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Article 2. Independent Certifier

2.1 Selection of Independent Certifier

2.1.1 General

- (a) Unless the parties, acting reasonably, agree to a later date, the Province and the Primary Contractor shall, within 180 days following the Effective Date, select an independent qualified firm of Professional Engineers as the Independent Certifier in accordance with the provisions of this Article 2 [Independent Certifier] and enter into the Independent Certifier Contract with the Independent Certifier.
- (b) If the procurement laws, policies or guidelines applicable to the Province require the award of the Independent Certifier Contract to be made based on a competitive tender process, the selection of the Independent Certifier pursuant to Article 2.1.1(a) of this Part 1 shall be determined by the conduct of a competitive tender process, the terms of which shall be reasonable and materially consistent with the terms of such processes conducted for the appointment of roles similar to that of the Independent Certifier on other projects in the Province and shall be agreed upon by the Province and the Primary Contractor, both acting reasonably, following the Effective Date.

2.1.2 Failure to Agree

- (a) In the event that the award of the Independent Certifier Contract is required to be determined by the conduct of a competitive tender process in accordance with Article 2.1.1(b) of this Part 1, and the Province and the Primary Contractor fail, within 90 days following the Effective Date, to agree on the terms of conduct of a competitive tender process pursuant to Article 2.1.1(b) of this Part 1, the dispute as to the terms of conduct of such competitive tender process shall be resolved pursuant to the Dispute Resolution Procedure.
- (b) In the event that the award of the Independent Certifier Contract is not required to be determined by the conduct of a competitive tender process in accordance with Article 2.1.1(b) of this Part 1 and the Province and the Primary Contractor fail to agree upon the selection of an Independent Certifier within the period of time specified in Article 2.1.1(a) of this Part 1, then the Independent Certifier shall be chosen as follows:
 - (i) each of the Province and the Primary Contractor shall, within five Business Days after the expiry of such period, select three suitably qualified and experienced potential Independent Certifier candidates that would be acceptable to that party, and shall provide notice thereof to the other party, with a ranking of preference among the candidates;

- (ii) if the Independent Certifier candidate ranked highest by both the Province and the Primary Contractor is the same firm, that firm shall be the Independent Certifier; and
- (iii) if the Province and the Primary Contractor have not selected a common Independent Certifier in accordance with Article 2.1.2(b)(ii) of this Part 1, then following the expiration of the five Business Day period referred to in Article 2.1.2(b)(i) of this Part 1, either party may apply to the BCICAC for selection of the Independent Certifier, in which case the BCICAC shall select the Independent Certifier in accordance with Article 14 of the BCICAC's Domestic Commercial Arbitration Rules of Procedure.

2.1.3 Independent Certifier Qualifications

- (a) Unless the Province or the Primary Contractor otherwise agree, no person shall be nominated or appointed to act as an Independent Certifier who, or any of whose Affiliates, is or at any time has been involved or interested in the conduct of:
 - (i) any of the Work on behalf of the Primary Contractor or any Subcontractor; or
 - (ii) the Project on behalf of the Province.
- (b) The Independent Certifier shall, at a minimum:
 - (i) be a suitably qualified and experienced firm of Professional Engineers in respect of projects of the nature and scope of the Project;
 - (ii) have the ability and resources necessary to carry out services of the nature required of an engineer to certify Substantial Completion of the Work and, where required, Total Completion (Reinstatement Work), and to perform and discharge all other functions and responsibilities of the Independent Certifier under the Independent Certifier Contract; and
 - (iii) be without bias or conflict of interest.

2.2 Independent Certifier Contract

2.2.1 Form of Contract

The Province and the Primary Contractor acknowledge and agree that the form of Independent Certifier Contract remains subject to modification following review by the Independent Certifier, with any such modifications requiring the agreement of the Province and the Primary Contractor.

2.2.2 Independent Certifier Services

The services to be provided by the Independent Certifier are described in the Independent Certifier Contract.

2.2.3 Change in Terms

Neither the Province nor the Primary Contractor shall without the other's prior agreement:

- (a) waive, settle, compromise or otherwise prejudice any rights or claims against the Independent Certifier under or in connection with the Independent Certifier Contract; or
- (b) vary the terms of the Independent Certifier Contract or the services performed or to be performed by the Independent Certifier.

2.3 Performance of Obligations

2.3.1 Independent Certifier Contract

Each of the Province and the Primary Contractor shall perform its respective obligations arising under or in connection with the Independent Certifier Contract.

2.3.2 Cooperation

- (a) The Province and the Primary Contractor agree to cooperate with each other generally in relation to all matters within the scope of or in connection with the Independent Certifier and the Independent Certifier Contract.
- (b) All communications, instructions and representations issued or made by either the Province or the Primary Contractor to the Independent Certifier shall be simultaneously copied to the other, and both the Province and the Primary Contractor shall be entitled to attend all inspections performed by or meetings involving the Independent Certifier.

2.3.3 Information

- (a) The Province shall provide the Independent Certifier with a complete copy of this Agreement as executed by the parties.
- (b) The Province shall provide the Independent Certifier with a complete copy of each Change Certificate issued by the Province's Representative within 10 Business Days of issuance of the Change Certificate.
- (c) The Province and the Primary Contractor shall provide the Independent Certifier with any information that the Independent Certifier reasonably requires for the purpose of providing the services described in the Independent Certifier Contract.

2.3.4 Access to Site

The Province and the Primary Contractor shall permit the Independent Certifier to have access to the Site and the Project Infrastructure and to all documents and records relating to the Work (other than documents and records which are legally privileged), as the

Independent Certifier reasonably requires to carry out its responsibilities under and in accordance with the Independent Certifier Contract.

2.4 Replacement of Independent Certifier

2.4.1 General

- (a) The Independent Certifier may, at any time, be discharged and replaced by another Independent Certifier by mutual agreement of the Province and the Primary Contractor.
- (b) In the event that the Independent Certifier's appointment is terminated for any reason and the procurement laws, guidelines or policies applicable to the Province require the award of the Independent Certifier Contract for the replacement Independent Certifier to be made based on a competitive tender process, the selection of a replacement Independent Certifier, the terms of which process shall be determined by the conduct of a competitive tender process, shall be reasonable and materially consistent with the terms of such processes conducted for the appointment of roles similar to that of the Independent Certifier on other projects in the Province and shall be agreed upon by the Province and the Primary Contractor, acting reasonably.
- (c) In the event that the Independent Certifier's appointment is terminated for any reason and the procurement laws, guidelines or policies applicable to the Province do not require the award of the Independent Certifier Contract for the replacement Independent Certifier to be made based on a competitive tender process, the Province and the Primary Contractor shall cooperate with each other in order to appoint a suitably qualified and experienced firm of Professional Engineers having, at a minimum, the qualifications described in Article 2.1.3 [Independent Certifier Qualifications] of this Part 1 to act as the Independent Certifier as soon as reasonably practicable.
- (d) The terms of the replacement Independent Certifier's appointment shall, unless otherwise agreed, be substantially as set out in the Independent Certifier Contract and the provisions of Article 2.3 [Performance of Obligations] of this Part 1 shall apply *mutatis mutandis* with respect to the replacement Independent Certifier.

2.4.2 Failure to Agree on Replacement

- (a) In the event that the Province and the Primary Contractor fail to agree upon the terms of conduct of a competitive tender process required to be conducted in accordance with Article 2.4.1(b) of this Part 1, the dispute as to the terms of conduct of such competitive tender process shall be resolved pursuant to the Dispute Resolution Procedure.

- (b) In the event that the Province and the Primary Contractor fail to agree upon a replacement Independent Certifier within five Business Days of the original Independent Certifier's appointment being terminated and the procurement laws, guidelines or policies applicable to the Province do not require the award of the Independent Certifier Contract for the replacement Independent Certifier to be made based on a competitive tender process, then a replacement Independent Certifier shall be selected in accordance with the provisions of Article 2.1.2(b) of this Part 1, which provisions shall apply *mutatis mutandis*.