

## 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 Design Build 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 Confirmation”** means the confirmation provided by the City of:
  - (i) the Estimate, and, if applicable, of any adjustments to the Project Schedule and/or Milestone Payments in Schedule 9 – Milestone Criteria and Milestone Payments; or
  - (ii) the Change Order Enquiry, if the proposed Change Order is not expected to result in a change to the Contract Price, Milestone Payments, the Project Schedule, or the Scheduled Substantial Completion Date;
- (b) **“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 Design Builder to immediately proceed with the work associated and which will be subsequently formalized with a Change Order;
- (c) **“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;
- (d) **“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
- (e) **“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;

- (f) **“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, Overhead Cost, and all superintendent's or foreman's wages or other personnel responsible for supervision of the work;
- (g) **“Estimate”** means a detailed breakdown, estimate and other information attributable to a Change Order prepared by Design Builder in accordance with and meeting the requirements of Section C3.4 of this Schedule 17;
- (h) **“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);
- (i) **“Overhead Cost”** means:
  - (i) the costs of Design Builder, 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;
  - (L) administration or oversight of work by subcontractor of Design Builder not identified in Schedule 6 – Subcontractors and Key Individuals; and
  - (M) other costs of a similar nature not included with the Total Cost of Materials and Labour;
- (j) “**Own Forces Work**” has the meaning given in Section E1.1(a) of this Schedule 17;
- (k) “**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;
- (l) “**Subcontractor Work**” has the meaning given in Section E1.1(b) of this Schedule 17;
- (m) “**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;
- (n) “**Third Party Input**” has the meaning given in Section C3.2 of this Schedule 17;
- (o) “**Total Cost of Materials and Labour**” means the sum of costs directly related to and necessarily and properly incurred by Design Builder, 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; and
  - (v) Design Cost,
- but excluding Overhead Cost and profit; and
- (p) “**Total Labour Cost**” means the sum of Direct Labour Cost and Payroll Burden Cost, exclusive of Overhead Costs, profits, and other markups.

## **SECTION B GENERAL PROVISIONS**

### **B1. Change Order**

B1.1 Subject to the provisions of this Schedule 17 and without invalidating the Design Build Agreement, the City may from time to time propose or require Design Builder to carry out and implement a Change Order. Design Builder shall not be entitled to any payment, compensation or extension of time for a Change Order except in accordance with the Design Build 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, the Parties shall resolve the disagreement in accordance with the process set out in Schedule 7 – Dispute Resolution Procedure.

### **B2. Valuation and Payments for Reductions or Avoided Costs**

B2.1 If a Change Order involves any reduction in the Work and results in net savings in costs to Design Builder 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 Milestone Payments to the extent as determined by the Parties, acting reasonably.

B2.2 Design Builder 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 Design Builder and included in the Milestone Payments 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 as set out in Section G1.1 of the DBA, it will deliver to Design Builder a Change Order Enquiry.

### **C2. Change Order Enquiry Requirements**

C2.1 For a proposed Change Order that is expected to result in a change to the Contract Price, Milestone Payments, the Project Schedule, or the Scheduled Substantial Completion Date, the Change Order Enquiry will:

- (a) describe the proposed Change Order with sufficient detail to enable Design Builder to prepare an Estimate;
- (b) detail Design Build Agreement section additions or deletions;
- (c) indicate the method of adjustment in the Contract Price or Milestone Payments resulting from the Change Order determined by one or more of the following methods:
  - (i) by estimate in a lump sum;

- (ii) by the unit prices and methods of measurement as set out in the Design Build Agreement or subsequently agreed upon; or
- (iii) by the actual cost of the change in Work to the Design Builder plus a fixed fee; and
- (d) indicate the Milestone Payment to which payment for the completion of the Change Order will apply.

C2.2 For a proposed Change Order that is not expected to result in a change to the Contract Price, Milestone Payments, the Project Schedule, or the Scheduled Substantial Completion Date, the Change Order Enquiry will:

- (a) detail Design Build Agreement section additions or deletions;
- (b) indicate to Design Builder in the Change Order Enquiry that the proposed Change Order that is not expected to result in a change to the Contract Price, Milestone Payments, the Project Schedule, or the Scheduled Substantial Completion Date;
- (c) indicate to Design Builder that an Estimate is not required to be delivered to the City; and
- (d) indicate that the process will now proceed to the Change Order Confirmation process in Section F1 SECTION F of this Schedule 17.

C2.3 If the City would be required by Applicable Law to require Design Builder 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 the requirement that Design Builder must seek and evaluate invitational tenders or quotations, or seek and evaluate competitive tenders, in relation to the Change Order.

### **C3. Design Builder's Delivery of Estimate**

C3.1 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, Design Builder shall deliver to the City an Estimate prepared in accordance with and meeting the requirements of Section C3.4 of this Schedule 17.

C3.2 If Design Builder 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**"), Design Builder may propose to the City that the Third Party Input be arranged by Design Builder at the City's expense.

C3.3 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 Design Builder 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.

- C3.4 If the City has issued a Change Order Enquiry and the City and Design Builder have not been able to reach agreement on the Estimate and, if applicable, an adjustment to the Project Schedule or the Milestone Payments in Schedule 9 – Milestone Criteria and Milestone Payments, then adjustments to the Estimate and the Project Schedule, the Parties shall resolve the disagreement in accordance with the process set out in Schedule 7 – Dispute Resolution Procedure, having regard to the manner in which value and payment are determined in Sections E1.1(a) and E1.1(b) of this Schedule 17.

#### **C4. Estimate Requirements**

- C4.1 The Estimate shall include such of the following information as is applicable, sufficient to demonstrate to the City's reasonable satisfaction:
- (a) the steps Design Builder will take to implement the Change Order, in such detail as is reasonable and appropriate in all the circumstances, including a description of the required changes to the Project Management Plan as a result of the impact to the Lands, environment, safety, stakeholders, risk, quality, etc.;
  - (b) any impact on Substantial Completion and any impact on the Project Schedule (failure to provide this information with the Estimate will disallow Design Builder from claiming compensation from the City for delays to the Scheduled Substantial Completion Date from the Change Order);
  - (c) any change to the proposed Milestone Payment to which payment for the completion of the Change Order will apply as provided in the Change Order Enquiry;
  - (d) any subcontractors required in addition to or in substitution for those listed in Schedule 6 – Subcontractors and Key Individuals;
  - (e) the estimated Total Cost of Materials and Labour, Overhead Cost and profit attributable to the Change Order;
    - (i) for clarity, the estimated Total Cost of Materials and Labour shall include an itemized statement with supporting documents from Design Builder Parties reflecting the method of adjustment identified in the Change Order Enquiry set out in Section C2.1(c) identifying each price as 'increases', 'decreases', or 'no change' as applicable including:

- (A) Materials Cost;
  - (B) Total Labour Cost;
  - (C) Temporary Work Cost;
  - (D) Construction Equipment Cost; and
  - (E) Design Cost;
- (f) any permits that are required to be obtained or amended attributable to the Change Order, and the estimated time for obtaining or amending same;
- (g) the proposed methods of certification of any Technical Requirements required by the Change Order if not currently contemplated within the provisions of the Design Build Agreement; and
- (h) any other impact of the Change Order on the Design Build Agreement,
- in each case, together with such supporting information and justification as is reasonably required.

C4.2 In preparing an Estimate, Design Builder shall include sufficient information to demonstrate that:

- (a) Design Builder 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) Design Builder has mitigated or will mitigate the impact of the Change Order, including on the Project Schedule for completion of the Project;
- (d) Design Builder will perform all work associated with a Change Order in accordance with the scheduling requirements with respect to Design Builder's access to the Lands described in Schedule 18 – Technical Requirements, if applicable; and
- (e) Design Builder is in compliance with all Applicable Law with respect to invitational tenders, quotations or competitive tenders.

C4.3 Design Builder 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 Design Builder would apply if all costs incurred were to its own account.

- C4.4 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, Design Builder and the City shall discuss and seek to agree on the Estimate and, if applicable, an adjustment to the Project Schedule and/or the Milestone Payments in Schedule 9 – Milestone Criteria and Milestone Payments.
- C4.5 The City may modify a Change Order Enquiry in writing, at any time prior to the agreement between the Parties referred to in Section C4.1(e) in which case Design Builder 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 the Project Schedule and/or the Milestone Payments in Schedule 9 – Milestone Criteria and Milestone Payments.

**C5. Design Builder Grounds for Objection**

- C5.1 Design Builder may only refuse to deliver an Estimate if Design Builder 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 Work (except those aspects of the Work 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 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 Design Build Agreement void or voidable, unless the City agrees to provide replacement security satisfactory to Design Builder, acting reasonably.
- C5.2 If Design Builder refuses to provide an Estimate on the grounds set out in Section C5.1, Design Builder shall, within the period for delivery of an Estimate specified or agreed pursuant to Section C3.1, deliver to the City a written notice specifying the grounds upon which Design Builder 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 Design Builder 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 Design Builder to prepare an Estimate and to proceed immediately with the work associated with the Change Order.

D1.2 The Change Order Directive will:

- (a) describe the proposed Change Order with sufficient detail to enable Design Builder to prepare an Estimate;
- (b) detail Design Build Agreement section additions or deletions;
- (c) indicate the method of adjustment in the Contract Price or Milestone Payments resulting from the Change Order determined by one or more of the following methods:
  - (i) by estimate in a lump sum;
  - (ii) by the unit prices and methods of measurement as set out in the Design Build Agreement or subsequently agreed upon; and
  - (iii) by the actual cost of the change in Work to the Design Builder plus a fixed fee;
- (d) indicate the Milestone Payment to which payment for the completion of the Change Order will apply.

D1.3 If the City would be required by Applicable Law to require Design Builder 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 Design Builder 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 Design Builder 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. Design Builder Grounds for Objection**

D3.1 Design Builder may only refuse to deliver an Estimate if Design Builder 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 Work (except those aspects of the Work 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 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 Design Build Agreement void or voidable, unless the City agrees to provide replacement security satisfactory to Design Builder, acting reasonably.

D3.2 If Design Builder refuses to provide an Estimate on the grounds set out in Section C5.1, Design Builder shall, within the period for delivery of an Estimate specified or agreed pursuant to Section C3.1, deliver to the City a written notice specifying the grounds upon which Design Builder rejects the Change Order and the details thereof.

### **D4. Design Builder's Delivery of Estimate**

D4.1 If Design Builder has not previously done so, Design Builder 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 C3.4 of this Schedule 17; and
- (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, Design Builder and the City shall discuss and seek to agree on the Estimate and, if applicable, an adjustment to the Project Schedule or the Milestone Payments in Schedule 9 – Milestone Criteria and Milestone Payments.

D4.2 If the City has issued a Change Order Directive and the City and Design Builder have not been able to reach agreement on the Estimate and, if applicable, an adjustment to the Project Schedule or the Milestone Payments in Schedule 9 –

Milestone Criteria and Milestone Payments, then adjustments to the Estimate and the Project Schedule, the Parties shall resolve the disagreement in accordance with the process set out in Schedule 7 – Dispute Resolution Procedure, having regard to the manner in which value and payment are determined in Sections E1.1(a) and E1.1(b) of this Schedule 17.

## **SECTION E VALUATION OF CHANGE ORDER**

- E1.1 The work attributable to the Change Order shall be valued and payment to Design Builder shall be determined as follows:
- (a) for the work associated with the Change Order that was not part of a competitive tender, that portion of the work associated the Change Order (the **“Own Forces Work”**) shall be valued as the Total Cost of Materials and Labour for the Own Forces Work, plus an additional 15% of the Total Cost of Materials and Labour to allow for Overhead Costs and profit for the Own Forces Work; or
  - (b) if the City has required Design Builder to seek and evaluate competitive tenders for the work associated with the Change Order, then for the work associated with the Change Order that is to be performed by a subcontractor of Design Builder not identified in Schedule 6 – Subcontractors and Key Individuals (the **“Subcontractor Work”**) pursuant to a contract between Design Builder 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 Design Builder’s work (including without limitation direct costs, indirect costs, overhead and profit) on the Subcontractor Work, an amount equal to 5% of the amount of the accepted bid or tender.

## **SECTION F CHANGE ORDER CONFIRMATION**

### **F1. Change Order Confirmation**

- F1.1 As soon as practicable, and in any event not more than 10 Business Days (unless an extension is agreed to by Design Builder, acting reasonably):
- (a) after the date the Estimate, and, if applicable, an adjustment to the Project Schedule or the Milestone Payments in Schedule 9 – Milestone Criteria and Milestone Payments, were agreed to; or
  - (b) after the date the City delivers to Design Builder a Change Order Enquiry with details as per Section C2.2,

the City shall either provide a Change Order Confirmation; or withdraw the Change Order Enquiry or Change Order Directive by written notice to Design Builder.

- F1.2 If the City does not provide a Change Order Confirmation within the time frames set out in Section F1.1 then the Change Order Enquiry or Change Order Directive shall be deemed to have been withdrawn.

## **SECTION G ISSUANCE OF CHANGE ORDER**

### **G1. Change Order**

- G1.1 As soon as practicable after the City has provided the Change Order Confirmation, the Parties shall execute the Change Order.
- G1.2 Design Builder shall as soon as practicable thereafter, take all actions necessary to implement the executed Change Order.
- G1.3 A Change Order Confirmation is not a Change Order. For clarity, a Change Order is the only document that amends the Design Build Agreement.