sum of the Total Cost of Materials and Labour for the Subcontractor Work and the amounts determined in accordance with Section D4.1(b)(i) and (ii) of this Schedule 17.

(c) notwithstanding Section D4.1(b) of this Schedule 17, if the City has required Project Co to seek and evaluate competitive tenders for the work associated with the Change Order Directive, then for the work associated with the Change Order Directive that is to be performed by a subcontractor of Project Co (other than the subcontractors identified in Schedule 6 - Subcontractors and Key Individuals) pursuant to a contract between Project Co and such subcontractor arising from the awarding of the competitive tender, that portion of the Change Order corresponding to the Subcontractor Work shall be valued as the amount of the accepted bid or tender plus, for Project Co’s work (including without limitation direct costs, indirect costs, overhead and profit) on the Subcontractor Work, an amount equal to ■% of the amount of the accepted bid or tender.