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**ENHANCED INCLUSION & DEVELOPMENT AGREEMENT**

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**[●] PROJECT**

**[●]**

**- AND -**

**[●]**

**INITIAL DRAFT**

**Confidential**

**Initial Enhanced Inclusion & Development Agreement**

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### **SCHEDULES**

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SCHEDULE 3 [INSURANCE CONDITIONS]

SCHEDULE 4 [PRIVACY PROTECTION SCHEDULE]

SCHEDULE 5 [CHANGES]

## ENHANCED INCLUSION & DEVELOPMENT AGREEMENT

THIS AGREEMENT (the "Agreement") is made as of [Month] [Day], [Year] (the "Effective Date"),

BETWEEN:

[●]

(the "Authority")

AND:

[●]

(the "Design-Builder")

WHEREAS:

- A. The Authority is seeking to achieve certain community benefit objectives through the [●] Project;
- B. The Authority wishes to achieve benefits in three pillars: **SAMPLE PILLARS BELOW**
  - (a) Pillar A: increasing representation in construction through employment of Underrepresented Groups and Indigenous Peoples;
  - (b) Pillar B: increasing the number of apprentices and certified tradespeople in construction through increasing the percentage of apprentices and certified tradespeople in the total workforce and those who self-identify as Indigenous; and
  - (c) Pillar C: increasing opportunities for Indigenous Businesses;
- C. This Agreement sets out a structure for the allocation of responsibilities and measurement of progress in meeting or exceeding Thresholds related to such benefits through the [●]; and
- D. The parties wish to enter into this Agreement to set out their respective rights and obligations.

NOW THEREFORE, in consideration of the covenants and agreements of the parties contained in this Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby expressly acknowledged by each of the parties hereto, the parties hereto covenant and agree as follows:

## SECTION 1 DEFINITIONS AND INTERPRETATION

1.1 Capitalized terms used but not defined in this Agreement will have the respective meanings given to them in the Design-Build Agreement.

1.2 Whenever used in this Agreement, the following terms have the following meanings:

"**Achieved Percentage**" has the meaning set out in Schedule 1 [Payment];

"**Affected Party**" has the meaning set out in Section 14.1;

"**Agreement**" means this agreement, including the documents referred to in Section 1.3;

"**Authority**" has the meaning set out on the first page of this Agreement;

"**Authority's Representative**" has the meaning set out in Section 4.1;

"**Base Payment**" has the meaning set out in Schedule 1 [Payment];

"**Base Payment Adjustments**" has the meaning set out in Schedule 1 [Payment];

"**Base Payment Adjustment Holdback**" has the meaning set out in Schedule 1 [Payment];

"**Business Day**" means a day other than a Saturday, Sunday or statutory holiday in British Columbia;

"**Change**" means a change in the Services, including any addition, deletion, alteration, revision or substitution;

"**Change Directive**" means a written instruction referenced as a "Change Directive" executed by the Authority and directing the Design-Builder to proceed with a Change;

"**Change Order**" means a written document referenced as a "Change Order" executed by the Authority and the Design-Builder and setting out a Change and the value or method of valuation of a Change and any adjustments to the Contract Price;

"**Confidential Information**" means information of a party that the party has designated as confidential at the time of disclosure and which is supplied, or to which access is granted, to or on behalf of the other party (whether before or after the Effective Date), either in writing, or in any other form, directly or indirectly pursuant to discussions with the other party and includes all analyses, compilations, studies and other documents whether prepared by or on behalf of a party which contain or otherwise reflect or are derived from such designated information;

"**Contract Price**" has the meaning set out in Schedule 1 [Payment];

"**Contract Year**" has the meaning set out in Schedule 2 [Services];

"**COVID-19 Pandemic**" means the novel coronavirus COVID-19 pandemic declared March 11, 2020 by the World Health Organization until such time as the World Health Organization designates or declares the COVID-19 post-pandemic phase;

**"Design-Build Agreement"** means the Design-Build Agreement dated as of the Effective Date between the Authority and the Design-Builder;

**"Design-Builder"** has the meaning set out on the first page of this Agreement;

**"Dispute"** means any disagreement, failure to agree or other dispute between the Authority and the Design-Builder arising out of or in connection with this Agreement, including in respect of the interpretation, breach, performance, validity or termination of this Agreement, whether in the law of contract or any other area of law;

**"Dispute Resolution Procedure"** has the meaning set out in Section 18.1;

**"Effective Date"** has the meaning set out on the first page of this Agreement;

**"EIDA Coordinator"** has the meaning set out in Section 4.2;

**"EIDA Advisory Committee"** has the meaning set out in Schedule 2 [Services];

**"Epidemic"** means an epidemic or pandemic of infectious disease of humans, including one that is either declared by the World Health Organization or a "regional event" as defined in the *Public Health Act* (British Columbia) for which the Provincial Health Officer gives notice under Section 52 of that Act, and including the COVID-19 Pandemic;

**"Epidemic Change in Law"** means a change to applicable Laws which in respect of an Epidemic imposes, modifies or removes measures to minimize or mitigate the spread of, and human health effects from, relevant infectious disease;

**"Epidemic Event"** means an event, other than an Epidemic Change in Law, arising after the Financial Submission Date and caused by an Epidemic;

**"Event of Force Majeure"** means Epidemic Events, labour disputes, strikes, lock-outs, fire, unusual delay by common carriers or unavoidable casualties or, without limiting any of the foregoing, by a cause beyond the Design-Builder's reasonable control, but excludes:

- (a) any event that is the result of breach of this Agreement or Law;
- (b) economic hardship or lack of financing;
- (c) equipment failure;
- (d) unavailability of personnel, labour or Subcontractors, unless and to the extent caused by an Epidemic Event;
- (e) unavailability of materials, unless and to the extent caused by an Epidemic Event;
- (f) labour disputes, strikes or lock-outs of the personnel of the Design-Builder or the Subcontractors;
- (g) delays resulting from adverse weather conditions, unless and to the extent that such adverse weather conditions directly give rise to a declaration of a state of emergency by the

Province of British Columbia pursuant to Section 9 of the *Emergency Program Act* (British Columbia); and

(h) unsuitable or unanticipated Site conditions, including subsurface conditions;

"**Financial Submission Date**" means [Month] [day], [year] [NTD: Insert date applicable to Epidemic Event and Epidemic Change in Law.];

"**FIPPA**" means the *Freedom of Information and Protection of Privacy Act* (British Columbia);

"**Incorporated Material**" means any material in existence prior to the start of the Term or developed independently of this Agreement, and that is incorporated or embedded in the Produced Material by the Design-Builder or a Subcontractor;

"**Indemnified Parties**" has the meaning set out in Section 12.1;

"**Indigenous Businesses**" has the meaning set out in Schedule 2 [Services];

"**Indigenous Peoples**" has the meaning set out in Schedule 2 [Services];

"**Laws**" means the common law and any and all laws, statutes, enactments, by-laws, regulations, rules, orders, directives, policies, permits, licences, codes and rulings of any government, and any ministries, agencies, board, commission or tribunal of any government;

"**Material**" means the Produced Material and the Received Material;

"**Monthly Performance Report**" has the meaning set out in Schedule 2 [Services];

"**Notice of Dispute**" has the meaning set out in Section 18.2;

"**Performance Payments**" has the meaning set out in Schedule 1 [Payment];

"**Produced Material**" means records, software and other material, whether complete or not, that, as a result of this Agreement, are produced or provided by the Design-Builder or a Subcontractor and includes the Incorporated Material;

"**Projected Base Payment**" has the meaning set out in Schedule 1 [Payment];

"**Received Material**" means records, software and other material, whether complete or not, that, as a result of this Agreement, are received by the Design-Builder or a Subcontractor from the Authority or any other person;

"**Senior Management Representatives**" has the meaning set out in 18.4;

"**Services**" means the services provided under this Agreement, including as described in Schedule 2 [Services];

"**Subcontractor**" means a person or entity having a contract with the Design-Builder or with a Subcontractor of any tier to perform a part or parts of the Services; [NTD: Consider whether separate DB Subcontractor provisions are required after review of the Design-Builder's proposal for subcontracting of rights and obligations arising under this Agreement, including the reporting and audit rights. For example,

consider whether the Design-Builder is setting out subcontract terms under a Design Build Agreement subcontract or whether under a separate subcontract under this Agreement.]

"**Survey Result Threshold**" has the meaning set out in Schedule 1 [Payment];

"**Term**" has the meaning set out in Section 3.1;

"**Threshold**" has the meaning set out in Schedule 1 [Payment];

"**Threshold A1**" has the meaning set out in Schedule 1 [Payment];

"**Threshold A2**" has the meaning set out in Schedule 1 [Payment];

"**Threshold B1**" has the meaning set out in Schedule 1 [Payment];

"**Threshold B2**" has the meaning set out in Schedule 1 [Payment];

"**Threshold C**" has the meaning set out in Schedule 1 [Payment];

"**Underrepresented Groups**" has the meaning set out in Schedule 2 [Services];

"**VanIAC**" means the Vancouver International Arbitration Centre; and

"**VanIAC Rules**" has the meaning set out in Section 18.5.

1.3 This Agreement includes the following schedules and all sub-schedules, appendices and attachments to those schedules:

- (a) Schedule 1 [Payment];
- (b) Schedule 2 [Services];
- (c) Schedule 3 [Insurance Conditions];
- (d) Schedule 4 [Privacy Protection Schedule]; and
- (e) Schedule 5 [Changes].

1.4 This Agreement will be interpreted according to the following provisions, except to the extent the context or the express provisions of this Agreement require otherwise:

- (a) no rule of law will apply that would construe this Agreement or any part of it against the party who (or whose counsel) drafted, prepared or put forward the Agreement or any part of it;
- (b) the table of contents, headings and sub-headings, marginal notes and references to them in this Agreement are for convenience of reference only, do not constitute a part of this Agreement and will not be taken into consideration in the interpretation or construction of, or affect the meaning of, this Agreement;
- (c) unless the context otherwise requires, each reference to a Section or Schedule is a reference to a Section of or Schedule to this Agreement;

- (d) a Schedule includes all of the sub-schedules, appendices and other attachments attached to that Schedule;
- (e) each reference to an agreement, document, standard, principle or other instrument includes (subject to all relevant approvals and any other provisions of this Agreement expressly concerning such agreement, document, standard, principle or other instrument) a reference to that agreement, document, standard, principle or instrument as amended, supplemented, substituted, novated or assigned;
- (f) each reference to a statute or statutory provision (including any subordinate legislation) includes any statute or statutory provision which amends, extends, consolidates or replaces the statute or statutory provision or which has been amended, extended, consolidated or replaced by the statute or statutory provision and includes any orders, regulations, by-laws, ordinances, orders, codes of practice, instruments or other subordinate legislation made under the relevant statute;
- (g) each reference to time of day is a reference to Pacific Standard Time or Pacific Daylight Time, as the case may be;
- (h) words importing the singular include the plural and vice versa;
- (i) words which may import gender are interpreted as gender neutral;
- (j) each reference to a public organization is deemed to include a reference to any successor(s) to such public organization or any organization or entity or organizations or entities which has or have taken over the functions or responsibilities of such public organization;
- (k) unless the context otherwise requires, each reference to "parties" means the parties to this Agreement and each reference to a "party" means any one of the parties to this Agreement, provided however that a reference to a third party does not mean a party to this Agreement;
- (l) all monetary amounts are expressed in Canadian Dollars;
- (m) whenever this Agreement obliges a party (the "**Payor**") to pay any amount to the other party (the "**Payee**") in respect of any costs, expenses, fees, charges, liabilities, losses, claims or other sums incurred by the Payee:
  - (i) such obligation will be construed as applying only to so much of such sums as have been properly incurred on an arm's length commercial basis or, where not incurred on an arm's length commercial basis (including when the payment is made to an affiliate of the Payee), so much of them as are proper and reasonable; and
  - (ii) the Payee will, when requested by the Payor, provide supporting evidence of such costs, expenses, fees, charges, liabilities, losses, claims or other sums;
- (n) the Authority will not be imputed with knowledge of any fact, matter or thing unless that fact, matter or thing is within the actual knowledge of any of those of its employees or agents (including the Authority's Representative) who have responsibilities in connection with the conduct of the Services;



- (o) without limiting the extent of its actual knowledge, the Design-Builder will for all purposes of this Agreement be deemed to have such knowledge in respect of the Services as is held (or ought reasonably to be held) by all persons involved in carrying out the Services including the Subcontractors and the officers, agents, employees or workers of any of them;
- (p) each requirement for a thing or action to be "in accordance with" or "in compliance with" any standard, code or specification or other requirement or stipulation means that such thing or action is to exceed or at least equal that standard, code, specification or other requirement or stipulation;
- (q) the words "include", "includes" and "including" are to be construed as meaning "include without limitation", "includes without limitation" and "including without limitation", respectively;
- (r) the terms "will", "shall" and "must" are synonymous;
- (s) Schedule 2 [Services] includes provisions written in the imperative, and all such provisions will be construed as obligations of the Design-Builder;
- (t) when a party has "discretion", it means that party has sole, absolute and unfettered discretion, with no requirement to act reasonably or provide reasons unless specifically required under the provisions of this Agreement;
- (u) any consent contemplated to be given under this Agreement must be in writing;
- (v) general words are not given a restrictive meaning:
  - (i) if they are introduced by the word "other", by reason of the fact that they are preceded by words indicating a particular class of act, matter or thing; or
  - (ii) by reason of the fact that they are followed by particular examples intended to be embraced by those general words;
- (w) words or abbreviations which have well-known technical or trade meanings are used in accordance with those meanings;
- (x) the expression "all reasonable efforts" and expressions of like import, when used in connection with an obligation of either of the parties, means taking in good faith and with due diligence all commercially reasonable steps to achieve the objective and to perform the obligation, including doing all that can reasonably be done in the circumstances taking into account each party's obligations hereunder to mitigate delays and additional costs to the other party, and in any event taking no less steps and efforts than those that would be taken by a commercially reasonable and prudent person in comparable circumstances but where the whole of the benefit of the obligation and where all the results of taking such steps and efforts accrued solely to that person's own benefit, provided that the foregoing will not require the Authority to:
  - (i) take any action which is contrary to the public interest, as determined by the Authority in its discretion; or

- (ii) undertake any mitigation measure that might be available arising out of its status as a public body that would not normally be available to a private commercial party;
  - (y) the expressions "by the Design-Builder" and "by or through the Design-Builder" and expressions of like import are synonymous and mean by the Design-Builder or by anyone employed by or through the Design-Builder, including the Design-Builder and all Subcontractors and their respective officers, agents, employees and workers;
  - (z) all accounting and financial terms used herein are, unless otherwise indicated, to be interpreted and applied in accordance with GAAP, and consistently applied;
  - (aa) if the time for doing an act falls or expires on a day that is not a Business Day, the time for doing such act will be extended to the next Business Day;
  - (bb) each provision of this Agreement will be valid and enforceable to the fullest extent permitted by law. If any provision of this Agreement is held to be invalid, unenforceable or illegal to any extent, such provision may be severed and such invalidity, unenforceability or illegality will not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Agreement. If any such provision of this Agreement is held to be invalid, unenforceable or illegal, the parties will promptly endeavour in good faith to negotiate new provisions to eliminate such invalidity, unenforceability or illegality and to restore this Agreement as nearly as possible to its original intent and effect;
  - (cc) each release, waiver of liability and indemnity in this Agreement expressed to be given in favour of a person is and will be interpreted as having been given in favour of and may be enforced by that party and, in the case of the Authority, by the Indemnified Parties;
  - (dd) the words "herein", "hereof", "hereto" and "hereunder" refer to this Agreement as a whole and not to a particular Section or Schedule in which such word may be used; and
  - (ee) a reference to a person includes an individual, legal personal representative, corporation, body corporate, legal entity, firm, partnership, trust, trustee, syndicate, joint venture, limited liability company, association, unincorporated organization, union or governmental authority.
- 1.5 All documents forming this Agreement are complementary, and what is required by any one will be as binding as if required by all.
- 1.6 If there is a conflict within the documents forming this Agreement:
- (a) the provisions establishing the higher quality, manner or method of performing the Services, using the more stringent standards, will prevail, with the intent that the provisions which produce the higher quality with the higher levels of safety, reliability, durability, performance and service will prevail;
  - (b) the order of priority of documents from highest to lowest will be:
    - (i) the part of this Agreement from the first page to the page with the signatures of the individuals executing this Agreement on behalf of the parties;

- (ii) the schedules (including appendices, sub-schedules and attachments to the schedules), in the order in which they are listed in Section 1.3; and
- (c) later dated documents will govern over earlier dated documents of the same type.

## **SECTION 2 SERVICES**

- 2.1 The Design-Builder will provide the Services in accordance with this Agreement.
- 2.2 Unless the parties otherwise agree in writing, the Design-Builder will supply and pay for all personnel, materials, equipment, facilities, education, training, approvals and licenses necessary or advisable to perform the Design-Builder's obligations under this Agreement.
- 2.3 The Design-Builder will ensure that all persons employed or retained to perform the Services are qualified and competent to perform them and are properly trained, instructed and supervised.
- 2.4 The Authority may from time to time give the Design-Builder reasonable instructions (in writing or otherwise) as to the performance of the Services. The Design-Builder will comply with those instructions but, unless otherwise specified in this Agreement, the Design-Builder may determine the manner in which the instructions are carried out. If the Design-Builder determines that those instructions may reasonably impact the Design-Builder's likelihood of meeting or exceeding any Threshold, the Design-Builder will provide written notice to the Authority in advance of complying with those instructions. In the event of such notice, the Authority may require the Design-Builder to proceed with those instructions under a Change Order or Change Directive.
- 2.5 If the Authority provides an instruction under Section 2.4 other than in writing, the Design-Builder may request that the instruction be confirmed by the Authority in writing, which request the Authority will comply with as soon as it is reasonably practicable to do so.
- 2.6 Requesting written confirmation of an instruction under Section 2.5 does not relieve the Design-Builder from complying with the instruction at the time the instruction was given.
- 2.7 The Design-Builder will not subcontract any of the Design-Builder's obligations under this Agreement to any person without the Authority's prior written consent. No subcontract, whether consented to or not, relieves the Design-Builder from any obligations under this Agreement. The Design-Builder will ensure that:
  - (a) any person retained by the Design-Builder to perform obligations under this Agreement; and
  - (b) any person retained by a person described in paragraph 2.7(a) to perform those obligationsfully complies with this Agreement in performing the subcontracted obligations.

## **SECTION 3 TERM**

- 3.1 Subject to Section 3.2, the Design-Builder will commence the Services within seven days after the Effective Date and will diligently perform the Services in accordance with this Agreement until the Total Completion Date (the "**Term**").

- 3.2 Nothing in Section 3.1 will relieve the Design-Builder from:
- (a) the obligation to provide final records, reports and other documentation in accordance with Section 11; and
  - (b) any other terms that survive completion or termination of this Agreement in accordance with Section 27.1.

#### SECTION 4 REPRESENTATIVES AND EIDA COORDINATOR

- 4.1 Within seven days after the Effective Date, the Authority will give written notice to the Design-Builder designating its representative for the purposes of this Agreement (the "**Authority's Representative**"). The Authority will give written notice to the Design-Builder of any change of the Authority's Representative. The Authority or the Authority's Representative may by written notice delegate any or all of the functions of the Authority's Representative to any other person, including for a specified period of time in the absence of the Authority's Representative.
- 4.2 The Design-Builder will, within two Business Days after the Effective Date, appoint an individual to be its representative for the purposes of the Agreement (the "**EIDA Coordinator**"). The EIDA Coordinator may by written notice, and with the written approval of the Authority, acting reasonably, delegate any or all of the functions of the EIDA Coordinator to any other individual, including for a specified period of time in the absence of the EIDA Coordinator. Unless otherwise agreed by the Authority, the EIDA Coordinator and any delegate will be employed directly by the Design-Builder.
- 4.3 The EIDA Coordinator will represent the Design-Builder and written instructions given to the EIDA Coordinator by the Authority will be deemed to have been given to the Design-Builder.
- 4.4 The EIDA Coordinator will be dedicated full-time, and exclusively, to the position of EIDA Coordinator and will be dedicated solely to the Project.
- 4.5 With respect to the EIDA Coordinator:
- (a) the Design-Builder will use all reasonable efforts to retain the person appointed as the EIDA Coordinator to coordinate the Services and to perform any duties of the EIDA Coordinator described in Schedule 2 [Services]; and
  - (b) if for any reason the EIDA Coordinator resigns or is otherwise unavailable to perform the duties described in Schedule 2 [Services] then the Design-Builder will use all reasonable efforts to appoint a replacement with similar expertise and experience to the unavailable EIDA Coordinator satisfactory to the Authority acting reasonably, and the Design-Builder will not replace the EIDA Coordinator without the Authority's consent, acting reasonably.
- 4.6 Within ten days of the Design-Builder having knowledge that the EIDA Coordinator is or will be unavailable, the Design-Builder will:
- (a) notify the Authority; and

- (b) immediately commence the process to appoint a replacement prior to the unavailability of the EIDA Coordinator or promptly thereafter and will replace the EIDA Coordinator no later than 20 Business Days after the unavailability of the EIDA Coordinator.
- 4.7 If either the Authority or the Design-Builder reasonably considers that a replacement cannot reasonably be appointed within such 20 Business Days, the Design-Builder will deliver to the Authority a reasonable program (set out, if appropriate, in stages) for appointing the replacement. The program will specify in reasonable detail the manner in and the latest date by which the replacement will be appointed.
- 4.8 The Authority will have ten Business Days from receipt of the program within which to notify the Design-Builder that the Authority, acting reasonably, does not accept the program, failing which the Authority will be deemed to have accepted the program. If the Authority notifies the Design-Builder that it does not accept the program as being reasonable, the parties will use all reasonable efforts within the following five Business Days to agree to any necessary amendments to the program put forward. In the absence of an agreement within such five Business Days, the question of whether the program (as it may have been amended by agreement) will result in the appointment of a replacement in a reasonable manner and within a reasonable time period (and, if not, what would be a reasonable program) may be referred by either party for resolution in accordance with Section 18 (Dispute Resolution).
- 4.9 The Design-Builder acknowledges that if the EIDA Coordinator is not available and is not replaced as required by this Agreement, the Authority will not obtain the Services at the quality and level assumed to be included in the payments to be made to the Design-Builder hereunder and that in addition the Authority may incur costs and expenses.
- 4.10 If either (i) the position of EIDA Coordinator remains unfilled for more than 20 Business Days after the previous EIDA Coordinator ceased to hold the position or ceased to perform the functions of that position, or (ii) the Authority has accepted a program under Section 4.8 and the Design-Builder at any time fails to comply with any part of the program:
- (a) the Design-Builder will pay the Authority's reasonable internal administrative and personnel costs and all reasonable out-of-pocket costs related to any measures the Authority considers are reasonably incurred in relation to the position being unfilled, including the costs to ensure that the Design-Builder meets its requirements for the Services and for the Authority to review and consider any replacement under this Section 4; and
- (b) the Authority at its election may deem the position of EIDA Coordinator to be a Change (other than the requirements to comply with this Section 4) and for the period of time that the EIDA Coordinator position has remained unfilled the Authority will be credited with the amount of the cost (wages, benefits, fees and other costs) that would have been incurred by the Design-Builder in respect of the EIDA Coordinator plus a markup as set out in Section 3.5 of Schedule 5 [Changes].

## **SECTION 5 PAYMENT**

- 5.1 If the Design-Builder complies with this Agreement, then the Authority will pay to the Design-Builder at the times and on the conditions set out in this Agreement, including Schedule 1 [Payment] and Schedule 2 [Services]:

- (a) the Contract Price described in that Schedule; and
  - (b) any applicable taxes payable by the Authority under law or agreement with the relevant taxation authorities on the Contract Price.
- 5.2 If the Design-Builder is non-resident in Canada, the Design-Builder acknowledges that the Authority may be required by law to withhold income tax from the Contract Price described in Schedule 1 [Payment] and then to remit that tax to the Receiver General of Canada on the Design-Builder's behalf.
- 5.3 The Design-Builder will not in relation to performing the Design-Builder's obligations under this Agreement commit or purport to commit the Authority to pay any money except as may be expressly provided for in this Agreement.
- 5.4 The Design-Builder will:
- (a) apply for, and use reasonable efforts to obtain, any available refund, credit, rebate or remission of federal, provincial or other tax or duty imposed on the Design-Builder as a result of this Agreement that the Authority has paid or reimbursed to the Design-Builder or agreed to pay or reimburse to the Design-Builder under this Agreement; and
  - (b) immediately on receiving, or being credited with, any amount applied for under paragraph 5.4(a), remit that amount to the Authority.

## **SECTION 6 BUILDERS LIENS**

- 6.1 The parties acknowledge that a builders lien holdback under the *Builders Lien Act* (British Columbia) is not applicable to the Contract Price.
- 6.2 If any Subcontractor or other person who provides Services directly or indirectly to the Design-Builder asserts a lien right under the *Builders Lien Act* (British Columbia), the Design-Builder will, at its sole risk and expense, do everything necessary, including through the institution, prosecution or defence of legal proceedings, to promptly discharge from title to the Site any claims of builder's lien, builder's liens or certificates of pending litigation by any Subcontractor or other person claiming under or through the Design-Builder without any monies being payable by the Authority in order to secure the discharge of such claim of builder's lien, builder's liens or certificate of pending litigation.

## **SECTION 7 CHANGES**

- 7.1 In the event of a Change required by the Authority, the parties will comply with Schedule 5 [Changes].

## **SECTION 8 REPRESENTATIONS AND WARRANTIES**

- 8.1 As at the date this Agreement is executed and delivered by, or on behalf of, the parties, the Design-Builder represents and warrants to the Authority:

- (a) the Design-Builder has the power and capacity to enter into this Agreement and to observe, perform and comply with the terms of this Agreement and all necessary corporate or other proceedings have been taken and done to authorize the execution and delivery of this Agreement by, or on behalf of, the Design-Builder; and
- (b) this Agreement has been legally and properly executed by, or on behalf of, the Design-Builder and is legally binding upon and enforceable against the Design-Builder in accordance with its terms except as enforcement may be limited by bankruptcy, insolvency or other laws affecting the rights of creditors generally and except that equitable remedies may be granted only in the discretion of a court of competent jurisdiction.

## **SECTION 9 PRIVACY, SECURITY AND CONFIDENTIALITY**

9.1 Subject to Section 9.2, each party will hold in confidence any Confidential Information received from the other party, except that this Section 9 will not restrict:

- (a) the Design-Builder from disclosing or granting access to such information to its professional advisers and consultants, to the extent necessary, to enable it to perform (or to cause to be performed) or to enforce its rights or obligations under this Agreement and provided further that the Design-Builder may, subject to obtaining confidentiality restrictions similar to those set out in this Agreement, provide to a Subcontractor and its advisors, or provide or cause to be provided to other third parties, Confidential Information which is necessary to enable the Design-Builder to perform (or to cause to be performed) its obligations under this Agreement; and
- (b) the Authority from disclosing or granting access to such information to any provincial ministry, Infrastructure BC Inc. and any other governmental authority which requires the information in relation to the Project.

9.2 Subject to any restrictions on the Confidential Information which are imposed by a third party that may own any Confidential Information, the obligation to maintain the confidentiality of the Confidential Information does not apply to:

- (a) Confidential Information which the party that disclosed the Confidential Information confirms in writing is not required to be treated as Confidential Information;
- (b) Confidential Information which is or comes into the public domain otherwise than through any disclosure prohibited by this Agreement;
- (c) Confidential Information to the extent any person is required to disclose such Confidential Information by Law, including a disclosure required under FIPPA;
- (d) Confidential Information to the extent consistent with any Authority's policy concerning the Authority's Confidential Information, the details of which have been provided to the Design-Builder in writing prior to the disclosure; or
- (e) any Confidential Information that the Authority is entitled to receive from the Design-Builder.



- 9.3 Without prejudice to any other rights and remedies that the other party may have, each of the parties agrees that damages may not be an adequate remedy for a breach of Section 9.1 and that the other party will, in such case, be entitled to the remedies of injunction, specific performance or other equitable relief for any threatened or actual breach of Section 9.1 subject, in the case of a claim for any such remedy against the Authority, to the provisions of the *Crown Proceeding Act* (British Columbia).
- 9.4 Unless required by any Law, neither party will make or permit to be made any public announcement or disclosure whether for publication in the press, radio, television or any other medium of any Confidential Information, without the consent of the other party (which will not be unreasonably withheld or delayed).
- 9.5 Except to the extent required for compliance with any applicable securities laws, the Design-Builder will not make any public announcement relating to the Project or this Agreement without the prior written consent of the Authority. The Design-Builder, with the prior written consent of the Authority, may include the Project in its promotional materials.
- 9.6 The Design-Builder acknowledges that the Authority may, in its discretion and without consultation with the Design-Builder, make any public announcement relating to the Project.
- 9.7 The Design-Builder must comply with the Privacy Protection Schedule attached as Schedule 4.

## **SECTION 10 OWNERSHIP OF MATERIAL AND INTELLECTUAL PROPERTY FEES**

- 10.1 If the Design-Builder receives a request for access to any of the Material from a person other than the Authority, and this Agreement does not require or authorize the Design-Builder to provide that access, the Design-Builder must promptly advise the person to make the request to the Authority.
- 10.2 The Authority exclusively owns all property rights in the Material which are not intellectual property rights. The Design-Builder must deliver any Material to the Authority immediately upon the Authority's request.
- 10.3 The Authority exclusively owns all intellectual property rights, including copyright, in:
- (a) Received Material that the Design-Builder receives from the Authority; and
  - (b) Produced Material, other than any Incorporated Material.

Upon the Authority's request, the Design-Builder must deliver to the Authority documents satisfactory to the Authority that irrevocably waive in the Authority's favour any moral rights which the Design-Builder (or employees of the Design-Builder) or a Subcontractor (or employees of a Subcontractor) may have in the Produced Material and that confirm the vesting in the Authority of the copyright in the Produced Material, other than any Incorporated Material.

- 10.4 Upon any Incorporated Material being embedded or incorporated in the Produced Material and to the extent that it remains so embedded or incorporated, the Design-Builder grants to the Authority:
- (a) a non-exclusive, perpetual, irrevocable, royalty-free, worldwide license to exercise, in respect of that Incorporated Material, the rights set out in the *Copyright Act* (Canada),



including the right to use, reproduce, modify, publish and distribute that Incorporated Material; and

- (b) the right to sublicense or assign to third-parties any or all of the rights granted to the Province under Section 10.4(a).

10.5 The Design-Builder will obtain and pay for all intellectual property rights (including of any patent, copyright, industrial design, trademark or trade secret) and all royalties and licence fees required for the performance of the Services and will, without limiting Section 12, indemnify and hold the Authority harmless from and against all claims, demands, losses, costs, damages, actions, suits or proceedings arising out of the Design-Builder's performance of the Services under this Agreement that are attributable to infringement or an alleged infringement of any intellectual property right by the Design-Builder or anyone for whose acts the Design-Builder may be liable.

## SECTION 11 RECORDS AND AUDIT

11.1 The Design-Builder will retain, for a minimum of six years after the completion of the Services, all records, reports, correspondence, and other documentation required under this Agreement.

11.2 In addition to Section 11.1, the Design-Builder will retain records, reports, correspondence and other documentation relating to applications for payment, Changes or delay or other claims by the Design-Builder whether or not required under other provisions of this Agreement. The Design-Builder will permit the Authority and its consultants and representatives to inspect and copy any or all such records, reports and other documentation.

11.3 The Authority and its consultants and representatives may on request, and acting reasonably, audit all books and records of the Design-Builder and its Subcontractors related to the Services, Thresholds, payments, Changes, Disputes or claims by the Design-Builder, whether such books and records relate to this Agreement or to the Design-Build Agreement.

11.4 The Design-Builder will fully cooperate with the Authority to conduct an audit pursuant to this Section 11.

11.5 If the Authority discovers an error, including an error in misreporting any performance under this Agreement (including in relation to meeting or exceeding Thresholds), the Design-Builder will reimburse the Authority for all costs related to the audit and in addition will pay the Authority the amount of any overpayment multiplied by [●] %.

## SECTION 12 INDEMNITY AND INSURANCE

12.1 The Design-Builder will indemnify and save harmless the Authority and its officers, employees, representatives, consultants and agents including the Authority's Representative (collectively the "**Indemnified Parties**") from and against any and all losses, claims, damages, actions, causes of action, costs and expenses (including actual legal and other professional fees and disbursements) that any of the Indemnified Parties may sustain, incur, suffer or be put to at any time either before or after the expiration or termination of this Agreement, where the same or any of them are based upon, arise out of or occur, directly or indirectly, by reason of any act or omission of the Design-Builder or of any representative, agent, employee, officer, director, consultant of the Design-

- Builder or of any Subcontractor, excepting only liability to the extent arising out of the independent acts of the Indemnified Parties.
- 12.2 The obligations of the Design-Builder under this Section 12 will not be affected by completion or termination of this Agreement, whether for default or otherwise, or suspension of the Services or any withdrawal of labour from the Project.
- 12.3 The Design-Builder will comply with Schedule 3 [Insurance Conditions].
- 12.4 Neither the requirement of the Design-Builder to purchase and maintain insurance as described in Schedule 3 [Insurance Conditions] nor the acceptance of evidence of such insurance by the Authority will, in any manner, limit or qualify the right of the Authority to make a claim and recover insurance proceeds under the insurance policies described in Schedule 3 [Insurance Conditions] or the liability and obligations otherwise assumed by the Design-Builder under this Agreement.
- 12.5 Without limiting the generality of Section 19.1, the Design-Builder must comply with, and will ensure that contractors comply with, all applicable occupational health and safety laws in relation to the performance of the Design-Builder's obligations under this Agreement, including the *Workers Compensation Act* in British Columbia or similar laws in other jurisdictions.
- 12.6 The Design-Builder will apply for and maintain personal optional protection insurance (consisting of income replacement and medical care coverage) at the Design-Builder's expense if:
- (a) the Design-Builder is an individual or a partnership of individuals and does not have the benefit of mandatory workers compensation coverage under the *Workers Compensation Act* in British Columbia or similar laws in other jurisdictions; and
  - (b) such personal optional protection insurance is available for the Design-Builder from WorkSafeBC or other sources.
- 12.7 Within ten Business Days of being requested to do so by the Authority, the Design-Builder will provide the Authority with evidence of the Design-Builder's compliance with Sections 12.5 and 12.6.

### **SECTION 13 EXCLUSIONS OF LIABILITY**

- 13.1 Neither the Design-Builder nor the Authority will be liable to the other for any consequential or indirect damages in connection with this Agreement, whether based in contract, tort (including negligence), strict liability or otherwise and including loss of use, loss of revenues or profits and loss of opportunity.
- 13.2 Subject to Section 13.3, the maximum amount of the total aggregate liability of the Design-Builder to the Authority in connection with this Agreement, whether based in contract, tort (including negligence), strict liability or otherwise is the Contract Price.

If this Agreement is terminated, the reference in this Section 13.2 to the "Contract Price" will be deemed only for purposes of this Section 13.2 to be the maximum amount to which the Design-Builder would have been entitled if the Design-Builder had properly performed the Services and this Agreement had not been terminated.

- 13.3 Section 13.1 will not limit the Design-Builder's liability in connection with:
- (a) fraud, gross negligence or wilful, fraudulent or criminal misconduct;
  - (b) bodily injury, sickness, disease or death;
  - (c) liability to third parties in respect of tangible personal or real property;
  - (d) breach by the Design-Builder of its obligations of confidentiality under this Agreement; and
  - (e) penalties, fines or other liability imposed by a governmental authority, an administrative tribunal or a court of competent jurisdiction for breach of applicable Law.
- 13.4 Nothing in this Section 13 will be construed to limit the liability of an insurer under the insurance required to be maintained under this Agreement.

## **SECTION 14 FORCE MAJEURE**

### Definitions Relating to Force Majeure

- 14.1 In this Section and Sections 14.2 and 14.3 "**Affected Party**" means a party prevented from performing the party's obligations in accordance with this Agreement by an Event of Force Majeure.

### Consequence of Event of Force Majeure

- 14.2 An Affected Party is not liable to the other party for any failure or delay in the performance of the Affected Party's obligations under this Agreement resulting from an Event of Force Majeure and any time periods for the performance of such obligations are automatically extended for the duration of the Event of Force Majeure provided that the Affected Party complies with the requirements of Section 14.3.

### Duties of Affected Party

- 14.3 An Affected Party will promptly notify the other party in writing upon the occurrence of the Event of Force Majeure and make all reasonable efforts to prevent, control or limit the effect of the Event of Force Majeure so as to resume compliance with the Affected Party's obligations under this Agreement as soon as possible.

## **SECTION 15 NON-DEFAULT SUSPENSION/TERMINATION**

- 15.1 Notwithstanding that the Design-Builder may not be in default of the terms of this Agreement, the Authority may suspend performance of the Services or terminate this Agreement by giving five days' written notice to that effect to the Design-Builder and the suspension or termination is effective in the manner specified in the notice.
- 15.2 Without limiting Section 15.1, the Authority may, if it determines that there is an emergency, by written notice to the Design-Builder, do either or both of the following:

- (a) suspend the Services whenever in its opinion such suspension may be necessary to ensure the safety or life of others or of the Services or neighbouring property; or
  - (b) order Changes to be implemented immediately.
- 15.3 The Authority will within two Business Days after a Change under Section 15.2(b) confirm in writing any Change instructions and if a Change has been performed by order of the Authority, the Design-Builder retains its right to claim the value of such Change.
- 15.4 The Design-Builder upon receiving notice of suspension or termination from the Authority will immediately suspend all Services except those, which, in the Design-Builder's reasonable opinion, are necessary to ensure the safety of personnel and the public. Subject to any directions in the notice of suspension or termination, the Design-Builder will not enter into any further contracts with Subcontractors and will make every reasonable effort in the event of termination to cancel existing contracts with Subcontractors and orders on the best terms available.
- 15.5 If the period of suspension is 30 days or less, the Design-Builder, upon the expiration of the period of suspension, will resume the performance of the Services and will be paid for all costs reasonably incurred by the Design-Builder in complying with the suspension, determined in accordance with Section 3 of Schedule 5 [Changes].
- 15.6 If the period of suspension is greater than 30 days and, before 120 days after the date of the notice of suspension, and the Authority and the Design-Builder agree to continue with the Services, the Design-Builder will resume operations and the Services in accordance with any terms and conditions agreed upon by the Authority and the Design-Builder and the Design-Builder will be paid for all costs reasonably incurred by the Design-Builder in complying with the suspension, determined in accordance with Section 3 of Schedule 5 [Changes].
- 15.7 If the period of suspension is greater than 30 days and the Authority and the Design-Builder do not agree to continue with the Services, or they fail to agree on the terms and conditions upon which the Design-Builder is to resume operations and the Services, before 120 days after the date of the notice of suspension, this Agreement will be deemed to have been terminated.
- 15.8 If this Agreement is terminated pursuant to this Section 15:
  - (a) the Authority will pay the Design-Builder:
    - (i) in accordance with this Agreement, the applicable portion of the Base Payment for the Services performed prior to the date of termination; and
    - (ii) all costs reasonably incurred by the Design-Builder in complying with the suspension or termination order, determined in accordance with Section 3 of Schedule 5 [Changes], less any costs already paid to the Design-Builder pursuant to Section 15.5; and
  - (b) the Authority will be entitled to finish the Services or any part of the Services by whatever reasonable method the Authority may consider expedient.

No Performance Payments are payable upon any termination pursuant to this Section 15.

## SECTION 16 DEFAULT AND TERMINATION OF AGREEMENT

16.1 In this Section:

- (a) **"Event of Default"** means any of the following:
- (i) an Insolvency Event;
  - (ii) the Design-Builder abandons the Services;
  - (iii) the Design-Builder fails to perform any of the Design-Builder's obligations under this Agreement;
  - (iv) any representation or warranty made by the Design-Builder in this Agreement is untrue or incorrect;
  - (v) the Design-Builder has made an assignment of this Agreement without the required consent of the Authority; or
  - (vi) the Design-Build Agreement entered into by the parties as of the Effective Date is terminated as a result of a default under that agreement by the Design-Builder (as that term is defined in that agreement); and
- (b) **"Insolvency Event"** means any of the following:
- (i) an order is made, a resolution is passed or a petition is filed, for the Design-Builder's liquidation or winding up;
  - (ii) the Design-Builder commits an act of bankruptcy, makes an assignment for the benefit of the Design-Builder's creditors or otherwise acknowledges the Design-Builder's insolvency;
  - (iii) a bankruptcy petition is filed or presented against the Design-Builder or a proposal under the *Bankruptcy and Insolvency Act* (Canada) is made by the Design-Builder;
  - (iv) a compromise or arrangement is proposed in respect of the Design-Builder under the *Companies' Creditors Arrangement Act* (Canada);
  - (v) a receiver or receiver-manager is appointed for any of the Design-Builder's property; or
  - (vi) the Design-Builder ceases, in the Authority's reasonable opinion, to carry on business as a going concern.

16.2 The Authority may give written notice to the Design-Builder of an Event of Default.

16.3 If an Event of Default occurs, other than an Event of Default referred to in Section 16.1(a)(i) or 16.1(a)(ii), the Design-Builder will remedy the Event of Default within a seven-day rectification period after the notice given under Section 16.2. If the nature of such Event of Default is that it cannot be remedied within such seven-day period, the Design-Builder will within such seven-day period provide the Authority with a schedule acceptable to the Authority for remedying the Event

of Default and the Design-Builder will remedy the Event of Default in accordance with that schedule.

- 16.4 If an Event of Default referred to in Section 16.1(a)(i) or 16.1(a)(ii) occurs or if the Design-Builder fails to remedy any other Event of Default within the rectification period described in Section 16.3 or in accordance with the schedule acceptable to the Authority, the Authority may without prejudice to any other right or remedy exercise any or all of the following:
- (a) suspend all or part of the Services;
  - (b) terminate the Design-Builder's right to continue with the Services in whole or in part;
  - (c) remedy the Event of Default and deduct the cost thereof from any payment then or thereafter due to the Design-Builder; and
  - (d) terminate this Agreement.
- 16.5 If the Authority terminates the right to continue with all or part of the Services or terminates this Agreement pursuant to Section 16.4, the Authority will be entitled to:
- (a) finish the Services or any part of the Services by whatever reasonable method the Authority may consider expedient;
  - (b) charge the Design-Builder the amount by which the full cost of finishing the Services exceeds the unpaid balance of the Contract Price; and
  - (c) The termination of the right to continue with part of the Services does not relieve or discharge the Design-Builder from any obligations under this Agreement, except the obligation to perform the part of the Services removed from the Design-Builder.
- 16.6 The rights, powers and remedies conferred on the Authority under this Agreement are not intended to be exclusive but are cumulative, are in addition to, do not limit and are not in substitution for any other right, power and remedy existing under this Agreement, under any other agreement, at law or in equity. The exercise by the Authority of any right, power or remedy does not preclude the simultaneous or later exercise by the Authority of any other right, power or remedy.

## **SECTION 17 TERMINATION BY THE DESIGN BUILDER**

- 17.1 The Design-Builder may by giving written notice to the Authority declare the Authority in default of this Agreement for any of the following reasons:
- (a) the Authority has failed to pay the Design-Builder within 45 days of the date that any payment becomes due to the Design-Builder in accordance with the terms of this Agreement, unless the Authority is bona fide disputing liability to make such payment and has provided written notice to the Design-Builder of the basis for its dispute before the time provided in Schedule 1 [Payment] for payment of invoices; or
  - (b) substantially all of the Services are stopped by an order of any court or public authority having jurisdiction (providing that such order was not issued as the result of any act or fault of the Design-Builder or a Subcontractor) for a period of 120 days.

- 17.2 If a default referred to in Section 17.1 occurs, the Authority will remedy the default within a 14-day rectification period after the notice given under Section 17.1 or within such extension thereof established by the Design-Builder.
- 17.3 If the Authority fails to remedy the default within the rectification period described in Section 17.2 or any extension thereof established in accordance with that Section, the Design-Builder may exercise any or all of the following:
- (a) waive the default;
  - (b) further extend the rectification period;
  - (c) suspend the Services; and
  - (d) terminate this Agreement.
- 17.4 If the Design-Builder terminates this Agreement in accordance with Section 17.3(d), the Design-Builder is entitled to be paid:
- (a) in accordance with this Agreement, the applicable portion of the Base Payment for the Services performed prior to the date of termination;
  - (b) in accordance with this Agreement, the applicable portion of Performance Payments that would have been earned by the Design-Builder up to the date of termination; and
  - (c) expenses of the Design-Builder that are directly related to the termination and reasonable in the circumstances including the Design-Builder's obligations to other parties.

## SECTION 18 DISPUTE RESOLUTION

- 18.1 All Disputes will be resolved in accordance with the Dispute resolution procedure set out in this Section 18 (the "**Dispute Resolution Procedure**").
- 18.2 Either Party may commence the Dispute Resolution Procedure by giving written notice of a Dispute to the other Party briefly setting out the nature of the Dispute, the remedy or relief sought, and a request that the Dispute Resolution Procedure pursuant to this Section 18 be commenced (a "**Notice of Dispute**").
- 18.3 Following the submission of a Notice of Dispute, the Parties agree to use a two-step process to resolve any Dispute, which will be taken in the following order:
- (a) first, by referring the Dispute to negotiations among the Parties' senior management representatives, pursuant to Section 18.4 below; and
  - (b) second, by referring the Dispute to arbitration pursuant to Section 18.5 below.



- 18.4 Upon the submission of a Notice of Dispute pursuant to Section 18.2 above, each of the Parties will refer the Dispute to a designated senior management representative with the authority to negotiate and settle the Dispute (the "**Senior Management Representatives**"). The Senior Management Representatives of the Parties will then attempt to resolve the Dispute within thirty (30) days after the date of the Notice of Dispute, or such longer period as the Senior Management Representatives may otherwise agree in writing. If the Senior Management Representatives agree upon a resolution of the Dispute, such resolution will be memorialized in a written settlement agreement mutually acceptable to and signed by both of the Parties.
- 18.5 If a Dispute is not resolved by the Senior Management Representatives within thirty (30) days after the Notice of Dispute (or such longer period as the Senior Management Representatives may otherwise agree in writing) pursuant to Section 18.4 above for any reason whatsoever, the Dispute will at the initiation of either Party be resolved by binding arbitration administered by the Vancouver International Arbitration Centre ("**VanIAC**") under its applicable Rules (the "**VanIAC Rules**"), except to the extent of conflicts between the VanIAC Rules and the provisions of this Agreement, in which event the provisions of this Agreement will prevail. The following provisions will apply to an arbitration commenced pursuant to this clause:
- (a) The number of arbitrators will be one, who will be appointed in accordance with the VanIAC Rules.
  - (b) The legal seat of the arbitration will be Vancouver, British Columbia, Canada.
  - (c) The language to be used in all aspects of the arbitration will be English.
  - (d) Any award issued by the arbitral tribunal will be final and binding on the parties, may be filed in any court of competent jurisdiction, and may be enforced by a party as a final judgment in such court. The parties expressly waive, to the maximum extent permitted by law, any right of appeal of any award, including appeals based on questions of law, questions of fact, questions of mixed law and fact, or otherwise.
  - (e) The parties will request that the arbitral tribunal render a final award as soon as reasonably practicable after the commencement of an arbitration, taking into consideration the size, nature and complexity of the applicable Dispute and the parties' intent to achieve a just, timely and cost effective determination of the matters in dispute.
  - (f) Any award for monetary damages will be made and payable in Canadian dollars, and may include interest from the date of any breach or violation of this Agreement until paid in full at the rate determined by the arbitrator.
  - (g) The parties agree that any arbitration carried out hereunder will be kept strictly private and confidential, and that the existence of the proceedings and any element of it (including but not limited to all awards, the identity of the parties and all witnesses and experts, all materials created for the purposes of the arbitration, all testimony or other oral submissions, all documents disclosed in arbitration and all documents produced by a party that were not already in the possession of the other party) will be kept strictly private and confidential, except (i) with the consent of the parties, (ii) to the extent disclosure may be lawfully required in bona fide judicial proceedings relating to the arbitration, (iii) where disclosure is lawfully required by a legal duty, and (iv) where such information is already in the public domain other than as a result of a breach of this clause. The parties will request that the arbitral tribunal and VanIAC keep any arbitration carried out hereunder strictly private and



confidential, including but not limited to all of the foregoing items, and will request that the arbitral tribunal and VanIAC refrain from publishing or disclosing any such items. The parties also agree not to use any information disclosed to them during the arbitration for any purpose other than in connection with the arbitration.

- 18.6 The parties agree that while an arbitration is pending pursuant to Section 18.5, the parties will continue to perform their obligations under this Agreement, provided that such performance will be without prejudice to the rights and remedies of the parties and will not be read or construed as a waiver of a party's right to claim for recovery of any losses suffered as a result of the continued performance of this Agreement.
- 18.7 Except as otherwise specifically permitted by this Agreement, no undisputed payment due or payable by a party will be withheld on account of a pending arbitration pursuant to this clause.
- 18.8 Any limitation period imposed by this Agreement or by law in respect of a Dispute shall be tolled upon the delivery of a Notice of Dispute pursuant to Section 18.2 above until such time as the Dispute Resolution Procedure under this Section 18 has concluded.

## SECTION 19 LAWS, NOTICE, PERMITS AND FEES

- 19.1 The Design-Builder will perform the Services in accordance with all applicable Laws and will comply with all Laws that may affect or relate to the Services.
- 19.2 The Design-Builder will prepare applications, apply for and obtain all permits, licences and approvals required for the performance of the Services. The Authority will be responsible for the cost of permits, licences and approvals.
- 19.3 Except as otherwise provided in this Agreement, if after:
- (a) the Financial Submission Date an Epidemic Change in Law comes into effect; or
  - (b) the Effective Date a change to applicable Laws comes into effect,
- either party will be entitled to make a claim for an adjustment in the Contract Price as a Change; provided that the Design-Builder will not be allowed any adjustment in the Contract Price for:
- (c) any lawful requirements of any governmental authority (unless resulting from a new Law or modification (including repeal) of any Law existing on the Effective Date);
  - (d) any change in the interpretation of any legislation other than a judgment of a relevant Court which changes binding precedent in British Columbia;
  - (e) any new Law or modification arising from or in any way connected to or having substantially the same effect as any Law which as of the Effective Date:
    - (i) had been introduced as a Bill in the Legislative Assembly of British Columbia or the Parliament of Canada or in a draft statutory instrument published or issued by a governmental authority; or

- (ii) had been published in the Canada Gazette or in a draft bill as part of a governmental authority discussion or consultation paper.

## SECTION 20 NOTICE

20.1 Any notice or communication required or permitted to be given under this Agreement will be in writing and will be considered to have been sufficiently given if delivered by hand or transmitted by electronic transmission to the address or electronic mail address of each party set out below:

- (a) if to the Authority:

[●]:

[●]

Attention: [●]

Email: [●]

- (b) if to the Design-Builder:

[●]

Attention: [●]

Email: [●]

or to such other address or electronic mail address as any party may, from time to time, designate in the manner set out above.

20.2 Any such notice or communication will be considered to have been received:

- (a) if delivered by hand during business hours (and in any event, at or before 5:00 pm local time in the place of receipt) on a Business Day, upon receipt by a responsible representative of the receiver, and if not delivered during business hours, upon the commencement of business hours on the next Business Day; and
- (b) if sent by electronic transmission during business hours (and in any event, at or before 5:00 pm local time in the place of receipt) on a Business Day, upon receipt, and if not delivered during business hours, upon the commencement of business hours on the next Business Day, provided that:
- (i) the receiving party has, by electronic transmission or by hand delivery acknowledged to the notifying party that it has received such notice; or
- (ii) within 24 hours after sending the notice, the notifying party has also sent a copy of such notice to the receiving party by hand delivery.

20.3 Delivery by mail will not be considered timely notice under this Agreement.

- 20.4 In the event of an emergency or urgent matter, in addition to the notice required by this Section 20, a verbal notice will be given as soon as the party giving the notice becomes aware of any material event or circumstance that gives rise to the requirement for a written notice being given.

## **SECTION 21 LEGAL RELATIONSHIP**

- 21.1 The Design-Builder is an independent contractor and not:
- (a) the servant, employee or partner of the Authority; or
  - (b) the agent of the Authority except as may be expressly provided for in this Agreement.
- 21.2 The Design-Builder will not commit the Authority to the payment of any money to any person.
- 21.3 No partnership, joint venture or agency involving the Authority is created by this Agreement or under this Agreement.
- 21.4 All personnel engaged by the Design-Builder to perform the Services are at all times the employees or Subcontractors of the Design-Builder and not of the Authority. The Design-Builder is solely responsible for all matters arising out of the relationship of employer and employee.

## **SECTION 22 ASSIGNMENT**

- 22.1 The Design-Builder will not, without the prior written consent of the Authority, assign, either directly or indirectly, any right or obligation of the Design-Builder under this Agreement.
- 22.2 The Authority may, upon notice to the Design-Builder, assign any or all of its rights or obligations under this Agreement to any other agency or organization that will assume responsibility for the operation of the Facility. Subject to the foregoing, the Authority will not, without the prior written consent of the Design-Builder, assign, either directly or indirectly, any right or obligation of the Authority under this Agreement.

## **SECTION 23 INTEREST**

- 23.1 If payment by either party of any amount payable under this Agreement is not made when due, interest will be payable on such amount at 2 % per annum over the prime rate, calculated from the date due under this Agreement until paid, compounded monthly. The party to whom payment is owed and overdue will notify the other party at least monthly of the overdue amount and the accrued interest on that amount. The prime rate is the annual rate of interest announced by the Royal Bank of Canada (or its successor), or any other Canadian chartered bank agreed to by the parties, as its "prime" rate then in effect for determining interest rates on Canadian dollar commercial loans made by it in Canada.

## **SECTION 24 WAIVER**

- 24.1 No waiver by either party of a right of that party or any breach by the other party in the performance of any of its obligations under this Agreement is effective unless it is in writing.

- 24.2 No waiver of any right or obligation is a waiver of any other right or obligation under this Agreement.
- 24.3 Failure or delay to complain of an act or failure of the other party or to declare the other party in default, irrespective of how long the failure or delay continues, does not constitute a waiver by the party of any of its rights against the other party.
- 24.4 The duties and obligations imposed by this Agreement and the rights and remedies available hereunder will be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available by Law.

## **SECTION 25 ASSUMPTION OF RISK**

- 25.1 Except to the extent expressly allocated to the Authority or otherwise provided for under this Agreement, all risks, costs and expenses in relation to the performance by the Design-Builder of its obligations under this Agreement are allocated to, and accepted by, the Design-Builder as its entire and exclusive responsibility.

## **SECTION 26 GENERAL DUTY TO MITIGATE**

- 26.1 In all cases where the Design-Builder is entitled to receive from the Authority any additional compensation or any costs, damages or extensions of time, the Design-Builder will use all reasonable efforts to mitigate such amount required to be paid by the Authority to the Design-Builder under this Agreement, or the length of the extension of time. Upon request from the Authority, the Design-Builder will promptly submit a detailed description, supported by all such documentation as the Authority may reasonably require, of the measures and steps taken by the Design-Builder to mitigate and meet its obligations under this Section 26.

## **SECTION 27 OTHER PROVISIONS**

- 27.1 The exclusions, waivers and limitations of liability, representations and warranties and indemnities in this Agreement, the provisions of Section 9 (Privacy, Security and Confidentiality), Section 10 (Ownership of Material and Intellectual Property Fees), Section 11 (Records and Audit), Section 18 (Dispute Resolution), and rights accrued prior to completion or termination of this Agreement will survive the completion or termination of this Agreement.
- 27.2 This Agreement constitutes the entire agreement between the parties, expressly superseding all prior agreements and communications (both oral and written) between any of the parties hereto with respect to all matters contained herein or therein, and except as stated herein or the instruments and documents to be executed and delivered pursuant hereto, contains all the representations and warranties of the respective parties.
- 27.3 No waiver of any provision of this Agreement and no consent required pursuant to the terms of this Agreement is binding or effective unless it is in writing and signed by the party providing such waiver or consent.
- 27.4 No failure to exercise, and no delay in exercising, any right or remedy under this Agreement will be deemed to be a waiver of that right or remedy. No waiver of any breach of any provision of this

- Agreement will be deemed to be a waiver of any subsequent breach of that provision or of any similar provision.
- 27.5 This Agreement enures to the benefit of and binds the Authority, its successors and its assigns and the Design-Builder and its successors and permitted assigns.
- 27.6 The parties must do everything reasonably necessary to give effect to the intent of this Agreement, including execution of further instruments.
- 27.7 The Design-Builder and the Authority will take all reasonable and necessary steps to minimize and avoid all costs and impacts arising out of the performance of the Services and this Agreement.
- 27.8 Neither the Authority nor the Design-Builder will take advantage of any apparent discrepancy, ambiguity, error or omission in this Agreement and will notify the other party forthwith following the detection of anything it suspects may be an ambiguity, discrepancy, error or omission.
- 27.9 Each Schedule attached to this Agreement is an integral part of this Agreement as if set out at length in the body of this Agreement.
- 27.10 This Agreement may only be amended by an agreement of the parties in writing. No such amendments will be valid unless executed by the Authority and the Design-Builder.
- 27.11 This Agreement will be deemed to be made pursuant to the Laws of the Province of British Columbia and the Laws of Canada applicable therein and will be governed by and construed in accordance with such Laws.
- 27.12 For the purposes of any legal actions or proceedings brought by any party hereto against the other party, the parties hereby irrevocably submit to the exclusive jurisdiction of the courts of the Province of British Columbia and acknowledge their competence and the convenience and propriety of the venue and agree to be bound by any judgment thereof and not to seek, and hereby waive, review of its merits by the courts of any other jurisdiction.
- 27.13 Where the Design-Builder is a joint venture, partnership or consortium, each member agrees to be jointly and severally liable for the obligations of the Design-Builder.
- 27.14 Time is of the essence of this Agreement.
- 27.15 This Agreement may be executed in any number of counterparts, each of which will be deemed to be an original, and this has the same effect as if the signatures on the counterparts were on a single copy of this Agreement so that it will not be necessary in making proof of this Agreement to produce or account for more than one such counterpart.
- 27.16 A party may deliver an executed copy of this Agreement by electronic means but that party will upon request immediately deliver to the other party an originally executed copy of this Agreement.

*[Signature Page to Follow]*

**IN WITNESS WHEREOF** the parties have executed this Agreement as of the Effective Date.

[•]

Per:

\_\_\_\_\_ [•]

[•]

Per:

[•]

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## SCHEDULE 1 [PAYMENT]

[NTD: All terms to be reviewed, and as applicable, revised after review of Proposal and finalization of Agreement with Proponent.]

### 1. DEFINITIONS AND INTERPRETATION

1.1 In this Schedule, in addition to the definitions set out in the Agreement:

- (a) "**Achieved Percentage**" means the applicable percentage calculated in relation to each Threshold in accordance with Section 7 of this Schedule;
- (b) "**Base Payment**" means the Projected Base Payment minus the aggregate of the Base Payment Adjustments;
- (c) "**Base Payment Adjustments**" has the meaning set out in Section 4.1 of this Schedule;
- (d) "**Base Payment Adjustment Holdback**" means [●] % of Projected Base Payments;
- (e) "**Contract Price**" means the sum of the Base Payment and the Performance Payment;
- (f) "**Performance Payments**" has the meaning set out in Section 5.1 of this Schedule;
- (g) "**Projected Base Payment**" means [Insert amount proposed by Proponent, not to exceed \$[●]];
- (h) "**Survey Result Threshold**" has the meaning set out in Section 7.6 of this Schedule;
- (i) "**Threshold**" means Threshold A1, Threshold A2, Threshold B1, Threshold B2 and Threshold C;
- (j) "**Threshold A1**" has the meaning set out in Section 7.1 of this Schedule;
- (k) "**Threshold A2**" has the meaning set out in Section 7.2 of this Schedule;
- (l) "**Threshold B1**" has the meaning set out in Section 7.3 of this Schedule;
- (m) "**Threshold B2**" has the meaning set out in Section 7.4 of this Schedule; and
- (n) "**Threshold C**" has the meaning set out in Section 7.5 of this Schedule.

### 2. CONTRACT PRICE

2.1 The Authority will pay the Design-Builder the Contract Price in accordance with this Agreement.

### 3. PROJECTED BASE PAYMENT

3.1 The Projected Base Payment is divided by the number of months during the Term and allocated to each month accordingly.



3.2 The Authority will on a monthly basis pay the monthly allocation of the Projected Base Payment, less the Base Payment Adjustment Holdback.

#### 4. BASE PAYMENT ADJUSTMENTS

4.1 Adjustments to the Base Payments (the "**Base Payment Adjustments**") are calculated annually, commencing the date that is 12 months after the Effective Date, as follows:

- (a) If for any year, the Design-Builder meets or exceeds all of the Thresholds, there are no Base Payment Adjustments.
- (b) If for any year, the Design-Builder fails to meet or exceed any Threshold, the Base Payment Adjustment(s) will be calculated as follows:

	EIDA Objective	Threshold %	Base Payment Adjustment for each whole percentage increment below Threshold	Maximum Annual Base Payment Adjustment	Maximum Aggregate Base Payment Adjustment for the Term
1.	Threshold A1.	[●]	[●]	[●]	[●]
2.	Threshold A2.	[●]	[●]	[●]	[●]
3.	Threshold B1.	[●]	[●]	[●]	[●]
4.	Threshold B2.	[●]	[●]	[●]	[●]
5.	Threshold C.	[●]	[●]	[●]	[●]
6.	Survey Result Threshold	[●]	[●]	[●]	[●]
	Total	N/A	[●]	[●]	[●]

[NTD: Note that if Threshold C is not assessed on an annual basis, as with the other Thresholds, a separate section may be required.]

4.2 The percentage calculation for the Base Payment Adjustment is based on rounding down the Achieved Percentage to the nearest lower whole percentage.

4.3 Upon completion of a Contract Year, the Authority may apply any Base Payment Adjustment Holdback to any Base Payment Adjustments.

4.4 The Base Payment Adjustment will not exceed the applicable amounts indicated in the table above as the maximum Base Payment Adjustment.

## 5. PERFORMANCE PAYMENTS

- 5.1 The Authority will on an annual basis (calculated annually and paid in arrears) pay the Design-Builder performance payments (the "**Performance Payments**") as follows:

	EIDA Objective	Threshold %	Performance Payment for each whole percentage increment above Threshold	Maximum Annual Performance Payment	Maximum Aggregate Performance Payment for the Term
1.	Threshold A1.	[●]	[●]	[●]	[●]
2.	Threshold A2.	[●]	[●]	[●]	[●]
3.	Threshold B1.	[●]	[●]	[●]	[●]
4.	Threshold B2.	[●]	[●]	[●]	[●]
5.	Threshold C	[●]	[●]	[●]	[●]
6.	Survey Result Threshold	[●]	[●]	[●]	[●]
	Total	N/A	[●]	[●]	[●]

- 5.2 The percentage calculation for the Performance Payment is based on rounding down the Achieved Percentage to the nearest lower whole percentage.
- 5.3 The Performance Payments per year will not exceed the applicable amounts indicated in the table above as the maximum annual Performance Payment.
- 5.4 The maximum aggregate total Performance Payments will not exceed the applicable amounts indicated in the table above as the maximum aggregate Performance Payment for the Term.

## 6. PAYMENTS DUE

- 6.1 The Design-Builder may request applicable payment monthly by submitting a Monthly Performance Report, including an invoice, in accordance with Schedule 2 [Services].
- 6.2 The Design-Builder will include the request for payment of Performance Payments and the request for the release of any Base Payment Adjustment Holdback in the final Monthly Performance Report for a year.
- 6.3 Within 30 days of the Authority's receipt of the Design-Builder's Monthly Performance Report and the satisfaction of any conditions of payment set out in this Agreement, the Authority will pay the Design-Builder the amounts (plus all applicable taxes) claimed in the attached invoice if they are in accordance with this Schedule and Schedule 2.
- 6.4 Any misreporting may result in an additional payment by the Design-Builder to the Authority pursuant to Section 11.5 of the main body of this Agreement.

## 7. THRESHOLDS

- 7.1 Underrepresented Groups Employment

The Design-Builder will seek to meet or exceed employment by individuals who self-identify as being from Underrepresented Groups at a threshold of [●] per cent of the total workforce ("**Threshold A1**").

Measurement of the applicable Achieved Percentage will be based on hours worked on the Project. The following formula provides a representation of the threshold ratio:

$$\frac{\text{Hours worked on the Project by individuals who self-identify as being from Underrepresented Groups for the current year}}{\text{Total hours worked on the Project by all individuals in construction for the current year}}$$

### 7.2 Indigenous Peoples Employment

The Design-Builder will seek to meet or exceed employment by individuals who self-identify as Indigenous Peoples at a threshold of [●] per cent of the total workforce ("**Threshold A2**").

Measurement will be based on hours worked on the Project. The following formula provides a representation of the threshold ratio:

$$\frac{\text{Hours worked on the Project by individuals who self-identify as Indigenous Peoples for the current year}}{\text{Total hours worked on the Project by all individuals in construction for the current year}}$$

### 7.3 Apprentices and Certified Tradespeople Employment

The Design-Builder will seek to meet or exceed employment by apprentices and certified tradespeople at a threshold of [●] per cent of the total workforce ("**Threshold B1**").

Measurement will be based on hours worked on the Project. The following formula provides a representation of the threshold ratio:

$$\frac{\text{Hours worked on the Project by individuals from apprentices and certified tradespeople for the current year}}{\text{Total hours worked on the Project by all individuals in construction for the current year}}$$

### 7.4 Apprentices and Certified Tradespeople (Indigenous Peoples) Employment

The Design-Builder will seek to meet or exceed employment by apprentices and certified tradespeople who self-identify as Indigenous Peoples at a threshold of [●] per cent of the total workforce ("**Threshold B2**").

Measurement will be based on hours worked on the Project. The following formula provides a representation of the threshold ratio:

Hours worked on the Project by individuals who are apprentices and certified tradespeople and self-identify as Indigenous Peoples for the current year

-----  
Total hours worked on the Project by all individuals in construction for the current year

#### 7.5 Indigenous Businesses

The Design-Builder will seek to achieve employment by Indigenous Businesses as follows:

[Insert Threshold Calculation]

("Threshold C").

#### 7.6 Survey Result Threshold

The Design-Builder will seek to achieve a survey result under Section [●] of Schedule 2 of \_\_\_\_ (the "Survey Result Threshold").

[NTD: The Survey Results Threshold will be determined in consultation with the third party survey firm which will be procured during the RFP process.]

#### 7.7 Principles of Measurement

- (a) No Duplication of Reporting for Pillar A: An individual who is qualified to be reported for purposes of the numerator for both Threshold A1 and Threshold A2 will be reported in only one of those Thresholds.
- (b) No Duplication of Reporting for Pillar B: An individual who is qualified to be reported for purposes of the numerator for both Threshold B1 and Threshold B2 will be reported in only one of those Thresholds.
- (c) Across Pillars A and B: An individual who is qualified to be reported for purposes of the numerator for Threshold A1 or A2, as applicable, may also, if qualified, be reported for purposes of the numerator for Threshold B1 or B2, as applicable.
- (d) Weighting for Achievement of Certificate of Qualification: If an apprentice has worked a minimum of [●] hours on the Project and achieves a Certificate of Qualification prior to Substantial Completion of the Project, the number of hours reported in the numerator of Threshold B1 and B2, as applicable, will be deemed to be increased in the applicable Contract Year where the certificate is achieved by [●] hours, but the number of hours in the denominators will be reported without any adjustment.

## 7.8 Adjustments to Thresholds

Commencing 12 months after the Effective Date, the Authority may consider making adjustments to the Thresholds in accordance with the EIDA Advisory Committee's recommendations to the Authority. Any adjustments will be in the Authority's sole discretion.

## **SCHEDULE 2 [SERVICES]**

### SCHEDULE 3 [INSURANCE CONDITIONS]

**[NTD: Subject to review by Risk Management Branch prior to issuing the Final Draft EIDA, including in relation to Services covered by the Wrap-up Liability Policy under the Design Build Agreement]**

1. In relation to any liability for Services not covered by the Wrap-up Liability Insurance provided under the Design-Build Agreement, the Design Builder must, without limiting the Design Builder's obligations or liabilities and at the Design Builder's own expense, purchase and maintain throughout the Term the following insurance with insurers licensed in Canada in forms and amounts acceptable to the Authority:
  - (a) Commercial General Liability in an amount not less than \$[●] inclusive per occurrence against bodily injury, personal injury and property damage and including liability assumed under this Agreement and this insurance must
    - (i) include the Authority as an additional insured,
    - (ii) be endorsed to provide the Authority with 30 days advance written notice of cancellation or material change, and
    - (iii) include a cross liability clause.
2. All insurance described in Section 1 of this Schedule must:
  - (a) be primary; and
  - (b) not require the sharing of any loss by any insurer of the Authority.
3. The Design Builder must provide the Authority with evidence of all required insurance as follows:
  - (a) within 10 Business Days of commencement of the Services, the Design Builder must provide to the Authority evidence of all required insurance in the form of a completed Certificate of Insurance;
  - (b) if any required insurance policy expires before the end of the Term, the Design Builder must provide to the Authority within 10 Business Days of the policy's expiration, evidence of a new or renewal policy meeting the requirements of the expired insurance in the form of a completed Certificate of Insurance; and
  - (c) despite paragraph (a) or (b) above, if requested by the Authority at any time, the Design Builder must provide to the Authority certified copies of the required insurance policies.
4. The Design Builder must obtain, maintain and pay for any additional insurance which the Design Builder is required by law to carry, or which the Design Builder considers necessary to cover risks not otherwise covered by insurance specified in this Schedule in the Contractor's sole discretion.

## SCHEDULE 4 [PRIVACY PROTECTION SCHEDULE]

### Definitions

1. In this Schedule,
  - (a) "**access**" means disclosure by the provision of access;
  - (b) "**Act**" means the *Freedom of Information and Protection of Privacy Act*;
  - (c) "**contact information**" means information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual;
  - (d) "**Contractor**" means the Design-Builder;
  - (e) "**[●] Organization**" means the Authority;
  - (f) "**personal information**" means recorded information about an identifiable individual, other than contact information, collected or created by the Contractor as a result of the Agreement or any previous agreement between the [●] Organization and the Contractor dealing with the same subject matter as the Agreement but excluding any such information that, if this Schedule did not apply to it, would not be under the "control of a public body" within the meaning of the Act; and
  - (g) "**privacy course**" means the [●] Organization's online privacy and information sharing training course.

### Purpose

2. The purpose of this Schedule is to:
  - (a) enable the [●] Organization to comply with the [●] Organization's statutory obligations under the Act with respect to personal information; and
  - (b) ensure that, as a service provider, the Contractor is aware of and complies with the Contractor's statutory obligations under the Act with respect to personal information.

### Collection of personal information

3. Unless the Agreement otherwise specifies or the [●] Organization otherwise directs in writing, the Contractor may only collect or create personal information that is necessary for the performance of the Contractor's obligations, or the exercise of the Contractor's rights, under the Agreement.
4. Unless the Agreement otherwise specifies or the [●] Organization otherwise directs in writing, the Contractor must collect personal information directly from the individual the information is about.
5. Unless the Agreement otherwise specifies or the [●] Organization otherwise directs in writing, the Contractor must tell an individual from whom the Contractor collects personal information:



- (a) the purpose for collecting it;
- (b) the legal authority for collecting it; and
- (c) the title, business address and business telephone number of the person designated by the [●] Organization to answer questions about the Contractor's collection of personal information.

### **Privacy Training**

- 6. The Contractor must ensure that each person who will provide services under the Agreement that involve the collection or creation of personal information will complete, at the Contractor's expense, the privacy course prior to that person providing those services.
- 7. The requirement in section 6 will only apply to persons who have not previously completed the privacy course.

### **Accuracy of personal information**

- 8. The Contractor must make every reasonable effort to ensure the accuracy and completeness of any personal information to be used by the Contractor or the [●] Organization to make a decision that directly affects the individual the information is about.

### **Requests for access to personal information**

- 9. If the Contractor receives a request for access to personal information from a person other than the [●] Organization, the Contractor must promptly advise the person to make the request to the [●] Organization unless the Agreement expressly requires the Contractor to provide such access and, if the [●] Organization has advised the Contractor of the name or title and contact information of an official of the [●] Organization to whom such requests are to be made, the Contractor must also promptly provide that official's name or title and contact information to the person making the request.

### **Correction of personal information**

- 10. Within 5 Business Days of receiving a written direction from the [●] Organization to correct or annotate any personal information, the Contractor must annotate or correct the information in accordance with the direction.
- 11. When issuing a written direction under section 10, the [●] Organization must advise the Contractor of the date the correction request to which the direction relates was received by the [●] Organization in order that the Contractor may comply with section 12.
- 12. Within 5 Business Days of correcting or annotating any personal information under section 10, the Contractor must provide the corrected or annotated information to any party to whom, within one year prior to the date the correction request was made to the [●] Organization, the Contractor disclosed the information being corrected or annotated.
- 13. If the Contractor receives a request for correction of personal information from a person other than the [●] Organization, the Contractor must promptly advise the person to make the request to the [●] Organization and, if the [●] Organization has advised the Contractor of the name or title and

contact information of an official of the [●] Organization to whom such requests are to be made, the Contractor must also promptly provide that official's name or title and contact information to the person making the request.

### **Protection of personal information**

14. The Contractor must protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or disposal, including any expressly set out in the Agreement.

### **Storage and access to personal information**

15. Unless the [●] Organization otherwise directs in writing, the Contractor must not store personal information outside Canada or permit access to personal information from outside Canada.

### **Retention of personal information**

16. Unless the Agreement otherwise specifies, the Contractor must retain personal information until directed by the [●] Organization in writing to dispose of it or deliver it as specified in the direction.

### **Use of personal information**

17. Unless the [●] Organization otherwise directs in writing, the Contractor may only use personal information if that use is for the performance of the Contractor's obligations, or the exercise of the Contractor's rights, under the Agreement.

### **Disclosure of personal information**

18. Unless the [●] Organization otherwise directs in writing, the Contractor may only disclose personal information inside Canada to any person other than the [●] Organization if the disclosure is for the performance of the Contractor's obligations, or the exercise of the Contractor's rights, under the Agreement.
19. Unless the Agreement otherwise specifies or the [●] Organization otherwise directs in writing, the Contractor must not disclose personal information outside Canada.

### **Notice of foreign demands for disclosure**

20. In addition to any obligation the Contractor may have to provide the notification contemplated by section 30.2 of the Act, if in relation to personal information in the custody or under the control of the Contractor, the Contractor:
  - (a) receives a foreign demand for disclosure;
  - (b) receives a request to disclose, produce or provide access that the Contractor knows or has reason to suspect is for the purpose of responding to a foreign demand for disclosure; or
  - (c) has reason to suspect that an unauthorized disclosure of personal information has occurred in response to a foreign demand for disclosure

the Contractor must immediately notify the [●] Organization and, in so doing, provide the information described in section 30.2(3) of the Act. In this section, the phrases "foreign demand for disclosure" and "unauthorized disclosure of personal information" will bear the same meanings as in section 30.2 of the Act.

### **Notice of unauthorized disclosure**

21. In addition to any obligation the Contractor may have to provide the notification contemplated by section 30.5 of the Act, if the Contractor knows that there has been an unauthorized disclosure of personal information in the custody or under the control of the Contractor, the Contractor must immediately notify the [●] Organization. In this section, the phrase "unauthorized disclosure of personal information" will bear the same meaning as in section 30.5 of the Act.

### **Inspection of personal information**

22. In addition to any other rights of inspection the [●] Organization may have under the Agreement or under statute, the [●] Organization may, at any reasonable time and on reasonable notice to the Contractor, enter on the Contractor's premises to inspect any personal information in the possession of the Contractor or any of the Contractor's information management policies or practices relevant to the Contractor's management of personal information or the Contractor's compliance with this Schedule and the Contractor must permit, and provide reasonable assistance to, any such inspection.

### **Compliance with the Act and directions**

23. The Contractor must in relation to personal information comply with:
- (a) the requirements of the Act applicable to the Contractor as a service provider, including any applicable order of the commissioner under the Act; and
  - (b) any direction given by the [●] Organization under this Schedule.
24. The Contractor acknowledges that it is familiar with the requirements of the Act governing personal information that are applicable to it as a service provider.

### **Notice of non-compliance**

25. If for any reason the Contractor does not comply, or anticipates that it will be unable to comply, with a provision in this Schedule in any respect, the Contractor must promptly notify the [●] Organization of the particulars of the non-compliance or anticipated non-compliance and what steps it proposes to take to address, or prevent recurrence of, the non-compliance or anticipated non-compliance.

### **Termination of Agreement**

26. In addition to any other rights of termination which the [●] Organization may have under the Agreement or otherwise at law, the [●] Organization may, subject to any provisions in the Agreement establishing mandatory cure periods for defaults by the Contractor, terminate the Agreement by giving written notice of such termination to the Contractor, upon any failure of the Contractor to comply with this Schedule in a material respect.

## Interpretation

27. In this Schedule, references to sections by number are to sections of this Schedule unless otherwise specified in this Schedule.
28. Any reference to the "Contractor" in this Schedule includes any Subcontractor or agent retained by the Contractor to perform obligations under the Agreement and the Contractor must ensure that any such Subcontractors and agents comply with this Schedule.
29. The obligations of the Contractor in this Schedule will survive the termination of the Agreement.
30. If a provision of the Agreement (including any direction given by the [●] Organization under this Schedule) conflicts with a requirement of the Act or an applicable order of the commissioner under the Act, the conflicting provision of the Agreement (or direction) will be inoperative to the extent of the conflict.
31. The Contractor must comply with the provisions of this Schedule despite any conflicting provision of this Agreement or, subject to section 32, the law of any jurisdiction outside Canada.
32. Nothing in this Schedule requires the Contractor to contravene the law of any jurisdiction outside Canada unless such contravention is required to comply with the Act.

## **SCHEDULE 5 [CHANGES]**

### **1. CHANGES**

- 1.1 The Authority, without invalidating this Agreement, may require Changes, with the Contract Price adjusted in accordance with Section 2 of this Schedule 5. The Authority may issue any Change Order or Change Directive, which can include a stop work order or resume work order, to the EIDA Coordinator or to any other person authorized by the Design-Builder to receive a Change Order.
- 1.2 No Change will be made without a Change Order or Change Directive from the Authority.
- 1.3 The Design-Builder will not be entitled to a Change Order or Change Directive, or to any adjustments to the Contract Price, for any Change for which the Design-Builder has not, prior to commencing the performance of a Change, obtained from the Authority a Change Order or Change Directive.
- 1.4 The Authority may, at any time, require the Design-Builder to assess the impact of a proposed Change on the Contract Price, including the Design-Builder's likelihood of meeting or exceeding any Thresholds or achieving any Performance Payments or other any portion of the Contract Price, and the Design-Builder will provide the Authority with such assessment within 10 days after the Authority's request or such other time as may be agreed by the Authority, acting reasonably.
- 1.5 Where the Design-Builder has already been compensated for a Change under the Design-Build Agreement, the Design-Builder will not be entitled to any compensation for the Change under this Agreement.

### **2. VALUATION AND CERTIFICATION OF CHANGES**

- 2.1 The value of any Change will be determined by one or more of the following methods:
  - 2.1.1 by estimate and acceptance of a lump sum; or
  - 2.1.2 by unit prices or fee rates agreed upon (and which may include a maximum upset price).
- 2.2 If a Change is made solely to a Threshold, the Design-Builder will not be entitled to any adjustment to the Contract Price.
- 2.3 Unless otherwise agreed by the Authority, any adjustment to the Contract Price will be made to the Base Payment and not to any Performance Payment.
- 2.4 The following process will be followed for Changes:
  - 2.4.1 where a Change is proposed or required by the Authority, the Design-Builder will promptly, and in any case within 10 days after the Change is proposed or required by the Authority, present to the Authority its claims for any adjustment to the Contract Price that arise from the Change;
  - 2.4.2 where the Design-Builder claims a Change in Contract Price, the Design-Builder will provide a full breakdown of labour, material and other cost information;

- 2.4.3 where the Authority and the Design-Builder agree to the Change, including adjustments in the Contract Price, or to the method to be used to determine the adjustments, such Change will be effective when recorded in a Change Order; and
- 2.4.4 the value of the Services performed as the result of a Change Order will be included in payment applications.
- 2.5 In the case of Changes to be paid for under Section 2.4.3 of this Schedule 5, the form of presentation of costs and methods of measurement will be agreed to by the Authority and the Design-Builder before proceeding with the Change. The Design-Builder will keep accurate records of costs as agreed upon and will present an account of the costs of the Change, together with vouchers where applicable, at least once each month during performance of the Change, and will present a final account upon completion of the Change.
- 2.6 If the methods of valuation, measurement and value of any Change cannot be promptly agreed upon, and in any case within 10 days after the proposed Change, and the Change is required by the Authority in writing to be proceeded with, then the Change will be performed by the Design-Builder and the value of the Change will be determined in accordance with the Dispute resolution process described in Section 18.
- 2.7 It is intended in all matters involving Changes that both the Authority and the Design-Builder will act promptly and in accordance with the times set out in this Section 2.
- 3. DETERMINATION OF COST**
- 3.1 Subject to Section 3.2 of this Schedule 5, whenever it is necessary for the purposes of this Agreement to determine the cost of a Change, the cost will be the amount agreed upon by the Design-Builder and the Authority within a reasonable time after the issue arises in any given instance.
- 3.2 If the Design-Builder and the Authority cannot agree as to the cost of the Change as contemplated in Section 3.1 of this Schedule 5, the sole cost to which the Design-Builder will be entitled for the Change will be equal to the aggregate of:
- 3.2.1 all reasonable and proper amounts actually expended by or legally payable by the Design-Builder in respect of the labour or material (supported by invoices, purchase orders, timesheets and other customary industry documentation) that are directly attributable to the subject matter of the Change and that are within one of the classes of expenditures described in Section 3.3 of this Schedule 5; plus
- 3.2.2 to cover other costs, including overhead and profit, the following applicable markup on the amounts charged pursuant to Section 3.2.1 of this Schedule 5:
- (a) 5%, when the expenditure is a payment to a Subcontractor pursuant to Section 3.3.1 of this Schedule 5; or
- (b) 10% when the Design-Builder performed the Change.
- 3.3 Classes of expenditure that are allowable (all without additional markups except as otherwise noted in Section 3) for the purposes of Section 3.2 of this Schedule 5 are:

- 3.3.1 payments to Subcontractors, including a maximum aggregate markup of 10% on the direct labour, equipment and material costs of the Subcontractors who directly perform the Change;
  - 3.3.2 wages, salaries and reasonable and traveling expenses of employees of the Design-Builder while they are actually and properly engaged on the Services, other than wages, salaries, bonuses, reasonable living and travelling expenses of personnel of the Design-Builder generally employed at the head office, or at a general office, of the Design-Builder unless such personnel is engaged at the site of the Services, with the approval of the Authority;
  - 3.3.3 payments for materials necessary for and incorporated in the Services or necessary for and consumed in the performance of the Services;
  - 3.3.4 assessments payable under any statutory scheme relating to workers compensation, employment insurance or holidays with pay;
  - 3.3.5 other payments, made with the prior approval of the Authority, that are necessary for the performance of the Services, as determined by the Authority.
- 3.4 If the Design-Builder and the Authority cannot agree as to the cost of labour, equipment or material as contemplated in Section 3.1 of this Schedule 5, and the Authority considers that a Change or series of related Changes may exceed \$[●], the Authority may require the Design-Builder, and the Design-Builder will, obtain a minimum of 3 competitive quotations or tenders for all or any part of such Change or Changes as directed by the Authority.
- 3.5 The applicable markup set out in this Section 3 will apply to any credit to the Authority for reductions in the costs relating to a Change. Where both increases and reductions in costs relate to a Change, the applicable markup will apply to the net increase or reduction in costs.

#### **4. CHANGE DIRECTIVE**

- 4.1 The Authority may issue a Change Directive to the Design-Builder directing the Design-Builder to proceed with a Change. The Design-Builder will proceed with the Change and the valuation and adjustments to the Contract Price will be made as soon as reasonably possible after the implementation of the Change in the same manner as a Change for which a Change Order would be issued under this Agreement.
- 4.2 The Authority may issue Change Directives at any time, including prior to commencing the process for a Change Order or if there is a Dispute in relation to a Change or Change Order (including a Dispute as to whether there is a Change).