



THE CITY OF WINNIPEG

DESIGN BUILD AGREEMENT

RFP NO. 779-2021B

DESIGN BUILD

OF

NORTH END SEWAGE TREATMENT PLANT (NEWPCC) UPGRADE:

BIOSOLIDS FACILITIES

SECTION A	DEFINITIONS AND INTERPRETATION	1
A1.	Definitions and Interpretation	1
A2.	Section References	1
A3.	Schedules	2
A4.	Order of Precedence	3
A5.	Design Builder's Knowledge	4
A6.	Restated Schedules	4
SECTION B	DESIGN AND CONSTRUCTION	4
B1.	Design and Construct	4
B2.	Responsibility for Costs	5
B3.	Design Builder Responsibilities	6
B4.	Key Individuals	6
B5.	Human Resources	8
B6.	City's Authority	9
SECTION C	DESIGN BUILD AGREEMENT SECURITY	9
C1.	Provide and Maintain Design Build Agreement Security	9
SECTION D	ACCESS TO THE LANDS AND CONDITION OF THE LANDS	12
D1.	Access and Use	12
D2.	No Access Fee	13
D3.	Status of the Lands	13
D4.	Location Deviation	14
D5.	Existing Defects	15
D6.	Environmental Damage or Degradation	16
D7.	Geotechnical Site Conditions	16
D8.	Project Background Information	17
D9.	Liens and Claims	18
D10.	Ownership of Lands and Infrastructure	19
D11.	Non-exclusive Access and Use	19
D12.	Limited Access Areas	20
D13.	Access and Use Rights to Cease	20
D14.	Additional Lands	21
SECTION E	DESIGN AND CONSTRUCTION OF THE INFRASTRUCTURE	21
E1.	Design Builder's Obligations	21
E2.	Technical Requirements	21
E3.	Design Builder's Responsibility to Carry Out Technical Requirements	22
E4.	Design Builder's Submittals and other Documents for Submission or Access	22

E5.	Design Builder's Other Responsibilities	23
E6.	No Other Business	23
E7.	Design Builder's Responsibility for Project	23
E8.	Construction Within the Lands Boundaries	23
E9.	Defective Work	23
E10.	Construction Delays	25
E11.	Independent Certifier	26
E12.	Referee	26
E13.	Work by City Contractors or City's Own Forces, and City Operations	27
E14.	Construction Impact on Residents and Community	27
E15.	City Assistance with Permits and Approvals	28
E16.	Security, Safety and Emergencies	29
E17.	Warranty	29
E18.	Safety Certification	32
E19.	Commissioning	32
E20.	Maintenance of the Infrastructure	33
E21.	Operations Advisory Period	33
E22.	Protection of Works and Property	33
SECTION F COMPLETION OF THE INFRASTRUCTURE		34
F1.	Substantial Completion	34
F2.	Final Completion	35
F3.	Deficiencies Holdback	36
F4.	Disputes Regarding the Achievement of Substantial Completion	37
F5.	Effect of Payments	37
F6.	Effect of Certificates	37
F7.	Certificate of Acceptance	38
SECTION G MODIFICATIONS AND CHANGE ORDERS		38
G1.	Modification of Project, Infrastructure or Technical Requirements	38
G2.	Determination of Costs of Change Orders	39
SECTION H PAYMENT		39
H1.	Contract Price	39
H2.	Cash Allowance	40
H3.	Progress Payments	40
H4.	Application for Progress Payments	40
H5.	Warranty Letter of Credit	40
H6.	Lien Holdbacks	41

H7.	Payment Adjustments	41
H8.	Direct Deposit	42
H9.	Set-off	42
H10.	Interest on Overdue Payments	43
H11.	Changes in Recoverability of Tax Credits	43
H12.	Information and Assistance Provided by Design Builder	44
H13.	Withholding Taxes	44
H14.	Design Builder Indemnities - Taxes	44
SECTION I	INSURANCE	45
I1.	Insurance Requirements	45
I2.	Evidence of Insurance	46
I3.	City May Insure	47
I4.	Repair of Damage – Prior to Substantial Completion	47
SECTION J	FORCE MAJEURE	49
J1.	Force Majeure	49
J2.	Procedure on Force Majeure Event	50
J3.	Termination for Force Majeure Event	50
SECTION K	RELIEF EVENTS	51
K1.	Relief Events	51
K2.	Effect of Relief Event	53
K3.	General Provisions Relating to Relief Events	54
K4.	Mitigation	55
SECTION L	REPRESENTATIONS AND WARRANTIES	55
L1.	Design Builder’s Representations and Warranties	55
L2.	The City’s Representations and Warranties	57
SECTION M	REPORTING	57
M1.	Reporting Requirements	57
M2.	Records	58
M3.	Notifications, Information and General Audit Rights	58
M4.	Canada and Manitoba Funding Contribution Requirements	60
SECTION N	INDEMNITIES AND LIMITATION OF LIABILITY	61
N1.	Design Builder’s Indemnity	61
N2.	City’s Indemnity	63
N3.	Calculation of and Limitation on Claims	63
N4.	Exclusivity of Specified Remedies	64
N5.	Conduct of Indemnified Claims	64

SECTION O	DEFAULT AND TERMINATION	66
O1.	City's Step-in Rights	66
O2.	Termination Events	67
O3.	Termination by City	69
O4.	Termination by Design Builder	70
O5.	Termination Upon Force Majeure	70
O6.	Consequences of Termination	71
O7.	Survival of Obligations	71
O8.	Exclusivity of Termination Provisions	72
SECTION P	TERMINATION PAYMENTS	72
P1.	Force Majeure Termination	72
P2.	Termination for Convenience or Termination by Design Builder	72
P3.	Full and Final Settlement	73
SECTION Q	ANNOUNCEMENTS, CONFLICT OF INTEREST, CONFIDENTIALITY & INTELLECTUAL PROPERTY	73
Q1.	Conflict of Interest	73
Q2.	Public Announcements and Stakeholder Communications	74
Q3.	Integrity Matters	74
Q4.	Confidential Information	75
Q5.	Disclosure of Confidential Information	75
Q6.	Public Disclosure of Design Build Agreement	76
Q7.	Collection, Use and Disclosure of Personal Information	76
Q8.	Naming Rights	77
Q9.	Intellectual Property	77
SECTION R	PROJECT GOVERNANCE	79
R1.	Senior Executive Committee	79
SECTION S	DISPUTE RESOLUTION	80
S1.	Dispute Resolution Procedure	80
S2.	Exception to Dispute Resolution Procedure	81
S3.	Termination and Dispute Resolution Procedure	81
S4.	No Court Proceedings	81
S5.	Payments Where Amount in Dispute	81
SECTION T	GENERAL PROVISIONS	82
T1.	Notices	82
T2.	Authority to Give Notices	83
T3.	Assignment by Design Builder	83

T4.	Change in Ownership	83
T5.	Subcontracting by Design Builder	84
T6.	Assignment by City	85
T7.	Enurement	85
T8.	Applicable Law and Jurisdiction	85
T9.	Amendment and Waiver	85
T10.	Severability	86
T11.	Cumulative Remedies	86
T12.	Additional Assurances	86
T13.	Costs	86
T14.	Counterparts	86
T15.	Joint and Several	86
T16.	Entire Agreement	87
T17.	Currency	87
T18.	Liquidated Damages	87
T19.	No Agency, Joint Venture, Partnership, Lease or Loan	87
T20.	City Persons and City Parties as Third Party Beneficiaries	87

THIS DESIGN BUILD AGREEMENT is made as of the ____ day of _____ 2024,

BETWEEN:

THE CITY OF WINNIPEG

(**“the City”**)

AND

[**NTD – legal name**],

(**“Design Builder”**)

WHEREAS:

A. The City intends to undertake the North End Sewage Treatment Plant (NEWPCC) Upgrade: Biosolids Facilities Project, which includes but is not limited to, the design and construction of a new biosolids facility, modifications to the existing primary clarification facility, and modifications to the existing centrate treatment 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.

B. Design Builder shall design and construct the Infrastructure as set out in this Design Build Agreement (the **“Project”**).

C. The City and Design Builder wish to enter into this Design Build Agreement (the **“Design Build Agreement”**), which sets out the terms and conditions upon which Design Builder shall perform the Project.

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

SECTION A DEFINITIONS AND INTERPRETATION

A1. Definitions and Interpretation

A1.1 This Design Build Agreement shall be interpreted in accordance with Schedule 1 – Definitions and Interpretation.

A2. Section References

A2.1 References in this Design Build Agreement to Sections of this Design Build Agreement are to the correspondingly numbered provisions of this Design Build Agreement. References to Schedules are to the correspondingly numbered Schedules listed in Section A3.1.

A3. Schedules

A3.1 The following Schedules are for every purpose to be considered as part of this Design Build Agreement (and provisions of the Schedules are to be considered as provisions of this Design Build Agreement):

- (a) Schedule 1 – Definitions and Interpretation
- (b) Schedule 2 – Design Builder's Project Schedule
- (c) Schedule 3 – Intermediate Design Submittal Extracts
- (d) Schedule 4 – Management Plans
- (e) Schedule 5 – Review Procedure
- (f) Schedule 6 – Subcontractors and Key Individuals
- (g) Schedule 7 – Dispute Resolution Procedure
- (h) Schedule 8 – Prices
- (i) Schedule 9 – Progress Payments
- (j) Schedule 10 – Independent Certifier Agreement
- (k) Schedule 11 – Insurance Requirements
- (l) Schedule 12 – Lands, Site(s), Facility(ies)
- (m) Schedule 13 – Document Management System
- (n) Schedule 14 – Payment Adjustments
- (o) Schedule 15 – Letter of Credit Forms
- (p) Schedule 16 – Contract Security and Labour and Material Payment Bond
- (q) Schedule 17 – Change Orders
- (r) Schedule 18 – Technical Requirements
- (s) Schedule 19 – Security Clearance Requirements
- (t) Schedule 20 – Referee Agreement
- (u) Schedule 21 – Social Procurement Requirements

A4. Order of Precedence

A4.1 In the event of ambiguities, conflicts or inconsistencies between or among any of the provisions of this Design Build Agreement, the provisions shall govern in the following order of precedence, with each taking precedence over those listed subsequently:

- (a) the provisions of amendments in writing to this Design Build Agreement signed by the Parties and Change Orders shall govern and take precedence only over those specific provisions of this Design Build Agreement expressly amended thereby;
- (b) any provision establishing a higher standard of safety, reliability, durability, performance or service shall take precedence over a provision establishing a lower standard of safety, reliability, durability, performance or service;
- (c) the body of this Design Build Agreement;
- (d) Schedule 1 – Definitions and Interpretation;
- (e) Schedule 7 – Dispute Resolution Procedure;
- (f) Schedule 18 – Technical Requirements;
- (g) Schedule 9 – Progress Payments;
- (h) Schedule 11 – Insurance Requirements;
- (i) Schedule 17 – Change Orders;
- (j) Schedule 5 – Review Procedure;
- (k) Schedule 13 – Document Management System;
- (l) Schedule 14 – Payment Adjustments;
- (m) Schedule 12 – Lands, Site(s), Facility(ies);
- (n) Schedule 6 – Subcontractors and Key Individuals;
- (o) the other Schedules in the order in which they are listed in Section A3.1; and
- (p) Schedule 2 – Design Builder's Project Schedule;
- (q) Schedule 4 – Management Plans;
- (r) Schedule 3 – Intermediate Design Submittal Extracts.

A4.2 Subject to Section A4.1, if the ambiguity, conflict or inconsistency is between a provision of general application and a provision that applies only to a specific part of

the Works, the provision that applies to the specific part of the Works shall govern for that specific part of the Works.

- A4.3 If any ambiguity, conflict or inconsistency is not readily resolved by the foregoing provisions of this Section A4, then Design Builder or the City, upon discovery of same, shall immediately give notice to the City Representative. The City Representative shall, within 10 Business Days after such notice, make a determination of which provision governs and give notice of such determination, in writing, to Design Builder.
- A4.4 The City and Design Builder shall comply with the determination of the City Representative pursuant to this Section A4 unless the City or Design Builder dispute the decision of the City Representative in which event such Dispute may be referred for resolution in accordance with Schedule 7 – Dispute Resolution Procedure.
- A4.5 Except for those parts of Intermediate Design Submittal which the City determines are incorporated into this Design Build Agreement by the Intermediate Design Submittal Extracts, the Request for Proposals, the RFP Submissions, and the DPA shall be superseded entirely by this Design Build Agreement and rendered null and void, and shall not be relied upon or used by Design Builder, the City or anyone else (including anyone pursuant to Schedule 7 – Dispute Resolution Procedure or any arbitral body or any Court) in any way to interpret or qualify the scope of the Project or the Technical Requirements, any obligations or liabilities of Design Builder, or anything else contained in this Design Build Agreement.

A5. Design Builder’s Knowledge

- A5.1 Where any provision of this Design Build Agreement refers to the knowledge of or matters known to Design Builder, then prior to the Effective Date, knowledge on the part of any personnel of Design Builder, any Design Builder Party, and any other personnel of any other person, having direct involvement in the preparation of Design Builder’s Proposal shall be deemed to have been knowledge of Design Builder; and during the Project Term, knowledge on the part of personnel of Design Builder and any Design Builder Party, provided such personnel are directly involved in the Works, shall be deemed to be knowledge of Design Builder.

A6. Restated Schedules

- A6.1 Where any provision of this Design Build Agreement contemplates amendment of a Schedule, the City will as soon as practicable after the amendment comes into effect prepare a restated Schedule reflecting the amendment and deliver it to Design Builder.

SECTION B DESIGN AND CONSTRUCTION

B1. Design and Construct

- B1.1 Design Builder shall design and construct the Infrastructure in accordance with the Technical Requirements and as more particularly set out in Section E.

B1.2 Design Builder shall perform the Work and carry out its duties pursuant to this Design Build Agreement in accordance with Good Industry Practice.

B1.3 Design Builder shall be solely responsible for all construction means, methods, techniques, sequences and procedures used to undertake the Works and for coordinating the various parts of the Works under this Design Build Agreement and shall coordinate the Works so as to not interfere, interrupt, obstruct, delay or otherwise affect the work of others, including any City Work and City Operations.

B1.4 Design Builder shall enter into a contract with each of the Nominated Vendors to deliver the work related to each Nominated Vendor as set out in Schedule 18 – Technical Requirements.

B2. Responsibility for Costs

B2.1 Except as expressly set out in this Design Build Agreement, Design Builder is solely responsible for paying all costs, fees and charges of any nature whatsoever required to complete the Project, except for:

- (a) the costs, fees and charges of the City's own personnel, consultants and professional advisors, including the City Representative, except for extra costs incurred by the City as a result of Default by Design Builder;
- (b) the costs, fees and charges of any mediation or arbitration pursuant to the Dispute Resolution Procedure, which are specifically provided for in Schedule 7 – Dispute Resolution Procedure;
- (c) any costs, fees, charges or payments expressly to be made by the City under the provisions of this Design Build Agreement; and
- (d) land acquisition costs.

B2.2 Design Builder shall be responsible for all costs which are:

- (a) required to rectify any Deficiencies pursuant to Section E17.2;
- (b) required to rectify any Deficiencies arising as a result of Design Builder's means and methods; or
- (c) required to rectify Deficiencies arising from any Site Conditions for which Design Builder is responsible pursuant to Section D3.2.

B2.3 For the purpose of this Section B2, the terms "properly inferable", "readily apparent" and "readily discoverable" shall be interpreted by taking into consideration the investigations, inspections and examinations by accessing the Lands, carried out by Design Builder or any Design Builder Party during the RFP Process, as defined in the RFP, as represented by Design Builder to the City in D3.2 and having regard to the requirements of Section B1.2.

B2.4 The City will not be obligated to pay any costs, fees or charges in relation to the Project except as expressly set out in this Design Build Agreement.

B3. Design Builder Responsibilities

B3.1 Without limiting any of Design Builder's obligations pursuant to this Design Build Agreement, Design Builder shall, at its own cost and risk:

- (a) perform all of its obligations under, and observe all provisions of this Design Build Agreement, in compliance with Applicable Law;
- (b) perform all of the Works:
 - (i) in compliance with all Permits, Licences, and Approvals and so as to preserve the existence and continued effectiveness of any such Permits, Licences, and Approvals;
 - (ii) so as to satisfy the Technical Requirements;
 - (iii) in accordance with Intermediate Design Submittal Extracts;
 - (iv) in accordance with Good Industry Practice;
 - (v) in a timely and professional manner;
 - (vi) in a manner consistent with Management Plans;
 - (vii) with due regard to the health and safety of persons and property;
 - (viii) subject to the other provisions of this Design Build Agreement, in a manner which will not impair the ability of the City or any City Party to comply with Applicable Law; and
 - (ix) subject to the other provisions of this Design Build Agreement, in a manner which will not impair the performance of the City Operations or the City Work;

B3.2 Design Builder shall not be relieved of any liability or obligation under this Design Build Agreement by the appointment of any Design Builder Party, and Design Builder shall cause each Design Builder Party, to the extent such Design Builder Party performs or is specified hereunder to perform any obligation under this Design Build Agreement on behalf of Design Builder, to comply with the obligations of Design Builder hereunder in the same manner and to the same extent as Design Builder.

B4. Key Individuals

B4.1 The individuals who are critical to the performance of the Works are identified in Schedule 6 – Subcontractors and Key Individuals. Design Builder shall use commercially reasonable efforts to ensure that such persons remain involved in the Works in the capacity set out in Schedule 6 – Subcontractors and Key Individuals

(unless such Key Individuals are not available for reasons beyond the control of Design Builder or a Design Builder Party).

- B4.2 As long as a Key Individual referred to in Section B4.1 continues to be employed by Design Builder or a Design Builder Party, Design Builder shall not, for the period following the Effective Date to and including the Substantial Completion Date or the Final Completion Date as provided for in Schedule 6 – Subcontractors and Key Individuals, require or request any Key Individual to leave or diminish their role on the Project, if, in the reasonable opinion of the City, such action would have a material adverse effect on the Works.
- B4.3 If Design Builder fails to comply with Section B4.2, Design Builder shall pay to the City an amount equal to [●] for each Key Individual to which the failure to comply applies, as liquidated damages. The Parties agree that the liquidated damages set out in this Section B4.3 are not a penalty but represent a genuine and reasonable pre-estimate of the damages that the City will suffer as a result of Design Builder's failure to provide the applicable Key Individual. Any payment to be made by Design Builder pursuant to this Section B4.3 shall be completed by the City deducting the applicable amount from the next due Progress Payment.
- B4.4 For clarity, Design Builder's and Design Builder Parties' reasonable commercial efforts, in accordance with this Section B4, shall include the denial of promotions or relocations of a Key Individual as permitted by the Applicable Law. For the purposes of this Section B4, only the following reasons will be considered beyond the control of Design Builder or a Design Builder Party: (i) death; (ii) short-term disability; (iii) long-term disability; (iv) maternity leave, parental leave or any other job protected leave under Applicable Law; (v) termination of employment for cause; (vi) retirement; (vii) relocation due to the employment-related relocation of the employee's spouse; or (viii) any other reason in the opinion of the City, acting reasonably (Design Builder shall provide to the City any further documentation as may be reasonably requested by the City to assess any reason beyond the control of Design Builder).
- B4.5 Subject to Design Builder's obligations to ensure that Key Individuals remain involved in the Works as set out in Sections B4.1, if it becomes necessary for Design Builder to replace any individual identified in Schedule 6 – Subcontractors and Key Individuals, Design Builder shall nominate a competent suitably qualified and experienced permanent replacement or replacements, having regard to the qualifications set out in Schedule 18 – Technical Requirements, as soon as practicable and shall provide the City with relevant information on the proposed replacement and shall consult with the City before finalizing the appointment of such replacement. Design Builder shall not replace any of the individuals identified in Schedule 6 – Subcontractors and Key Individuals without the prior written consent of the City, which consent shall not be withheld or delayed if Design Builder is compliant with Sections B4.1, B4.2 and B4.6 and the proposed replacement is suitably qualified and experienced. In the event Design Builder fails to nominate a competent suitably qualified and experienced permanent replacement or replacements for a period of greater than 30 Calendar Days from the date it became necessary for Design Builder to replace any individual identified in Schedule 6 – Subcontractors and Key Individuals, Design Builder shall pay to the City an amount equal to [●] per week as liquidated damages for as long as replacement personnel

acceptable to the City is not available to the Project. The Parties agree that the liquidated damages set out in this Section B4.5 are not a penalty but represent a genuine and reasonable pre-estimate of certain damages that the City will suffer in respect of Design Builder's failure to provide or replace individuals identified in Schedule 6 – Subcontractors and Key Individuals in accordance with this Section B4.5. The Parties acknowledge and agree that such liquidated damages shall be payable whether or not the City incurs or mitigates its damages and that the City shall not have any obligation to mitigate such damages.

B4.6 If the City determines, acting reasonably, that it is in the best interests of the City that any individual identified in Schedule 6 – Subcontractors and Key Individuals be replaced, the City will notify Design Builder (including a detailed explanation of the reasons for such determination), and, within 30 Calendar Days after receipt by Design Builder of such notice, Design Builder shall provide the City with relevant information on the proposed replacement and shall consult with the City before finalizing the appointment of such replacement.

B5. Human Resources

B5.1 The City will have the right to order the removal from the Works and/or the Lands of any person employed by (or acting on behalf of) Design Builder, or any Design Builder Party, whose presence, in the reasonable opinion of the City is likely to have an adverse effect on the City Work or the City Operations or who, in the reasonable opinion of the City is not a fit and proper person to be engaged in the Works or to be on the Lands for any reason, including a failure to comply with any City policy or any obligation of the City to ensure the safety and wellbeing of persons engaged in the Works or on the Lands.

B5.2 Any decision of the City made pursuant to this Section B5 shall be final and conclusive. Any action taken under Section B5 shall promptly be confirmed by the City to Design Builder and, for greater certainty, shall not relieve Design Builder of any of its obligations under this Design Build Agreement.

B5.3 Design Builder shall ensure that:

- (a) there shall at all times be a sufficient number of persons employed or engaged by Design Builder or any Design Builder Party engaged in the performance of the Works with the requisite level of skill and experience to perform the Works in accordance with this Design Build Agreement;
- (b) all persons employed or engaged by Design Builder or any Design Builder Party engaged in the provision of the Works receive such training and supervision as is necessary to ensure the proper performance of this Design Build Agreement and compliance with all health and safety rules, procedures and requirements and Authority Requirements; and
- (c) it creates and maintains, and causes all Design Builder Parties to create and maintain, a process which allows it to assess, monitor and correct, on an ongoing basis, the competency of persons employed or engaged by Design

Builder or any Design Builder Party engaged in the provision of the Works to ensure the proper performance of this Design Build Agreement.

- B5.4 Design Builder shall ensure that there are set up and maintained by it and by all Design Builder Parties, human resources policies and procedures covering all relevant matters relating to the Works (including, for example, health and safety). Design Builder shall ensure that the terms and the implementation of such policies and procedures comply with Applicable Law and Good Industry Practice and that they are published in written form and that copies of them (and any revisions and amendments to them) are available to the City upon request.
- B5.5 Design Builder shall comply with the requirements of Schedule 21 - Social Procurement Requirements including its Social Procurement Management Plan.

B6. City's Authority

- B6.1 Nothing in this Design Build Agreement shall in any way fetter the right, authority and discretion of the City or any Governmental Authority in fulfilling its statutory or regulatory functions under Applicable Law, and Design Builder understands and agrees that nothing in this Design Build Agreement shall preclude the City of Winnipeg from performing, discharging or exercising its duties, responsibilities and powers under Applicable Law. For clarity, nothing in this Design Build Agreement shall compel the City of Winnipeg to take any actions in relation to the Project or Design Builder, including the issuance of any applicable Permits, Licences and Approvals.

SECTION C DESIGN BUILD AGREEMENT SECURITY

C1. Provide and Maintain Design Build Agreement Security

- C1.1 Design Builder shall provide and deliver, to the City, the following Design Build Agreement Security on or before 10 Business Days from:
- (a) the Effective Date and before commencing the Works:
 - (i) a performance bond of a company registered to conduct the business of a surety in Manitoba in Form A1: Performance Bond as set out in Schedule 16 – Contract Security and Labour and Material Payment Bond, in the amount of 50% of the Contract Price ("**Contract Security**"); and
 - (ii) a labour and material payment bond of a company registered to conduct the business of a surety in Manitoba, in Form A2: Labour and Material Payment Bond as set out in Schedule 16 – Contract Security and Labour and Material Payment Bond, in an amount equal to 50% of the Contract Price (the "**Labour and Material Payment Bond**");
- A-1 The Contract Security and Labour and Material Payment Bond may be submitted in hard copy or digital format. If submitted in digital

format the Contract Security and Labour and Material Payment Bond must meet the following criteria:

- A-1.1 the version submitted by Design Builder must have valid digital signatures and seals;
 - A-1.2 the version submitted by Design Builder must be verifiable by the City with respect to the totality and wholeness of the bond form, including: the content; all digital signatures and digital seals; with the surety company, or an approved verification service provider of the surety company;
 - A-1.3 the version submitted must be viewable, printable and storable in standard electronic file formats compatible with the City, and in a single file. Allowable formats include pdf;
 - A-1.4 the verification may be conducted by the City immediately or at any time during the life of the bond and at the discretion of the City with no requirement for passwords or fees;
 - A-1.5 the results of the verification must provide a clear, immediate and printable indication of pass or fail regarding A-1.2.
- A-2 Digital bonds failing the verification process will not be considered to be valid. If a digital bond fails the verification process, Design Builder must provide a replacement bond (in hard copy or digital format) within 7 Calendar Days of the City's request or within such greater period of time as the City in its discretion, acting reasonably, allows.
- A-3 Digital Bonds passing the verification process will be treated as original and authentic.
- (b) the Substantial Completion Date:
- (i) a Warranty Letter of Credit in the amount of \$ [REDACTED] in the form as set out in Schedule 15 – Letter of Credit Forms (the "**Warranty Letter of Credit**");

(collectively, "**Design Build Agreement Security**").

To satisfy the requirement to provide the the Warranty Letter of Credit, Design Builder may, with the prior written consent of the City, which consent may be withheld in the sole discretion of the City, provide multiple letters of credit from [NTD – populate with DB entity names] as approved and confirmed by the City (each a "**Letter of Credit Provider**") totalling the required amount of the Warranty Letter of Credit, as applicable.

C1.2 Design Builder shall maintain the:

- (a) Contract Security until the expiration of the Warranty Period, including any extensions to the Warranty Period pursuant to Section E17.6;
- (b) Labour and Material Payment Bond until expiration of the Warranty Period, including any extensions to the Warranty Period pursuant to Section E17.6; and
- (c) Warranty Letter of Credit until the expiration of the Warranty Period, including any extensions to the Warranty Period pursuant to Section E17.6.

C1.3 If this Design Build Agreement is amended or a Change Order is issued that increases the Contract Price, subject to Schedule 17 – Change Orders, when the cumulative total of Change Orders exceeds [●] (calculated from the Contract Security amount required under Section C1.1(a) or the last rider issued in accordance with this Section C1.3, as the case may be) Design Builder must also increase the Contract Security amount and the Labour and Material Payment Bond amount to not less than the applicable percentage as set out in C1.1, of the increased Contract Price by obtaining and providing additional Contract Security and Labour and Material Payment Bond, or a satisfactory rider or extension to an existing performance bond or Labour and Material Payment Bond. Without limiting Design Builder's obligations within this Section C1.3, the City may request a rider to the existing Contract Security and Labour and Material Payment Bond, at any time, up to a maximum of the applicable percentage as set out in C1.1, of the Contract Price, or as part of any Change Order. If Design Builder's surety declines consent or coverage for any amendment to this Design Build Agreement or for a Change Order, Design Builder must obtain and provide the City with valid Contract Security, satisfactory to the City, covering the Works specified in the amendment to this Design Build Agreement or in the Change Order. Where the City has become aware of the occurrence of a Termination Event or if a notice of termination is given under Section O3.1(a) or Section O3.1(b), the City will promptly provide the surety with notice of the same.

C1.4 The City shall be entitled to draw on the Warranty Letter of Credit in accordance with Section H5.2.

C1.5 If Design Builder delivers multiple letters of credit from multiple Letter of Credit Providers in accordance with Section C1.1 to satisfy the requirement to supply the Warranty Letter of Credit, Design Builder acknowledges and agrees that:

- (a) the City may draw upon any letter of credit provided by any Letter of Credit Provider in any specified ratable amount;
- (b) the City may draw on any letter of credit provided by any Letter of Credit Provider in a disproportionate amount to such Letter of Credit Provider's contribution to security;
- (c) the City may draw upon any letter of credit provided by any Letter of Credit Provider even in the event that such Letter of Credit Provider is no longer a party to this Design Build Agreement; and

- (d) the provision of multiple letters of credit shall not in any way prejudice or adversely affect the rights of the City to draw on any letter of credit in accordance with this Design Build Agreement, including in the event that the City is entitled to draw on the letter(s) of credit in accordance with Section C1.4 and such circumstance is not the result of any act or omission of the Letter of Credit Provider whose letter of credit is drawn upon.

SECTION D ACCESS TO THE LANDS AND CONDITION OF THE LANDS

D1. Access and Use

- D1.1 Effective from the Effective Date until the earlier of the Final Completion Date and the Termination Date, and subject to this Design Build Agreement, including any restrictions on the use and access to the Lands set out in Schedule 12 – Lands, Sites(s), Facility(ies), or in Schedule 18 – Technical Requirements, the City hereby grants or shall cause to be granted to Design Builder and all Design Builder Parties such non-exclusive licence right of use and access to, on, under and over the Lands sufficient to allow Design Builder and such Design Builder Parties to perform the Works, subject to Design Builder performing its obligations with respect to Permits, Licences and Approvals.
- D1.2 In consideration for the licences granted pursuant to Section D1.1, Design Builder shall carry out its obligations under this Design Build Agreement subject to and in accordance with the terms and conditions of this Design Build Agreement.
- D1.3 None of the rights granted pursuant to this Section D1 shall extend beyond the boundaries of the Lands, other than easements, encumbrances and similar interests of the City which benefit the Lands, to the extent such easements, encumbrances and similar interests are necessary for the Project.
- D1.4 Design Builder acknowledges and agrees that the City, City Parties and/or third parties may, from time to time, use or develop or permit the use or development of all or part of the Lands, the Existing Infrastructure or property adjacent to the Lands and Existing Infrastructure and that such use or development shall not give rise to any right of Design Builder to claim any delay, compensation or right to a Change Order unless, and subject always to the terms and conditions of this Design Build Agreement including as contemplated by this Design Build Agreement, such use or development materially interferes with Design Builder's carrying out of the Works subject to the Identified Encumbrances, which individually or when aggregated with other interference occurrences, would cost greater than \$ [REDACTED] or would cause a delay in the critical path of Project Schedule of 5 Business Days or more, but only to the extent that it delays Design Builder from achieving Substantial Completion by the Scheduled Substantial Completion Date.
- D1.5 Subject to Design Builders obligation to comply with the other terms and conditions set forth in this Design Build Agreement, Design Builder shall ensure that each Design Builder Party shall at all times, when entering the Lands, act in a manner consistent with the obligations of Design Builder under the Design Build Agreement.

D1.6 The use and access rights to the Lands provided in this Section D1 shall automatically terminate as of the Termination Date, save an except for any earlier termination of the use and access rights specified in Schedule 12 – Lands, Site(s), Facility(ies).

D2. No Access Fee

D2.1 No fee or other monetary amount shall be payable by Design Builder for its right of access to and use of the Lands.

D3. Status of the Lands

D3.1 Except as expressly set out in this Design Build Agreement:

- (a) access to and use of the Lands and the Existing Infrastructure is being provided to Design Builder on an “as is, where is” basis as of the Intermediate Design Submittal Date, except in respect of the geotechnical Site Conditions, which shall be governed by Section D7 and Schedule 18 – Technical Requirements, Appendix 18Q – Geotechnical Baseline Report; and
- (b) the City provides no representations or warranties with respect to the Lands and the Existing Infrastructure.

D3.2 Subject to Sections D6.2(a) and K1.1(d), Design Builder acknowledges and agrees that prior to executing this Design Build Agreement it has and shall be deemed to have:

- (a) performed all necessary Lands’ due diligence and investigations and investigated and examined the Lands and the Existing Infrastructure and adjacent areas and any existing works on, over or under the Lands and the Existing Infrastructure in accordance with Good Industry Practice, taking into account all matters relating to the Lands, including the buildings, structures and works, on, over and under the Lands and the Existing Infrastructure existing on the Effective Date and the Project Background Information, excepting where such investigations would have required any of the following activities:
 - (i) destructive testing;
 - (ii) excavations;
 - (iii) complete shutdown or bypass of wastewater flow; or
 - (iv) entry to confined space;
- (b) in accordance with Good Industry Practice, taking into account all matters relating to the Lands and the Existing Infrastructure, including the buildings, structures and works, on, over and under the Lands and the Existing Infrastructure existing on the Effective Date, and with reference to the Project Background Information, satisfied itself as to the form and nature of the

Lands and the Existing Infrastructure, and other relevant properties of the Lands and the Existing Infrastructure, the risk of injury or damage to property affecting the Lands and the Existing Infrastructure, the nature of the materials (whether natural or otherwise) to be excavated and the nature of the design, work and materials necessary for the execution and delivery of the Works, and the nature of the Site Conditions except for the geotechnical Site Conditions;

- (c) through its review of Schedule 18 – Technical Requirements – Appendix 18Q – Geotechnical Baseline Report, in accordance with Good Industry Practice, satisfied itself as to the geotechnical Site Conditions, the ground and the subsoil properties, the level, quantity and quality of groundwater, the loadbearing capacities and other relevant properties of the Lands;
 - (d) satisfied itself, subject to Sections D6.2(a) and D6.2(b), as to the presence of any Environmental Damage or Degradation on, in or under the Lands and the Existing Infrastructure, or migrating to or from the Lands and the Existing Infrastructure in accordance with Good Industry Practice, taking into account all matters, including the Project Background Information, relating to the Lands and the Existing Infrastructure, including the buildings, structures and works, on over and under the Lands and the Existing Infrastructure existing on the date hereof;
 - (e) satisfied itself as to the adequacy of the rights of access to, from and through the Lands and the Existing Infrastructure and any accommodation it may require for the purposes of fulfilling its obligations under this Design Build Agreement;
 - (f) satisfied itself as to the possibility of interference by persons of any description whatsoever with access to or use of, or rights in respect of, the Lands and the Existing Infrastructure; and
 - (g) satisfied itself as to the precautions, times and methods of working necessary to prevent any nuisance or interference, whether public or private, being caused to any third parties.
- D3.3 Design Builder further acknowledges and agrees that, other than as referred to or contained in this Design Build Agreement, no representations or warranties have been made, nor documentation delivered to Design Builder or any Design Builder Party, which would indicate that Design Builder would be unable to perform the Works in a lawful manner.

D4. Location Deviation

- D4.1 If, during the Term of the Design Build Agreement, Design Builder identifies a Location Deviation which, individually or when aggregated with other Location Deviations, would cost greater than [\$●] or , or would cause a delay in the critical path of Project Schedule to address, but only to the extent that it delays Design Builder from achieving Substantial Completion by the Scheduled Substantial

Completion Date, Design Builder shall give notice to the City of the need for a Change Order as a result of such Location Deviation, including:

- (a) a description of the work required to address such Location Deviation (the **“Proposed Location Deviation Work”**); and
- (b) an Estimate for completing the Proposed Location Deviation Work, prepared in accordance with Schedule 17 – Change Orders.

D4.2 As soon as practicable and, in any event, within 10 Business Days following receipt by the City of the notice described in Section D4.1, the Parties shall meet to agree on whether a Change Order is required as a result of the Location Deviation. If the Parties have not, within 10 Business Days of this meeting, reached an agreement, either Party may refer the dispute to the Dispute Resolution Procedure.

D4.3 The City will, within 10 Business Days of an agreement or determination that a Change Order is required, issue a Change Order Enquiry in respect of the Proposed Location Deviation Work and the relevant provisions of Schedule 17 – Change Orders shall apply, except that:

- (a) the City will not be entitled to withdraw such Change Order Enquiry unless Design Builder agrees; and
- (b) Section K1.1(r) has not been relied upon for the same incident.

D5. Existing Defects

D5.1 If, during the Term of the Design Build Agreement, Design Builder identifies an Existing Defect that would cause a delay in the critical path of Project Schedule, but only to the extent that it delays Design Builder from achieving Substantial Completion by the Scheduled Substantial Completion Date, Design Builder shall give notice to the City of the need for a Change Order as a result of such Existing Defect, including:

- (a) a description of the work required to repair such Existing Defect (the **“Proposed Existing Defect Work”**); and
- (b) an Estimate for completing the Proposed Existing Defect Work, prepared in accordance with Schedule 17 – Change Orders.

D5.2 As soon as practicable and, in any event, within 10 Business Days following receipt by the City of the notice described in Section D5.1, the Parties shall meet to agree on whether a Change Order is required as a result of the Existing Defect. If the Parties have not, within 10 Business Days of this meeting, reached an agreement, either Party may refer the dispute to the Dispute Resolution Procedure.

D5.3 The City will, within 10 Business Days of an agreement or determination that a Change Order is required, issue a Change Order Enquiry in respect of the Proposed Existing Defect Work and the relevant provisions of Schedule 17 – Change Orders shall apply, except that:

- (a) the City will not be entitled to withdraw such Change Order Enquiry unless Design Builder agrees; and
- (b) Design Builder shall not be entitled to any payment or compensation from the City in respect of the first \$ [REDACTED] in costs incurred by Design Builder in the repair of Existing Defects.

D6. Environmental Damage or Degradation

- D6.1 Subject to Section D6.3, Design Builder shall not commit or permit any waste, nuisance or Environmental Damage or Degradation on the Lands.
- D6.2 Design Builder shall promptly deal with any Environmental Damage or Degradation to the Lands during the Project Term as required by Applicable Law, except for:
- (a) Environmental Damage or Degradation (including the presence of any Hazardous Substance) that was not disclosed in or readily apparent or properly inferable from the Project Background Information, subject to Design Builder's review in accordance with Good Industry Practice, provided that if such Environmental Damage or Degradation is required to be dealt with in order to carry out the Works, Design Builder shall do so and shall be entitled to a Relief Event pursuant to Section K1.1(d); and
 - (b) Environmental Damage or Degradation (including the presence of any Hazardous Substance) directly caused after the Effective Date by the City or any City Party, provided that if such Environmental Damage or Degradation is required to be dealt with in order to carry out the Works, Design Builder shall do so and shall be entitled to a Relief Event pursuant to Section K1.1(d).
- D6.3 The Environmental Damage or Degradation which is the responsibility of the City in accordance with Sections D6.2(a) or D6.2(b) shall be remediated by the City in such manner and upon such timetable as the City may determine, provided however that the City will ensure that neither the remediation nor any failure or delay by the City to carry out the remediation materially interferes with the carrying out by Design Builder of the Works.

D7. Geotechnical Site Conditions

- D7.1 For the purposes of this Design Build Agreement, differing geotechnical Site Condition ("**Differing Geotechnical Site Condition**") means any geotechnical Site Condition which is the subject of a Geotechnical Baseline Statement to the extent that it differs from such Geotechnical Baseline Statement as determined in accordance with Schedule 18 - Technical Requirements, Appendix 18Q - Geotechnical Baseline Report, provided that such difference was not:
- (a) within the actual knowledge of Design Builder as of Effective Date;
 - (b) readily apparent from any due diligence undertaken by Design Builder during the Development Phase; or

(c) caused or contributed to by Design Builder or a Design Builder Party.

D7.2 Design Builder shall be responsible for all geotechnical Site Conditions other than Differing Geotechnical Site Conditions (including any delays, additional costs, or actions required as a result of such geotechnical Site Conditions).

D7.3 Any Differing Geotechnical Site Condition experienced by Design Builder shall, subject to and in accordance with Section K1.1, be treated as a Relief Event.

D7.4 Upon the discovery of any Differing Geotechnical Site Condition, Design Builder shall immediately inform the City Representative.

D7.5 The City may issue an instruction in relation to any Differing Geotechnical Site Condition to Design Builder specifying what action the City requires Design Builder to take and Design Builder shall promptly and diligently comply with all such instructions.

D7.6 If Design Builder is required to perform any alteration, addition, demolition, extension or variation in the Works as a result of instructions given by the City pursuant to Section D7.5 which would not otherwise be required under this Design Build Agreement, then Design Builder shall be entitled to a Change Order for any such alteration, addition, demolition, extension or variation in the Works in accordance with Schedule 17 – Change Orders.

D8. Project Background Information

D8.1 Except as expressly provided in Sections D4, D6.2(a) and K1.1(d), the City or any City Party shall not be liable to Design Builder or any Design Builder Party for, and Design Builder or any Design Builder Party shall not seek to recover from the City or any City Party, any damages, losses, costs, liabilities or expenses which may arise (whether in contract, tort or otherwise) from the adoption, use or application of the Project Background Information by, or on behalf of, Design Builder or any Design Builder Party.

D8.2 Except as expressly provided in Sections D4, D6.2(a) and K1.1(d):

(a) the City does not give any warranty or undertaking of whatever nature in respect of the Project Background Information and, specifically (but without limitation), the City does not warrant that the Project Background Information represents all of the information in its possession or power (either during the conduct of the procurement process for the Project or at the time of execution and delivery of this Design Build Agreement) relevant or material to or in connection with the Project or the obligations of Design Builder under this Design Build Agreement; and

(b) the City will not be liable to Design Builder or any Design Builder Party in respect of any failure, whether before, on or after the execution and delivery of this Design Build Agreement:

- (i) to disclose or make available to Design Builder or any Design Builder Party any information, documents or data; or
- (ii) to review or update the Project Background Information.

D8.3 Design Builder acknowledges and confirms that:

- (a) it has conducted its own analysis and review of the Project Background Information and has, before the execution and delivery of this Design Build Agreement, satisfied itself as to the accuracy and completeness of any such Project Background Information upon which it places reliance, all in accordance with Good Industry Practice; and
- (b) except as expressly provided in Sections D4, D6.2(a) and K1.1(d), it shall not be entitled to and shall not, and shall ensure that no Design Builder Party shall, make any claim against the City or any City Party (whether in contract, tort or otherwise), including, without limitation, any claim in damages, for extensions of time or for additional payments under this Design Build Agreement on the grounds:
 - (i) of any misunderstanding or misapprehension in respect of the Project Background Information;
 - or
 - (ii) that the Project Background Information was incorrect or insufficient;nor shall Design Builder be relieved from any of its obligations under this Design Build Agreement on any such ground.

D8.4 Project Background Information shall be deemed to be Confidential Information.

D9. Liens and Claims

D9.1 Design Builder shall promptly pay all proper accounts for work done or materials furnished under all contracts it enters into relating to the Works, excepting those sums required to be retained under the provisions of any applicable statute of Manitoba, and, subject to non-payment by the City, shall not by any act or omission cause, encourage, suffer or allow any lien or claim under any such statute or in equity to be made against the City or filed or registered against the Lands by reason of work, services or materials supplied or claimed to have been supplied to Design Builder, any Design Builder Party or anyone holding any interest through or under Design Builder. Design Builder shall, at its own cost and expense, promptly take all steps required to effect a discharge of any lien or deal with any claim so filed or registered.

D9.2 In the event that Design Builder fails to promptly take all steps required to effect a discharge of any lien or deal with any claim filed or registered against the City or the Lands in accordance with Section D9.1, the City, without prejudice to any other rights or remedies it may have, shall in its discretion take any steps it deems necessary

and appropriate to remove, vacate or discharge the lien or claim and seek immediate recovery from Design Builder of the amount of any such payment and associated costs, including legal costs (on a full indemnity basis), all of which shall be payable on demand.

D10. Ownership of Lands and Infrastructure

D10.1 Design Builder acknowledges that Design Builder shall not have any ownership interest in any of the Lands, the Infrastructure or the Existing Infrastructure and that the City will, at all times, retain all right, title and ownership in and to the Lands, the Infrastructure and the Existing Infrastructure.

D10.2 For clarity, title to each item and part of the Infrastructure but not the risk of loss or damage or destruction thereof, shall pass to the City upon receipt of such item on the Lands provided that title to items of tangible personal property that will comprise part of the Infrastructure or are to be affixed or attached to the Infrastructure prior to Substantial Completion shall pass to the City at the time that such items of tangible personal property are included in the Infrastructure or are affixed or attached to the Infrastructure.

D11. Non-exclusive Access and Use

D11.1 Design Builder acknowledges and agrees that the licence rights granted to Design Builder and Design Builder Parties hereunder shall be non-exclusive and that the City and any person authorized by the City may occupy and possess the Lands, the Infrastructure and/or the Existing Infrastructure, including for the purposes of the City Operations and/or City Work.

D11.2 Without limiting any other provision of this Design Build Agreement, including Section D11.1, Design Builder's access to and use of the Lands, the Infrastructure and the Existing Infrastructure pursuant to Section D1 shall be subject to the following:

- (a) the Identified Encumbrances;
- (b) the exercise by the City of any express right under and in accordance with this Design Build Agreement, including the City's rights under Section E9, the City's rights under Section M3, the City's step-in rights under Section O1, the City's rights under Schedule 18 – Technical Requirements and all other rights of the City to access the Lands, the Infrastructure and the Existing Infrastructure for the purposes of any inspection or review under Schedule 18 – Technical Requirements;
- (c) any entry upon the Lands, the Infrastructure or the Existing Infrastructure by the City in accordance with the provisions of this Design Build Agreement or by any third party through written consent of the City;
- (d) the conduct of the City Operations, and the City Work, by the City, City Parties, and other contractors;

- (e) the restrictions on access to the Lands, the Infrastructure or the Existing Infrastructure set out in Schedule 18 – Technical Requirements;
- (f) the right of any Governmental Authority to enter the Lands, the Infrastructure or the Existing Infrastructure for any purpose pursuant to Applicable Law; and
- (g) any interference, including by means of an injunction issued by a Court, or action by protesters, to the extent attributable to any act or omission by Design Builder or any Design Builder Party.

D11.3 Without limiting any other provision of this Design Build Agreement, including Section D11.1 and Section D11.2, Design Builder acknowledges and agrees that, at all times the City will have full and free access to:

- (a) the Works, the Lands, the Infrastructure and the Existing Infrastructure; and
- (b) on reasonable prior notice, any site occupied by Design Builder or to which Design Builder has access, where materials to be used in the Works are fabricated or stored;

for the purpose of inspecting the Works, the Lands, the Infrastructure and the Existing Infrastructure or materials to be used in the Works so as to be able to determine compliance by Design Builder with the terms of this Design Build Agreement; and such access shall not of itself be construed as constituting disturbance or interference with Design Builder's uninterrupted access to the Lands, the Infrastructure and the Existing Infrastructure; provided however that Design Builder may, subject to the provisions of this Design Build Agreement, exercise reasonable control over such access for reasons of safety and operational efficiency. For the purpose of such inspection, the City may at all reasonable times and subject to the reasonable requirements of third party suppliers, perform any measurement, test or other observation or investigation. Subject to the terms of this Design Build Agreement, Design Builder shall provide reasonable cooperation to facilitate any such measurements, tests or other observations or investigations.

D12. Limited Access Areas

D12.1 The City may limit or restrict Design Builder's access to designated portions of the Lands or the Existing Infrastructure (on the Lands), as set out in the Design Build Agreement unless a person seeking access obtains the prior written consent of the City, which consent may be subject to such reasonable conditions as are imposed by the City in its sole discretion. In this regard any time Design Builder requires access to the NEWPCC Site it shall request authorization in accordance with Schedule 18 – Technical Requirements Appendix 18P – Coordination Protocol.

D13. Access and Use Rights to Cease

D13.1 Design Builder's access and use to the Lands shall terminate in accordance with Section D1.1. If Design Builder fails to vacate Lands in accordance with this Design Build Agreement, then, subject to Section N3 it shall indemnify the City Indemnified Parties for any Direct Losses incurred by the City Indemnified Parties as a result of

such failure. If the Termination Date occurs before the Final Completion Date, then Design Builder shall have 30 Calendar Days to demobilize and vacate the Lands.

D14. Additional Lands

D14.1 Design Builder shall be entitled to obtain any lands outside the Lands (or obtain temporary access to any such lands) at its own cost and expense, however, such lands shall not, for the purposes of this Design Build Agreement, be Lands and no Infrastructure shall be located on, or rely in any way upon, any lands which Design Builder acquires pursuant to this Section D14.1. Design Builder shall be responsible for and shall rectify any damage to lands outside of the Lands, irrespective of who holds title to such lands where damage is caused by Design Builder, any Design Builder Party or any other party for whom Design Builder is legally responsible. Design Builder shall be responsible for obtaining all consents and complying with all Applicable Law as necessary to obtain required access to lands outside of the Lands, and the City provides no representations or assurances in relation to such matters.

SECTION E DESIGN AND CONSTRUCTION OF THE INFRASTRUCTURE

E1. Design Builder's Obligations

E1.1 Design Builder shall design and construct the Infrastructure and complete the Works in accordance with this Design Build Agreement and achieve:

- (a) Substantial Completion by the Scheduled Substantial Completion Date; and
- (b) Final Completion by the Scheduled Final Completion Date.

E1.2 In the event of any conflict or inconsistency among the Technical Requirements, Design Builder Proposal Extracts, Design Builder's Design and Management Plans, the higher standard or specification shall apply, save and except, that the Technical Requirements shall, at all times, take precedence and prevail over Design Builder Proposal Extracts, Design Builder's Design and Management Plans in the event of conflict or inconsistency. However, notwithstanding the foregoing, in the event that Schedule 3 – Intermediate Design Submittal Extracts has specifically identified a conflict or inconsistency with the Technical Requirements and the Parties have agreed that the improvement or innovation within the Proposal Extracts will increase the requirement, then Design Builder will design and construct that improvement or innovation element to that higher or improved level.

E2. Technical Requirements

E2.1 Notwithstanding any other provision of this Design Build Agreement, Design Builder's obligation to design and construct the Infrastructure in accordance with the Technical Requirements is absolute, and cannot be modified or waived except by amendment of the Technical Requirements in accordance with Section G.

E3. Design Builder's Responsibility to Carry Out Technical Requirements

E3.1 Except as expressly stated otherwise in this Design Build Agreement, no consultation with or inspection, test, approval or comment (whether under the procedure contemplated by Section E4 or otherwise) or purported direction by or on behalf of the City, and no Project Background Information shall relieve Design Builder from exclusive responsibility for ensuring that the Infrastructure complies with the Technical Requirements or estop the City from asserting any non-compliance with the Technical Requirements. In the event of any failure by Design Builder to comply with the Technical Requirements, Design Builder shall not assert any duty of care or contributory negligence on the part of the City in relation to such failure.

E4. Design Builder's Submittals and other Documents for Submission or Access

E4.1 Design Builder shall submit:

- (a) all Submittals in accordance with Schedule 5 – Review Procedure; and
- (b) all Documents;

or any amendments thereto, in accordance with Schedule 13 – Document Management System and Schedule 18 – Technical Requirements.

E4.2 All responses by the City to Submittals will be made in accordance with Schedule 5 – Review Procedure. Design Builder acknowledges that the City may make any response as it sees fit pursuant to Schedule 5 – Review Procedure. All responses by the City to Documents will be made in accordance with the applicable provisions of the Design Build Agreement. If Design Builder disagrees with the City's response or withholding of consent the Parties shall resolve the disagreement in accordance with the process set out in Schedule 7 – Dispute Resolution Procedure.

E4.3 Design Builder shall not commence, or permit commencement of, work on any component of the Project, or if applicable on any modification or rehabilitation to the Infrastructure, until the applicable Detailed Design Submittal has been provided to the City in accordance with this Section E4 and received a Submittal Endorsement of "Construction Commencement Allowed" in accordance with Schedule 5 – Review Procedures, and all other Construction Commencement Conditions, as set out in Schedule 18 – Technical Requirements, have been met.

E4.4 The Parties expressly acknowledge and agree that neither comment by the City, nor failure by the City to comment or otherwise participate in any manner in respect of the procedure prescribed by Schedule 5 – Review Procedure, shall vary Design Builder's obligation under Section E3 to carry out the Project in accordance with the Technical Requirements.

E4.5 Design Builder shall make available all further documents as provided for in Schedule 18 – Technical Requirements in accordance with Schedule 13 – Document Management System and Schedule 18 – Technical Requirements.

E5. Design Builder's Other Responsibilities

E5.1 Design Builder shall do all things specified in this Design Build Agreement to be done by Design Builder, in such manner and at such times as specified in this Design Build Agreement. Design Builder shall take all such actions in the context of the Project as are from time to time required in order to allow the City, other Governmental Authorities, police services and emergency response services to carry out their respective statutory duties in relation to the Works, including, without limitation, meeting with the City, at any time and from time to time, at the City's request, acting reasonably.

E6. No Other Business

E6.1 Design Builder shall not engage in any activities on the Lands which are not specifically related to, required by and conducted for the purpose of the Project.

E7. Design Builder's Responsibility for Project

E7.1 Except for the obligations of the City set out in Section E14, Design Builder is solely responsible for doing all things of any nature whatsoever required to complete the Project, including:

- (a) the design and construction, including correction of all errors, omissions or Deficiencies, pursuant to the Design Build Agreement;
- (b) the obtaining of all required Permits, Licences and Approvals; and
- (c) complying with all Applicable Law.

E8. Construction Within the Lands Boundaries

E8.1 Design Builder shall design and construct the Infrastructure within the Construction Lands and acknowledges that it has fully familiarized itself with the requirements of the Infrastructure, as detailed in this Design Build Agreement including Schedule 18 – Technical Requirements, and has satisfied itself that no other land outside the Construction Lands will be required for the design and construction of the Infrastructure.

E9. Defective Work

E9.1 The City may, at any time, direct Design Builder to cease any aspect of construction of the Works, or open up any component of the Works already constructed that it considers to be not in accordance with the Technical Requirements, or if the City is of the opinion that Design Builder has not complied with any other obligations of this Design Build Agreement.

E9.2 If the inspection shows that the relevant part or parts of the Works is or are defective or that Design Builder has failed to comply with the requirements of this Design Build Agreement (including the Technical Requirements and Intermediate Design Submittal Extracts) relevant to such part or parts of the Works, Design Builder shall

- rectify all such defects and non-compliance diligently and at no cost to the City and Design Builder shall not be entitled to any additional compensation or extension of time in relation thereto.
- E9.3 If the inspection shows that the relevant part or parts of the Works is or are not defective and that Design Builder has complied with the requirements of this Design Build Agreement (including the Technical Requirements and Intermediate Design Submittal Extracts) relevant to such part or parts of the Works, the exercise by the City of its rights pursuant to this Section E9 shall, subject to and in accordance with Section K1.1, be treated as a Relief Event.
- E9.4 If, at any stage, the City is of the opinion, acting reasonably, that there are defects in the Works or that Design Builder has failed to comply, in any material respect, with the requirements of this Design Build Agreement (including the Technical Requirements and Intermediate Design Submittal Extracts), the City may, without prejudice to any other right or remedy available to it, by notice to Design Builder, increase the level of monitoring of Design Builder to such level as the City considers reasonable taking into account the nature of the relevant defect or failure until such time as Design Builder shall have demonstrated, to the City's satisfaction, that it is capable of performing and will perform, in all material respects, its obligations related to the Works under this Design Build Agreement. Design Builder shall compensate the City for any reasonable costs incurred as a result of such increased monitoring, which shall be deducted from the next due Progress Payment.
- E9.5 Design Builder shall promptly remove from the Lands and replace or re-execute defective work that fails to conform to this Design Build Agreement whether or not the defective work has been incorporated in the Infrastructure and whether or not the defect is the result of poor workmanship, use of defective products or damage through carelessness or other act or omission of Design Builder. The correction of defective works shall be at Design Builder's expense.
- E9.6 Design Builder shall rectify, in a manner acceptable to the City, all defective works and Deficiencies throughout the Infrastructure, whether or not they are specifically identified by the City, and Design Builder shall prioritize the correction of any defective works so as not to interfere with or derogate from Design Builder's Project Schedule, provided that Design Builder shall prioritize the correction of any defective works that in the discretion of the City is determined to adversely affect the City Operations or the City Work.
- E9.7 Design Builder shall promptly Make Good any Existing Infrastructure or other contractors' work destroyed or damaged by such rectifications at Design Builder's expense.
- E9.8 If in the opinion of the City it is not expedient to correct defective works or works not performed as provided in this Design Build Agreement, the City may deduct from the amount otherwise due to Design Builder the difference in value between the work as performed and that called for in this Design Build Agreement. If Design Builder does not agree on the difference in value, Design Builder shall refer the matter to the Dispute Resolution Procedure pursuant to Section S.

E9.9 The Parties acknowledge that the exercise by the City or the City Representative of the rights under Section E9 shall in no way affect the obligations of Design Builder under this Design Build Agreement except as set out in this Section E9.

E10. Construction Delays

E10.1 Without limiting any other provision of this Design Build Agreement but subject to Section K if, at any time:

- (a) the actual progress of the Works has significantly fallen behind Design Builder's Project Schedule, in which case Design Builder shall notify the City promptly upon becoming aware of such delay; or
- (b) the City is of the opinion, acting reasonably, that either:
 - (i) the actual progress of the Works has significantly fallen behind the Project Schedule; or
 - (ii) Design Builder will not achieve Substantial Completion by the Scheduled Substantial Completion Date,

the City will notify Design Builder of such opinion.

E10.2 No later than 5 Business Days following either delivery of the notice by Design Builder in accordance with Section E10.1(a) or delivery of the notice from the City in accordance with Section E10.1(b), Design Builder shall produce and submit to the City and to the Independent Certifier:

- (a) a detailed report identifying the reason for the delay; and,
- (b) a plan to bring the progress of the Works back on schedule (the "**Design Builder Schedule Recovery Plan**"), including an updated Project Schedule showing the steps that are to be taken by Design Builder to eliminate the delay to achieve Substantial Completion by the Scheduled Substantial Completion Date,

all as further detailed in Schedule 18 – Technical Requirements.

E10.3 The City will review Design Builder Schedule Recovery Plan delivered by Design Builder under Section E10.2(b) in accordance with Schedule 5 – Review Procedure.

E10.4 Following review of Design Builder Schedule Recovery Plan by the City, Design Builder shall implement Design Builder Schedule Recovery Plan and shall provide the City with weekly progress reports on the progress of the Works, in a form specified by the City.

E10.5 Design Builder shall notify the City if, at any time, the actual progress of the Works is significantly ahead of the Project Schedule.

E11. Independent Certifier

E11.1 Within 30 Calendar Days of the Effective Date, Design Builder and the City will jointly retain an Independent Certifier acceptable to both Parties, acting reasonably, to perform all of the obligations set out in this Design Build Agreement, including in Schedule 10 – Independent Certifier Agreement. The Independent Certifier shall be retained in accordance with the following:

- (a) the Independent Certifier shall be or shall employ an engineering consultant having strong expertise in wastewater and biosolids treatment design and construction payment certification services, all as further detailed in Schedule 10 – Independent Certifier Agreement;
- (b) the Independent Certifier must agree to carry out and discharge the responsibilities contemplated by this Section E11, and Section F1, Section F2 and Section H3 and Schedule 9 – Progress Payments, as well as the scope of services set out in Schedule 10 – Independent Certifier Agreement, and be available to carry out and discharge such responsibilities promptly and within the timelines contemplated in this Design Build Agreement;
- (c) the Independent Certifier must carry professional liability with an annual policy term with a limit of not less than \$5,000,000 per claim and \$5,000,000 in the aggregate;
- (d) all fees and expenses of the Independent Certifier are to be shared equally by Design Builder and the City;
- (e) the Independent Certifier shall be impartial to the Parties when required to make any recommendation, determination or assessment in accordance with this Design Build Agreement; and
- (f) the Independent Certifier shall execute an agreement with the City and Design Builder in the form set out in Schedule 10 – Independent Certifier Agreement.

E12. Referee

E12.1 Within 30 Calendar Days of the Effective Date, Design Builder and the City will jointly retain a Referee acceptable to both Parties, acting reasonably, to perform all of the obligations set out in this Design Build Agreement, including in Schedule 20 – Referee Agreement. The Referee shall be retained in accordance with the following:

- (a) the Referee shall be or shall employ an engineering consultant having strong expertise in wastewater and biosolids treatment design and construction dispute resolution services, all as further detailed in Schedule 20 – Referee Agreement;
- (b) the Referee must agree to carry out and discharge the responsibilities contemplated by this Section E12 as well as the scope of services set out in Schedule 20 – Referee Agreement, and be available to carry out and

discharge such responsibilities promptly and within the timelines contemplated in this Design Build Agreement;

- (c) the Referee must carry professional liability with an annual policy term with a limit of not less than \$2,000,000 per claim and \$4,000,000 in the aggregate;
- (d) all fees and expenses of the Referee are to be shared equally by Design Builder and the City;
- (e) the Referee shall be impartial to the Parties when required to make any recommendation, determination or assessment in accordance with this Design Build Agreement; and
- (f) the Referee shall execute an agreement with the City and Design Builder in the form set out in Schedule 20 – Referee Agreement.

E13. Work by City Contractors or City’s Own Forces, and City Operations

E13.1 The City may in its sole discretion:

- (a) award separate contracts to other contractors in connection with work related to the Project (including contracts for work on the Lands, the Existing Infrastructure, and the Infrastructure) that is outside the scope of the Works;
- (b) award separate contracts to other contractors for work on the Existing Infrastructure and the Lands unrelated to the Project;
- (c) perform work with its own forces related to the Project or on the Existing Infrastructure, the Infrastructure, and the Lands that is outside the scope of the Works; or
- (d) perform work with its own forces on the Existing Infrastructure, the Infrastructure, and the Land, that is unrelated to the Project,

(collectively, the “**City Work**”).

E13.2 Design Builder shall undertake, execute and complete the Works in a manner which does not interfere with or impair the City Operations or the City Work. Design Builder shall not cause any unnecessary hindrance or delay to any other contractors working at the Lands, the Existing Infrastructure and the Infrastructure. Without limiting any of the foregoing, Design Builder shall comply with Schedule 18 – Technical Requirements Appendix 18P – Coordination Protocol.

E14. Construction Impact on Residents and Community

E14.1 Design Builder shall comply with the requirements set out in Section Q1.

E14.2 Design Builder shall undertake the Works in a manner that:

- (a) minimizes actual or potential nuisance claims by surrounding community members in the vicinity of the Lands;
- (b) minimizes the impact of construction activities on surrounding community;
- (c) subject to Section Q1, promotes public communication and education with respect to the Project; and
- (d) for the purposes of Section E14.2, Design Builder shall be deemed to have complied with its obligation to minimize nuisance claims and the impact of construction activities on surrounding community members if it operates in accordance with Good Industry Practice and the Technical Requirements.

E14.3 Without derogating from Design Builder's responsibilities under this Section E13 or any other provision of this Design Build Agreement, Design Builder shall, in response to any reasonable request by the City, provide the City with such assistance and information as the City may reasonably require in relation to the Project.

E15. City Assistance with Permits and Approvals

E15.1 Without derogating from Design Builder's responsibilities under Section E7 to obtain all Permits, Licences and Approvals required for the Project, the City shall, in response to any reasonable request to the City Representative by Design Builder, provide Design Builder with such assistance and information as Design Builder may reasonably require in relation to the Permits, Licences and Approvals. For clarity, nothing in this Section E15 nor any assistance or direction provided by the City to Design Builder shall be construed as a fettering of any authority or discretion that the City may have pursuant to the exercise of its statutory powers under Applicable Law in relation to any Permits, Licences and Approvals. For clarity, nothing in this Design Build Agreement shall compel the City of Winnipeg to take any actions in relation to the Project or Design Builder, including the issuance of any applicable Permits, Licences and Approvals.

E15.2 Where a Permit, Licence or Approval requires execution of documents by the City as owner of the Lands, the Existing Infrastructure and the Infrastructure, Design Builder shall:

- (a) prepare and pay for all applications for any Permits, Licences or Approvals;
- (b) provide all information and documentation necessary for the City to review such application;
- (c) communicate with any authority responsible for any such Permit, Licence or Approval; and
- (d) promptly respond to any inquiries by the City with respect to such Permit, Licence or Approval.

E15.3 Provided that Design Builder has complied with Section E14.2, the City will, within the timeframe requested by Design Builder, acting reasonably and having regard to

the City's internal approval processes, review the documents prepared by Design Builder and, when the City is satisfied with the content of such applications, the City will execute the applications in accordance with the requirements of the Permits, Licences and Approvals. Where any Permits, Licences or Approvals have requirements that impose any conditions, liability or obligations on the City, Design Builder shall not obtain such Permit, Licence or Approval, without the prior written consent of the City, not to be unreasonably withheld or delayed.

E16. Security, Safety and Emergencies

- E16.1 Design Builder shall observe and comply with all safety and security requirements set out in Schedule 18 – Technical Requirements and Schedule 19 – Security Clearance Requirements and shall in all respects and at all times carry out the Works with due regard for public security and safety, including the security and safety of the City, all City Parties and the general public.
- E16.2 Design Builder shall take all such actions in the context of the Works as are from time to time required in order to allow the City, other governmental authorities, police services and emergency response services to carry out their respective statutory duties in relation to the Existing Infrastructure and the Infrastructure.
- E16.3 Without limiting Sections E15.1, E15.2 or the Technical Requirements Design Builder shall:
- (a) be familiar with and comply with *The Workplace Safety and Health Act* and Regulations, *The Employment Standards Code* and shall be familiar with the City's safety and health policies;
 - (b) ensure that all notices, permits and warnings are posted as required by Applicable Law;
 - (c) ensure that all Design Builder employees and Design Builder Parties on the Lands, the Existing Infrastructure, and the Infrastructure are trained and have applicable certification on the type of job to be performed. Without limiting the generality of the foregoing, all employees operating powered mobile equipment shall be trained and certified in the operation of this equipment and in compliance with *The Workplace Safety and Health Act* and Regulations. Design Builder shall produce proof of certification upon request by a City authorized representative; and
 - (d) be responsible for controlling and mitigating all workplace health and safety hazards and perform, or cause a Design Builder Party to perform, all of the obligations of the “**prime contractor**” for the purposes of *The Workplace Safety and Health Act* and Regulations.

E17. Warranty

- E17.1 Design Builder warrants that the Infrastructure or any part(s) shall:
- (a) conform to the Technical Requirements in all respects;

- (b) be new, of good quality material, of merchantable quality; and
- (c) be free of defects in materials, equipment and workmanship,

for a period commencing on the Substantial Completion Date and ending on the date that is two years after the Substantial Completion Date (the “**Warranty Period**”).

- E17.2 Design Builder shall promptly Make Good any Deficiency, defect or error in the Works or failure of the Works to conform to the Design Build Agreement, including any Deficiency, defect, error or failure that could not reasonably have been ascertained by a competent person in accordance with Good Industry Practice during a visual inspection of the Works (each a “**Construction Defect**”) in a manner approved by the City whether or not such Construction Defect has been incorporated into the Infrastructure and whether or not the Construction Defect is the result of poor workmanship, use of defective products or equipment or damage through carelessness or other act or omission of Design Builder. The correction of Construction Defects shall be at Design Builder’s sole cost and expense.
- E17.3 Design Builder shall obtain warranties from the manufacturers of each of the products and items of equipment for the duration(s) and in accordance with the applicable requirements specified in the Technical Requirements in the name of and to the benefit of Design Builder and the City. Where, in respect of a product warranty or equipment warranty, the Technical Requirements do not specify a specific duration and/or other requirements, Design Builder shall obtain industry-standard warranties from the applicable manufacturers in the name of and to the benefit of Design Builder and the City and shall use commercially reasonable efforts to ensure that such product warranties and equipment warranties extend for as long a period from the Substantial Completion Date as can be obtained from the applicable manufacturer, but in any event such product warranties and equipment warranties shall extend no less than the applicable Warranty Period. Each product warranty and equipment warranty shall be issued by the applicable manufacturer and delivered to Design Builder no later than 30 days prior to the Substantial Completion Date, with respect to the Works. Design Builder shall ensure that each product warranty and equipment warranty, including any product warranty or equipment warranty extended under this Section E17.3, is fully assigned to the City at no cost or expense to the City at the end of the Warranty Period, as such Warranty Period may be extended in accordance with Section E17.6.
- E17.4 The warranty set out in Section E17.1 shall cover labour and material, including the costs of removal and replacement of covering materials. The warranty shall not limit extended warranties on any items of equipment or material specified in the Technical Requirements or otherwise provided by any manufacturer of such equipment or material.
- E17.5 Design Builder shall carry out all work, including correcting Construction Defects, to satisfy the warranties provided pursuant to this Section E17 and in accordance with the applicable Warranty Period, and Design Builder shall also Make Good any damage to other works caused by the repairing of such defects, Deficiencies, or failures to comply (the “**Warranty Work**”). All Warranty Work shall not be the basis

of a claim for a Relief Event, any compensation related to a Relief Event, a Change Order or additional compensation or damages.

- E17.6 The applicable Warranty Period shall be extended for a further two years from the date of the last Warranty Work completed and accepted by the City in respect of the Infrastructure. For clarity, any extension of a Warranty Period for the purposes of a correction shall only apply to the relevant Warranty Work and not the Works as a whole. The cumulative duration of the Warranty Period in respect of any portion of the Works shall not exceed a period of 6 years from the Substantial Completion Date or such longer period as is set out in Schedule 18. If, during the Project Term, Warranty Work has been completed 3 separate times on the same component or part, as the case may be, and the City has determined that same component or part requires a fourth instance of Warranty Work, Design Builder shall replace the entire part, in the case of a defective component contained therein, or replace the entire piece of equipment, in the case of a defective part contained therein. For clarity, if a component is within a larger part which forms a portion of a piece of equipment, and a component fails 4 times, then the part will be replaced; whereas, if the larger part fails 4 times then the entire piece of equipment it is contained within will be replaced.
- E17.7 Design Builder acknowledges that the timely performance of Warranty Work is critical to the ability of the City to maintain effective City Operations. Design Builder shall use commercially reasonable efforts to respond to any requirement by the City to correct Construction Defects within the time periods required by the City, which in relation to critical areas may require immediate correction. Design Builder further acknowledges that if the City is unable to contact Design Builder or to obtain the Warranty Work within such time period required by the City, that the City's own forces, including City contractors, may take such emergency steps as are reasonable and appropriate to correct such Construction Defects at Design Builder's sole cost and expense, and may retain such amounts from the Warranty Letter of Credit. Except in the case of damage caused by the City's own forces, (including City contractors), such emergency steps taken by the City's own forces including City contractors shall not invalidate any warranties in respect of such portion of the Infrastructure affected by such corrective actions of the City and shall be without prejudice to any other right or remedy the City may have.
- E17.8 The performance of replacement work and Making Good of defects, Deficiencies or non-compliant items for which Design Builder is responsible, shall be commenced and completed as expeditiously as possible, and shall be executed at times convenient to the City and this may require work outside normal working hours at Design Builder's expense. Any extraordinary measures required to complete the replacement work, as reasonably directed by the City, to accommodate the operation of the Infrastructure or other aspects of the Project as constructed shall be at Design Builder's expense.
- E17.9 Design Builder shall, at any time or times prior to the expiry of the Warranty Period and when required to do so by the City, make such openings, tests, inspections, excavations, examinations, or other investigations in, through, of, or in the vicinity of the Infrastructure as directed and shall, if required, Make Good again, to the satisfaction of the City, acting reasonably, any openings, excavations or disturbances of any property, real or personal, resulting therefrom. If any Construction Defects are

found in the Infrastructure by such investigations, the cost of such investigations and such Making Good shall be borne by Design Builder, but only to the extent to which Design Builder is responsible for such Construction Defects. If no Construction Defects are found in the Infrastructure by such investigations, the cost of such investigations and the reinstatement of the Infrastructure shall be borne by the City. Neither test results, nor selection or approval by the City or the City Representative of testing entities, nor any other provision of this Design Build Agreement shall have the effect of limiting or shortening or otherwise affecting in any way whatsoever the duration, effectiveness or content of any guarantee or warranty set forth in any other document or material forming part of the Design Build Agreement.

E17.10 The express warranties set out in this Section E16 shall not deprive the City of any action, right or remedy otherwise available to the City at law or in equity for breach of any of the provisions of the Design Build Agreement by Design Builder, and the periods referred to in this Section E16, shall not be construed as a limitation on the time in which the City may pursue such other action, right or remedy.

E17.11 Design Builder acknowledges that the City may, in its sole discretion maintain and/or repair any part or parts of the Works during the applicable Warranty Period. Design Builder agrees that such work, whether performed by the City's own forces or any City Party, and any work performed in accordance with Section E17.7 shall not impact any of the warranties provided by Design Builder hereunder, provided that such work is carried out in accordance with Good Industry Practice and that such work does not materially alter the affected part or parts of the Works.

E18. Safety Certification

E18.1 Design Builder shall, no later than 5 Business Days after receipt of a request by the City, provide proof satisfactory to the City Representative that Design Builder, any Design Builder Party performing obligations of the "**prime contractor**" for the purposes of *The Workplace Safety and Health Act* and Regulations and any other Design Builder Party as required in accordance with *The Workplace Safety and Health Act* and Regulations has a workplace safety and health program meeting the requirements of *The Workplace Safety and Health Act* and Regulations, by providing:

- (a) a copy of its valid COR Certificate; or
- (b) a report or letter to that effect from an independent reviewer acceptable to the City.

E19. Commissioning

E19.1 Design Builder shall develop and update the Commissioning Plan in accordance with Schedule 18 – Technical Requirements. Design Builder understands and agrees that the City is ultimately responsible for City Operations and that Design Builder will operate any specific process or aspect of the Infrastructure or Existing Infrastructure during commissioning only for the purpose of carrying out the task of commissioning.

E20. Maintenance of the Infrastructure

E20.1 Upon Substantial Completion, the City will take responsibility for operating the Infrastructure and Design Builder shall continue to be responsible for maintenance of the Infrastructure in accordance with Schedule 18 – Technical Requirements until Final Completion.

E21. Operations Advisory Period

E21.1 Design Builder shall be responsible for providing Operations Advisory Services throughout the Operations Advisory Period in accordance with Schedule 18 – Technical Requirements and until Design Builder has been issued a Certificate of Operations Advisory Services Completion.

E22. Protection of Works and Property

E22.1 Design Builder shall protect the Works and the property at or adjacent to the Lands, the Lands, the Existing Infrastructure, and the Infrastructure, from damage which may arise as a result of Design Builder's operations under this Design Build Agreement, and shall be responsible for such damage, except damage which occurs as a result of acts or omissions by the City or any City Party.

E22.2 Should Design Builder, in the performance of this Design Build Agreement, damage the Works or the property at or adjacent to the Lands, the Lands, the Existing Infrastructure, and the Infrastructure, Design Builder shall be responsible to Make Good such damage at Design Builder's expense. For clarity, Design Builder's obligation to Make Good such damage shall be to the standard required to restore the City's property to its state prior to such damage.

E22.3 Should damage occur to the Works or the property at or adjacent to the Lands, including the Lands, the Existing Infrastructure, and the Infrastructure, for which Design Builder is not responsible, as provided in Section E19.1, Design Builder shall Make Good such damage to the Works and, if the City so directs, to the property of the City and, subject to and in accordance with Schedule 17 – Change Orders, such work to Make Good such damage to the Works, in accordance with the Technical Requirements, and, if the City so directs, to the property of the City by Design Builder shall result in a Change Order.

E22.4 Design Builder shall not undertake to repair and/or replace any damage whatsoever to adjoining property without first consulting the City and receiving written instructions as to the course of action to be followed.

E22.5 Notwithstanding Section E22.4, where there is danger to life or property which arises out of or in connection with the performance of the Works, the City may but Design Builder shall, take such emergency action as is necessary to remove the danger.

E22.6 If any Design Builder Party has caused damage to the work of another contractor related to the Project, the City Work or the City Operations, Design Builder agrees upon due notice to settle with the other contractor by negotiation or arbitration in accordance with Schedule 7 – Dispute Resolution Procedure. If the other contractor

makes a claim against the City on account of damage alleged to have been so sustained, the dispute shall be dealt with in substantially the same manner as contemplated in Schedule 7 – Dispute Resolution Procedure.

SECTION F COMPLETION OF THE INFRASTRUCTURE

F1. Substantial Completion

- F1.1 Design Builder shall achieve Substantial Completion on or before the Scheduled Substantial Completion Date.
- F1.2 If Design Builder fails to achieve Substantial Completion on or before the Scheduled Substantial Completion Date, Design Builder shall be liable for and shall pay to the City liquidated damages in the amount of [●] per Business Day for each and every Business Day following the Scheduled Substantial Completion Date during which such failure continues up to a maximum of [●] Business Days. The liquidated damages payable by Design Builder pursuant to this Section F1.2 shall be recoverable by the City in respect of the City's costs for the Owner's Advocate, Veolia, City personnel, City required insurance, impact on City perception due to delay in completing the Project, but, for clarity, shall not be the City's sole remedy with respect to damages that may otherwise be incurred by the City with respect to Design Builder's failure to achieve Substantial Completion by the Scheduled Substantial Completion Date or otherwise in relation to Design Builder's failure to perform the Works in accordance with the Design Build Agreement.
- F1.3 The Parties agree that the liquidated damages set out in Section F1.2 are not a penalty but represent a genuine and reasonable pre-estimate of the damages that the City will suffer as a result of Design Builder's failure to achieve Substantial Completion by the Scheduled Substantial Completion Date. The Parties also agree that any liquidated damages due to Design Builder's failure to achieve Substantial Completion by the Scheduled Substantial Completion Date shall be limited by the cap on liability set out in Section F1.2 and any other claim for damages due to Design Builder's failure to achieve Substantial Completion by the Scheduled Substantial Completion Date shall be limited by the aggregate cap on liability set out in Section N3.3(b).
- F1.4 Liquidated damages, if any, payable under Section F1.2 shall be deducted from the next Progress Payment and from subsequent Progress Payments until the full amount of the liquidated damages has been paid, and if there are insufficient monies payable by the City to Design Builder to cover the amount of the liquidated damages, then the difference shall be a debt due and payable by Design Builder to the City.
- F1.5 The Independent Certifier shall, in accordance with Section H3 in respect of the applicable Progress Payment, determine if and when Substantial Completion is achieved and shall certify (the "**Substantial Completion Certificate**") the date thereof and issue the Substantial Completion Certificate to Design Builder and to the City.

F2. Final Completion

- F2.1 Design Builder shall achieve Final Completion on or before the Scheduled Final Completion Date.
- F2.2 If Design Builder fails to achieve Final Completion on or before the Scheduled Final Completion Date, Design Builder shall be liable for and shall pay to the City liquidated damages in the amount of [\$●] per Business Day for each and every Business Day following the Scheduled Final Completion Date during which such failure continues up to a maximum of [\$●] Business Days. The liquidated damages payable by Design Builder pursuant to this Section F2.2 shall be recoverable by the City in respect of the City's costs for the Owner's Advocate, Veolia, City personnel, City required insurance, impact on City perception due to delay in completing the Project, but, for clarity, shall not be the City's sole remedy with respect to damages that may otherwise be incurred by the City with respect to Design Builder's failure to achieve Final Completion by the Scheduled Final Completion Date or otherwise in relation to Design Builder's failure to perform the Works in accordance with the Design Build Agreement.
- F2.3 The Parties agree that the liquidated damages set out in Section F2.2 are not a penalty but represent a genuine and reasonable pre-estimate of the damages that the City will suffer as a result of Design Builder's failure to achieve Final Completion by the Scheduled Final Completion Date. The Parties also agree that any liquidated damages due to Design Builder's failure to achieve Final Completion by the Scheduled Final Completion Date shall be limited by the cap on liability set out in Section F2.2 and any other claim for damages due to Design Builder's failure to achieve Final Completion by the Scheduled Final Completion Date shall be limited by the aggregate cap on liability set out in Section N3.3(b).
- F2.4 Liquidated damages, if any, payable under Section F2.2 shall be deducted from the next Progress Payment and from subsequent Progress Payments until the full amount of the liquidated damages has been paid, and if there are insufficient monies payable by the City to Design Builder to cover the amount of the liquidated damages, then the difference shall be a debt due and payable by Design Builder to the City.
- F2.5 In the event that Sections F1.2 and F2.2 are both applicable, Design Builder shall be liable for and shall pay to the City liquidated damages in accordance with Section F1.2 until Substantial Completion is achieved or the maximum days as set out in Section F1.2 have been reached and then liquidated damages in accordance with Section F2.2 until Final Completion is achieved or the maximum days as set out in Section F2.2 have been reached; both types of liquidated damages will not be applied simultaneously.
- F2.6 Upon issuing the Substantial Completion Certificate, the Independent Certifier shall also issue to Design Builder and to the City the Deficiency List of items required to be rectified for Final Completion and the Independent Certifier's estimate of the cost to achieve Final Completion.
- F2.7 The City may, no later than 15 Business Days following receipt of the Deficiency List, notify Design Builder and the Independent Certifier of any additional items that, in the

opinion of the City, are required to be rectified for Final Completion and the Independent Certifier shall, to the extent that it agrees with the City, adjust the Deficiency List and its estimate of the cost to achieve Final Completion accordingly.

- F2.8 Following achievement of Substantial Completion, Design Builder shall diligently proceed to Final Completion, subject to any restrictions on access set out in Schedule 18 – Technical Requirements.
- F2.9 When Design Builder is of the opinion that it has rectified all of the Deficiencies on the Deficiency List, it shall notify the City and the Independent Certifier in writing and proceed in accordance with Section H3. The Independent Certifier shall, in accordance with Section H3 in respect of the applicable application of Progress Payment Certificate, and in the case of Final Completion determine if all of the items on the Deficiency List have been rectified, determine if and when Final Completion is achieved and shall certify (the “**Final Completion Certificate**”) the date thereof and issue the Final Completion Certificate to Design Builder and to the City.
- F2.10 If the Independent Certifier is of the view that certain items on the Deficiency List have not been rectified, then the Independent Certifier will:
- (a) advise Design Builder and the City in writing of those outstanding items within 10 Business Days of receipt of Design Builder’s notification in Section F2.9; and
 - (b) conduct subsequent inspections and will issue a Final Completion Certificate when the Independent Certifier is satisfied that all items on the Deficiency List have been rectified.

F3. Deficiencies Holdback

- F3.1 If the Independent Certifier issues a Deficiency List in accordance with Section F2.6 and as adjusted by F2.7 Design Builder shall, no later than 30 Calendar Days following the issuance of the Deficiencies List, prepare and deliver to the City a comprehensive workplan and schedule acceptable to the City, acting reasonably, designed to achieve Final Completion within a reasonable time following Substantial Completion (the “**Deficiencies Workplan and Schedule**”). Following acceptance of the Deficiencies Workplan and Schedule by the City, Design Builder shall keep the City fully advised of all activity and progress in carrying out the Deficiencies Workplan and Schedule.
- F3.2 If:
- (a) Design Builder fails to deliver an acceptable Deficiencies Workplan and Schedule no later than 30 Calendar Days following issuance of the Deficiencies List; or
 - (b) having delivered an acceptable Deficiencies Workplan and Schedule, fails in any material respect to diligently carry out the Deficiencies Workplan and Schedule in accordance with the schedule;

then the City may hold back from any amounts then owing to Design Builder an amount equal to twice the amount of the Independent Certifier's estimate for the rectification of all of the items on the Deficiencies List (the "**Deficiencies Holdback**").

- F3.3 The City will release the Deficiencies Holdback to Design Builder, without interest, no later than 30 Calendar Days following the issuance of the Final Completion Certificate.
- F3.4 If Final Completion is not achieved before 180 Calendar Days following Substantial Completion (or such longer period as may be agreed by the City, acting reasonably, including up to 360 Calendar Days for completion of seasonal works that cannot be completed within the specified 180 day period provided such works do not impact City Operations), the City shall request that the Independent Certifier provide an estimate of the cost of achieving Final Completion based on the work that Design Builder has not completed by the date of such request. The City may, by notice to Design Builder, elect to do the remaining work required to achieve Final Completion by means of its own forces or another contractor. The City will perform all such work in accordance with the Design Build Agreement and the Technical Requirements.
- F3.5 In the event that the City exercises its right in Section F3.4, the City may retain, as liquidated damages, an amount equal to the Independent Certifier's estimate of the cost to complete the work remaining to be done to achieve Final Completion and the balance of the Deficiencies Holdback, if any, shall be released to Design Builder without interest.

F4. Disputes Regarding the Achievement of Substantial Completion

- F4.1 The Independent Certifier's decision to issue or not to issue the Substantial Completion Certificate shall be final and binding on the Parties solely in respect of determining the Substantial Completion Date, and a Dispute in relation to the Substantial Completion Date shall not be subject to resolution pursuant to Schedule 7 – Dispute Resolution Procedure, provided, however, that any other Dispute in relation to the Independent Certifier's decision to issue or not to issue the Substantial Completion Certificate may be referred for resolution pursuant to the Dispute Resolution Procedure.

F5. Effect of Payments

- F5.1 No payment made by the City under this Design Build Agreement, or partial or entire use or occupancy of the Works/Infrastructure by the City, will constitute an acceptance of Works not in accordance with this Design Build Agreement.

F6. Effect of Certificates

- F6.1 By issuing any certificate required or permitted under this Design Build Agreement, the City including the City Representative, does not guarantee or otherwise become liable or responsible in any way for the correctness or completeness of the Works, including the design, and no certificate makes the City or the City Representative any way responsible or liable for adequacy of the design or for the Works.

F6.2 As of the Final Completion Date, each Party expressly waives and releases the other Party from all claims except those claims (i) made in writing prior to Design Builder's application for payment in respect of the Progress Payment for Final Completion and still unsettled, (ii) arising in connection with the obligations of either Party to be performed after Final Completion (iii) made in writing by third parties after Final Completion and for which the City has agreed to indemnify Design Builder pursuant to Section N2, and (iv) any claims which are unknown and discovered by either party after Final Completion.

F7. Certificate of Acceptance

F7.1 The Independent Certifier shall certify acceptance of the Work and issue a "**Certificate of Acceptance**" upon:

- (a) the satisfactory performance of the Works during the Warranty Period;
- (b) Design Builder having fully complied with Section E21; and
- (c) the satisfactory completion of the Work necessary for the Independent Certifier to issue a Certificate of Acceptance pursuant to the Technical Requirements.

F7.2 Only certification of acceptance of the Infrastructure shall constitute:

- (a) acceptance of the Infrastructure; or
- (b) acceptance that the Works/Infrastructure or any part thereof has been duly performed.

SECTION G MODIFICATIONS AND CHANGE ORDERS

G1. Modification of Project, Infrastructure or Technical Requirements

G1.1 If the City wishes to modify the Project, the Infrastructure or the Technical Requirements, it shall proceed as provided in Schedule 17 – Change Orders. If Design Builder wishes to recommend modification of the Project or the Technical Requirements, it may invite the City to proceed as provided in Schedule 18 – Technical Requirements.

G1.2 Upon issuance of a Change Order Confirmation or a Change Order Directive by the City pursuant to Schedule 17 – Change Orders in respect of the Project, the Infrastructure or the Technical Requirements:

- (a) all applicable Schedules shall be amended accordingly through issuance and execution of a Change Order;
- (b) except as otherwise agreed between the City and Design Builder, Design Builder shall be entitled to payment from the City, on the next Progress Payment of the reasonable incremental costs, if any, calculated in

accordance with Schedule 17 – Change Orders, of carrying out the Project or the Technical Requirements;

- (c) if the Parties agree that the Change Order will delay the achievement of Substantial Completion by the Scheduled Substantial Completion Date, Design Builder may propose to the City that such extraordinary measures be taken by Design Builder at the City's expense and the City shall respond within 10 Business Days of such proposal, or the Parties may agree to required adjustments to the Project Schedule; and
- (d) in the event that the Parties cannot agree on the date that Substantial Completion would have been achieved but for the Change Order, or the revised date on which Substantial Completion should be scheduled to be achieved following the issuance of a Change Order, either Party may require that the matter be determined in accordance with the Dispute Resolution Procedure.

G1.3 The City will not, without the prior consent of Design Builder, pursue any Change Orders that singularly or in the aggregate involve an alteration in the scope of the Project of such magnitude that it could reasonably be expected to materially impact Design Builder's ability to achieve Substantial Completion by the Scheduled Substantial Completion Date or otherwise materially and adversely alter the risk profile of the Project.

G2. Determination of Costs of Change Orders

G2.1 All payments on account of Change Orders shall be calculated in accordance with the provisions of Schedule 17 – Change Orders.

SECTION H PAYMENT

H1. Contract Price

- H1.1 The City will pay the Contract Price as set out in Schedule 8 – Prices, plus GST as applicable, to Design Builder for the performance of the Works in accordance with this Design Build Agreement.
- H1.2 The Contract Price is the entire compensation to Design Builder for the performance of the Works.
- H1.3 The Contract Price is subject to adjustments only as provided for in this Design Build Agreement.
- H1.4 The City will pay the Contract Price to Design Builder by making Progress Payments. Progress Payments will be made subject to, and in accordance with, this Design Build Agreement including Schedule 9 – Progress Payments.

H2. Cash Allowance

- H2.1 Design Builder shall only use the Cash Allowance Amount in accordance Schedule 9 – Progress Payments and this Section H2.
- H2.2 Design Builder shall include in its application for a Progress Payment, the amount for any Cash Allowance Items properly incurred against the Cash Allowance Amount in the next or any subsequent Progress Payment after such expense have been incurred. The application shall include all documentation, including a Change Order as applicable, supporting the amount requested for the payment from the Cash Allowance Amount.
- H2.3 Design Builder acknowledges and agrees that:
- (a) neither it, nor any Design Builder Party, shall be entitled to any mark-ups for profit, overhead or other costs associated with the Cash Allowance Items; and
 - (b) all discounts, rebates, refunds, chargebacks, credits, price adjustments and other allowances available to Design Builder or any Design Builder Party in connection with the Cash Allowance shall be attributed solely to and shall benefit the costs of carrying out the work described in Schedule 9 – Progress Payments.

H3. Progress Payments

- H3.1 Design Builder shall make application for Progress Payment Certificates in accordance with Schedule 9 – Progress Payments.

H4. Application for Progress Payments

- H4.1 Design Builder shall make application to the City for payment of Progress Payments in accordance with Schedule 9 – Progress Payments.

H5. Warranty Letter of Credit

- H5.1 As security for Design Builder's warranty obligations during the Warranty Period, Design Builder shall provide the Warranty Letter of Credit pursuant to Section C1.1(b)(i).
- H5.2 The City shall be entitled to draw on the Warranty Letter of Credit if Design Builder fails to carry out the Warranty Work in accordance with Section E17.5, and in the time specified in Section E17.7 or subsequently agreed upon, without prejudice to any other right or remedy the City may have, the City may correct the Works at the sole risk, cost and expense of Design Builder and may draw such amounts from the Warranty Letter of Credit to fund or as reimbursement for such costs and expenses.
- H5.3 If the amounts set out in Section H5.2 exceed the amount of the Warranty Letter of Credit, then Design Builder shall reimburse the City for all such excess cost.

H5.4 Unless the Warranty Letter of Credit is fully drawn by the City in accordance with the provisions of this Design Build Agreement, the City shall return any unused portion of the Warranty Letter of Credit, less any amounts deducted in accordance with Section H5.2, no later than 45 Calendar Days following the date that is 2 years following the Substantial Completion Date, unless the Warranty Period is extended pursuant to Section E17.6.

H6. Lien Holdbacks

H6.1 In accordance with the provisions of *The Builders' Liens Act* (Manitoba), the City will retain holdbacks from payments to Design Builder ("**Lien Holdback**").

H6.2 The City will release the Lien Holdbacks in accordance with the provisions of *The Builders' Liens Act* (Manitoba).

H6.3 For the purposes of *The Builders' Liens Act* (Manitoba), the Independent Certifier will be the Payment Certifier for this Design Build Agreement.

H6.4 Design Builder shall submit its application to the City Representative for release of a Lien Holdback.

H6.5 Design Builder shall maintain, or cause to be maintained, all holdbacks required pursuant to Applicable Law and shall only release holdbacks on being satisfied that no claims for lien can be claimed in respect of any subcontracts for which holdbacks are to be released.

H7. Payment Adjustments

H7.1 Payments to Design Builder are subject to Payment Adjustments on the basis set out in this Design Build Agreement and as summarized in Schedule 14 – Payment Adjustments, applied in accordance with this Design Build Agreement. In the event of any inconsistency between the criteria for and descriptions of the Payment Adjustments set out in the body of this Design Build Agreement or Schedule 18 – Technical Requirements with the summaries of such criteria and such descriptions included in Schedule 14 – Payment Adjustments, the more detailed provisions of the body of this Design Build Agreement and Schedule 18 – Technical Requirements shall govern.

H7.2 Design Builder will notify the City and the Independent Certifier in a timely manner upon becoming aware of circumstances that give rise to a Payment Adjustment. Failure by Design Builder to give such notice in a timely manner shall not prevent the City from claiming the Payment Adjustment and in turn providing notice to the Independent Certifier, with a copy to Design Builder, that circumstances that give rise to a Payment Adjustment exist, but the City may assert against Design Builder a claim for any damages resulting from the failure of Design Builder to give notice in a timely manner. The Independent Certifier will determine if a Payment Adjustment is applicable and notify the City and Design Builder accordingly within 5 Business Days of the notice by Design Builder or the City, as the case may be.

H7.3 Design Builder acknowledges and agrees that the Payment Adjustments are integral to the provisions of this Design Build Agreement. The Parties agree that the Payment Adjustments provided for in Schedule 18 – Technical Requirements and the amounts as specified in Schedule 14 – Payment Adjustments are not a penalty but represent a genuine and reasonable pre-estimate of the particular damages that the City will suffer, and will be the City’s sole remedy arising from the particular events as set out in Schedule 14 – Payment Adjustments, Table 1 Reference numbers 1, 2, 3, 4, 6, 7, 8, 11, and 14 provided that the application of Payment Adjustments shall not be the City’s sole remedy in relation to the damages that the City will suffer arising from Schedule 14 – Payment Adjustments, Table 1 Reference numbers 5, 9, 10, 12 and 13, and the City expressly reserves its rights in relation thereto.

H7.4 If, for any reason, any Payment Adjustment is invalid and unenforceable, and an Applicable Law that is a Change in Law is enacted that permits the City to recover or to cause such Payment Adjustment to be enforceable, such Change in Law (only to the extent that it permits the City to recover or to cause such Payment Adjustment to be enforceable) shall be deemed to not be a Designated Change in Law and Design Builder shall not be entitled to any compensation hereunder for such Change in Law.

H7.5 If at any time during the Project Term, circumstances arise that entitle the City to claim a Payment Adjustment, then the City will be entitled to make a deduction in the total amount of the Payment Adjustments from the next Progress Payment and from subsequent Progress Payments until the full amount of the Payment Adjustment has been deducted.

H7.6 Notwithstanding that the Independent Certifier makes the determination regarding the application of a Payment Adjustment in accordance with Section H7.2, the City may at its discretion waive the assessment of Payment Adjustments in accordance with this Design Build Agreement.

H8. Direct Deposit

H8.1 The City will pay Design Builder by direct deposit to Design Builder’s banking institution.

H9. Set-off

H9.1 The City is entitled to set off against any Progress Payment or any other payment, any amount:

- (a) recoverable or payable by Design Builder to the City under this Design Build Agreement under any provision of this Design Build Agreement, including in connection with any Permits, Licences and Approvals; and
- (b) paid by the City under and in accordance with any statute in respect of any lien or claim arising from any act or omission of Design Builder or any Design Builder Party in relation to the Project.

H10. Interest on Overdue Payments

H10.1 Any amount payable under this Design Build Agreement and not paid when it becomes due shall bear interest at the current prejudgment interest rate set by the Manitoba Court of King's Bench, without compounding, from the due date of the amount payable until the date (or dates) of payment. Where pursuant to the Dispute Resolution Procedure a disputed amount is determined to have been payable, then subject to any contrary determination pursuant to the Dispute Resolution Procedure, interest at the current prejudgment interest rate set by the Manitoba Court of King's Bench, without compounding, shall be payable from the date when such amount ought to have been paid until the date (or dates) of payment.

H11. Changes in Recoverability of Tax Credits

H11.1 The City will pay to Design Builder from time to time, as the same is incurred by Design Builder, amounts equal to any Irrecoverable Tax to the extent such Irrecoverable Tax results from the coming into effect or repeal (without re-enactment or consolidation) in Manitoba of any Applicable Law, or any amendment or variation of any Applicable Law, including any judgment of a relevant court of law which changes binding precedent in Manitoba, in each case after the date of the Design Build Agreement. Design Builder shall pay to the City from time to time, as the same is incurred by Design Builder, amounts equal to any Recoverable Tax to the extent such Recoverable Tax results from the coming into effect or repeal (without re-enactment or consolidation) in Manitoba of any Applicable Law, or any amendment or variation of any Applicable Law, including any judgment of a relevant court of law which changes binding precedent in Manitoba, in each case after the date of the Design Build Agreement.

H11.2 For the purposes of this Section H11, the term "**Irrecoverable Tax**" means GST, RST or an irrecoverable sales tax levied by the Legislative Assembly of Manitoba in lieu of all or a portion of RST incurred by Design Builder in respect of the supply of any good or service to the City which is consumed, used or supplied, or to be consumed, used or supplied, exclusively by Design Builder in the course of carrying out the Works to the extent that Design Builder is unable to recover or be credited with input tax credits, refunds, rebates or exemptions for such GST or RST, or after obtaining an input tax credit, refund, rebate or exemption, is required to pay an additional amount to the Canada Revenue Agency or any other Governmental Authority equal to all or part of the input tax credit, refund, rebate or exemption claimed.

H11.3 For the purposes of this Section H11, the term "**Recoverable Tax**" means GST or RST incurred by Design Builder in respect of the supply of any good or service to the City which is consumed, used or supplied, or to be consumed, used or supplied, exclusively by Design Builder in the course of carrying out Works to the extent that Design Builder is able to recover or be credited with input tax credits, refunds, rebates or exemptions for such GST or RST.

H12. Information and Assistance Provided by Design Builder

- H12.1 Design Builder shall, at the City's request and cost, assist the City in applying for and obtaining all remissions and credits of GST or RST, as the case may be, outside of the City's routine GST and RST filings, to which the City is entitled.
- H12.2 The City may apply for a global or general exemption, waiver, remission or refund of some or all taxes which may otherwise be applicable in relation to this Design Build Agreement. Design Builder shall, at the City's request and reasonable cost, assist the City in making any applications for such global or general exemption, waiver, remission or refund and shall provide the City with such documentation as the City may reasonably require to support such application and, in any event, shall provide such consent as the City may require. Any exemption, waiver, remission, refund or other recovery of taxes obtained by the City through such application shall accrue to the sole benefit of the City.
- H12.3 Design Builder shall provide the City with any information reasonably requested by the City from time to time in relation to the GST or RST, as the case may be, chargeable in accordance with this Design Build Agreement and payable by the City to Design Builder from time to time.

H13. Withholding Taxes

- H13.1 Design Builder shall not, without the prior written consent of the City, which consent may be withheld in its sole discretion, undertake any action or transaction that, if undertaken, would cause the City to have (or result in the City having) any obligation to deduct, withhold or remit any taxes that are required by Applicable Law to be deducted, withheld or remitted from any amounts paid or credited to Design Builder under this Design Build Agreement.

H14. Design Builder Indemnities - Taxes

- H14.1 If Design Builder becomes a non-resident (as defined in the *Income Tax Act* (Canada)) or the City is or becomes required by Applicable Law to deduct and withhold any amount in respect of taxes on or in respect of any amounts paid or credited to Design Builder or a Design Builder Party by the City under this Design Build Agreement, then the City will be entitled to make any applicable deductions or withholdings required by Applicable Law from any amount paid or credited or to be paid or credited to Design Builder or a Design Builder Party on or after the date on which:
- (a) Design Builder or Design Builder Party becomes a non-resident and at all times while it remains a non-resident; or
 - (b) the City is required by Applicable Law to deduct or withhold amounts in respect of any such amounts, in each case, in respect of all taxes that are required by Applicable Law to be deducted or withheld from amounts paid or credited to a non-resident or otherwise as required by Applicable Law, and all amounts paid or credited by the City under this Design Build Agreement to

Design Builder or a Design Builder Party shall be paid or credited net of such deductions or withholdings.

H14.2 If Design Builder becomes a non-resident (as defined in the *Income Tax Act* (Canada)) or the City is or becomes required by Applicable Law to deduct and withhold any amount in respect of taxes on or in respect of any amounts paid or credited to Design Builder or a Design Builder Party by the City under this Design Build Agreement, Design Builder shall, in each case, indemnify and hold harmless the City for:

- (a) the full amount of all taxes (“**Indemnifiable Taxes**”) that arise, are imposed on or are required to be paid by the City in respect of any amounts paid or credited by the City to Design Builder or any Design Builder Party under this Design Build Agreement as a result of either of the foregoing items less any amount withheld or deducted by the City in respect of such taxes; and
- (b) any liability payable or incurred in connection with Indemnifiable Taxes (including penalties, interest and reasonable expenses associated with tax compliance, reporting and contesting such liability for Indemnifiable Taxes, including reasonable professional expenses payable or incurred in connection therewith) arising from or with respect to Indemnifiable Taxes, whether or not they were correctly or legally asserted (“**Associated Liabilities**”).

Payment under this indemnification shall be made within 30 Calendar Days from the date the City makes written demand for it. A certificate containing reasonable detail as to the amount of Indemnifiable Taxes and Associated Liabilities submitted to Design Builder by the City will be conclusive evidence, absent manifest error, of the amount due from Design Builder to the City. The City will be entitled to exercise its rights of set off under Section H9 against any amounts owing under this indemnification.

SECTION I INSURANCE

11. Insurance Requirements

11.1 Design Builder shall obtain and maintain in place, or cause to be obtained and maintained, all of the insurance specified in Sections D and E of Schedule 11 – Insurance Requirements.

11.2 The City will maintain in place all of the insurance specified in Section C of Schedule 11 – Insurance Requirements. City shall notify Design Builder if it receives notice or otherwise becomes aware that any of the insurance required under this Design Build Agreement or any extensions of coverage required will not be renewed or may be restricted by the insurer(s) on risk.

11.3 Design Builder shall provide the City with any information reasonably requested by the City, from time to time, to enable the insurance specified in Section C of Schedule 11 – Insurance Requirements to be appropriately underwritten by competent insurers.

- 11.4 Design Builder shall provide the City with information regarding any equipment or machinery that will form part of the Project that is being purchased and shipped via ocean or air and/or not insured by the seller or freight forwarder from their location to the Lands no less than 60 days prior to the expected shipment date.
- 11.5 Without limiting Design Builder's obligations pursuant to Section I1.1, Design Builder shall require and ensure that Design Builder Party, if applicable, obtain and maintain, or cause to be obtained and maintained, and provide evidence as reasonably requested by the City of the insurance required in Sections D and E of Schedule 11 – Insurance Requirements, as applicable.
- 11.6 All insurance required pursuant to Schedule 11 – Insurance Requirements shall be placed with Eligible Insurers.
- 11.7 In order for Design Builder to most efficiently provide the information required by the City's insurer(s), Design Builder shall designate an insurance representative to communicate directly with the City's insurance representative to place the initial insurance, produce the quarterly insurance report, if required, and/or provide any other information that the City's insurer(s) require to place and maintain insurance.

12. Evidence of Insurance

- 12.1 Design Builder shall deliver or cause to be delivered to the City:
- (a) insurance as specified in Section D of Schedule 11 – Insurance Requirements. Evidence may include detailed insurance cover notes and detailed certificates of insurance and written confirmation from Design Builder's insurance broker that all insurance required by this Section I is in effect and complies with each of the insurance requirements in Section I and Schedule 11 – Insurance Requirements. Such evidence of the requirements as outlined in Section D1.1 of Schedule 11 – Insurance Requirements shall be provided within 14 Calendar Days of the execution of the Design Build Agreement and any other insurances as detailed under Section D of Schedule 11 – Insurance Requirements, shall be provided at least 21 Calendar Days prior to Mobilization upon the Land;
 - (b) in relation to the insurance required for the Warranty Period, evidence that may include detailed insurance cover notes and/or detailed certificates of insurance required by this Design Build Agreement. Evidence of all insurance policies required to be obtained and maintained by Design Builder outlined in this Design Build Agreement shall be in effect and compliant, and satisfactory to the City, acting reasonably, prior to and as a precondition to Final Completion; and,
 - (c) not less than 14 Calendar Days prior to expiration of any then current policy, notice from Design Builder's insurance provider or broker confirming, in writing, the renewal, extension or replacement of such insurance. Within 30 Calendar Days after expiration of any then current policy, certified copies of policies or detailed certificates of insurance, as applicable, shall be provided to the City for review, to their satisfaction, acting reasonably.

- 12.2 Design Builder shall arrange and ensure that all insurance documentation, including certified policies, certificates of insurance, notices of cancellation or notices of material changes as described in Schedule 11 – Insurance Requirements, shall be sent to the City at the following address:

The City of Winnipeg,
Attention: Supervisor of Insurance
3rd Floor – 185 King Street
Winnipeg, Manitoba R3B 1J1
FAX No. (204) 986-6132
Email: insurance@winnipeg.ca

With a copy to:
Lana Obach, P.Eng., MASc., PMP,
Senior Project Engineer
Email: lobach@winnipeg.ca

- 12.3 Delivery to and examination by the City of any policy of insurance or certificate or other form of documentation evidencing such insurance shall not relieve Design Builder of any of its obligations pursuant to the provisions of this Design Build Agreement and shall not operate as a waiver by the City of any rights.
- 12.4 Design Builder shall promptly notify the City if it receives notice or otherwise becomes aware that any of the insurance required under this Design Build Agreement will not be renewed or may be restricted by the insurer(s) on risk.
- 12.5 The City shall arrange and provide insurance documentation such as project specific policies and/or certificates of insurance including notices of cancellation as described in Schedule 11 – Insurance Requirements to Design Builder.

13. City May Insure

- 13.1 If Design Builder at any time fails to furnish the City with evidence of all required insurance in the manner specified Section 12, or if subsequent to providing evidence of all required insurance, Design Builder's insurance is subject to a material change restricting coverage or is cancelled, the City may, upon 15 Business Days' notice to Design Builder, obtain the required insurance not so evidenced or so restricted or cancelled, and may set off the cost of the insurance so obtained against any amount payable to Design Builder under this Design Build Agreement.

14. Repair of Damage – Prior to Substantial Completion

- 14.1 Design Builder shall protect the Existing Infrastructure and the Works from damage that may arise as the result of Design Builder's, and any Design Builder Party's, operations under this Design Build Agreement and shall be responsible for such damage excepting only:

- (a) damage caused by a Force Majeure Event (in which case Sections J1 and J2 apply);
 - (b) Environmental Damage or Degradation described in Section D6.2 (in which case Section D6.2 applies); and
 - (c) damage directly caused by the City or any City Party; or
 - (d) damage caused prior to Mobilization to the Construction Land and/or Staging Area Lands.
- 14.2 Should any damage occur to the Existing Infrastructure and the Works for which Design Builder is responsible Design Builder shall Make Good in accordance with the Technical Requirements, such damage at its own cost and expense or pay all costs incurred by the City or others in Making Good such damage.
- 14.3 Immediately and without delay upon Design Builder becoming aware of the occurrence of damage to the Existing Infrastructure and the Works, Design Builder shall give the City Representative notice of the damage including reasonable details of the anticipated effect of the damage upon Design Builder's performance of this Design Build Agreement and, thereafter the Parties shall on an ongoing basis communicate and consult with each other (including any applicable insurance provider and/or their adjuster) with a view to monitoring, remedying, mitigating or otherwise addressing the consequences of the damage.
- 14.4 If damage to the Existing Infrastructure and the Works during construction causes a delay in the critical path of the Project Schedule to the extent that it delays Design Builder from achieving Substantial Completion by the Scheduled Substantial Completion Date, then provided that:
- (a) the damage was directly caused by the City or a City Party;
 - (b) Design Builder takes all reasonable action to diligently mitigate the delay and, at the City's request and cost, repair the damage;
 - (c) Design Builder has maintained all insurance required by this Design Build Agreement that is relevant to the damage and if over the deductible, made a claim thereunder for its loss; and
 - (d) Design Builder is not otherwise entitled to an adjustment of Scheduled Substantial Completion Date, compensation or other relief in accordance with Sections J1 or K1,
- then the Scheduled Substantial Completion Date, the Project Schedule and the dates in O2.1(f), O2.1(g), and O2.1(h), shall be adjusted to take account of the period during which Design Builder is taking all reasonable action to diligently mitigate the delay and, at the City's request and cost, repair the damage.

SECTION J FORCE MAJEURE

J1. Force Majeure

- J1.1 This Section J1 shall apply to any Force Majeure Event that occurs during the Project Term, notwithstanding any other provision of this Design Build Agreement.
- J1.2 The Parties acknowledge and agree that this Section J does not apply to the COVID-19 Pandemic given it is no longer considered a pandemic and that the COVID-19 Pandemic shall not be considered a Force Majeure Event for the purposes of this Design Build Agreement.
- J1.3 To the extent that and for so long as either Party is prevented by the Force Majeure Event from performing all or a material part of its obligations under this Design Build Agreement, that Party is relieved from performance of such obligations.
- J1.4 If a Force Majeure Event prevents Design Builder from proceeding with the Works for a period of at least 15 Calendar Days (measured on a critical path basis having regard to the Project Schedule, then, subject to this Section J1:
- (a) the Project Schedule, including the Scheduled Substantial Completion Date and the dates in Section E10, shall be adjusted proportionately to the period during which Design Builder is prevented by the Force Majeure Event from proceeding with the Works measured on a critical path basis; and
 - (b) if the Parties agree that Design Builder should accelerate the Works to compensate for the delay caused by the Force Majeure Event, the City will compensate Design Builder as would place Design Builder in no better and no worse position than it would have been in had the relevant Force Majeure Event not occurred.
- J1.5 The compensation payable to Design Builder pursuant to Section J1.4 shall be reduced by any amount which Design Builder or a Design Builder Party recovers, or is entitled to recover, under any insurance policy as set out in the Design Build Agreement, or would have recovered if it had complied with the requirements of this Design Build Agreement in respect of insurance or the terms of any policy of insurance required under this Design Build Agreement, which amount, for greater certainty, shall not include any excess or deductibles or any amount over the maximum amount insured under any such insurance policy.
- J1.6 Subject to Section J3, no non-performance of any obligation under this Design Build Agreement shall give rise to a Termination Event, to the extent that and for so long as performance of the obligation is prevented by the Force Majeure Event.
- J1.7 In the event that the Parties cannot, for the purpose of this Section J1, agree on the date that Substantial Completion would have been achieved but for the Force Majeure Event, or the revised date on which Substantial Completion should be scheduled to be achieved following the occurrence of the Force Majeure Event, either Party may require that the matter be determined in accordance with the Dispute Resolution Procedure.

J1.8 If Design Builder anticipates that the Force Majeure Event will delay Substantial Completion, but is of the opinion the delay can be avoided or mitigated through extraordinary measures, Design Builder shall provide a proposal to the City for the City to decide if such extraordinary measures should be taken by Design Builder at the City's expense.

J2. Procedure on Force Majeure Event

J2.1 Upon either Party becoming aware of the occurrence of a Force Majeure Event that may prevent that Party from performing any obligation under this Design Build Agreement, that Party shall in a timely manner give the other Party notice of the Force Majeure Event, including reasonable details of the anticipated effect of the Force Majeure Event upon performance of this Design Build Agreement, and thereafter the Parties shall on an ongoing basis consult with each other with a view to remedying or mitigating the Force Majeure Event and, if applicable, rebuilding the Project or otherwise addressing the consequences of the Force Majeure Event.

J2.2 Except to the extent that damage caused to the Infrastructure by a Force Majeure Event is insured against or required to be insured against by Design Builder in accordance with this Design Build Agreement, the City will be responsible for repairing the damage, provided that:

- (a) the City may in its discretion, having regard to the nature and extent of the damage and acting reasonably, decline to repair the damage, and if the City declines to repair the damage it shall provide notice of this decision to Design Builder as soon as reasonably practicable;
- (b) if the City, pursuant to Section J2.2(a), declines to repair the damage, then, subject to Section J3 and Section K1, the City's decision to decline to repair the damage shall constitute a Relief Event under Section K1.1(j) (but without prejudice to any termination right arising under Section O4.1); and
- (c) if the City chooses to repair the damage and it intends to require Design Builder to carry out the repairs, then the City will issue a Change Order Directive to Design Builder for the necessary repairs in accordance with Schedule 17 – Change Orders.

For clarity, this Section J2.2 applies only in respect of damage that is caused by a Force Majeure Event and shall not apply to damage that is otherwise the responsibility of Design Builder pursuant to this Design Build Agreement.

J3. Termination for Force Majeure Event

J3.1 Where a Force Majeure Event has occurred and continues, or in the opinion of both Parties, is highly likely to continue for a continuous period of at least 120 Calendar Days and it has become impossible or impractical for Design Builder to carry out all or a substantial part of its obligations under this Design Build Agreement and, if applicable, the City has exercised its discretion in Section J2.2(a) and declined to repair damage to the affected Infrastructure, then either Party may, upon notice to the other Party, terminate this Design Build Agreement. Any compensation payable

upon termination in accordance with this Section J3.1 shall be calculated in accordance with Section P1.

SECTION K RELIEF EVENTS

K1. Relief Events

- K1.1 In this Design Build Agreement, “**Relief Event**” means any of the following events that either (i) affects the Works so as to cause a delay in the critical path of Project Schedule, but only to the extent that it delays Design Builder from achieving Substantial Completion by the Scheduled Substantial Completion Date, or (ii) in respect of Sections K1.1(a), K1.1(b), K1.1(c), K1.1(e), K1.1(g), K1.1(h), K1.1(j), only, causes and increase in the cost of the Works:
- (a) breach of any provision of this Design Build Agreement by the City, including the City preventing Design Builder access to the Lands without notice, as such notice is specified in Schedule 18 – Technical Requirements;
 - (b) in the circumstances specified in Section E9.3;
 - (c) a Designated Change in Law coming into effect after the Intermediate Design Submittal Date;
 - (d) any Environmental Damage or Degradation for which the City is responsible pursuant to Section D6;
 - (e) the presence in, under or on the Lands, of Heritage Finds, which presence was not described in or readily apparent or properly inferable from the Project Background Information at the time of submission of Design Builder’s Proposal;
 - (f) an order granted by a Court directly resulting from a third party claim of an interest in the Lands or a portion thereof;
 - (g) in the circumstances specified in Section O1.3(a) any Remedial Action taken by the City that does not arise as a result of any breach by Design Builder of its obligations under this Design Build Agreement or by any act or omission of Design Builder or any Design Builder Party;
 - (h) if, despite Design Builder taking all commercially reasonable measures to mitigate any cost, delay or inconvenience (including providing the City with timely notice of the cost, delay or inconvenience encountered), Design Builder incurs increased costs or the Works is delayed or prevented as a result of any encumbrances on the Lands, other than Identified Encumbrances;
 - (i) protest action at the Lands, the Infrastructure or the Existing Infrastructure;
 - (j) the presence on the Lands of animal or plant species protected by Applicable Law, which presence was not described in or readily apparent or properly

inferable from the Project Background Information at the time of submission of Design Builder's Proposal;

- (k) in the circumstances specified in Section J2, a failure by the City to repair, within a timeframe that is reasonable having regard to the circumstances, damage caused by a Force Majeure Event;
- (l) any environmental assessment process or environmental impact assessment report directed under Applicable Law in respect of the Project, except where such direction arises as a result of activities or actions (whether planned or actually carried out) by Design Builder or any Design Builder Party in circumstances where:
 - (i) it was reasonably foreseeable that such activities or actions could lead to such assessment process or report being directed; and
 - (ii) having regard to Design Builder's design, Design Builder could reasonably have carried out the Project without such activities or actions;
- (m) a stop work order issued by a Governmental Authority, provided that such order was not issued as a result of a Force Majeure Event that already resulted in schedule and/or cost relief to Design Builder;
- (n) a general strike or other labour disruption in Manitoba that is applicable to the construction industry in Manitoba or is directed at the City;
- (o) a claim of indigenous title or treaty rights by any person in respect of all or any part of the Lands;
- (p) compliance by Design Builder with an order or direction of police, fire or other public officials having the legal authority to make such order or give such direction in relation to the Lands, the Infrastructure or the Existing Infrastructure;
- (q) failure by any Utility Company, local authority or other like body to perform works or provide services (solely in its role as utility service provider or similar service provided to the Project), provided, however, that such a failure shall not, in any event, be cause for a Relief Event, unless Design Builder:
 - (i) has performed its obligations under any applicable agreement with the Utility Company with respect to the provision of such services and the relevant Utility Company has failed to meet its obligations thereunder; and
 - (ii) has made all, and is continuing to make all, commercially reasonable efforts to diligently enforce its legal rights under any applicable agreement in respect of such services and otherwise cause the Utility Company to perform those works or services;

for clarity, Section K1.1(n) shall apply only in circumstances where the Utility Company is providing services to Design Builder of the type provided by the Utility Company in the normal course of its business;

- (r) the presence of Unknown Utilities, provided Design Builder has taken commercially reasonable efforts to identify all Utility Infrastructure on the Lands (including the Existing Infrastructure); and
- (s) Design Builder discovers a Differing Geotechnical Site Condition, as per Section D7.1 .

K1.2 For clarity, none of the events or circumstances listed in Section K1.1 shall be Relief Events to the extent that the event or circumstance is caused by any act or omission of Design Builder or any Design Builder Party or by a breach of this Design Build Agreement by Design Builder or any Design Builder Party.

K2. Effect of Relief Event

K2.1 If:

- (a) a Relief Event wholly or substantially delays Design Builder from performing the Works where such delay is for a period of at least 5 continuous Calendar Days; or
- (b) if multiple Relief Events, when taken together, wholly or substantially delay Design Builder from performing the Works, where such delay is for a period of at least 14 Calendar Days in the aggregate and each such Relief Event wholly or substantially delays Design Builder from performing the Works, where such delay is for a period of at least 3 continuous Business Days:

then, each of the following dates shall be adjusted proportionately to the period during which Design Builder is prevented by the Relief Event from performing the Works:

- (i) the Scheduled Substantial Completion Date;
- (ii) the Scheduled Final Completion Date;
- (iii) the dates in Section E10; and
- (iv) the date specified for adjustment in Sections O2.1(f) and O2.1(g).

K2.2 Subject to Section K2.3, Design Builder shall be entitled to such compensation from the City as would place Design Builder in no better and no worse position than it would have been in had the relevant Relief Event not occurred. For greater certainty, such compensation will include amounts which, but for the Relief Event, would have been paid by the City to Design Builder and will exclude amounts otherwise paid by the City in accordance with the Design Build Agreement to Design Builder in relation to the event giving rise to the Relief Event. Design Builder shall

promptly provide the City with any information the City Representative may require in order to determine the amount of such compensation.

- K2.3 Design Builder shall only be entitled to compensation pursuant to Section K2.2 if a Relief Event, either individually or aggregated with the effect of any other Relief Event not previously claimed for by Design Builder, increases Design Builder's cost of carrying out the Project by at least \$ [REDACTED].
- K2.4 All periods of delay pursuant to this Section K2.1 shall be measured on a critical path basis having regard to the Project Schedule.
- K2.5 In the event that the Parties cannot agree on the date that Substantial Completion would have been achieved but for the Relief Event, or the revised date on which Substantial Completion should be scheduled to be achieved following the occurrence of the Relief Event, either Party may require that the matter be determined in accordance with the Dispute Resolution Procedure.

K3. General Provisions Relating to Relief Events

- K3.1 Within 5 Business Days of Design Builder becoming aware of the occurrence of an event that is, or may be, or is likely to become a Relief Event, Design Builder shall give the City notice of the Relief Event, or possible Relief Event, including reasonable details of the anticipated effect of the Relief Event, or possible Relief Event, upon Design Builder's performance of this Design Build Agreement (a "**Relief Event Notice**"). The Relief Event Notice shall be in a form acceptable to the City, acting reasonably. Following delivery of a Relief Event Notice, the Parties shall, on an ongoing basis, communicate and consult with each other with a view to monitoring, remedying, mitigating or otherwise addressing the consequences of the Relief Event. Design Builder shall only be entitled to claim relief or compensation in accordance with Section K2 if Design Builder has delivered a Relief Event Notice as set out in this Section K3.1. Design Builder shall provide any additional information requested by the City in relation to a Relief Event.
- K3.2 Subject to Section K4 no non-performance of any obligation of Design Builder under this Design Build Agreement shall give rise to a Termination Event, to the extent that, and for so long as performance of the obligation, is prevented by a Relief Event.
- K3.3 The compensation payable to Design Builder pursuant to Section K2.2 shall be reduced by any amount which Design Builder or a Design Builder Party recovers, or is entitled to recover, under any insurance policy as set out in the Design Build Agreement, or would have recovered if it had complied with the requirements of this Design Build Agreement in respect of insurance or the terms of any policy of insurance required under this Design Build Agreement, which amount, for greater certainty, shall not include any excess or deductibles or any amount over the maximum amount insured under any such insurance policy.

K4. Mitigation

- K4.1 If Design Builder is (or claims to be) affected by a Relief Event, Design Builder shall, and shall require all Design Builder Parties to, take and continue to take commercially reasonable steps to:
- (a) eliminate or mitigate the consequences of such event upon the performance of its obligations under this Design Build Agreement;
 - (b) continue to perform its obligations under this Design Build Agreement to the extent possible notwithstanding the Relief Event; and
 - (c) resume performance of its obligations under this Design Build Agreement affected by the Relief Event as soon as practicable.
- K4.2 To the extent that Design Builder does not comply with its obligations under this Section K4, such failure shall be taken into account in determining Design Builder's entitlement to an extension of time pursuant to Section K2.1 or compensation pursuant to Section K2.2.

SECTION L REPRESENTATIONS AND WARRANTIES

L1. Design Builder's Representations and Warranties

- L1.1 Design Builder represents and warrants to the City that, as of the Effective Date:
- (a) Design Builder is duly organized, validly existing and in good standing in **TBD [NTD: Design Builder must be formed in a Canadian jurisdiction.]**, is registered and otherwise lawfully authorized to do business under the laws of Manitoba and has the corporate capacity, power and authority to enter into and perform its obligations under this Design Build Agreement;
 - (b) this Design Build Agreement has been duly authorized on behalf of Design Builder, and upon its execution and delivery constitutes a legal, valid and binding obligation of Design Builder;
 - (c) all shareholdings in Design Builder and in the ultimate parent corporation of Design Builder at the date hereof have been disclosed to the City; **[NTD: Disclosure obligation will be waived for persons whose equity securities or other ownership interests are listed on a recognized stock exchange.]**;
 - (d) no steps or proceedings have been taken or are pending to supersede or amend the constating documents, articles or by-laws of Design Builder in a manner that would impair or limit its ability to perform its obligations under this Design Build Agreement;
 - (e) Design Builder is relying only on its own inspections, investigations and due diligence in relation to the risks assumed by it under the provisions of this Design Build Agreement and is not relying on any information received from

or representation made by the City, with the exception only of the City's representations in Section L2;

- (f) Design Builder has made plain and true disclosure to the City of all facts and circumstances regarding Design Builder, its shareholders, its intended subcontractors and the project financing that might reasonably be material to the willingness of the City to enter into this Design Build Agreement with Design Builder;
- (g) Design Builder and Design Builder Parties, collectively, have extensive experience and are knowledgeable in the design and construction, as well as how such design and construction have an impact on operations and maintenance, of projects that are similar to the Project in scale, scope, type and complexity and have the required ability, experience, skill and capacity to perform the Works in a timely and professional manner as set out in this Design Build Agreement;
- (h) Design Builder is not a non-resident of Canada for purposes of the *Income Tax Act* (Canada);
- (i) there are no actions, suits, proceedings or investigations pending or threatened against Design Builder or, to Design Builder's knowledge, any Design Builder Party, at law or in equity, before any Governmental Authority or arbitral body that, individually or in the aggregate, could result in any material adverse effect on the business, properties or assets, or the condition, financial or otherwise, of Design Builder or in any impairment of Design Builder's ability to perform its obligations under this Design Build Agreement, and Design Builder has no knowledge of any violation or default with respect to any order, writ, injunction, or decree of any Governmental Authority or arbitral body that could result in any such material adverse effect or impairment;
- (j) Design Builder is registered under Division V of Part IX of the *Excise Tax Act* (Canada) and its registration number is **TBD**;
- (k) Design Builder is registered under *The Retail Sales Tax Act* (Manitoba) and its registration number is **TBD**;
- (l) Design Builder or the applicable Design Builder Party is registered with the Manitoba Workers' Compensation Board;
- (m) the Scheduled Substantial Completion Date is a realistic date and is achievable by Design Builder performing the Works in accordance with this Design Build Agreement;
- (n) the Contract Price is sufficient to cover all liabilities, costs, fees and charges of any nature whatsoever required to complete the Works; and

- (o) any Intellectual Property used in relation to the Project or licensed to the City hereunder and its use by or on behalf of the City does not and will not infringe the Intellectual Property of any third party.

L2. The City's Representations and Warranties

L2.1 The City represents and warrants to Design Builder, as of the date of execution of this Design Build Agreement, that:

- (a) the City has the requisite power, authority and capacity to execute, deliver and perform this Design Build Agreement, and to do all acts and things, and execute, deliver and perform all other agreements, instruments, undertakings and documents as are required by this Design Build Agreement to be done, executed, delivered or performed;
- (b) the execution and delivery of this Design Build Agreement and all documents, instruments and agreements required to be executed and delivered by the City pursuant to this Design Build Agreement, and the completion of the transactions contemplated by this Design Build Agreement have been duly authorized on behalf of the City, and upon execution and delivery constitutes a legal, valid and binding obligation of the City;
- (c) the entering into of the Design Build Agreement will not result in a breach or violation of *The City of Winnipeg Charter*, S.M. 2002, c.39, as amended;
- (d) the City has obtained all necessary approvals to enter into this Design Build Agreement; and
- (e) the City is the owner of an estate in fee simple of the Lands or a holder of a valid and effective easement, right of way or other instrument or agreement which permits the grant of access and use for the purposes contemplated under this Design Build Agreement, subject to the terms and conditions of this Design Build Agreement.

SECTION M REPORTING

M1. Reporting Requirements

M1.1 In addition to all specific reports and notices required by the Technical Requirements, Design Builder shall, commencing on the Effective Date and continuing throughout the Project Term, provide the following reports to the City:

- (a) reports on the progress of the Project monthly, as set out in the Technical Requirements, including but not limited to a report of any material events, developments or circumstances arising in relation to the Project since the last report, all in a form and format prescribed or approved from time to time by the City, acting reasonably;
- (b) social procurement reports as set out in Schedule 21 – Social Procurement Requirements;

- (c) such other periodic reports as the City may from time to time reasonably require; and
- (d) a response delivered in a timely manner to any inquiry reasonably made by the City Representative in relation to any aspect of the business of Design Builder, the Project, the Technical Requirements, or this Design Build Agreement.

M2. Records

- M2.1 Design Builder shall, beginning on the Effective Date and for a period of 6 years following the Termination Date:
- (a) maintain in an appropriate form full accounting and other records in respect of performance by it of its obligations under this Design Build Agreement; and
 - (b) keep those records available for inspection by the City (including any representative designated by the City for that purpose) or by any Governmental Authority at all reasonable times upon reasonable notice, for the purpose of determining Design Builder's compliance with this Design Build Agreement.
- M2.2 Upon expiry of the Project Term, Design Builder shall, upon request by the City and at no cost to the City, hand over to the City copies of all records that pertain to Design Builder's performance of its obligations under this Design Build Agreement.

M3. Notifications, Information and General Audit Rights

- M3.1 Design Builder shall provide and shall cause each Design Builder Party to provide to the City all information, reports, documents, records and the like with respect to the Project, in the possession of, or available to, Design Builder as the City may reasonably require from time to time for any purpose in connection with this Design Build Agreement. Design Builder shall use commercially reasonable efforts to ensure that, for such purpose, all such information, reports, documents, records and the like in the possession of, or available to any Design Builder Party with respect to the Project, shall be available to Design Builder and Design Builder shall include relevant terms in all subcontracts to this effect.
- M3.2 Design Builder shall also provide to the City, and shall require each Design Builder Party to provide to the City (at the City's reasonable cost), all information, reports, documents, records and the like required to be provided pursuant to Section M3.1 which subsequent to the Termination Date come into the possession of, or become available to, Design Builder or any Design Builder Party, as the City may reasonably require from time to time to enable the City to provide reports, notices, returns and the like pursuant to Applicable Law, including information and documentation pertaining to the physical condition of the Lands, the Existing Infrastructure, the Infrastructure or the Works, security, health and safety, fire safety, emergency preparedness, environmental matters, employees and human resources related matters.

M3.3 Design Builder shall promptly after receipt provide the City with a copy of any material notice, order, direction, requirement or other similar communication received by it or by any Design Builder Party from any Governmental Authority in relation to any of the Project, the Lands, the Existing Infrastructure, the Infrastructure or the Works, and Design Builder shall include relevant terms in all subcontracts to this effect.

M3.4 Design Builder shall promptly notify the City of:

- (a) any actions, suits, proceedings or investigations commenced, pending or threatened against Design Builder or, to Design Builder's knowledge, any Design Builder Party, at law or in equity, before any Governmental Authority or arbitral body that, individually or in the aggregate, could result in any material adverse effect on the business, properties or assets, or the condition, financial or otherwise, of Design Builder or in any impairment of Design Builder's ability to perform its obligations under this Design Build Agreement;
- (b) any steps or proceedings that have been taken or are pending to supersede or amend the constating documents, articles or by-laws of Design Builder in a manner that would impair or limit its ability to perform its obligations under this Design Build Agreement;
- (c) if Design Builder becomes a non-resident of Canada for the purposes of the *Income Tax Act (Canada)*;
- (d) any material changes to the shareholdings in Design Builder and in the ultimate parent corporation of Design Builder; and
- (e) any notice of default, breach or non-compliance received by Design Builder or any Design Builder Party under or in connection with any permit, project contract, subcontract of \$ [REDACTED] or more, parent guarantee or other agreement pertaining to the Project and shall provide copies of same and all documents and information associated with such notice of default upon written request of the City.

M3.5 All information, reports, documents and records in the possession of, or available to, Design Builder, which are required to be provided to or available to the City hereunder, shall be subject and open to inspection and audit by the City at any time and from time to time, which inspection and audit shall take place during normal business hours and at Design Builder's normal places of business unless the City and Design Builder otherwise agree. Subject to compliance by the City with Design Builder's reasonable safety requirements, the City will also have the right to monitor and audit the performance of any and all the activities within the Project, wherever located, and Design Builder shall cooperate with, and shall require each Design Builder Party to cooperate with, and provide access to the representatives of the City monitoring and auditing the Project, including providing them with access and copies (at the City's reasonable cost) of all relevant information, reports, documents and records pertaining to the performance of the activities within the Project. For clarity, to the degree appropriate in relation to the City's monitoring and auditing activities

set out in this Section M3.5, the monitoring and auditing shall be of information, reports, documents and records pertaining to the Project and not to books of general accounting, unless such books of general accounting contain information relevant to the Project. Except as otherwise provided herein, all of the City's costs for the inspections, audits and monitoring shall be borne by the City.

M3.6 In conducting an audit of Design Builder under Section M3 or Section M4 or as otherwise provided under this Design Build Agreement, the City will have all rights necessary or incidental to conducting an audit, including the right to have access to and inspect and take copies (at the City's reasonable cost) of all books and records of Design Builder required to be provided to or available to the City hereunder, upon reasonable notice and at reasonable times. Design Builder shall fully cooperate with the City and its auditors in the conduct of any audits, including by making available all such records and accounts in existence at that time as they may require to perform a full and detailed audit, and Design Builder further agrees to promptly review and settle with the City all matters arising from such audits, including the refunding of monies to the City where applicable. At the reasonable request of the City's auditors, Design Builder shall provide such information, reports, documents and records as the City's auditors may reasonably require.

M3.7 The City's rights pursuant to this Section M3 shall be in addition to, and shall not limit, any other audit, information, inspection or similar rights under this Design Build Agreement.

M3.8 The City's rights pursuant to this Section M3 shall not limit or restrict any Governmental Authority's right of review, audit, information or inspection under Applicable Law.

M4. Canada and Manitoba Funding Contribution Requirements

M4.1 Canada, as required pursuant to a funding contribution agreement, the Auditor General of Canada, and their designated representatives, to the extent permitted by law, and Manitoba will at all times be permitted to inspect the terms and conditions of this Design Build Agreement and any records and accounts respecting the Project and will have free access to the Lands and to any documentation relevant for the purpose of audit.

M4.2 Design Builder shall, on notice from the City and at no cost to the City, comply with City instructions concerning retention of and access to records and the Lands, the Existing Infrastructure, and the Infrastructure and with respect to communication protocols, as a result of any funding agreements applicable to the Works and entered into by the City with the governments of Manitoba and/or Canada (regardless whether entered into before or after the Effective Date).

M4.3 Pursuant to Section T20, Design Builder shall indemnify and save Manitoba and Canada, and their Ministers, officers, employees and agents harmless from and against all claims and demands, losses, costs, damages, actions, suit or other proceedings brought or pursued in any manner in respect of any matter caused by Design Builder or a Design Builder Party or arising from the Design Build Agreement or from the goods or services provided, or required to be provided by Design Builder,

except those resulting from the negligence of any of Manitoba's or Canada's Ministers, officers, servants, employees or agents or to the extent caused, or contributed to, by the breach of this Design Build Agreement by the City or any negligence or willful misconduct of the City.

M4.4 Design Builder represents and warrants that:

- (a) no current or former public servant or public office holder to whom any postemployment, ethics and conflict of interest legislation, guidelines, codes or policies of Canada applies will derive direct benefit from any contract for products or services for the Project unless the provision or receipt of such benefits is in compliance with such legislation, guidelines, policies or codes;
- (b) if the Lobbying Act (Canada) applies to Design Builder, Design Builder has filed a return and is registered and in full compliance with the obligations of the Act, and provide a covenant that Design Builder will continue to comply for the duration of the Design Build Agreement;
- (c) any contract entered into with Design Builder and any third party for products or services related to the Project shall not establish a partnership, joint venture, principal-agent relationship or employer-employee relationship in any way or for any purpose whatsoever between Canada and Design Builder or a third party or between Manitoba and Design Builder or a third party;
- (d) any contract entered into with Design Builder and any third party for products or services related to the Project shall not be construed as authorizing any person, including Design Builder or a third party, to contract for or to incur any obligation on behalf of Canada or on behalf of Manitoba, or to act as an agent for Canada or as an agent for Manitoba.

SECTION N INDEMNITIES AND LIMITATION OF LIABILITY

N1. Design Builder's Indemnity

N1.1 Subject to Section N3, Design Builder shall indemnify and hold harmless the City Indemnified Parties against all Direct Losses which may be suffered, sustained or incurred as a result of, in respect of, or arising out of any one or more of the following:

- (a) a failure by Design Builder to achieve Substantial Completion by the Scheduled Substantial Completion Date;
- (b) a failure by Design Builder to achieve Final Completion by the Scheduled Final Completion Date;
- (c) the negligence, other tortious conduct or willful misconduct of Design Builder, any Design Builder Party or their respective directors, officers, employees, agents or subcontractors in relation to the Works;

- (d) any loss or damage of a third party arising from the Works (including death, personal injury, any physical loss or damage to property or assets of any third party) arising from a wrongful act or omission of Design Builder, any Design Builder Party or their respective directors, officers, employees, agents or subcontractors in relation to the Works,
- (e) any infringement directly or indirectly by the City, Design Builder or any Design Builder Party of Intellectual Property of third parties in relation to the Works, Assigned Intellectual Property, or any Intellectual Property licensed to the City hereunder, or its use or exploitation by or on behalf of the City, and any claim that the Works, Assigned Intellectual Property, or any Intellectual Property licensed to the City hereunder, or its use or exploitation by or on behalf of the City, infringes the Intellectual Property of any third party;
- (f) any physical loss or damage to all or any part of the Lands, the Infrastructure or the Existing Infrastructure, or to any equipment, assets or other property related thereto which is the responsibility of Design Builder pursuant to this Design Build Agreement, arising from a wrongful act or omission of Design Builder, any Design Builder Party or their respective directors, officers, employees, agents or subcontractors in relation to the Works;
- (g) the performance by Design Builder of this Design Build Agreement not in accordance with or in breach of the requirements of any Permits, Licences and Approvals, Applicable Law or the requirements of Governmental Authorities, or the failure of Design Builder to obtain all necessary Permits, Licences and Approvals required for the Project;
- (h) any claims arising under or in relation to Environmental Damage or Degradation for which Design Builder is responsible pursuant to this Design Build Agreement;
- (i) as provided for in Section D12.1;
- (j) as provided for in Section E3.1; and
- (k) as provided for in Section O3.1(b),

except, in each case, to the extent caused, or contributed to, by the breach of this Design Build Agreement by the City or any negligence or willful misconduct of the City.

N1.2 Subject to Section N3 but without limiting Section N1.1(e), Design Builder shall indemnify and hold harmless the City Indemnified Parties against all legal consequences, including all legal costs and expenses and any fines or penalties imposed by a Governmental Authority, incurred by the City in connection with the non-compliance with Applicable Law or any Permits, Licences and Approvals by Design Builder and any Design Builder Party, except, in each case, to the extent caused, or contributed to, by the breach of this Design Build Agreement by the City or any negligence or willful misconduct of the City.

N2. City's Indemnity

N2.1 Subject to Section N3, the City will indemnify and hold harmless Design Builder and its directors, officers and employees against all Direct Losses arising from:

- (a) failure on the part of the City to pay any amount or amounts due to Design Builder under this Design Build Agreement (except to the extent that such amount or amounts are disputed in good faith through the Dispute Resolution Procedure) and where the City does not remedy such failure within 30 Calendar Days of Design Builder providing the City with notice to do so;
- (b) the negligence or willful misconduct of the City in relation to the subject matter of this Design Build Agreement;
- (c) a failure by the City to comply with Applicable Law;

except to the extent, and only in that proportion that is not the City's liability, that such damages, losses and costs are caused or contributed to, by breach of this Design Build Agreement by Design Builder or by any negligence or willful misconduct of Design Builder or any Design Builder Party. Further there shall be excluded from the indemnity given by the City, any liability for the occurrence of risks against which Design Builder is required to insure, as set out under this Design Build Agreement to the extent of insurance proceeds received by Design Builder or that should have been received by Design Builder, but for a failure by Design Builder to comply with its obligations to properly insure or report a claim upon discovery under this Design Build Agreement.

N3. Calculation of and Limitation on Claims

N3.1 Where any provision of this Design Build Agreement entitles a Party to recover damages or losses from the other Party, except as otherwise expressly indicated, the intent is to afford such Party the equivalent of the ordinary contractual measure of damages, that is, that such recovery will place such Party in the same position it would have been in but for the occurrence of the specified event that gives rise to the right to recover damages or losses from the other Party, subject to such Party's obligation to take all commercially reasonable measures to mitigate its damages.

N3.2 Notwithstanding Section N3.1, the indemnities under this Design Build Agreement shall not apply and there shall be no right to claim damages for breach of this Design Build Agreement, in tort or on any other basis whatsoever, to the extent that loss claimed by either Party is:

- (a) for punitive, exemplary or aggravated damages;
- (b) for loss of profit (but does not include the Parties' rights to payments expressly provided for in this Design Build Agreement), loss of use, loss of production, loss of business, claims of customers or loss of business opportunity; or

- (c) is a claim for consequential loss or for indirect loss of any nature suffered or allegedly suffered by either Party, (collectively, “**Indirect Losses**”).

N3.3 Subject to Section N3.4, the maximum aggregate liability of:

- (a) Design Builder in respect of all claims under or in connection with the Design Build Agreement, shall not exceed \$ [REDACTED];
- (b) Design Builder in respect of all claims under Sections F1.2, F2.2, N1.1(a) and N1.1(b) shall not exceed [\$●]; and,
- (c) the City in respect of all claims under Section N2.1(b) or Section N2.1(c) shall not exceed \$ [REDACTED]. For clarity, the limitation in this Section N3.3(c) shall not apply to any claim by Design Builder under Section K1.

N3.4 The limits set out in Section N3.3, shall:

- (a) be exclusive of any insurance proceeds received or which will be received pursuant to policies maintained in accordance with Schedule 11 – Insurance Requirements, or which would have been received if the City or Design Builder had complied with its obligations to insure under this Design Build Agreement or the terms of any policy of insurance required under this Design Build Agreement each as set out in the Design Build Agreement; and
- (b) not apply in cases of willful misconduct or Gross Negligence.

N4. Exclusivity of Specified Remedies

N4.1 Design Builder shall not be entitled to damages or indemnification in respect of any breach by the City under this Design Build Agreement that would duplicate compensation to Design Builder under Section K1 arising from a Relief Event.

N4.2 Every right to claim damages or indemnification or reimbursement or to set off or hold back any amount under this Design Build Agreement shall be construed so that recovery is without duplication to any other amount recoverable under this Design Build Agreement, and shall not be construed in such manner as would allow a Party to recover the same loss or amount twice.

N5. Conduct of Indemnified Claims

N5.1 Where either Party to this Design Build Agreement is entitled to indemnification under this Design Build Agreement (“**Indemnified Party**”) and determines that an event has occurred giving rise or that may give rise to a right of indemnification in favor of the Indemnified Party (an “**Indemnity Claim**”), the Indemnified Party shall promptly notify the Party obligated to provide indemnification (the “**Indemnifying Party**”) of such Indemnity Claim (a “**Claim Notice**”) describing in reasonable detail the facts giving rise to the claim for indemnification, and shall include in such Claim Notice (if then known) the amount or the method of computation of the amount of such Indemnity Claim; provided that the failure of an Indemnified Party to give timely notice thereof shall not affect any of its rights to indemnification nor relieve the

Indemnifying Party from any of its indemnification obligations except to the extent the Indemnifying Party is materially prejudiced by such failure.

N5.2 Any obligation to provide indemnification under this Design Build Agreement shall be subject to the following terms and conditions:

- (a) upon receipt of a Claim Notice the Indemnifying Party shall, at its cost and expense and upon notice to the Indemnified Party within 30 Calendar Days of its receipt of such Claim Notice (or such shorter time period as the circumstances warrant), assume and control the defence, investigation, compromise and settlement of such Indemnity Claim, including the management of any proceeding relating thereto, and shall employ and engage legal counsel reasonably acceptable to the Indemnified Party; provided that if there exists a material conflict of interest (other than one of a monetary nature) or if the Indemnified Party has been advised by counsel that there may be one or more legal or equitable defences available to it that are different from or additional to those available to the Indemnifying Party that in either case, would make it inappropriate for the same counsel to represent both the Indemnifying Party and the Indemnified Party, then the Indemnified Party shall be entitled to retain its own counsel at the cost and expense of the Indemnifying Party (except that the Indemnifying Party shall not be obligated to pay the fees and expenses of more than one separate counsel, other than local counsel, for all Indemnified Parties, taken together);
- (b) the Indemnified Party may, at its own cost and expense, participate in the defence of the Indemnity Claim, and shall cooperate with the Indemnifying Party in such efforts and make available to the Indemnifying Party all witnesses, records, materials and information in the Indemnified Party's possession, under its control or to which it may have access as may be reasonably required by the Indemnifying Party. The Indemnifying Party will keep the Indemnified Party reasonably informed of the progress of the defence of the Indemnity Claim. If the Indemnifying Party, contrary to clause (a), fails to assume the defence and investigation of the Indemnity Claim, then:
 - (i) the Indemnified Party shall have the right to undertake the defence, investigation, compromise and settlement of the Indemnity Claim on behalf of, and at the cost and expense of and for the account and risk of the Indemnifying Party;
 - (ii) the Indemnifying Party shall cooperate with the Indemnified Party in such efforts; and
 - (iii) the Indemnified Party will keep the Indemnifying Party reasonably informed of the progress of the defence of the Indemnity Claim;
- (c) the Indemnifying Party shall not, without the written consent of the Indemnified Party:

- (i) settle or compromise any Indemnity Claim or consent to any final judgment that does not include as an unconditional term thereof the delivery by the claimant or plaintiff of a written release or releases from all liability in respect of such Indemnity Claim of all Indemnified Parties affected by such Indemnity Claim; or
- (ii) settle or compromise any Indemnity Claim if the settlement imposes equitable remedies or material obligations on the Indemnified Party other than financial obligations for which such Indemnified Party will be indemnified hereunder.

No Indemnity Claim that is being defended in good faith by the Indemnifying Party shall be settled or compromised by the Indemnified Party without the written consent of the Indemnifying Party.

SECTION O DEFAULT AND TERMINATION

O1. City's Step-in Rights

O1.1 The City may exercise all rights set out in Section O1.1 at any time if the City reasonably believes that it needs to take action in relation to the Works, the Existing Infrastructure or the Infrastructure:

- (a) because a serious risk exists to public security or to the environment or in the case of an emergency;
- (b) in order to discharge a statutory duty or enable performance by any other person of a statutory duty;
- (c) if necessary in order to prevent Design Builder or any Design Builder Parties from excluding or limiting use or operation of the Existing Infrastructure or the Infrastructure;
- (d) because, in the reasonable opinion of the City, the reputation or integrity of the City, the City's Water and Waste Department (including the Existing Infrastructure or the Infrastructure) may be or has been compromised;
- (e) because the City's ability to carry out the City Operations is materially adversely affected (other than for purposes expressly contemplated in the Technical Requirements); or
- (f) because a Default has occurred, any applicable remediation period has passed, and Design Builder is not diligently pursuing a cure of the Default.

O1.2 Upon the occurrence of any of the events set out in Section O1.1, the City may, upon notice to Design Builder (which notice shall specify all pertinent details of the intended action) take such action (the "**Remedial Action**") in relation to the Works as the City reasonably considers necessary under the circumstances to mitigate the risk, conduct the City Operations, ensure that the Existing Infrastructure and the

Infrastructure is available for use by the City and City Parties, remedy a Default or otherwise advance the Project.

- O1.3 The City will carry out any Remedial Action as quickly as is practicable, and in such manner as will minimize interference with Design Builder's performance of its obligations under this Design Build Agreement:
- (a) if the need for the Remedial Action does not arise as a result of any breach by Design Builder of its obligations under this Design Build Agreement or by any act or omission of Design Builder or any Design Builder Party, then the Remedial Action shall, subject to Section K1, constitute a Relief Event under Section K1.1(g); and
 - (b) to the extent that the need for the Remedial Action arises as a result of any breach by Design Builder of its obligations under this Design Build Agreement or by any act or omission of Design Builder or any Design Builder Party, then Design Builder shall indemnify the City against all costs and expenses reasonably incurred by the City in carrying out the Remedial Action.

O2. Termination Events

- O2.1 Subject to Section O2.2, the following shall constitute Termination Events:
- (a) if Design Builder is declared or adjudged a bankrupt, makes a general assignment for the benefit of creditors, or takes the benefit of any legislation in force for:
 - (i) protection against creditors;
 - (ii) orderly payment of debts; or
 - (iii) winding up or liquidation;
 - (b) if a receiver or receiver-manager is appointed for the business of Design Builder, unless the appointment is cancelled within 21 Calendar Days;
 - (c) if any material part of the property of Design Builder is seized or attached and such seizure or attachment is not successfully contested by Design Builder within 21 Calendar Days;
 - (d) if Design Builder ceases active business operations;
 - (e) if, having regard to the Project Schedule, Design Builder abandons the Project;
 - (f) if Design Builder fails to achieve Substantial Completion within 60 Calendar Days after the Scheduled Substantial Completion Date;
 - (g) if Design Builder:

- (i) fails to deliver a Design Builder Schedule Recovery Plan under Section E10.2;
 - (ii) delivers a Design Builder Schedule Recovery Plan which indicates that Design Builder shall not achieve Substantial Completion by the Scheduled Substantial Completion Date; or
 - (iii) delivers a Design Builder Schedule Recovery Plan that is not acceptable to the City, acting reasonably, as to the matters set out in Section E10.2;
- (h) if, at any time after the date that is 365 Calendar Days before the Scheduled Substantial Completion Date, it is determined pursuant to the Dispute Resolution Procedure that there is no reasonable possibility of Design Builder achieving Substantial Completion by the day which is 30 Calendar Days after the Scheduled Substantial Completion Date;
- (i) if, at any time, Design Builder or any Design Builder Party, other than:
 - (i) for purposes expressly contemplated by Schedule 18 – Technical Requirements;
 - (ii) for reasons of public security and safety, exercised on a temporary basis;takes any steps to exclude or limit the City or any City Party from using the Infrastructure or the Existing Infrastructure or accessing the Lands;
- (j) if Design Builder, upon receiving a Notice of Default from the City where the specified Default has a Material Adverse Effect, fails to:
 - (i) cure the Default within 21 Calendar Days; or
 - (ii) where the Default cannot by reasonable commercial efforts be cured within 21 Calendar Days, communicate to the City and initiate within that 21 Calendar Days a commercially reasonable course of action designed to cure the Default, and thereafter diligently pursue that course of action until the Default is cured;
- (k) if Design Builder breaches the provisions of Section T3 or Section T4;
- (l) if Design Builder fails to obtain any bond, security or insurance required to be obtained by or on behalf of Design Builder pursuant to this Design Build Agreement or any such bond, security or insurance is vitiated or otherwise ceases to be in full force and effect or in material compliance with the requirements set out in this Design Build Agreement, other than as a consequence of a breach by the City of its obligations under this Design Build Agreement, and:

- (i) in respect of insurance, Design Builder does not remedy such breach within 5 Business Days of the occurrence of the breach; and
 - (ii) in respect of a bond or security, Design Builder does not remedy such breach within 5 Business Days of Design Builder becoming aware of such breach;
- (m) if Design Builder fails to pay any amount or amounts due to the City under this Design Build Agreement, which amount or amounts, either singly or in the aggregate, exceed(s) \$ [REDACTED] (except to the extent that such amount or amounts are disputed in good faith through the Dispute Resolution Procedure) and does not remedy such failure within 30 Calendar Days of the City providing Design Builder with written notice to do so; or
- (n) if Design Builder commits a breach of its obligations under this Design Build Agreement which results in a criminal conviction or a conviction for an offence which causes or is likely to cause serious injury or death to a worker under the WSHA against Design Builder, any Design Builder Party or the City (a “**WSHA Conviction**”), provided that:
- (i) a WSHA Conviction against Design Builder, a Design Builder Party or the City will not constitute a Termination Event if, within 90 Calendar Days from the date of the WSHA Conviction (whether or not the WSHA Conviction is subject to an appeal or any further judicial process), the involvement in the Project of each relevant Design Builder Party (which, in the case of an individual director, officer or employee, shall be deemed to include Design Builder Party of which that person is a director, officer or employee) is terminated or Design Builder takes such other disciplinary action against each such Design Builder Party as is acceptable to the City, in its sole discretion; and
 - (ii) in determining whether to exercise any right of termination for a Termination Event pursuant to this Section O2.1(n), the City will:
 - (A) act in a reasonable and proportionate manner having regard to such matters as the gravity of any offence and the identity of the person committing the act leading to the WSHA Conviction; and
 - (B) give all due consideration, where appropriate, to action other than termination of this Design Build Agreement.
- O2.2 An event listed in Section O2.1 shall not constitute a Termination Event where such event is caused directly and specifically by a material breach of the Design Build Agreement by the City, as finally determined in accordance with the Dispute Resolution Procedure.

O3. Termination by City

O3.1 The City may terminate this Design Build Agreement by notice to Design Builder:

- (a) upon the occurrence of a Termination Event set out in Sections O2.1(d), O2.1(e) or O2.1(g), following the expiration of a 21 Calendar Day cure period provided Design Builder does not remedy the breach leading to the Termination Event;
- (b) immediately upon the occurrence of a Termination Event set out in Sections O2.1(a), O2.1(b), O2.1(c), O2.1(f), O2.1(h), O2.1(i), O2.1(j), O2.1(k), O2.1(l), O2.1(m) or O2.1(n);
- (c) at any time, in the absolute and unfettered discretion of the City and for any reason whatsoever or for no reason at all, and at the convenience of the City;
- (d) in accordance with Section O5.1; or
- (e) if a Relief Event has occurred and continues for a continuous period in excess of 180 Calendar Days and has wholly or substantially prevented either Party from performing a material part of its obligations under this Design Build Agreement during that period.

O3.2 No notice of termination under this Section O3 shall be effective unless, in the case of a notice under Section O3.1(a) and Section O3.1(b), it specifies the Termination Event relied on, or in the case of a notice under Section O3.1(c), it states that the termination is for convenience.

O4. Termination by Design Builder

O4.1 Design Builder may suspend or terminate this Design Build Agreement by notice to the City only:

- (a) if the City has failed to pay any amount due to Design Builder under this Design Build Agreement, which amount or amounts, either singly or in the aggregate, exceed(s) \$ [REDACTED] (except to the extent that such amount is disputed in good faith through the Dispute Resolution Procedure) and the City does not remedy such failure within 30 Calendar Days of Design Builder providing the City with notice to do so;
- (b) if a Relief Event has occurred and continues for a continuous period in excess of 180 Calendar Days and has wholly or substantially prevented either Party from performing a material part of its obligations under this Design Build Agreement during that period; or
- (c) in accordance with Section O5.1.

O5. Termination Upon Force Majeure

O5.1 As a result of a Force Majeure Event, either Party may by notice to the other terminate this Design Build Agreement in accordance with Section J3.

O6. Consequences of Termination

O6.1 Upon any termination of this Design Build Agreement under Sections O3.1(a) or O3.1(b):

- (a) as soon as practicable the City Representative shall determine the value of the Works and any other sums due to Design Builder for Works executed in accordance with this Design Build Agreement;
- (b) the City may complete the Works and/or arrange for any other entities to do so;
- (c) the City may:
 - (i) withhold further payments to Design Builder until the costs of design, execution, completion and remedying of any defects, damages for delay in completion (if any), and all other costs incurred by the City, have been established; and/or
 - (ii) recover from Design Builder any losses and damages incurred by the City and any extra costs of completing the Works, after allowing for any sum due to Design Builder under Section O6.1(a).

O6.2 Upon any termination of this Design Build Agreement under Sections O3.1(c), O3.1(d), or O3.1(e), if a Termination Payment is payable by the City in accordance with Section P, then the City will as soon as practicable and, in any event, not later than 60 Calendar Days following determination of the amount of the Termination Payment, subject to Design Builder complying with Section O6.3, pay to Design Builder the amount of the Termination Payment.

O6.3 Upon any termination of this Design Build Agreement under Sections O3.1:

- (a) Design Builder shall, upon request by the City and at no cost to the City, hand over to the City copies of all records that pertain to Design Builder's performance of, or may otherwise facilitate the City or its contractors assuming responsibility for performing, the Technical Requirements, within 30 Calendar Days of the request;
- (b) Design Builder shall deliver to the City all Work and work-in-progress Work and documentation, all as prescribed in Schedule 18 – Technical Requirements to be delivered upon termination; and
- (c) Design Builder shall, within 30 Calendar Days, complete Demobilization.

O7. Survival of Obligations

O7.1 Except as otherwise provided in this Design Build Agreement, termination of this Design Build Agreement shall be without prejudice to, and shall not affect:

- (a) all representations, warranties and indemnities under this Design Build Agreement; and
- (b) Sections A4, D9, M2, M3, M4, N1, N2, N3, N4, O3, O4, O5, O6, O7, O8, Section P, Section Q, Section S, T1, T8, T12, T15, Schedule 7 – Dispute Resolution Procedure, and any other provisions of this Design Build Agreement which are expressed to survive termination or which are required to give effect to such provisions which survive termination or are required to give effect to such termination or the consequences of such termination,

all of which shall survive the termination or expiry of this Design Build Agreement.

O8. Exclusivity of Termination Provisions

- O8.1 Neither Party shall have any right to terminate this Design Build Agreement except as expressly set out in Sections O3, O4, or O4.1; and without limiting the generality of the foregoing neither Party shall in any event be entitled to terminate this Design Build Agreement on the basis of fundamental breach.

SECTION P TERMINATION PAYMENTS

P1. Force Majeure Termination

- P1.1 Upon a termination of this Design Build Agreement under Section O5.1 the City will pay to Design Builder a Termination Payment equal to the lesser of:

- (a) the Contract Price less the Progress Payments and any other payments, payable to Design Builder, to the extent paid; and
- (b) the amount actually expended (including any irrevocable commitment to purchase and pay for materials not readily returnable or readily deployable other than on the Project provided arrangements are made satisfactory to the City, acting reasonably, to transfer to the City ownership of such materials free and clear of any security interests) in furtherance of the design and construction of, build and financing of the Works by Design Builder, less the amount of the Progress Payments and any other payments, to the extent paid,

less in either case, all insurance proceeds available as a result of events occurring prior to the Force Majeure Termination or that should have been available but for a failure by Design Builder to comply with its obligations to properly insure or claim under this Design Build Agreement.

P2. Termination for Convenience or Termination by Design Builder

- P2.1 Upon a termination by the City under Section O3.1(c) or a termination by Design Builder under Section O4.1(a), the City will pay to Design Builder a Termination Payment calculated as follows:

- (a) Design Builder's reasonable damages, including overhead and profit in accordance with the guidelines set out Schedule 17 – Change Orders, including amounts payable to Design Builder's subcontractors, and other contracting parties having regard to the principles set out in Section N3.

P3. Full and Final Settlement

P3.1 Except as otherwise provided in Section P3.2, Termination Payments paid pursuant to Section P, shall be in full and final settlement of any claims, demands and proceedings of Design Builder and the City, and each shall be released from all liability to the other in relation to any breaches or other events leading to such termination of this Design Build Agreement, and the circumstances leading to such breach or termination, and Design Builder and the City will be precluded from exercising all other rights and remedies in respect of any such breach or termination whether in contract, tort, restitution, statute, at common law or otherwise.

P3.2 Section P3.1 shall be without prejudice to:

- (a) any liability of either Party to the other, including under the indemnities contained in this Design Build Agreement, that arose prior to the date of termination (but not from the termination itself or the events leading to such termination) to the extent such liability has not already been set off pursuant to Section H9 in determining or agreeing upon the Termination Payment;
- (b) any liabilities arising under or in respect of any breach by either Party of their obligations under Section O7 of this Design Build Agreement, or the Sections referred to therein, which did not lead to such termination and which arises or continues after the Termination Date; and
- (c) any amount owing to the City in relation to:
 - (i) fines, penalties or restitution orders by a court under any Federal or Provincial statute; and
 - (ii) any fraud or other criminal offence committed against the City.

SECTION Q ANNOUNCEMENTS, CONFLICT OF INTEREST, CONFIDENTIALITY & INTELLECTUAL PROPERTY

Q1. Conflict of Interest

Q1.1 For the purpose of this Design Build Agreement, a conflict of interest (a "**Conflict of Interest**") includes any perceived, potential, or actual situation or circumstance where, in relation to the Project, the Design Builder or any Design Builder Parties:

- (a) in relation to the performance of its contractual obligations in a City contract including this Design Build Agreement, other commitments, relationships, or financial interests of Design Builder and each Design Builder Party that:

- (i) could or could be seen to exercise an improper influence over the objective, unbiased and impartial exercise of its independent judgment; or
- (ii) could or could be seen to compromise, impair or be incompatible with the effective performance of its contractual obligations.

Q1.2 The Design Builder shall:

- (a) avoid any Conflict of Interest in the performance of its obligations under this Design Build Agreement;
- (b) disclose to the City without delay any actual or potential Conflict of Interest that arises during the performance of its contractual obligations; and
- (c) comply with any requirements prescribed by the City to resolve any Conflict of Interest.

Q1.3 In addition to all other contractual rights or rights available at law or in equity, the City may immediately terminate the Design Build Agreement upon giving Notice to Design Builder where:

- (a) Design Builder fails to disclose an actual or potential Conflict of Interest;
- (b) Design Builder fails to comply with any requirements prescribed by the City to resolve a Conflict of Interest; or
- (c) a Conflict of Interest exists which cannot be resolved.

Q2. Public Announcements and Stakeholder Communications

Q2.1 Design Builder shall not make, and shall not cause or permit any Design Builder Party to make, any public announcement relating to this Design Build Agreement or the Project except as approved in advance by the City.

Q2.2 Subject to Schedule 18 – Technical Requirements and Schedule 19 – Security Clearance Requirements, and to the extent that Design Builder or any Design Builder Party undertakes any public communication or community engagement, it shall ensure that it obtains the prior written approval of the City prior to undertaking any such activities or distributing any materials to the public.

Q3. Integrity Matters

Q3.1 Design Builder represents and warrants to the City that:

- (a) none of Design Builder, a Design Builder Party or any of their respective Affiliates, any individual identified in the Design Builder's Proposal, any Key Individuals, or any individual currently engaged as an officer, director, executive or senior manager of Design Builder, any Design Builder Party or any of their respective Affiliates has been convicted in Canada:

- (i) of carrying out inappropriate bidding or procurement practices or engaging in unethical behaviour in relation to a public sector procurement process or public sector contract carried out in Canada; or
- (ii) under the *Corruption of Foreign Public Officials Act*, S.C. 1988, c. 34;
- (b) Design Builder and each Design Builder Party has conducted itself with integrity and propriety and did not engage in any inappropriate bidding practices or unethical behaviour in the course of the Request for Proposals including by not making any material misrepresentation or submitting any inaccurate or incomplete information in response to the Request for Proposals or in its Intermediate Design Submittal; and
- (c) none of Design Builder, Design Builder Party or any of their respective Affiliates, any individual identified in the Design Builder's Proposal, any Key Individuals, or any individual currently engaged as an officer, director, executive or senior manager of Design Builder, any Design Builder Party or any of their respective Affiliates is a Restricted Person.

Q3.2 Design Builder acknowledges and agrees that its representations and warranties contained in this Section Q3 are continuing representations and warranties and shall apply and be true and correct at all times during the Project Term.

Q4. Confidential Information

Q4.1 Each Party shall, upon delivering any information to the other that includes information delivered in confidence, identify the information delivered in confidence (the "**Confidential Information**"). Subject to Sections Q5 and Q6, the receiving Party shall maintain (and shall ensure that its officers, employees, consultants, advisors and contractors maintain) the confidentiality of the Confidential Information, with the exception of information that:

- (a) at the time of the disclosure to the receiving Party, was in the public domain;
- (b) after disclosure to the receiving Party became part of the public domain through no fault of the receiving Party or those for whom it is responsible at law;
- (c) was in the possession of the receiving Party at the time of disclosure to it, as demonstrated by written records; or
- (d) was received by the receiving Party from a third party who had a lawful right to disclose the information.

Q5. Disclosure of Confidential Information

Q5.1 Neither Party shall disclose Confidential Information delivered by the other except:

- (a) to such of its affiliates, officers, employees, consultants, advisors and contractors (including, in the case of Design Builder, its lenders and potential lenders, investors and potential investors, and rating agencies, surety companies and prospective guarantors) who reasonably require access to the Confidential Information for the due performance of this Design Build Agreement or to further the purposes of this Design Build Agreement, but only after they have been advised of the confidentiality obligations included in the Design Build Agreement;
- (b) as required by FIPPA or any other Applicable Law;
- (c) as required by the Province of Manitoba;
- (d) as required by the Government of Canada in accordance with the City's obligations to the Government of Canada; or
- (e) where the disclosure is consented to by the other Party.

Q6. Public Disclosure of Design Build Agreement

- Q6.1 Notwithstanding Sections Q3 and Q5, Design Builder acknowledges and agrees that this Design Build Agreement, including any Schedules and appendices hereto, may be made available upon request to the City under FIPPA, subject to the applicable provisions of FIPPA.
- Q6.2 Design Builder agrees that the City will be at liberty to make public disclosure of this Design Build Agreement, excepting only any Schedules or portions thereof that Design Builder has, prior to signing of this Design Build 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.
- Q6.3 Where a compelling public interest, as that term is set out in FIPPA, in the disclosure of the information clearly outweighs the public interest in limiting the disclosure of the information supplied by Design Builder (or any Design Builder Party), Design Builder acknowledges and agrees that the City may disclose such information.

Q7. Collection, Use and Disclosure of Personal Information

- Q7.1 For the purposes of this Section, "**personal information**" has the same definition as that which is found in FIPPA.
- Q7.2 Design Builder acknowledges that FIPPA applies to information obtained, related, generated, collected or provided for the City under this Design Build Agreement and agrees to adhere to FIPPA and all City policies and guidelines with respect to the collection, use or disclosure of personal information. Without limiting the generality of the foregoing, Design Builder shall comply with all City policies and directions with respect to the retention of personal information, notification and handling of breaches and requests for the correction of personal information, provided that Design Builder has access to such policies and directions.

Q7.3 Design Builder shall not collect, use or disclose any personal information under this Design Build Agreement except that which is reasonably required to fulfil its obligations under this Design Build Agreement, or as otherwise authorized by the City.

Q7.4 Design Builder shall protect the personal information it collects under this Design Build Agreement and shall make reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or destruction.

Q7.5 Upon request, Design Builder shall provide to the City, within 5 Business Days, any records that are requested under the access provisions of FIPPA that are in the custody or under the control of Design Builder. Should Design Builder receive an access request under FIPPA, Design Builder shall not respond to it, but shall immediately forward the access request to the City for further handling.

Q7.6 Design Builder shall ensure that all Design Builder Parties comply with this Section Q7.

Q8. Naming Rights

Q8.1 Design Builder acknowledges that the City has the exclusive right to name the Infrastructure and all related improvements. Design Builder shall not name, nor purport to name, the Project, the Infrastructure, or any portions thereof. Where the City has named the Infrastructure or the Existing Infrastructure, Design Builder shall not publicly refer to the Infrastructure or the Existing Infrastructure except as so named by the City.

Q9. Intellectual Property

Q9.1 Design Builder represents, warrants and covenants to the City and agrees that:

- (a) Design Builder is and shall be the exclusive owner of the Project Data and the Intellectual Property Rights, or has and shall have the right to provide the licences granted to the City herein;
- (b) Design Builder has and shall have the right to provide the assignments granted to the City herein; and
- (c) the Project Data and the Intellectual Property Rights, and their use by the City and/or by City Parties do not and shall not infringe, and are not and shall not be a misappropriation of, any third party Intellectual Property, and, as of the Effective Date, Design Builder has not received any alleged infringement or misappropriation notices from third parties regarding the Project Data and the Intellectual Property Rights, and following the Effective Date Design Builder shall promptly notify the City, and provide details, of any such notices.

Q9.2 Design Builder shall make all Project Data and Intellectual Property Rights available to, and upon request shall deliver to, the City free of charge all Project Data, and shall obtain all necessary licences, permissions and consents to ensure that Design Builder shall make the Project Data and Intellectual Property Rights available to and

deliver the Project Data to the City on the aforesaid terms of this Section Q9.2, for any and all of the rights, purposes and licences referred to in Section Q9.3.

Q9.3 Design Builder:

- (a) shall retain all right title and interest in and to Design Builder's Background Intellectual Property;
- (b) hereby grants to the City a non-exclusive, irrevocable, perpetual, royalty-free, fully paid-up and transferable licence to use, copy, support, maintain, modify, and otherwise exploit, and to allow third parties to use, copy, support, maintain, modify, and otherwise exploit the Project Data and the Intellectual Property Rights, and any other rights relating to the Project, including Background Intellectual Property, as may be required for any and all City purposes in connection with, arising out of, or related to:
 - (i) the Project, including the completion, use, operation, maintenance or support of, the Infrastructure, the Existing Infrastructure, and/or the Lands; and
 - (ii) the preparation of requests for proposals to perform construction work, design and construction work, design or consulting work/services, or other work/services, on behalf of the City (including, without limitation, in respect of the Infrastructure, the Existing Infrastructure, and/or the Lands) and in connection with the performance of such work/services;
- (c) shall, at Design Builder's cost, where any Intellectual Property Rights are or become vested in any Design Builder Party, obtain the grant of an equivalent licence to that referred to in Section Q9.3(a);
- (d) shall, at Design Builder's cost, where any Intellectual Property Rights are or become vested in a third party (other than a Design Builder Party), obtain the grant of an equivalent licence to that referred to in Section Q9.3(a); and
- (e) agrees to assign, and for the avoidance of doubt does hereby assign, to the City the Assigned Intellectual Property, and agrees to waive, and does hereby waive, and obtain waivers for, all moral rights therein.

Q9.4 To the extent any data, documents, drawings, reports, plans, software, formulae, calculations, methods, processes or designs or any other materials or procedures are developed jointly by Design Builder and the City pursuant to this Design Build Agreement or in relation to the Project, the Works, the Infrastructure, the Existing Infrastructure or the Lands (the "**Jointly Developed Materials**"), then the Parties hereby acknowledge and agree that the City will be the exclusive owner of all right, title and interest in and to the Jointly Developed Materials, any Intellectual Property associated therewith and any and all improvements, modifications and enhancements thereto. Design Builder shall, at the request of the City, execute such further agreements and cause Design Builder Parties to execute any and all assignments, waivers of moral rights and other documents as may be reasonably

required to fulfill the intent of this provision. For the avoidance of doubt, Design Builder agrees to assign, and does hereby assign, to the City the Jointly Developed Materials, and agrees to waive, and does hereby waive, and obtain waivers for, all moral rights therein.

- Q9.5 The City hereby grants Design Builder a royalty free, non-exclusive and non-transferable licence, with a right to grant sub-licences to Design Builder Parties, to use the Jointly Developed Materials during the Project Term for the sole purposes of Design Builder or any Design Builder Party performing obligations under this Design Build Agreement or its applicable subcontract, as applicable.
- Q9.6 Upon termination of this Design Build Agreement, all rights and licences whatsoever granted to Design Builder in the Jointly Developed Materials shall automatically terminate, and Design Builder shall return any and all Jointly Developed Materials in the custody or possession of Design Builder or any Design Builder Party to the City.
- Q9.7 Where a demand, claim, action or proceeding is made or brought against the City or a City Party which arises out of the alleged infringement or misappropriation of any rights in or to any Project Data or Intellectual Property Rights or the use thereof by the City or any City Party or because the use of the Infrastructure or any part thereof infringes any rights in or to any Intellectual Property of a third party then, or otherwise as set out in Section N1.1(d), unless such infringement has arisen out of the use of any Project Data or Intellectual Property Rights by the City otherwise than in accordance with the terms of this Design Build Agreement, Design Builder shall indemnify, defend and hold harmless the City from and against all such demands, claims, actions and proceedings and Section N5 shall apply.
- Q9.8 It is expressly acknowledged and agreed that nothing in this Section Q9 shall be deemed to create or convey to a Party any right, title, or interest in and/or to the Confidential Information or Background Intellectual Property of the other Party.

SECTION R PROJECT GOVERNANCE

R1. Senior Executive Committee

- R1.1 The Parties shall, within 30 Calendar Days of the Effective Date, establish a committee (the “**Senior Executive Committee**”), which shall operate from the Effective Date to Final Completion, consisting of:
- (a) 2 senior executive level representatives, appointed by the City from time to time; and
 - (b) 2 senior executive level representatives, appointed by Design Builder from time to time.
- R1.2 The senior executive representatives shall hold a regular meeting on at least a quarterly basis to review and discuss the status of the Project, progress of the Work and any items of concern related to the Project (the “**Senior Executive Committee Meeting**”). Senior Executive Committee Meetings may take place by conference call as long as a minimum of 2 meetings per year are held in-person at the City’s offices

or the NEWPCC. The parties will cooperate to schedule the Senior Executive Committee Meetings.

- R1.3 The Senior Executive Committee shall assist the Parties by promoting cooperative and effective communication with respect to matters related to the Project.
- R1.4 The Senior Executive Committee shall not have authority to make decisions with respect to or approve:
- (a) any amendment to or waiver of any provision of this Design Build Agreement;
 - (b) any change to the Project Schedule, the Scheduled Substantial Completion Date or the Scheduled Final Completion Date;
 - (c) any Change Order;
 - (d) any change that may materially adversely affect Design Builder's ability to achieve Substantial Completion by the Scheduled Substantial Completion Date or Final Completion by the Scheduled Final Completion Date; or
 - (e) any matter with respect to which the City have a right of consent or in respect of which the City may exercise discretion pursuant to this Design Build Agreement.
- R1.5 The City will be entitled to replace its representatives on the Senior Executive Committee by written notice to Design Builder. Design Builder may replace its representatives on the Senior Executive Committee with the prior written consent of the City, not to be unreasonably withheld.
- R1.6 The members of the Senior Executive Committee may adopt such procedures and practices for the conduct of the activities of the Senior Executive Committee, as they consider appropriate from time to time.

SECTION 5 DISPUTE RESOLUTION

S1. Dispute Resolution Procedure

- S1.1 Unless otherwise agreed to in writing between the City and Design Builder, all disputes in respect of the application or interpretation of any provision of this Design Build Agreement shall be determined in accordance with the Dispute Resolution Procedure. Either Party may, at any time by notice to the other, refer any question in respect of the application or interpretation of any provision of this Design Build Agreement to the Dispute Resolution Procedure. The right to refer disagreements to the Dispute Resolution Procedure shall not be limited to provisions of this Design Build Agreement that expressly refer to the Dispute Resolution Procedure, and all such express provisions shall be construed as having been included only for greater certainty.

S2. Exception to Dispute Resolution Procedure

- S2.1 Where under the provisions of this Design Build Agreement a Party has an unfettered discretion to exercise a right or take an action, the decision of that Party to exercise the right or take the action is not subject to review under the Dispute Resolution Procedure; but where any decision or discretion is expressly required to be made or exercised reasonably (or is otherwise qualified), then the reasonableness (or other qualification) of the decision made or the discretion exercised may be referred to the Dispute Resolution Procedure for determination.
- S2.2 Where the City is of the opinion that a Dispute in respect of the application or interpretation of any provision of this Design Build Agreement requires equitable relief or an injunction, the City may, in its sole discretion, proceed directly to litigation and the Dispute is not subject to review under the Dispute Resolution Procedure.

S3. Termination and Dispute Resolution Procedure

- S3.1 A Party may refer to the Dispute Resolution Procedure for advance determination the question of whether it has grounds for terminating this Design Build Agreement (including, whether the circumstances described in Section O2.1(h) have occurred). However, the submission of that question to the Dispute Resolution Procedure shall not prevent either Party from terminating this Design Build Agreement in accordance with its provisions prior to determination of that question by the Dispute Resolution Procedure. If either Party has purported to terminate this Design Build Agreement in accordance with its provisions, the other Party may submit to the Dispute Resolution Procedure the question of whether such termination was made in accordance with this Design Build Agreement, and request either:
- (a) a ruling that this Design Build Agreement has not been terminated; or
 - (b) an award of damages for wrongful repudiation of this Design Build Agreement.

S4. No Court Proceedings

- S4.1 Design Builder shall not, without the prior written approval of the City, initiate in any Court any proceedings against the City in respect of the application or interpretation of any provision of this Design Build Agreement.
- S4.2 The City shall not, except as may be otherwise expressly permitted by this Design Build Agreement or permitted by *The Arbitration Act, 1997 (Manitoba)* or with the prior written approval of Design Builder, initiate in any Court any proceedings against Design Builder in respect of the application or interpretation of any provision of this Design Build Agreement.

S5. Payments Where Amount in Dispute

- S5.1 Where the amount of any payment required to be made under this Design Build Agreement (including the amount of any Termination Payment) is in dispute, the

Party required to make the payment shall pay such portion of the payment as it does not dispute in good faith.

SECTION T GENERAL PROVISIONS

T1. Notices

T1.1 Any notice, consent, approval or other communication under any provision of this Design Build Agreement must be in writing to be effective, and is effective when delivered by any means, including registered mail, email or by hand, (in each case, with a copy always by electronic transmission in accordance with Schedule 13 – Document Management System), to the following respective addresses:

(a) if to the City: The City of Winnipeg
Water and Waste Department
1199 Pacific Avenue
Winnipeg, Manitoba R3E 3S8

Attn: Lana Obach, P.Eng., M.A.Sc., PMP,
Senior Project Engineer

Email: lobach@winnipeg.ca

(b) With a copy to: The City of Winnipeg
Water and Waste Department
1199 Pacific Avenue
Winnipeg, Manitoba R3E 3S8

Attn: Tim Shanks, M.Eng., P.Eng,
Director

Email: tshanks@winnipeg.ca

(c) if to Design Builder: **[NTD – to be populated after award]**

Attn:

Email:

T1.2 Any communication delivered in accordance with Section T1.1 shall be deemed to have been given or made and to have been received on the day of delivery if delivered, or, if emailed, at the time and date received by the recipient, provided that such day in either event is a Business Day and the communication is so delivered or e-mailed before 4:30 p.m. on such day. Otherwise, such communication shall be deemed to have been given and made and to have been received on the next following Business Day.

T2. Authority to Give Notices

T2.1 The Parties designate for the time being the following individuals as having authority to communicate to the other any notice, approval, consent, waiver or other communication under this Design Build Agreement:

(a) in the case of the City:

Lana Obach, P.Eng., MAsc., PMP, Senior Project Engineer

(b) in the case of Design Builder:

[NTD – to be populated after award]

T2.2 In the absence of any further designation or limitation communicated with reference to this Section T2, each Party may assume that any notice, approval, consent, waiver or other communication under this Design Build Agreement given by the above individual has been duly authorized and is binding upon the other Party.

T3. Assignment by Design Builder

T3.1 Design Builder may not, without the prior consent of the City, which consent shall not be unreasonably withheld, assign this Design Build Agreement or any right or benefit under this Design Build Agreement. For greater certainty, the City will not withhold or delay its consent where Design Builder has satisfied the City, acting reasonably, that:

(a) the proposed transferee is of good reputation and has suitable technical, commercial and financial resources; and

(b) the proposed transferee is not involved in a business or activity incompatible with or inappropriate in relation to the Project or the business relationship between the City and Design Builder.

T4. Change in Ownership

T4.1 Design Builder shall provide the City with Notice of any material change in its ownership (direct or indirect). If such change materially adversely impacts any of the following factors:

(a) the financial standing and technical, commercial and financial resources (as determined by the City) of Design Builder or the person acquiring an interest in Design Builder;

(b) whether the proposed owner is involved in a business or activity incompatible with or inappropriate in relation to the Works or the business relationship between the City and Design Builder; or

(c) whether the change in ownership compromises the integrity or reputation of the City or the Project.

T4.2 For the purposes of this Section T4:

- (a) the issuance by Design Builder of non-voting preferred shares or any similar transaction entered into for tax-planning purposes that does not involve voting shares in Design Builder;
- (b) internal reorganizations, which do not have the effect of changing the ultimate ownership of Design Builder; or
- (c) the initial public offering or the issuance of or trading of publicly traded securities of an entity that directly or indirectly holds an interest in Design Builder,

shall not be considered to be a material change in the ownership of Design Builder.

T5. Subcontracting by Design Builder

T5.1 Design Builder may subcontract its obligation to carry out the Works only to:

- (a) the respective subcontractors identified in Schedule 6 – Subcontractors and Key Individuals;
- (b) any additional subcontractors in which the subcontract value is in excess of \$ [REDACTED], approved in advance by the City; and
- (c) any additional subcontractors in which the subcontract value is \$ [REDACTED], or less, at Design Builder's discretion.

T5.2 Design Builder may replace a subcontractor or engage additional subcontractors in accordance with this Design Build Agreement, only with the prior consent of the City, except as provided in Section T5.1(c), such consent not to be unreasonably withheld (having regard to the reputation of and the technical, commercial and financial resources available to the proposed subcontractor).

T5.3 Design Builder shall employ only subcontractors that are competent, qualified and that have the necessary expertise to perform that portion of the Works, in accordance with the warranties, standards and requirements of this Design Build Agreement that is subcontracted to them.

T5.4 Design Builder agrees to preserve and protect the rights of the Parties under this Design Build Agreement with respect to work to be performed under subcontract and to:

- (a) enter into contracts or written agreements with its subcontractors and suppliers to require them to perform their work in accordance with and subject to the terms and conditions of this Design Build Agreement; and
- (b) incorporate the terms and conditions of this Design Build Agreement into all contracts with subcontractors and suppliers with subcontracts or supply agreements in excess of \$ [REDACTED], including:

- (i) the warranties contained herein and such additional warranties from subcontractors or suppliers as are required by this Design Build Agreement; and
- (ii) the right to terminate the contracts with subcontractors and suppliers and limitations on subcontractor and supplier claims arising out of such terminations. For greater certainty, all subcontracts and contracts with suppliers shall exclude any claims for loss of profits for the period after termination of the subcontract or the contract with a supplier for any reason.

T5.5 Design Builder shall, as soon as is practicable after entering into a contract with a subcontractor:

- (a) give the subcontractor written notice of the existence of the Labour and Material Payment Bond; and
- (b) post a notice of the Labour and Material Payment Bond and/or a copy of that bond in a conspicuous location at the Construction Lands.

T6. Assignment by City

T6.1 The City may assign and transfer all of its rights and obligations under this Design Build Agreement to an assignee that is a related and/or government entity with suitable technical, commercial and financial resources at any time without the consent of Design Builder.

T7. Enurement

T7.1 This Design Build Agreement and any other agreement entered into in connection with this Design Build Agreement to which both the City and Design Builder are parties shall enure to the benefit of, and be binding on, the City and Design Builder and their respective successors and permitted transferees and assigns.

T8. Applicable Law and Jurisdiction

T8.1 This Design Build Agreement shall be governed by the laws in force in Manitoba, including the federal laws of Canada applicable therein. Subject to Section S4, Manitoba courts shall have exclusive jurisdiction over all matters arising in relation to this Design Build Agreement, and each Party accepts the jurisdiction of Manitoba courts.

T9. Amendment and Waiver

T9.1 Except as provided for in Schedule 17 – Change Orders, no amendment of this Design Build Agreement is effective unless made in writing and signed by a duly authorized representative of each of the City and Design Builder. No waiver of any provision of this Design Build Agreement is effective unless made in writing, and any such waiver has effect only in respect of the particular provision or circumstance stated in the waiver. No representation by either of the Parties with respect to the

performance of any obligation under this Design Build Agreement is capable of giving rise to an estoppel unless the representation is made in writing.

T10. Severability

T10.1 Each provision of this Design Build Agreement shall be valid and enforceable to the fullest extent permitted by law. If any provision of this Design Build Agreement is declared invalid, unenforceable or illegal by the courts of a competent jurisdiction, 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 Design Build Agreement. If any such provision of this Design Build 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 Design Build Agreement as near as possible to its original intent and effect.

T11. Cumulative Remedies

T11.1 Except as otherwise set forth in this Design Build Agreement, the rights, powers and remedies of each Party set forth in this Design Build Agreement are cumulative and are in addition to and without prejudice to any other right, power or remedy that may be available to such Party under this Design Build Agreement.

T12. Additional Assurances

T12.1 The City and Design Builder each agree to from time to time do all such acts and provide such further assurances and instruments as may reasonably be required in order to carry out the provisions of this Design Build Agreement according to their spirit and intent; but this Section T12.1 shall not in any event be construed as obligating the City to amend or enact any by-law or regulation.

T13. Costs

T13.1 Each Party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution and delivery of this Design Build Agreement.

T14. Counterparts

T14.1 This Design Build Agreement may be executed in counterparts, in which case (i) the counterparts together shall constitute one agreement, and (ii) communication of execution by fax transmission shall constitute good delivery.

T15. Joint and Several

T15.1 Where two or more persons execute this Design Build Agreement as Design Builder, the liability under this Design Build Agreement of such persons executing this Design Build Agreement shall be joint and several.

T15.2 The Parties have therefore signed this Design Build Agreement, by their respective duly authorized officers, on the respective dates shown below.

T16. Entire Agreement

T16.1 This Design Build Agreement is the entire agreement between the City and Design Builder regarding the subject matter of this Design Build Agreement, and supersedes any previous agreements, discussions, negotiations and understandings. There are no agreements, representations, warranties, terms, conditions or commitments regarding the subject matter of this Design Build Agreement except as expressed in this Design Build Agreement.

T17. Currency

T17.1 In this Design Build Agreement, all references to dollar amounts are in Canadian currency.

T18. Liquidated Damages

T18.1 Where any provision of this Design Build Agreement specifies or otherwise indicates an amount as liquidated damages, both the City and Design Builder agree that such amount represents their genuine mutual pre-estimate of the particular damages arising from the particular event.

T19. No Agency, Joint Venture, Partnership, Lease or Loan

T19.1 This Design Build Agreement is not intended to and does not:

- (a) constitute either Party as the agent of the other for any purpose, or otherwise create any relationship of agency;
- (b) constitute or create any joint venture;
- (c) constitute or create any partnership;
- (d) constitute the relationship of landlord and tenant; or
- (e) constitute the relationship of lender and borrower,

and neither Party shall allege or assert for any purpose that this Design Build Agreement constitutes or creates a relationship of agency, joint venture, partnership, landlord and tenant, or lender and borrower.

T20. City Persons and City Parties as Third Party Beneficiaries

T20.1 All provisions expressed to be for the benefit of a City Person or City Party, as applicable, are:

- (a) intended for the benefit of each City Person, or City Party, as applicable and, if so set out in the relevant Section, each City Person's or City Party's, as applicable, directors, officers, employees, board appointees, agents, and

representatives, and shall be enforceable by each of such persons and his or her heirs, executors, administrators, and other legal representatives (collectively, in respect of each City Person, the “**City Person Third Party Beneficiaries**”, and in respect of each City Party, the “**City Third Party Beneficiaries**”); and

- (b) in addition to, and not in substitution for, any other rights that the City Person Third Party Beneficiaries may have in contract or otherwise.

T20.2 The City shall hold the rights and benefits of each provision of this Design Build Agreement which is to the benefit of each City Person or City Party, as applicable, in trust for and on behalf of the City Person Third Party Beneficiaries or City Third Party Beneficiaries, as applicable, and the City hereby accepts such trust and agree to hold the benefit of and enforce performance of such covenants on behalf of the City Person Third Party Beneficiaries or City Third Party Beneficiaries, as applicable.

IN WITNESS WHEREOF the parties have executed this Design Build Agreement as of the date first above written.

THE CITY OF WINNIPEG

Per: _____
Michael A. Jack
Chief Administrative Officer

I have authority to bind The City of Winnipeg

Reviewed as to Business terms:

Certified as to Contract Details:

Cynthia Wiebe, P.Eng., CAMP
Manager of Engineering
Water and Waste Department

Tim Shanks, M.Eng., P.Eng,
Director, Water and Waste Department

Legally Reviewed and Certified as to Form:

Lisa R. Rowswell, BA, LLB
Sr. Solicitor (Team Lead – Procurement)
for Director of Legal Services and City Solicitor

[DESIGN BUILDER]

Per:

Name:
Title:

I have authority to bind the corporation

[DESIGN BUILDER]

Per:

Name:
Title:

I have authority to bind the corporation