

# Attachment 1

## Independent Certifier Agreement

## SCHEDULE 10

### INDEPENDENT CERTIFIER AGREEMENT

**THIS AGREEMENT** is made as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_

**BETWEEN:**

**THE CITY OF WINNIPEG**

(the “**City**”)

AND:

**[NTD – Design Builder],**

[NTD corporation/partnership formed in Province of \_\_\_\_]

(“**Design Builder**”)

AND:

**[INSERT NAME],**

(the “**Independent Certifier**”)

**WHEREAS:**

A. The City and Design Builder (collectively, the “**Parties**” and each, a “**Party**”) have entered into an agreement on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ to undertake the North End Sewage Treatment Plant (NEWPCC) Upgrade: Headworks Facilities Project, which includes but is not limited to, the design and construction of a new raw sewage pumping station with connections to the interceptor sewers, a new screening and grit removal facility, and a new standby generator facility, all of which Work is to be performed while minimizing impact on the continuing operation of the existing NEWPCC in the city of Winnipeg, 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 “**Design Build Agreement**”).

B. Pursuant to the terms of the Design Build Agreement, the Parties wish to appoint the Independent Certifier, and the Independent Certifier wishes to accept such appointment, to perform certain services in connection with the Design Build Agreement.

C. The 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 Parties and the Independent Certifier herein contained and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the 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 Design Build 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 Design Build 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) **“Contract Material”** means all material:

- (i) provided to the Independent Certifier or created or required to be created by either 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);

(d) **“Design Build Agreement”** has the meaning given in the Recitals;

(e) **“Fee”** means the fees payable by the City and Design Builder 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;

- (f) **“Initial Term”** has the meaning given in Section J1.1(c) of this Independent Certifier Agreement;
- (g) **“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;
- (h) **“Parties”** and **“Party”** have the meaning given in the Recitals; and
- (i) **“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 Parties**

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

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

### **C1. Engagement**

- C1.1 The 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 Work, or for the certifications of the professionals of record.
- C1.3 Neither Party shall, without the prior written consent of the other Party, enter into any separate agreement with the Independent Certifier in connection with the Project, and Design Builder shall ensure that no Design Builder 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 Work pursuant to a Change Order in order to certify any Milestone Payment to Design Builder 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 Parties that it has received a copy of the Design Build 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 Parties in accordance with the terms of the Design Build 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 Design Build Agreement; or
  - (ii) where no times are prescribed, within 10 Calendar Days or such earlier time so as to enable the Parties to perform their respective obligations under the Design Build Agreement; and
- (d) act in accordance with the joint directions of the Parties provided that the directions are not inconsistent with the other terms of this Independent Certifier Agreement or the terms of the Design Build 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 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 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 venture party or agent of either Party;
- (b) other than as expressly set out in this Independent Certifier Agreement or the Design Build Agreement, has no authority to give any directions to a Party or its officers, directors, members, employees, contractors, consultants or agents; and

- (c) has no authority to waive or alter any terms of the Design Build Agreement, nor to discharge or release a party from any of its obligations under the Design Build Agreement unless jointly agreed by the Parties in writing.

## **C6. Knowledge of the 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 Design Build 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 Design Build 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 Parties;
- (b) carefully co-ordinate the Certification Services with the work and services performed by the 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 Parties; and
- (d) provide copies to the Parties of all reports, communications, certificates and other documentation that it provides to either Party in accordance with Appendix E – Document Management of this Independent Certifier Agreement.

**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 an advisor to either of the Parties or any of their respective related entities in respect of the Design Build Agreement (including, but not limited to, acting as a transaction advisor to either 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 Parties immediately in writing of that conflict or risk of conflict and take such steps as may be required by either of the 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 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 Design Build Agreement, including not only the start-up procedures and operator training, but any pre-Milestone, 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, operating as Engineers Geoscientists Manitoba (EGM) 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, but no later than 7 Calendar Days, 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 Work.

**SECTION D ROLE OF THE PARTIES**

**D1. Assistance**

D1.1 The 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 Design Build Agreement, all instructions to the Independent Certifier by the Parties shall be given in writing and accepted or endorsed by both of the Parties.

**D3. Information and Services**

D3.1 The Parties shall make available to the Independent Certifier, as soon as practicable from time to time, all information, documents, schedules and/or look-ahead schedules 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 a Milestone, 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 Parties, then:

- (a) the Independent Certifier must give notice in writing to Design Builder 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) Design Builder 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 Design Builder Representative, the Independent Certifier (and any person authorized by it) may enter and inspect the Lands, the Work 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 Design Builder as to safety and security for the Lands, the Work, or the Infrastructure;
  - (b) not causing unreasonable delay to the carrying out of the Work by reason of its presence on the Lands or the Infrastructure; and
  - (c) not causing any damage to the Lands, the Work or the Infrastructure.

**D6. Parties Not Relieved**

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

**D7. Parties Not Liable**

- D7.1 On no account will a Party be liable to another Party for any act or omission by the Independent Certifier whether under or purportedly under a provision of the Design Build 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 Party against or any obligation or liability of either Party to the other 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 Design Builder Representative;
  - (b) within 14 Calendar Days after the date of this Independent Certifier Agreement, provide such certification quality plan to each of the City Representative and Design Builder Representative;
  - (c) if satisfactory to each of the City Representative and Design Builder Representative, implement such certification quality plan; and

- (d) if not satisfactory to each of the City Representative and Design Builder Representative, within 7 Calendar Days after receiving notice thereof from either Party to that effect, revise and resubmit the certification quality plan to each of the City Representative and Design Builder Representative, and implement it if satisfactory to each of the City Representative and Design Builder 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 Design Builder Representative.

## **SECTION F SUSPENSION**

### **F1. Notice**

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

- (a) if the Independent Certifier fails to comply with its obligations under this Independent Certifier Agreement, immediately by the Parties giving joint notice in writing to the Independent Certifier; or
- (b) in any other case, by the Parties giving 7 Calendar 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 Section I, 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. Recommendation**

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 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) an annual term professional liability insurance policy:
  - (i) in the amount of \$2,000,000 per claim and \$4,000,000 in the aggregate including 30 days written notice of cancellation from an insurer licensed to carry on business in the Province of Manitoba and on terms satisfactory to each of the 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 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 \$2,000,000 per occurrence and in the aggregate, for bodily injury and property damage including 30 days written notice of cancellation and from an insurer licensed to carry on business in the Province of Manitoba and on terms satisfactory to each of the Parties.

G1.2 The Independent Certifier must provide copies of its insurance policies to each of the Parties upon execution of this Independent Certifier Agreement and the commencement of any Renewal Term, and, at least 5 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 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, or provide evidence of employer's liability insurance under Section G1.1(b) above

## **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 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 Party to pay one-half of the Fee to the Independent Certifier is a several obligation, and neither Party shall have any liability in respect of the non-payment by the other Party of any fees or costs payable by such other 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 Parties acknowledge and agree that if any approved amount due and payable by the Parties to the Independent Certifier in excess of \$100,000 is outstanding for more than 60 Calendar Days, the Independent Certifier shall not have any obligation to make any certification under the Design Build 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 Parties constitutes or involves a Certification Services Variation it must:
- (a) within 7 Calendar Days after receiving the direction and before commencing work on the subject matter of the direction, give notice to the Parties that it considers the direction constitutes or involves a Certification Services Variation; and
  - (b) within 21 Calendar 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 Design Builder 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 Parties, any additional fees relating to such external personnel or consultants will be payable by the Parties at the agreed upon amount.

**I4. Certification Services Variation Procedure**

I4.1 The City Representative and Design Builder 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 Parties are considering.

I4.2 Within 7 Calendar Days after the receipt of a “Certification Services Variation Price Request”, the Independent Certifier must provide each of the City Representative and Design Builder 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 Design Builder 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 I1.1(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 Parties and the Independent Certifier or, failing agreement, determined by the City Representative and Design Builder 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 it is executed and continue in full force until the earlier of:

- (a) completion of the Certification Services set forth herein;
- (b) the termination of the Design Build Agreement;
- (c) the 7<sup>th</sup> 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 Parties and the Independent Certifier.

J1.2 The Initial Term may be renewed, in the Parties’ discretion, for up to 5 one-year renewal terms (each, a “Renewal Term”) by the Parties providing written notice to the Independent Certifier not less than 120 Calendar 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 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 7 Calendar 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 Parties may, without prejudice to any other rights of the Parties or either of them, immediately terminate this Independent Certifier Agreement.

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

J4.1 The Parties may, without prejudice to any other rights which the 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 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 Parties may, at any time, jointly terminate this Independent Certifier Agreement upon 30 Calendar Days' written notice to the Independent Certifier. The Parties and the Independent Certifier agree that, notwithstanding the 30 Calendar 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 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 Parties with respect to the transition of the Certification Services to a replacement certifier;
- (b) deliver to the 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 Parties, meet with them and such other persons nominated by them with a view to providing them with sufficient information to enable the 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 J8.1 as at the date of termination (including the right of the 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 Parties and the Independent Certifier under Section G, Section H, Section K, Sections J6, J7, J8 and L8 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. Parties to Save Independent Certifier Harmless**

K1.1 The 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 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 Parties Harmless**

K2.1 The Independent Certifier hereby indemnifies and saves the 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 Party shall not extend:

- (a) to any negligent or unlawful act or omission or willful misconduct of such Party, its employees, servants or persons for whom it is in law responsible (in respect of which such 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 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. Independent Contractor**

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 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. Records**

- L4.1 The Independent Certifier shall, during the Term, as extended, and for a period of 6 years thereafter, maintain in an appropriate form, full accounting and other records in respect of performance by it of its obligations under this Independent Certifier Agreement and keep those records available for inspection by the City (including any representative designated by the City for that purpose), at all reasonable times upon reasonable notice, for the purpose of determining Independent Certifier's compliance with this Independent Certifier Agreement.

**L5. Notices**

- L5.1 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 always by electronic transmission in accordance with Appendix E), as follows:

If to the City:       Address

Attn.:

Email:

With a copy to:     Address

Attn.:

Email:

If to Design Builder:     Address:

Attn.:

Email:

If to the Independent Certifier: Address

Attn.:

Email:

L5.2 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.

L5.3 Subject to Sections L5.4 and L5.5 of this Independent Certifier Agreement:

- (a) a notice given by registered mail shall be deemed to have been received on the 3rd 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.

L5.4 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.

L5.5 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.

## **L6. Transfer and Assignment**

L6.1 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 Parties, which each 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.

L6.2 For the purposes of this Section L6, 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.

L6.3 Each of the Parties may assign, transfer, mortgage, charge or encumber any right or obligation under this Independent Certifier Agreement in accordance with the terms of the Design Build Agreement.

## **L7. Governing Laws and Jurisdictions**

L7.1 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.

L7.2 The 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.

## **L8. Confidentiality**

L8.1 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 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.

L8.2 The 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 Parties, relating to the non-disclosure of confidential information, in which case the Independent Certifier must promptly arrange for such agreements to be made.

## **L9. Contract Material**

L9.1 The 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 Party.

L9.2 As between the 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 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 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 Parties acknowledge and agree that as between the Parties, title, ownership and other rights to the foregoing shall be governed by the Design Build Agreement.

L9.3 The Independent Certifier will do all such things and execute all such documents as reasonably requested by either of the Parties in order to confirm or perfect the assignment of Intellectual Property in the Contract Material referred to in Section L9.2 of this Independent Certifier Agreement.

**L10. Public Disclosure of Design Build Agreement and Project Information**

L10.1 The 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.

L10.2 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.

L10.3 Notwithstanding Section L10.2, 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.

**L11. Amendment**

L11.1 This Independent Certifier Agreement may not be varied, amended or supplemented except by an agreement in writing signed by duly authorized representatives of the 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.

**L12. Severability**

L12.1 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.

**L13. Enurement**

L13.1 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.

**L14. Counterparts**

L14.1 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: \_\_\_\_\_

Title: Chief Administrative Officer

I have authority to bind The City of Winnipeg

Reviewed as to Business terms:

Certified as to Contract Details:

\_\_\_\_\_  
Name:  
Manager Engineering Services

\_\_\_\_\_  
Name:  
Director Water and Waste

Legally Reviewed and Certified as to Form:

\_\_\_\_\_  
Name:

*for* Director of Legal Services and City  
Solicitor

**DESIGN BUILDER**

Per:

Name: \_\_\_\_\_

Title:

Per:

Name: \_\_\_\_\_

Title:

I/We have authority to bind Design Builder

**INDEPENDENT CERTIFIER**

Per:

Name: \_\_\_\_\_

Title:

Per:

Name: \_\_\_\_\_

Title:

I/We have authority to bind Independent Certifier



## APPENDIX A

### CERTIFICATION SERVICES

#### SECTION A CERTIFICATION SERVICES

##### A1. Services

A1.1 Without limiting the other provisions of this Independent Certifier Agreement and the Design Build Agreement, the Independent Certifier shall:

- (a) develop the following templates as contemplated in the Design Build Agreement to be used on the Project, for review by the City and Design Builder, within 20 Business Days after execution of the Independent Certifier Agreement:
  - (i) Milestone inspect list;
    - (A) a framework populated with examples from different stages of the Project, i.e. design, construction, commissioning, substantial completion, etc.;
    - (B) the template should at a minimum include the following per Milestone: item #s, description of the items, meeting Technical Requirements (yes or no), comment relating to the finding, etc.;
  - (ii) Milestone Items Notice;
  - (iii) Deficiency List;
  - (iv) Milestone Certificate (the City will provide a sample template);
  - (v) Substantial Completion Certificate;
  - (vi) Final Completion Certificate; and
  - (vii) Certificate of Acceptance;
- (b) 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 Works;
- (c) participate in monthly conference call meetings, and when necessary in person meetings, with the City and Design Builder;
- (d) receive and monitor progress reports as necessary for the Independent Certifier to be informed as to the progress of the Work;

- (e) 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;
- (f) prior to any certification, consider the views and comments of both Design Builder and the City in relation to the satisfaction of the conditions for certification;
- (g) in reviewing the schedule and/or planned work relating to a milestone, develop a list that identifies the area, work completed, etc. to be inspected as part of the certification, prior to the inspection;
- (h) provide a copy of the list setting out all the aspects to be inspected to the City and Design Builder, prior to the inspection;
- (i) coordinate and conduct, with both the City and Design Builder, within the time period set out in the Design Build Agreement and in accordance with the Design Build Agreement, visual inspections of the Work as necessary for the Independent Certifier to complete the Certification Services;
- (j) review relevant documentation provided to the Independent Certifier pursuant to the Design Build Agreement;
- (k) upon receipt of notice from Design Builder requesting the issuance of a Milestone Certificate, Substantial Completion Certificate or Final Completion Certificate, consider such request and, within the time period set out in the Design Build Agreement and in accordance with the Design Build Agreement, either:
  - (i) issue the applicable certificate; or
  - (ii) issue a report detailing the matters that the Independent Certifier considers are required to be performed prior to issuing the applicable certificate;
- (l) upon notice from Design Builder that the matters required to be performed prior to issuing the applicable certificate have been completed, re-inspect the Work or re-consider the matters specified to be performed, and repeat the procedures in Section A1.1(g) – (j) of this Appendix A, as applicable, until the issuance of the applicable certificate;
- (m) prepare, in consultation with Design Builder and the City, as soon as reasonably practicable and, in any event within, the time period specified in Section F2, Section F3 and Section H3 of the Design Build Agreement, a Deficiency List, which shall include an estimate of the cost and the time for rectifying the deficiencies. Additionally, for the Deficiency List associated with Section F2 of the Design Build Agreement, a schedule for the completion and rectification of the deficiencies;
- (n) as set out in Schedule 18 – Technical Requirements – Appendix 18R – Process Performance Guarantee, provide the determination of the Process

Performance Guarantee Adjustment within 10 Business Days from the receipt of all sampling and analysis data;

- (o) participate in and give the 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 Parties that relate to the Certification Services; and
- (p) provide advice on other matters that may arise that both Parties may jointly require.

## APPENDIX B

### INDEPENDENT CERTIFIER FEE

#### SECTION A INDEPENDENT CERTIFIER FEE

##### A1. Disbursements and Travel Expenses

A1.1 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.

A1.2 The Independent Certifier shall not be reimbursed for any travel, hospitality, food or incidental expenses incurred, except in the case of hourly rate Certification Services, in which case any additional disbursements shall be agreed upon prior to engagement for those services.

##### A2. Total Fixed Fee for all Certification Services

A2.1 The maximum amount that shall be paid by the Parties to the Independent Certifier for all Certification Services listed in Appendix A (other than Certification Services identified in items A1.1(o) and A1.1(p) of Appendix A) shall not exceed, in aggregate, the total fixed fee of \$ [NTD – fee to be populated] (excluding GST and RST) (the “Total Fixed Fee”).

A2.2 The Total Fixed Fee shall be paid monthly in arrears, subject to the Parties receiving invoices reflecting the Certifications Services which is in form and substance satisfactory to the Parties.

##### A3. Hourly Rate for Certification Services

A3.1 The Independent Certifier will be reimbursed for Certification Services identified in items A1.1(o) and A1.1(p) of Appendix A at the following blended hourly rate for a professional performing Certification Services: \$ per hour [NTD – fee to be populated] (excluding GST and RST) (the “Hourly Rate”), plus pre-approved disbursements.

A3.2 The provision of Certification Services identified in item A1.1(p) of Appendix A of this Independent Certifier Agreement must be pre-approved by the Parties in writing. If the Parties decide to proceed with such Certification Services, the Independent Certifier will be reimbursed at the Hourly Rate, plus pre-approved disbursements.

A3.3 The fee for the Certification Services identified in items A1.1(o) and A1.1(p) of Appendix A shall be paid monthly in arrears, subject to the Parties receiving invoices reflecting the Certifications Services which are in form and substance satisfactory to the Parties.

## APPENDIX C

### INDEPENDENT CERTIFIER PERSONNEL

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

Name	Title

## APPENDIX D

### CONDUCT OF CLAIMS

#### SECTION A CONDUCT OF CLAIMS

##### A1. Process

- A1.1 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”.
- A1.2 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.
- A1.3 Subject to Sections A1.4, A1.5 and A1.6 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 Design Builder 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.
- A1.4 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.

A1.5 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 A1.3;
- (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 A1.2 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 A1.4.

A1.6 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 A1.3 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 Design Build 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 A1.6, then the applicable Indemnifier shall be released from any liabilities arising under the applicable indemnity hereunder in respect of the applicable claim.

A1.7 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.

A1.8 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.



## APPENDIX E

### DOCUMENT MANAGEMENT

#### SECTION A DOCUMENT MANAGEMENT

##### A1. General

- A1.1 The City's Document Management System for the Project Term will be Aconex.
- A1.2 All Documents to be submitted to the City and Design Builder must be uploaded to Aconex and transmitted to the City and Design Builder by Aconex. All Documents to be returned to the Independent Certifier, will be uploaded to Aconex and transmitted to the Independent Certifier by Aconex.
- A1.3 Submission of any Document within an e-mail, hard copy or by other means outside of Aconex shall not be considered received unless otherwise noted in Independent Certifier Agreement.
- A1.4 The City will provide the Independent Certifier access to the City's Document Management System up to a maximum of 2 users for the Project Term with sufficient access privileges necessary to accomplish the document management activities required by this Independent Certifier Agreement.
- A1.5 The City will coordinate up to a maximum of 2 training sessions for the Independent Certifier exclusively on the use of Aconex for the Project. The Independent Certifier shall coordinate with the City Representative to schedule the training sessions.

##### A2. Communication

- A2.1 Any written communications between the Parties and the Independent Certifier shall be via the Aconex mail system, except as follows:
- (a) standard e-mail may be utilized for calendar appointments; however, no documents or other information shall be attached to the calendar appointments.
- A2.2 The Independent Certifier shall use the Aconex mail system in accordance with the City Representative's instructions and the following requirements:
- (a) address no more than one topic in a single Aconex mail; and
  - (b) send mail (including cc's) to persons in accordance with instructions from the City Representative.

##### A3. Document Submission Requirements

- A3.1 All Documents shall be in a text-searchable electronic format (e.g. Word, PDF, Excel, etc.). Scanned Documents will not be permitted due to the loss of metadata.

- A3.2 The Independent Certifier shall provide native files of all Documents.
- A3.3 The Independent Certifier shall individually upload each Document to the Document Management System as a separate Document.

**A4. Document Numbering**

- A4.1 The Independent Certifier shall number all Documents in accordance with the Document Numbering Standard included in Schedule 18 – Technical Requirements – Appendix 18D – City Standards. Generally, the document number format is as shown in Table 1.

**Table 1: Document Number Format**

Alpha-numeric Identifier	Code Identifier
LNNNN	Project Code
-	
NN	WBS Code
L	Category Code
L	Discipline Code
-	
LLL	Document Type Code
-	
NNNN	Sequence Number

Legend: N = numeral, L= Letter.

- A4.2 The **Project Code** is the City project number for each project. The Project Code for the NEWPCC Upgrade: Headworks Facilities Project is S0972.
- A4.3 The **WBS Code** is used to provide the organizational structure to the documents. The WBS codes applicable to the NEWPCC Upgrade: Headworks Facilities Project will be provided to the Independent Certifier after execution of this Independent Certifier Agreement.
- A4.4 The **Category Code** provides an organizational structure to the document numbering system.
- A4.5 Table 2 shows the *Category Codes* that will be required by the Independent Certifier for the Project.

**Table 2: Category Codes Required for the Independent Certifier**

<b>Code</b>	<b>Description</b>	<b>Notes</b>
C	Construction	Documents associated with the implementation of construction. Example: Milestone Certificates
P	Project Management	Management of the overall Project or a specific contract. Includes meeting minutes, correspondence, Change Orders, progress estimates, etc.

A4.6 The Discipline Code is used to identify the discipline responsible for producing the Document. Generally, the Discipline Code applicable to the Independent Certifier is G (General).

A4.7 The Document Type Code describes the general subject or nature of the document. Table 3 shows the Document Type Codes that will be required by the Independent Certifier for the Project.

**Table 3: Document Type Codes Required by the Independent Certifier**

<b>Code</b>	<b>Description</b>	<b>Description / Examples</b>
ACC	Change Order or Certification Services Variation Order	Change Order to the DBA or direction to carry out a variation (in the case of the Independent Certifier)
CCN	Change Order Enquiry or Certification Services Variation Price Request	Documents associated with Change Order Enquiry, Certification Services Variation Price
CER	Certificate	Examples: Milestone Certificate Substantial Completion Certificate
CIR	Inspection Report	Example: Milestone inspection reports
COR	Correspondence	Formal correspondence. Examples: Letters, Memos (other than technical memos).
EST	Estimate	Example: Financial estimate provided with a Change Order, Certification Services Variation Process etc.
GEN	General / Miscellaneous	Documents that do not fall under any other document type.
INS	Insurance	Insurance documents
INV	Invoice	

Code	Description	Description / Examples
LIS	List	Any type of list document that is not a record i.e. log of event that has occurred. Example: Deficiency List
NTC	Notice	Formal notices as indicated in the DBA e.g. Milestone item notice, Relief event notice, etc.

A4.8 The Sequence Number is a four-digit number to uniquely identify the specific document with a given Project Code, Category Code and a specific Document Type Code. It is usually assigned in a sequential manner.

A4.9 Generally, the document numbering codes provided in this Section A4 are the ones applicable to the Independent Certifier for the Project. If a Document must be uploaded by the Independent Certifier to the City’s DMS and does not fall into the categories provided, the Independent Certifier shall request assistance from the City Representative.

**A5. Metadata**

A5.1 The Independent Certifier shall apply appropriate document metadata that adheres to the City’s Document Numbering Standards found in Schedule 18 Appendix 18D – City Standards, to all Documents uploaded to the City’s DMS.

A5.2 The document filename shall be consistent with the DMS Document Number.