

SCHEDULE 7

DISPUTE RESOLUTION PROCEDURE

SECTION A GENERAL

A1. Capitalized Terms

A1.1 Capitalized terms used in this Schedule 7 have the meanings set out in the Design Build Agreement, unless otherwise expressed in this Schedule 7.

A2. Definitions

A2.1 In this Schedule 7, the following terms shall have the following meanings:

- (a) “**Arbitrator**” means the person appointed pursuant to Section B4;
- (b) “**Dispute**” means any disagreement, failure to agree or other dispute in respect of the application or interpretation of any provision of the Design Build Agreement;
- (c) “**Dispute Notice**” means a notice from one Party to the other Party providing details of a Dispute and invoking the Dispute Resolution Procedure in respect of that Dispute;
- (d) “**Informal Negotiations**” has the meaning set out in Section B2.1;
- (e) “**Initiating Party**” has the meaning given in Section B4.4;
- (f) “**Party Representative(s)**” has the meaning given in Section B2;
- (g) “**Referee**” means the person appointed pursuant to Section B3; and
- (h) “**Responding Party**” has the meaning given in Section B4.4.

SECTION B DISPUTES

B1. Dispute Resolution

B1.1 Except as otherwise set out in the Design Build Agreement or any other Schedule thereto, any Dispute will be resolved in accordance with the Dispute Resolution Procedure set out in this Schedule 7, which procedure shall be followed in the order set out below unless both Parties agree otherwise in writing:

- (a) unless expressly provided otherwise in this Schedule 7 or any other provision of the Design Build Agreement, the Dispute Resolution Procedure shall be started by delivery of a Dispute Notice by one Party to the other;
- (b) the Dispute Resolution Procedure as set out in this Schedule 7 shall be for a single dispute, claim, or controversy. The Party Representatives may agree in

writing to limit, or otherwise expand the Dispute to include other disputes, claims, or controversies without limiting the applicability of the Dispute Notices for each. The effect of this inclusion of multiple Disputes has the effect of combining agreed-to disputes, claims or controversies into a single Dispute;

- (c) the Parties shall attempt to resolve the Dispute by Informal Negotiations and within the timelines as set out in Section B2 of this Schedule 7, except as permitted otherwise in this Schedule 7;
- (d) if Informal Negotiations do not result in resolution of the Dispute, the Parties shall obtain the recommendation of the Referee pursuant to Section B3; and
- (e) if the Dispute is not resolved through the Referee’s recommendation, either Party shall refer the Dispute to arbitration or litigation in accordance with the provisions of this Schedule 7, except as permitted otherwise in this Schedule 7.

B2. Informal Negotiations

B2.1 In the event of a Dispute which is not resolved in the normal course of business, either Party may deliver a Dispute Notice to the other Party. On receipt of a Dispute Notice, the City Representative and the Design Builder Representative shall promptly and diligently make all reasonable bona fide efforts to resolve the Dispute. Within 5 Business Days from the delivery of the Dispute Notice, the Parties will commence an informal and escalating negotiation process with the view to resolving the Dispute without recourse to a third party Referee or Arbitrator (“**Informal Negotiations**”). The first level of Informal Negotiations shall be between the City Representative and the Design Builder Representative, and occur within the said 5 Business Days from the delivery of the Dispute Notice, or such longer period as agreed to in writing by both Parties. The City Representative and the Design Builder Representative shall each be entitled to bring a subject matter expert if they are of the opinion that is necessary given the nature of the dispute and upon giving the other Party 2 Business Days’ notice. The City and Design Builder shall each designate a second level negotiation position and a final level negotiation position prior to execution of the Design Build Agreement (each, a “**Party Representative**” and, collectively, the “**Party Representatives**”).

- (a) City Informal Negotiations representatives:
 - (i) Second level:
Water and Waste Manger of Engineering Services and/or WSTP
Project Director
 - (ii) Final level:
Director of Water and Waste
- (b) Design Builder Informal Negotiations representatives:

- (i) Second level:
[name/title]; and
[name/title]

- (ii) Final level:
[name/title]; and
[name/title].

- B2.2 If the Dispute is not resolved at the first level then the second level negotiation meeting shall occur within 15 Business Days from the delivery of the Dispute Notice, or such longer period as agreed to in writing by both Parties. If the Dispute is not resolved at the second level, then the final level negotiation meeting shall occur within 25 Business Days from the delivery of the Dispute Notice, or such longer period as agreed to in writing by both Parties.
- B2.3 All Informal Negotiations meetings shall take place at a mutually acceptable time and place.
- B2.4 When conducting second level and final level informal negotiations pursuant to B2.1, the Parties shall consider involving other upper management personnel of each Party in the informal negotiation process, as well as other representatives of the Parties not actively involved in the day-to-day activities associated with the dispute who might be able to take a broader look at the dispute in the context of the overall objectives of the Project and this Design Build Agreement. Further, either Party may request that senior representatives from the other Party's subconsultants, suppliers, or subcontractors to participate in the Dispute Resolution Procedure. Each Party shall provide the other Party with 2 Business Days' notice of its attendees to negotiation meetings.
- B2.5 Each Party Representative shall provide to the other, on a without prejudice basis, frank, candid and timely disclosure of relevant facts, information and documents (except such documentation that is subject to legal privilege) as may be required or reasonably requested by the other Party Representative to facilitate the resolution of the Dispute.
- B2.6 If the Party Representatives agree to a resolution of the Dispute at any of the levels, a typed summary of the agreed-to resolution shall be drafted, ideally in the presence of both Party Representatives, and signed and dated by both Party Representatives. A signed copy of the summary of the resolution shall be provided immediately to both Party Representatives. For clarity, this summary is only intended to be the basis for a Change Order and will not amend the Design Build Agreement.
- B2.7 The resolution of the Dispute will be formalized using the process set out in Schedule 17 – Change Orders, within 5 Business Days from completion of the summary of the resolution pursuant to B2.6. If the Parties are unable to formalize the resolution with a Change Order, the Dispute will be resolved in accordance with Section B3.

- B2.8 Upon resolution of a Dispute, and its confirmation with a Change Order, either Party shall not re-open that Dispute without evidence of unknown or unforeseeable conditions or circumstances or new subject matter.
- B2.9 All negotiations held pursuant to Section B2 of this Schedule 7 are to be held on a without prejudice basis and will not be used by either Party as evidence at any other proceeding. All information exchanged in connection with Informal Negotiations shall be deemed “**Confidential Information**” for purposes of the Design Build Agreement.
- B2.10 Upon the expenditure of reasonable efforts towards resolution of a dispute through each level of such informal negotiations without reaching agreement, a Party may declare that the informal negotiations have been exhausted and such Party may request escalation to the next step in the Dispute Resolution Procedure.

B3. Recommendation from Referee

- B3.1 Notwithstanding Section B2.10, if the Parties are unable to resolve a Dispute within 30 Business Days of the Dispute Notice, before proceeding to arbitration or litigation of the Dispute, the Parties shall obtain a recommendation on the Dispute from the Referee in accordance with the requirements of this Section B3.
- B3.2 The Referee’s review and recommendation will not be required as a prerequisite to arbitration or litigation if the Parties mutually agree in writing to waive the Referee’s review and recommendation. If the Parties mutually agree, the Dispute is referred to the procedure set out in Section B4.
- B3.3 The City will provide written notice, within 5 Business Days from no resolution being formalized in a Change Order pursuant to Section B2.7, to Design Builder that the Dispute is being referred to the Referee to review and recommend resolution of the Dispute. If the City fails to provide written notice within 5 Business Days from no resolution being formalized in a Change Order pursuant to Section B2.7, Design Builder shall submit written notice of the Dispute being referred to the Referee within 5 Business Days of the City’s failure to provide such written notice. In the event both Parties fail to provide notice herein to the other Party, the Dispute Notice is cancelled and withdrawn, requiring resubmission.
- B3.4 The Parties may mutually agree in advance that the review and recommendation of the Referee may be binding on both Parties and shall be considered an arbitrated resolution. This mutual agreement must be completed in writing within 5 Business Days of the Dispute being referred to the Referee.
- B3.5 The Referee must have qualifications and experience as set out in Schedule 20 – Referee Agreement.
- B3.6 The Referee will participate in the Dispute as follows:
- (a) the Referee will conduct a review of the Dispute in the manner which the Referee decides is most suitable, including on-site inspections and discussions with any persons;

- (b) the Parties will comply with all reasonable requests from the Referee for additional information and documents which the Referee considers necessary for the review, provided that any information given to the Referee by a Party will be given to the other Party and all information disclosed in accordance with this Section B3.8 shall be deemed “**Confidential Information**” for purposes of the Design Build Agreement;
- (c) the Referee may, with the written approval of the Parties, retain others to assist with the review;
- (d) the Referee will deliver to both of the Parties a brief written recommendation on the Dispute within 10 Business Days of referral to the Referee or such longer period as agreed to in writing by both Parties;
- (e) either Party may submit a request for one-time clarification on the Referee’s written recommendation to the Referee and to the other Party, within 5 Business Days of the issuance of the Referee’s recommendation. The Referee shall provide a written clarification to both Parties within 10 Business Days. Additional clarifications by either Party shall not be permitted. If the Referee’s recommendation taking into account the clarification is not already received, the City will provide written notice to the Referee after 10 Business Days from the date of its written clarification, to submit its final written recommendation;
- (f) if the Party Representatives agree to a resolution of the Dispute by accepting the recommendation(s) of the Referee, a written legible summary of the agreed-to resolution shall be drafted in the presence of both Party Representatives and the Referee in duplicate, and signed and dated by both Party Representatives, all within 5 Business Days after receipt of the Referee’s written final recommendation. An original copy of the summary of the resolution shall be provided to both Party Representatives. For clarity, this summary is only intended to be the basis for a Change Order and will not amend the Design Build Agreement;
- (g) the resolution of the Dispute will be formalized using the process set out in Schedule 17 – Change Orders within 5 Business Days from completion of the summary of the resolution pursuant to B3.6(f). If the Parties are unable to formalize the resolution with a Change Order, the Dispute will be resolved in accordance with Section B4;
- (h) unless otherwise agreed by the Parties in advance of the Referee’s review, a recommendation of the Referee is not binding on the Parties, and the Referee’s review will be sought only for the purpose of assisting the Parties to reach agreement with respect to the Dispute;
- (i) the Referee may not be retained by either Party and may not be called by either Party to give evidence with respect to the Dispute in any subsequent arbitration or court proceeding to resolve the Dispute, nor will either Party refer to or enter into evidence the recommendation of the Referee in such proceeding, unless required by Applicable Law or by a court of competent jurisdiction; and

- (j) the City and Design Builder shall agree to release and indemnify the Referee in respect of certain claims provided the Referee has acted in good faith and in accordance with the agreement among the Parties.

B3.7 If, during the evaluation of the Dispute, the Referee finds the Dispute is without grounds, is false in nature, or shares similar grounds for striking out documents as set out in the Court of King’s Bench Rules (Manitoba), the costs associated with the Referee shall be borne completely by the Initiating Party.

B3.8 Each Party shall bear its own costs related to the process for resolution of a Dispute by the Referee. In addition, the costs of the Referee shall be borne equally by the Parties. The Referee shall invoice each Party separately for their share of the costs, providing disclosure to both Parties of the total cost of the Referee.

B4. Arbitration

B4.1 If any Dispute which is the subject of a recommendation by the Referee is not resolved by agreement between the Parties within 10 Business Days after receipt of the Referee’s written final recommendation or the date the Parties have agreed to waive the Referee’s review, then subject to Section B5 either Party may refer the Dispute to arbitration.

B4.2 Subject to Section B5 either Party shall, within 10 Business Days after the Referee’s final recommendation and being advised that the Party Representatives have been unable to resolve the Dispute, refer the Dispute to arbitration.

B4.3 A Dispute referred to arbitration shall be decided by a single arbitrator and The Arbitration Act (Manitoba) shall apply.

B4.4 Arbitration proceedings shall be commenced by the Party desiring arbitration (the “**Initiating Party**”) giving notice to the other Party entitled to participate in the arbitration proceedings (the “**Responding Party**”) specifying the matter to be arbitrated and submitting the names of three potential arbitrators that would be acceptable to the Initiating Party.

B4.5 Within 5 Business Days of receipt of such notice, the Responding Party shall either select one of the three potential arbitrators or submit the names of three potential arbitrators that would be acceptable to the Responding Party. If the Parties are not able to agree on an arbitrator within 15 Business Days of receipt of the notice to arbitrate issued by the Initiating Party through the above or any other process or mechanism agreed to by the Parties, then either Party may apply to the Court of King’s Bench of Manitoba to appoint the arbitrator. Each Party shall bear its own costs with respect to the application to the Court of King’s Bench for Manitoba.

B4.6 If during the evaluation of the Dispute, the Arbitrator finds the Dispute is without grounds, is false in nature, or shares similar grounds for striking out documents as set out in the Court of King’s Bench Rules (Manitoba), the costs associated with the Arbitrator shall be borne completely by the Initiating Party.

B4.7 All arbitrators must have qualifications and experience relevant to the issues in the Dispute and also have qualifications and experience as arbitrators. In selecting an

- arbitrator, the Parties and, as applicable, the Court of King’s Bench for Manitoba, shall have regard to the education, training or experience to decide the matter in Dispute and shall use best efforts to select an arbitrator with at least 10 years’ related experience.
- B4.8 The arbitration shall be determined in accordance with the ADR Institute of Canada National Arbitration Rules that are in force at the time of the arbitration.
- B4.9 The Arbitrator will have the authority to award any remedy or relief that a judge of the Court of King’s Bench for Manitoba could order or grant in accordance with the Design Build Agreement.
- B4.10 Meetings and hearings of the Arbitrator will take place in the English language in the City of Winnipeg or another location in the Province of Manitoba specified by the City. The Arbitrator shall proceed promptly to hear and determine the Dispute. Time shall be of the essence. Subject to the foregoing, the Arbitrator may fix the date, time and place of meetings and hearings in the arbitration and will give all Parties adequate notice of same. Subject to any adjournments which the Arbitrator allows, the final hearing will be continued on successive Business Days until it is concluded. All meetings and hearings will be in private unless the Parties agree otherwise and both Parties are entitled to be represented at any meetings or hearings by legal counsel. Either Party may examine and re-examine all its own witnesses at the arbitration and may cross-examine all of the other Party’s witnesses.
- B4.11 The arbitration will be kept confidential and the existence of the proceedings and any element of it (including but not limited to, any pleadings, briefs or other documents submitted and exchanged, and testimony or other oral submission and any awards) will not be disclosed beyond the Arbitrator, the Parties, their counsel and any person necessary to the conduct of the proceeding, except as may be required for City approvals or reports or lawfully required in judicial proceedings relating to the arbitration or otherwise.
- B4.12 Notwithstanding Rule 36 of the National Arbitration Rules, the Arbitrator shall not be entitled to retain its own expert(s).
- B4.13 The Arbitrator shall make and provide a decision in writing no later than 15 Business Days after the conclusion of the hearing and, shall set out reasons for the decision. Costs will be awarded in accordance with *The Arbitration Act* (Manitoba) unless the Parties have previously agreed on the basis for the apportionment costs.
- B4.14 The decision of the Arbitrator will be final and binding on the Parties and subject only to judicial review or an appeal in accordance with the provisions of *The Arbitration Act* (Manitoba).
- B4.15 The resolution of the Dispute will be formalized using the process set out in Schedule 17 – Change Orders, within 5 Business Days or unless otherwise directed by the Arbitrator.
- B4.16 Nothing contained in this Schedule 7 will prevent the Parties from seeking interim protection from the courts of the Province of Manitoba, including seeking an

interlocutory injunction where available pursuant to Applicable Law, if necessary to prevent irreparable harm to a Party.

B5. Litigation

B5.1 Notwithstanding that a notice to arbitrate has been delivered pursuant to Section B4.4, if:

- (a) the actual or potential total value or amount at issue in the Dispute (as determined by adding all claims and counterclaims) is more than \$750,000 in the aggregate; or
- (b) the Dispute is considered by the City, acting reasonably, to involve material issues of public health or safety;

then the City may elect, within 15 Business Days of receipt of the notice of arbitration, to require that the Dispute be referred to and resolved solely by litigation in the Court of King's Bench of Manitoba, and both Parties agree to attorn to the exclusive jurisdiction of the courts of the Province of Manitoba in respect of the Dispute.

B5.2 If the City does not deliver a written notice of election to resolve a particular Dispute by litigation in the manner and within the time specified in this Section B5, then that Dispute shall be resolved only by arbitration pursuant to Section B4.

SECTION C MISCELLANEOUS

C1. Strict Compliance with Time Limits

C1.1 The Parties agree that timely resolution of any Dispute is mutually beneficial and, in order to achieve timely resolution, the time limits as set out in this Schedule 7 shall be strictly enforced.

C2. Continued Performance

C2.1 Subject to Section O4.1 of the Design Build Agreement, unless otherwise directed in writing by the City, at all times during the course of any Dispute Resolution Procedure as set out herein, Design Builder shall, to the extent not precluded by the matter in Dispute, continue with the Project and the performance of its respective obligations under the Design Build Agreement in a diligent manner and in accordance with the applicable provisions of the Design Build Agreement. The City will continue to satisfy its uncontested payment obligations to Design Builder during the pendency of any such dispute, subject to the terms and conditions of the Design Build Agreement. Records of the Work performed during such time shall be kept in accordance with the applicable provisions of this Design Build Agreement.

C3. Design Builder Documentation and Information

C3.1 Design Builder shall ensure that any and all documents and other information in the possession or control of any Design Builder Party that are available to Design Builder and that may be necessary for the resolution of a Dispute on an informed basis by

the Party Representatives, or by the Referee, an Arbitrator or a court of competent jurisdiction, are made available in a timely manner to the City and the City Representative.

C4. City Documentation and Information

C4.1 The City will ensure that any and all documents and other information in the possession or control of any City Party that are available to the City and that may be necessary for the resolution of a Dispute on an informed basis by the Party Representatives, or by the Referee, an Arbitrator or a court of competent jurisdiction, are made available in a timely manner to Design Builder and the Design Builder Representative.