

APPENDIX 4K

MARKET TESTING PROCEDURE

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APPENDIX 4K**MARKET TESTING PROCEDURE****1. DEFINITIONS****2. TIMING OF MARKET TESTING AND BENCHMARKING****2.1 Project Co's Responsibility to Conduct**

Notwithstanding any other provision of this Appendix (including the participation of the Authority described in Section 3.1 of this Appendix):

- (a) Project Co may; or
- (b) at the Authority's request not less than 8 months prior to the Market Testing Date for the relevant Market Tested Service, Project Co will:

carry out a Benchmarking Exercise, and if required pursuant to this Appendix, the Market Testing described in Section 3, in respect of each Market Tested Service in accordance with this Appendix so that the Preferred Service Tenderer(s) will, if appointed to act as Service Provider(s), commence provision of the relevant Market Tested Services on the relevant Market Testing Date.

2.2 Consequences of Delay in Market Testing

If for any reason the applicable Market Testing for any Market Tested Services will not be complete on the relevant Market Testing Date, including for failure of the Market Testing, then Project Co will remain responsible to ensure the continued provision of the relevant Market Tested Services until the completion of the Market Testing, and the Authority will be responsible to continue to pay Project Co as provided in this Agreement for the continued provision of the relevant Market Tested Services, pending completion of the applicable Market Testing or the determination of how to proceed if Market Testing has failed. The pricing of such continued Market Tested Services will, pending the establishment of new pricing as contemplated under this Appendix, be at the same pricing as prevailed before the relevant Market Testing and will be Index Linked (with the base date for such purposes deemed to be the relevant Market Testing Date) provided that to the extent that any delay in completing the Market Testing on or before the Market Testing Date is caused by the Authority, the Authority will pay such reasonable additional costs as Project Co may incur for the continued provision of the Market Tested Service until completion of the Market Testing.

3. MARKET TESTING**3.1 Market Testing Meetings**

Unless a Benchmarking Exercise has been successfully completed in accordance with Section 4 of this Appendix, at least 6 months before each Market Testing Date the parties will hold meetings ("**Market Testing Meetings**") in respect of all Market Tested Services:

- (a) to review the Services Protocols and Specifications for each Market Tested Service and if required by the Authority, to amend the relevant Services Protocols and Specifications as

appropriate, provided that Project Co may only object to any change in the requirements of the Authority on the grounds referred to in Section 2.4 (Restrictions on Changes) of Schedule 6 [Changes, Minor Works and Innovation Proposals] and any such objection must be made in writing to the Authority within 15 days of the relevant Market Testing Meeting at which the change was contemplated;

- (b) to discuss and seek to agree (subject to the provisions of Section 3.4 of this Appendix) upon any grouping or groupings of Market Tested Services or any division of any Market Tested Service into separate parts which will optimize the opportunity for the Authority to obtain best value for money;
- (c) to discuss and seek to agree upon the appropriate media for advertising the Market Tested Services and identifying the Prospective Service Tenderers;
- (d) to discuss and seek to agree upon the basis on which the Service Tenderers will be selected by Project Co from among the Prospective Service Tenderers; and
- (e) to discuss and seek to agree upon the form and requirements of the tender documents to be sent to Service Tenderers (the “**Service Tender Requirements**”) which will satisfy the requirements of this Appendix and be in sufficient detail to allow the Preferred Service Tenderer to be determined in accordance with this Appendix, and which will include:
 - (1) a statement of the Service Tender Validity Period;
 - (2) requirements in respect of the possible grouping or groupings of Market Tested Services and any division of any Market Tested Service into separate parts;
 - (3) details of the tender evaluation criteria;
 - (4) the information Service Tenderers are required to provide; and
 - (5) details of the required financial capacity and performance security/guarantees to be provided to support the Preferred Service Tenderer’s obligations.

3.2 Notice of Meetings

Project Co will provide at least one month’s notice to the Authority of the time, place and agenda for the first Market Testing Meeting. Thereafter, each subsequent Market Testing Meeting will be convened on not less than 7 days notice, with such notice identifying the agenda items to be discussed at the Market Testing Meeting, provided that in emergencies a Market Testing Meeting may be called at any time on such notice as may be reasonable in the circumstances. The parties will hold Market Testing Meetings as often as necessary.

3.3 Tender Evaluation Material

Any tender evaluation criteria agreed between Project Co and the Authority and made available to the Service Tenderers as part of the Service Tender Requirements will be objective and impartial.

3.4 Grouping of Services

Unless Project Co can demonstrate to the Authority that Project Co will optimize its ability to obtain best value for money for the Authority if Market Tested Services are tendered separately or in particular groupings or if any Market Tested Service is divided into separate parts, the grouping of any Market Tested Services will be left to the discretion of Service Tenderers on the basis that the Service Tender Requirements will specify that:

- (a) Service Tenderers may submit tenders for all or any of the Market Tested Services; and
- (b) where a Service Tenderer submits a tender for a group or groups of Market Tested Services, such Service Tenderer may be required to provide all or any of the Market Tested Services in such group or groups and will, in any event, provide separate pricing for each Market Tested Service in such group or groups.

3.5 Market Testing Proposal

Notwithstanding any failure of the parties to agree upon any matter referred to in Section 3.1 of this Appendix:

- (a) Project Co will prepare and deliver to the Authority no later than 4 months before the relevant Market Testing Date a draft market testing proposal (the “**Draft Proposal**”) describing in detail Project Co’s proposals for the Market Testing of each Market Tested Service. The Draft Proposal will describe all of the matters referred to in, and agreed pursuant to, Section 3.1 of this Appendix and the form of contract which the Preferred Service Tenderer will be required to accept;
- (b) it will be a principle of the Market Testing Proposal that, unless otherwise agreed by the parties, the allocation of risk to the Preferred Service Tenderer, if appointed to act as a Service Provider, will not be materially greater or less than such allocation to the Service Provider whom the Preferred Service Tenderer is to replace;
- (c) the Authority may, within 30 days of the Authority’s receipt of the Draft Proposal, provide comments and request amendments to the Draft Proposal to the extent required to comply with the requirements of this Section 3 and Project Co will revise the Draft Proposal as reasonably required by the Authority;
- (d) if Project Co and the Authority are unable to agree on any matter relating to the Draft Proposal within 60 days of the Authority’s receipt of the Draft Proposal, either party may refer the matter for resolution in accordance with the Dispute Resolution Procedure;
- (e) the Draft Proposal, amended as agreed by the parties or as determined by the Dispute Resolution Procedure, will be the “**Market Testing Proposal**”; and
- (f) the Services Protocols and Specifications, Service Tender Requirements and form of contracts set out in the Market Testing Proposal will be used for the Market Testing.

3.6 Selection of Prospective Service Tenderers

Prospective Service Tenderers will be selected as follows:

- (a) Project Co will be responsible for compiling the list of Prospective Service Tenderers;
- (b) if the Authority recommends any Prospective Service Tenderers, then Project Co will include any such recommended Person in the list of Prospective Service Tenderers provided such Person complies with and meets the criteria referred to in Section 3.7(a) of this Appendix; and
- (c) unless otherwise consented to by the Authority, the Authority will have the right to object to the selection of, and Project Co will not select, any Person as a Prospective Service Tenderer:
 - (1) if such Person does not, or could not reasonably be considered to, comply with and meet any of the criteria referred to in Section 3.7(a) of this Appendix;
 - (2) if such Person is an Excluded Person provided that for the purposes of this Section 3.6 the existing Service Provider will not be an Excluded Person if such person is not in default of the performance of its obligations under its contract to provide the Market Tested Services; or
 - (3) if such Person is a Restricted Person or any other Person who is not permitted to be a Sub-Contractor pursuant to this Agreement.

3.7 Selection Of Service Tenderers

Service Tenderers will be selected as follows:

- (a) Project Co, in consultation with the Authority, will be responsible for selecting the Service Tenderers from the list of Prospective Service Tenderers on the basis of the following criteria:
 - (1) the financial standing of the Prospective Service Tenderers;
 - (2) the technical, managerial and other relevant experience and ability of the Prospective Service Tenderers, taking into account any relevant customer references;
 - (3) any other basis identified pursuant to Section 3.1(d) of this Appendix or the Service Tender Requirements; and
 - (4) the ability of the Prospective Service Tenderers to accept all relevant obligations and liabilities under the terms of Services Contract or the relevant Sub-Contract;
- (b) the Authority will have the right to object to the selection of, and Project Co will not select, any Person as a Service Tenderer if pursuant to Section 3.6(c) of this Appendix the Authority consented to such Person being a Prospective Services Tenderer and Project

Co or such Person failed to comply with any condition of such consent, including with respect to any conflict of interest for an Excluded Person; and

- (c) Project Co will, after consultation with the Authority, provide any Prospective Service Tenderer which is unsuccessful in being selected as a Service Tenderer with an appropriate explanation of the reasons behind its non-selection, if so requested by the Person in question.

3.8 Service Tendering Process

Project Co will be responsible for managing and co-ordinating the Market Testing in an efficient and fair manner in accordance with the Market Testing Proposal (including the Service Tender Requirements) and:

- (a) Project Co will ensure that only Service Tenderers selected in accordance with this Appendix are invited to submit tenders and that the principle of equality of information to, and treatment of, Service Tenderers will apply at all times;
- (b) the Market Testing will be by way of competitive tenders unless the Authority consents in writing to another competitive process (including requests for proposals, requests for qualifications or requests for quotations). If the Authority consents to another such process, the terms “tender”, “tenderer” and “tendering” will be deemed modified as necessary to reflect the terminology of such other process;
- (c) Project Co will send all necessary documents and information to Service Tenderers (including the Service Tender Requirements) in a timely manner;
- (d) tenders must be assessed on the basis of relevant criteria, including:
 - (1) their compliance with the Service Tender Requirements; and
 - (2) the value for money that the tenders represent for the Authority;
- (e) Project Co will bear all costs, fees and expenses associated with Market Testing other than any costs, fees or expenses incurred by the Authority;
- (f) the Authority may, at its own cost, appoint a monitor for the purpose of monitoring and reporting to the Authority on Project Co’s compliance with all requirements for Market Testing. Such monitors will be entitled to attend all meetings and processes relating to Market Testing, including evaluation meetings and processes, inspect copies of all the tender documentation, bids and evaluation documentation and comment (on behalf of the Authority) to Project Co as to compliance with the requirements for Market Testing provided that the Authority will cause such monitor to comply with the confidentiality provisions set out in Section 17.1 of this Agreement; and
- (g) if, in respect of any Market Tested Service or group of Market Tested Services or any part of any Market Tested Service, there is only one Prospective Service Tenderer, or

Project Co intends to select only one of the Prospective Service Tenderers as the Service Tenderer, then Project Co will provide notice thereof to the Authority and:

- (1) Project Co and the Authority will discuss and consider whether the Market Testing conducted for the relevant Market Tested Services was adequate or whether such Market Tested Service should be re-performed on a different basis; and
- (2) if Project Co and the Authority agree that such Market Testing was adequate, or if such Market Testing is re-performed and there is still only one Prospective Service Tenderer, then the Authority may negotiate with the Prospective Service Tenderer and Project Co with respect to the pricing for such Market Tested Service for a period of no greater than 30 days. If:
 - (A) following such negotiations the Authority, Project Co and the Prospective Service Tenderer agree, then Project Co will appoint the Prospective Service Tenderer to perform the Market Tested Service in accordance with Section 3.10 of this Appendix; or
 - (B) the Authority chooses not to negotiate or no agreement is reached pursuant to this Section 3.8(g)(2), then Project Co will implement the Benchmarking Exercise described in Section 4 of this Appendix unless an unsuccessful Benchmarking Exercise has previously been conducted in respect of such Market Tested Service;
- (3) if no agreement is reached pursuant to Section 3.8(g)(2)(A) of this Appendix and the subsequent Benchmarking Exercise, if any, is either terminated pursuant to Section 4.3 of this Appendix or results in a price greater than the Benchmarking Price Range pursuant to Section 4.7 of this Appendix, then the pricing for such Market Tested Service will be the greater of:
 - (A) the average of all prices included in the Benchmark Price Range if agreed pursuant to section 4.5 of this Appendix; and
 - (B) an amount based on the pricing of such Market Tested Service then in effect subject to adjustments for the period such pricing was in effect equal to the greater of any increase in:
 - (i) the Consumer Price Index, All-Items in British Columbia as published by Statistics Canada for the period; and
 - (ii) the British Columbia Average Weekly Wage Rates as published by BC stats in the monthly report entitled "Earnings and Employment Trends",

to the extent such increases have not already been taken into account in the price for such Market Test Services then in effect.

- (h) if Project Co does not comply with all requirements for Market Testing, then, without limiting any other remedies of the Authority under this Agreement or otherwise, Project Co will if required by the Authority re-perform the relevant Market Testing in accordance with such requirements.

3.9 Preferred Service Tenderers

Following expiry of the Service Tender Validity Period, Project Co will, subject to the provisions of this Section 3.9, determine which Service Tenderer (the “**Preferred Service Tenderer**”) offers the Qualifying Service Tender in respect of any Market Tested Service, group of Market Tested Services or individual part of any Market Tested Service, that represents, as the case may be, the best value for money for the Authority, and:

- (a) promptly upon making such determination of the Preferred Service Tenderer, Project Co will supply to the Authority a copy of its tender evaluation, together with sufficient supporting information concerning the tender evaluation to enable the Authority to analyse and understand the basis for Project Co’s determination; and
- (b) if the Authority does not agree with Project Co’s determination in the case of any Qualifying Service Tender, the Authority may, within 30 days of being provided with the tender evaluation, dispute such determination and, if the parties do not resolve such Dispute within a further 30 days, the Dispute will be resolved in accordance with the Dispute Resolution Procedure; and
- (c) Project Co will, after consultation with the Authority, provide any Service Tenderer which is unsuccessful in being selected as a Preferred Service Tenderer with an appropriate explanation of the reasons behind its non selection, if so requested by the party in question.

3.10 Appointment

On or about each Market Testing Date, Project Co will ensure that all Preferred Service Tenderers, as agreed or determined in accordance with Section 3.9 of this Appendix, are appointed to provide and enter into contracts to provide the relevant Market Tested Service or group of Market Tested Services or individual parts of any Market Tested Service, as the case may be, for 6 year terms and on the basis set out in their Qualifying Service Tender.

4. BENCHMARKING

4.1 Project Co Notice May Initiate Benchmarking

Project Co may, not later than 8 months before a Market Testing Date, carry out a benchmarking exercise (the “**Benchmarking Exercise**”) of one or more of the Market Tested Services rather than Market Testing as otherwise required by this Appendix.

4.2 Initial Meeting

Within 7 days of initiating a Benchmarking Exercise pursuant to Section 4.1 of this Appendix, the parties will meet to:

- (a) discuss and agree to the procedure for, and factors to be taken into account, in the Benchmarking Exercise to ensure that the Market Tested Services are compared on a like to like basis with suitable comparators and reliable information, which will include comparing the standards and prices of such Market Tested Services and the costs of providing them with the standards and prices of equivalent services and the costs of providing them in similar circumstances by reputable organizations possessing an appropriate degree of skill, resources, reputation and financial standing relative to the provision of such Market Tested Services; and
- (b) review the Services Protocols and Specifications for each Market Tested Service that will be subject to the Benchmarking Exercise and, if required by the Authority, amend the relevant Services Protocols and Specifications to be applicable to the Market Tested Service after the Market Testing Date, as appropriate, provided that Project Co may only object to any change in the requirements of the Authority on the grounds referred to in Section 2.4 (Restrictions on Changes) of Schedule 6 [Changes, Minor Works and Innovation Proposals] and any such objection must be made in writing to the Authority within 15 days of the relevant meeting at which the change was contemplated.

4.3 No Suitable Comparators

If Project Co cannot establish to the Authority's satisfaction, acting reasonably, that for a Market Tested Service there are suitable comparators and reliable information as described in Section 4.2(a) of this Appendix, then the Benchmarking Exercise for that Market Tested Service will not proceed and Market Testing of such Market Tested Service will be as otherwise provided in this Appendix.

4.4 Benchmarking Proposal

Project Co will, prior to the start of the Benchmarking Exercise, submit a proposal (the "**Benchmarking Proposal**") for the pricing of each Market Tested Service that is the subject of the Benchmarking Exercise. The pricing will not exceed any amount contractually agreed between Project Co and the relevant Service Provider that is applicable for the period after the Market Testing Date adjusted to reflect any changes to the Services Protocols and Specifications to the applicable Market Tested Service required pursuant to Section 4.2(b) of this Appendix. After Project Co submits the Benchmarking Proposal, Project Co will carry out the Benchmarking Exercise for the relevant Market Tested Services.

4.5 Records and Information

Project Co will maintain complete and accurate records of each Benchmarking Exercise and will present the results of the Benchmarking Exercise to the Authority, together with all necessary supporting documentation and such other information for full transparency of relevant cost and other information relating to the Benchmarking Exercise and as the Authority may reasonably require in order to evaluate properly the results of the Benchmarking Exercise. The parties will use all reasonable efforts to agree upon the Benchmark Price Range, but if each party acts reasonably and no agreement is reached Section 3 of this Appendix will apply.

4.6 Pricing Less Than Benchmark Price Range

If the pricing of a Market Tested Service in the Benchmarking Proposal is less than or within the Benchmark Price Range, then Project Co will confirm the appointment of the relevant Service Provider then providing such Market Tested Service to continue providing such Market Tested Service for a further 6 year term and the re-pricing of such Market Tested Service will be at the pricing set out in the Benchmarking Proposal.

4.7 Pricing Greater Than Benchmark Price Range

If the pricing of a Market Tested Service in the Benchmarking Proposal is greater than the Benchmark Price Range then Section 3 of this Appendix will apply unless Project Co agrees to provide the Market Tested Services for an amount within the Benchmark Price Range or the Authority otherwise agrees.

4.8 Costs

Project Co will bear all costs, fees and expenses associated with the Benchmarking Exercise other than any costs, fees or and expenses incurred by the Authority.

5. PAYMENTS

5.1 Service Payment Adjustment

Following Market Testing, the Periodic Payments will be adjusted in accordance with Section 2.2 of Schedule 8 [Payments].

6. INFORMATION REQUIREMENTS

Without prejudice to any of Project Co's general obligations under this Agreement, including pursuant to Section 4.2 (Records and Reports) of this Agreement, Schedule 14 [Records and Reports] and the other provisions of this Appendix, Project Co will:

- (a) maintain a full record and audit trail of each Market Testing and make all such records, including details of all tenders received, available for inspection by the Authority and other authorized representatives on reasonable notice from the Authority;
- (b) provide to the Authority, in a comprehensive and accurate manner, all information necessary to enable the Authority to review and assess all matters relating to the Market Testing; and
- (c) certify to the Authority within 30 days after expiry of the Service Tender Validity Period that:
 - (1) to the best of Project Co's knowledge after due enquiry, no Excluded Person intends to or will obtain any direct or indirect financial or other benefit from such appointment, other than the benefit of the contract itself;
 - (2) to the best of Project Co's knowledge after due enquiry, no Excluded Person has colluded in connection with the Market Testing; and

- (3) there has been material compliance with all requirements relating to ensuring equality of information provided to, and treatment of, Service Tenderers.

7. INDEMNITY

Project Co will indemnify and keep the Authority and each Authority Person indemnified at all times from and against all Direct Losses (including those arising from any third party claims) that any such Person may sustain in connection with:

- (a) the implementation of this Appendix;
- (b) any breach of the provisions of this Appendix; and
- (c) any claim made by any Person, including any Prospective Service Tenderer, Service Tenderer or Preferred Service Tenderer, that is not awarded a contract,

except to the extent that any such breach or claim results from any failure of the Authority to comply with the provisions of this Appendix.