



# **Project Alliance Agreement**

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**GO Transit – Union Station Enhancement Project**

**RFP No. 19-190**

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**THIS PROJECT ALLIANCE AGREEMENT is entered into as of the 27<sup>th</sup> day of January, 2022.**

**BETWEEN:**

- (1) **Metrolinx**, a non-share capital corporation continued under the *Metrolinx Act, 2006*, S.O. 2006, c.16 and a Crown agency within the meaning of the *Crown Agency Act*, R.S.O. 1990, c.48, as amended in accordance with Section 3 of the *Metrolinx Act, 2006* (Ontario);  
  
(the “**Owner**”); and
- (2) **Kiewit-Alberici Union General Partnership (“NOP 1”)**; and
- (3) **Mass. Electric Construction Canada Co. (“NOP 2”)**; and
- (4) **WSP Canada Inc. (“NOP 3”)**;  
  
(the Owner and the NOPs together, the “**Parties**”)

**WHEREAS:**

- (A) GO Expansion is an investment program that will transform GO Rail into a Rapid Rail System that provides the expanded mobility of the Greater Toronto Area needs to accommodate growth and maintain a high quality of life and prosperous economy.
- (B) The Owner wishes to procure the design and construction of certain infrastructure improvements to Union Station, located in the City of Toronto, in order to accommodate the anticipated Regional Express Rail services.
- (C) The Owner commenced the procurement process for the Project, as hereinafter defined, by issuance of a Request for Qualifications for the Project on October 28, 2019.
- (D) The Owner and the NOPs entered into an alliance development agreement on November 10, 2020 and the NOPs were selected as the successful proponent at the conclusion of the Alliance Development Agreement process.
- (E) The Participants have developed a Project Proposal for delivering the Project in accordance with the VFM Statement.
- (F) The Owner and the NOPs wish to enter into this project alliance agreement (the “**Agreement**”) which sets out, among other things, the terms and conditions upon which the Works will be performed.
- (G) The Project shall follow five (5) fundamental principles which guide the procurement of public infrastructure projects in Ontario:
  - 1. The public interest is paramount.
  - 2. Value for money must be demonstrable.
  - 3. Appropriate public control/ownership must be preserved.
  - 4. Accountability must be maintained.
  - 5. All processes must be fair, transparent and efficient.

- (H) Consistent with the principle of appropriate public ownership/control, public ownership of assets will be preserved in the public sector.
- (I) The Participants have undertaken to enter into an alliance and perform their respective roles in relation to the Project in a spirit of co-operation and openness with the objective of delivering the Project using an alliance relationship.
- (J) The Participants are committed to:
- achieving the VFM Statement;
  - meeting the Alliance Goals; and
  - elevating stakeholder partnerships.
- (K) The Participants have committed to deliver the Works as an integrated collaborative team, having regard to the Alliance Charter and the Alliance Principles set forth therein.
- (L) The Participants have committed to the goal of creating exceptional value and mutual benefits by, in part, driving a culture of innovation balanced by the imperative of reducing overall project risk.
- (M) The Participants have committed to integrating work health and safety into construction project management, redefining and integrating safety, health and well being into all Project workplaces.
- (N) The Risk or Reward Regime incentivises the Participants to meet or exceed the Alliance Goals.

**IT IS AGREED:**

**DEFINITIONS AND INTERPRETATION**

**1. DEFINITIONS AND INTERPRETATION**

**1.1 Definitions and interpretation**

The definitions and interpretation are set out in Schedule 1 (Definitions and Interpretation).

**ALLIANCING PRINCIPLES AND COMMITMENTS**

**2. THE OWNER AS CLIENT AND AS OWNER PARTICIPANT**

**2.1 Distinction between Owner and Owner Participant**

Although the Owner and the Owner Participant are the same entity, throughout this Agreement references are made to “**Owner**” and “**Owner Participant**” respectively to indicate the distinction between when that entity is acting as the client for the delivery of the Works and when it is acting as one of the Participants in the Alliance for the delivery of the Works.

**2.2 Owner’s Representative**

2.2.1 The Owner may perform any of its obligations under this Agreement through the Owner’s Representative.

2.2.2 The Owner must ensure that the Owner’s Representative promptly performs the roles and functions and is given the powers and rights allocated to the Owner’s Representative as set out in Schedule 4 (Owner’s Representative).

- 2.2.3 The Participants will provide all assistance necessary to ensure the Owner and the Owner's Representative can fulfil the responsibilities, perform those roles and functions and exercise those rights.
- 2.2.4 The Owner has initially selected the person named in Schedule 2 (Representatives) as the Owner's Representative.
- 2.2.5 The Owner may, from time to time, change its representative by giving notice to the Participants.
- 2.2.6 All Notices to or from the Owner under this Agreement must be sent to or from the Owner's Representative.
- 2.2.7 The Owner's Representative may from time to time on prior notice to the ALT appoint named delegates to perform any specified role or roles of the Owner's Representative (including specifying limits of authority) and may vary or remove any such appointment or authority at any time on prior notice to the ALT.
- 2.2.8 The ALT and the Participants are entitled to rely on any act or omission of a delegate of the Owner's Representative which such person is authorized to make in accordance with Section 2.2.7 as though it were a direction of the Owner's Representative.

### 2.3 Exercise of rights by the Owner

Having regard to the distinction between when the Owner is acting as the client and when the Owner is acting as one of the Participants in the Alliance, the Parties have agreed that:

- 2.3.1 the ALT must proactively liaise with, communicate with and provide all other assistance necessary to ensure that the Owner's Representative can perform its roles and obligations on behalf of the client in the delivery of the Works;
- 2.3.2 the Owner's Representative must, acting reasonably and to the extent practicable in the circumstances, consult with and have regard to the recommendations of the ALT in exercising its discretions under this Agreement (but without limiting any express rights of the Owner under this Agreement); and
- 2.3.3 where the Owner is exercising its rights (including the Reserved Powers under Section 27.3) and performing its obligations under this Agreement in its role as client for the delivery of the Works (rather than as a Participant in the Alliance) then, without limiting the obligations of the Owner Participant and the Owner's Representative under Sections 2.3.1 and 2.3.2, the Owner will not be subject to the commitments made under Sections 4 and 5.

### 2.4 Ambiguity, discrepancy and inconsistency

- 2.4.1 The Participants acknowledge and agree that, if there is any ambiguity, discrepancy or inconsistency in this Agreement, and the documents comprising this Agreement (including the VFM Statement and the Project Proposal), the ALT will make a recommendation to the Owner's Representative as to how to resolve the ambiguity, discrepancy or inconsistency, in a manner consistent with the commitments given by the Participants under Section 5.
- 2.4.2 Following consideration of a recommendation by the ALT as to how to resolve an ambiguity, discrepancy or inconsistency under Section 2.4.1, the Owner's

Representative will direct the Participants as to how to resolve the ambiguity, discrepancy or inconsistency and the provisions of Section 27 will apply.

## **2.5 Provision of information and documentation by the Participants**

The Participants have, prior to the date of this Agreement, exchanged information and advice about the Works and the performance of the Works. The Participants acknowledge that they will continue to do this from the Commencement Date until the expiry of the Relevant Period. To avoid the possibility of issues between the Participants arising and the need for any subsequent alterations to the Target Outturn Cost, each Participant must undertake its own enquiries to satisfy itself so far as reasonably practicable as to the accuracy, completeness and relevance of that information or advice.

## **2.6 Future tendering and contracting opportunities**

Each NOP acknowledges and agrees that the NOP's performance under this Agreement (including the NOP's performance as part of the Alliance with the Owner Participant in carrying out the Project and performing the Works) may be taken into account by the Owner and any other Governmental Authority when considering the NOP for future tendering and contracting opportunities.

## **2.7 Performance of Works by Owner**

The Participants acknowledge and accept that, without limiting Section 2.3, the Owner may at any time and at its sole and absolute discretion elect to deliver all or part of the Project which has not been included in the Scope of Works.

# **3. VALUE FOR MONEY STATEMENT**

## **3.1 Value for money outcome**

The Participants acknowledge and agree that the key purpose of this Agreement is, and they commit themselves to achieving, a value for money outcome in respect of the Project.

## **3.2 Achieving the VFM Statement**

The Participants acknowledge and agree that the key purpose referred to at Section 3.1 is achieved by the Participants meeting the VFM Statement.

## **3.3 Amendment of the VFM Statement**

3.3.1 The VFM Statement, in whole or in part, may be amended or substituted by the Owner, in its absolute discretion, by a direction pursuant to Section 27.

3.3.2 The VFM Statement cannot be amended by any Participant or the ALT.

3.3.3 An amended VFM Statement is a Scope Variation, subject to the requirements of Section 27.4 of this Agreement being satisfied.

# **4. ALLIANCE CHARTER**

## **4.1 Purpose of Alliance Charter**

The Alliance Charter (including the Alliance Principles, Alliance Goals and Alliance Values), as set out in Schedule 5 of this Agreement, has been developed with the aim of carrying out the Project and performing the Works so as to achieve the VFM Statement.

## 4.2 **Compliance with Alliance Charter**

4.2.1 The Participants will perform the Works in accordance with the Alliance Charter.

4.2.2 The Alliance Charter, together with the other terms of this Agreement, will govern the relationship between the Participants at all levels of the Alliance.

## 4.3 **Amending the Alliance Charter**

The ALT may, where it considers it appropriate, review and amend any part of the Alliance Charter.

## 5. **THE PARTICIPANTS' COMMITMENTS**

### 5.1 **Good Faith obligation**

In exercising their rights and performing their obligations under this Agreement, the Participants agree at all times to act in Good Faith.

### 5.2 **Achievement of Objectives**

In delivering the Project and performing the Works, the Participants commit to working together to:

5.2.1 achieve the VFM Statement;

5.2.2 meet or exceed MCOS Performance in respect of each Key Result Area; and

5.2.3 meet the Alliance Goals.

### 5.3 **Best For Project**

The Participants commit to establishing an alliance culture based on the Alliance Charter and to act at all times in a manner that is consistent with a Best For Project approach.

### 5.4 **Open book commitment**

5.4.1 Each Participant commits to:

5.4.1.1 maintain, for at least the Relevant Period, all of their records and other documentation referred to in this Agreement that relate to the Works in accordance with, where applicable, Canadian GAAP and Good Industry Practice, having due regard to the policies and guidelines of the Office of the Information and Privacy Commissioner of Ontario;

5.4.1.2 fully disclose any corporate or other objectives or affiliations that could reasonably be considered to have an adverse impact on the achievement of the VFM Statement or the Alliance Goals;

5.4.1.3 make their records and other documentation referred to in this Agreement that relate to the Works available to each other (or each other's nominated auditor), the Owner's Representative and the Alliance Auditor on request; and

5.4.1.4 make available to each other (or each other's nominated auditor), the Owner's Representative and the Alliance Auditor any existing documentation or information in whatever form relating to the Works, including documentation and

information relating to its Actual Cost incurred by it directly or relating to any of its Affiliates or Subcontractors undertaking any part of the Works.

5.4.2 The obligation to make records and documentation available pursuant to this Section 5.4 does not apply to records or documentation that may be the subject of legal professional privilege or are confidential lawyer/client communications.

5.4.3 For the purposes of this Section 5.4, references to the Owner's Representative include the Auditor General of Ontario, the Auditor General of Canada and Her Majesty the Queen in right of Canada.

## 5.5 **Commitment to a “no blame” and “no claim” culture**

The Participants acknowledge and agree that a key purpose of this Agreement is, and they will commit themselves to:

5.5.1 the promotion and maintenance of a “no blame” and “no claim” culture between the Participants in relation to disputes, errors, mistakes, Defects, poor performance and other issues which may arise within the Alliance; and

5.5.2 the prompt and mutual resolution of all disputes, differences and other issues by all Participants within the framework created by this Agreement.

## 5.6 **Sharing Arrangements**

5.6.1 The Participants acknowledge that the transparency and visibility of the legal and commercial arrangements between them and between the Participants and the Owner is essential for the successful delivery of the Project and in order to deliver the commitments set out in this Section 5.

5.6.2 Accordingly, at the Commencement Date and at all times thereafter, each Participant severally warrants to each other Participant and the Owner that it and none of its Affiliates have entered and will not enter into any sharing arrangement, joint venture, partnership or other similar arrangement with any of the other Participants or any of their Affiliates in relation to any legal or beneficial interest in its:

5.6.2.1 allocation under this Agreement of any Actual Costs or Fee;

5.6.2.2 allocation of Gainshare, Painshare, Performance Reward Amount, or Performance Liability Amount under this Agreement; or

5.6.2.3 rights or liabilities arising under Section 6.4,

(“**Sharing Arrangement**”), and that all legal, commercial and financial arrangements between it or any of its Affiliates and the other Participants or any of their Affiliates in relation to the Project and its rights and liabilities under this Agreement are exclusively and exhaustively set out in this Agreement.

5.6.3 A breach of this Section 5.6 will be deemed to be a Wilful Default by any Participant who is party to the relevant Sharing Arrangement.

## **6. NO CLAIMS BETWEEN THE PARTIES**

### **6.1 Commitment to avoid and resolve issues**

The Participants must, acting in accordance with the commitments given under Section 5, use their best efforts to avoid issues arising as between each other and, to the extent an issue arises, must resolve the issue internally and otherwise comply with the procedure for resolution of issues set out in Schedule 17 (Issue Resolution Procedures).

### **6.2 No litigation, arbitration or adjudication**

Subject to Section 6.4, the Parties agree that there will be no litigation, arbitration or adjudication between them arising out of or in connection with this Agreement.

### **6.3 Non-application of enforceable rights or obligation**

6.3.1 Subject to the exceptions listed in Section 6.4, a failure by a Party to perform any obligation or to discharge any duty under, or arising out of or in connection with this Agreement, or which is otherwise an obligation to or duty owed to another Party however arising, does not give rise to any enforceable right or obligation at law or in equity and, to the extent that it does, the other Parties releases and hold harmless that Party from any consequences at law or in equity for that failure.

6.3.2 Subject to the exceptions listed in Section 6.4, the sole remedy arising under contract, tort, statute or otherwise for failure by any Party to perform any obligation or to discharge any duty under, or arising out of or in connection with this Agreement, or which is otherwise an obligation to or duty owed by it to another Party however arising is the operation of Schedule 11 (Risk or Reward Regime) and Schedule 12 (Payment Procedures).

### **6.4 Saving of certain legal and equitable rights**

Sections 6.2 and 6.3 have no force or effect:

6.4.1 in respect of a Wilful Default by a Participant;

6.4.2 where a Party has a right to bring a claim or cause of action under a Statutory Requirement which cannot be excluded by the Parties as a matter of law;

6.4.3 in respect of a claim for loss or damage to existing structures or surrounding property not forming part of the Works, provided the Participant or the Owner (as applicable) is able to recover any such loss or damage under a policy of insurance that is required to be obtained pursuant to the terms of this Agreement or under a policy of insurance the Owner may obtain pursuant to Section 1.3 of Schedule 13 (Insurance Policies and Bonds) of this Agreement;

6.4.4 in respect of any claim for breach of any Statutory Requirement (including any prosecution brought against a Party by a Governmental Authority) in connection with the Works, except where the Owner determines otherwise by notice in writing to the other Parties, having regard to the nature of the breach and the effect of the breach on the Project, the Works and the Owner;

6.4.5 in respect of a failure by a Party to make payment under:

6.4.5.1 Sections 26, 29 or 34.2.1;



6.4.5.2 Schedule 12 (Payment Procedures) or Schedule 16 (Exclusion and Termination); or

6.4.5.3 any indemnity under this Agreement; or

6.4.6 where this Agreement expressly states that Sections 6.2 and 6.3 do not apply.

## 6.5 **Early notification of issues**

Each Party agrees to immediately notify the others of any matter which may amount to or result in an issue between the Parties in relation to this Agreement or the Project.

## 7. **ALLIANCE LEADERSHIP TEAM**

### 7.1 **Membership of the ALT**

7.1.1 The Participants have established the ALT. The ALT shall be comprised of the same persons that were ALT representatives under the Alliance Development Agreement, as identified in the Project Proposal.

7.1.2 The initial ALT representatives for each Participant are named in Schedule 2 (Representatives).

7.1.3 Each Participant must use its reasonable efforts to ensure that, where appropriate, its representatives appointed to the ALT remain as representatives on the ALT for the entire duration of the Project.

7.1.4 Any removal and replacement by a Participant of any of its representatives appointed to the ALT must be to a replacement representative agreed by the ALT and with the level of experience and capability in project alliancing considered appropriate by the ALT.

7.1.5 Each Participant must at all times be represented on the ALT.

7.1.6 Where a NOP removes or replaces an ALT representative other than:

7.1.6.1 in the event of a personal conflict of interest;

7.1.6.2 in exceptional circumstances; or

7.1.6.3 otherwise with the written consent of the Owner's Representative,

the Owner's Representative may determine that the costs of removing or replacing the ALT representative (including any costs incurred in familiarising the new ALT representative with the Alliance or the Works) will not be an Actual Cost.

### 7.2 **Appointment of chairman**

The ALT must appoint a chairperson. The chairperson must be a representative of the ALT. The initial chairperson shall be the same person appointed as the chairperson under the Alliance Development Agreement, as identified in the Project Proposal.

### 7.3 **Roles and functions of the ALT**

7.3.1 The primary functions of the ALT are to:

- 7.3.1.1 establish and ensure the implementation of the strategic leadership and direction of the Participants;
  - 7.3.1.2 establish and implement transparent governance and accountability structures for the Participants; and
  - 7.3.1.3 assume responsibility for the performance of the Participants under this Agreement.
- 7.3.2 Each Participant must ensure that its representative on the ALT comply with the Governance Plan and the Responsibilities Matrix. The roles and responsibilities of the ALT are more fully described in the:
- 7.3.2.1 Governance Plan; and
  - 7.3.2.2 Responsibilities Matrix.
- 7.3.3 The Participants acknowledge and agree that the ALT will be responsible for ensuring that all members of the AMT understand the Alliance Charter and the requirement to perform the Works in accordance with the Alliance Charter.
- 7.3.4 The ALT must ensure that at all times it:
- 7.3.4.1 monitors and predicts each NOP's potential liability to make payment of Painshare; and
  - 7.3.4.2 does not allow the AMT to apply for any payment under Schedule 12 (Payment Procedures) which includes an amount which may subsequently be required to be repaid as Painshare.
- 7.4 Authorization of ALT representatives**
- 7.4.1 Each Participant's representative is authorized to represent and bind their appointer on any matter relating to this Agreement.
  - 7.4.2 Any ALT representative of the Owner Participant may only represent and bind the Owner Participant in its capacity as such under this Agreement, and not in its capacity as the Owner.
- 7.5 ALT meetings**
- 7.5.1 The ALT must hold a meeting at no greater than monthly intervals and otherwise when reasonably required by any Participant.
  - 7.5.2 Meetings of the ALT must be conducted in accordance with the Governance Plan.
  - 7.5.3 The Participants acknowledge that:
    - 7.5.3.1 the continuous involvement in and attendance at the ALT meetings of the nominated ALT representatives is critical to the success of the Alliance; and
    - 7.5.3.2 there may be limited circumstances when an ALT representative cannot attend an ALT meeting through reasons beyond its reasonable control.

- 7.5.4 Each of the Participants has appointed an alternative representative or representatives who may attend an ALT meeting in substitution for a nominated ALT representative in the limited circumstances referred to in Section 7.5.3.2.
- 7.5.5 Each Participant's alternative representatives are set out in Schedule 2 (Representatives) and a Participant may only change one of its alternative representatives to a replacement alternative representative agreed by the ALT and with the level of experience and capability in project alliancing considered appropriate by the ALT. The initial alternative representatives shall be comprised of the same persons that were identified as the ALT alternative representatives under the Alliance Development Agreement, as identified in the Project Proposal.
- 7.5.6 Where an alternative representative attends an ALT meeting in accordance with this Section 7.5, that substitute, alternate or delegate has the powers of an ALT representative as if they were appointed by a Participant as an ALT representative under Section 7.1.2.
- 7.5.7 Each ALT representative that attends an ALT meeting has a positive obligation to ensure that any non-attending ALT representative from his or her respective Participant is fully briefed on the business conducted at the ALT meeting such that they can understand and support each decision of the ALT at that ALT meeting.

#### **7.6 Attendance of Third Parties at ALT meetings**

- 7.6.1 The ALT may agree to invite:
- 7.6.1.1 the Owner's Representative;
  - 7.6.1.2 any person representing any Party (including the Owner);
  - 7.6.1.3 any Subcontractor (including an Implementation Works Subcontractor);  
and/or
  - 7.6.1.4 any subcontractor, designer or supplier of any tier of any Subcontractor,
- to attend any ALT meeting and make representations to the ALT.
- 7.6.2 If requested to do so by any Party, the ALT must invite any person to attend and make representation to an ALT meeting in accordance with Section 7.6, unless the ALT agrees that any such request is unreasonable or would create a conflict of interest having regard to the matters to be discussed at that meeting.
- 7.6.3 Any person attending an ALT meeting pursuant to Sections 7.6.1 or 7.6.2 has no voting rights.

#### **7.7 Attendance of an alliance facilitator at ALT meetings**

The ALT may from time to time appoint a non-voting independent person as an alliancing facilitator to attend meetings of the ALT and the cost of such a facilitator will be Actual Cost and, for clarity, will not give rise to any adjustment to the Target Outturn Cost.

#### **7.8 ALT decisions must be unanimous**

- 7.8.1 All decisions of the ALT must be unanimous.

- 7.8.2 No decision can be made by the ALT unless:
- 7.8.2.1 a representative of each Participant is present at the meeting;
  - 7.8.2.2 it is within the matters contemplated by this Agreement and is made in accordance with this Agreement; and
  - 7.8.2.3 it is recorded in writing.

## 7.9 **Implementing ALT decisions**

- 7.9.1 Subject to Section 7.9.2, each Participant must comply with all ALT decisions.
- 7.9.2 If a Participant considers that compliance with an ALT decision would cause the Participant or a Participant's officer, director, agent, or employee to do or omit to do anything that contravenes:
- 7.9.2.1 any law or Statutory Requirement; or
  - 7.9.2.2 that Participant's constituent statute, constitution, memorandum, articles of association or articles of incorporation,
- that Participant need not comply, but must immediately give notice in writing to the remaining Participants providing the details of the law or Statutory Requirement, or the Participant's constituent statute, constitution, by-laws or articles of incorporation or formation, as the case may be, that will be so contravened and, where appropriate, the ALT will then make a further decision in respect of the relevant matter.

## 7.10 **Consultation with others**

- 7.10.1 The Participants recognize the importance of having access to all appropriate resources, information and/or skills to determine certain matters under this Agreement which are required to be determined on a Best For Project basis in accordance with the VFM Statement.
- 7.10.2 In particular, the Participants acknowledge that to achieve the VFM Statement, acting on a Best For Project basis and complying with the commitments at Section 5, they will need to take into account the Owner's reasonable operational, maintenance and safety requirements for using or taking over the Project and its interface with other infrastructure (including with other projects).

## 7.11 **Disclosure of conflict of interest**

- 7.11.1 A Participant's representative on the ALT, AMT or APT (as the case may be) must fully disclose to an ALT, AMT or APT meeting (as the case may be), any conflicting interest or duty, or potential conflict of interest or duty, the representative may have (whether personally or as a representative) before participating in a discussion on any relevant issue or making a decision about that issue.
- 7.11.2 A Participant's representative who has made full disclosure under Section 7.11.1 may fully participate in any discussion and decision, even though the representative has or may have a conflicting interest or duty.
- 7.11.3 For the purposes of this Section 7.11, a conflict of interest will include any corporate or other objective or affiliations of a Participant that could reasonably be considered to

have an adverse impact on the achievement of either or both of the VFM Statement or the Alliance Goals.

7.11.4 A conflict of interest is not created merely by the fact that a representative is an appointee and/or an employee of a Participant.

## **8. ALLIANCE MANAGEMENT TEAM**

### **8.1 Appointment of the Alliance Director**

8.1.1 The person named in Schedule 2 (Representatives) has been appointed as the Alliance Director. The Alliance Director shall be the same person that was the Alliance Director under the Alliance Development Agreement. Any replacement to the Alliance Director shall be appointed by the ALT.

8.1.2 The functions and responsibilities of the Alliance Director are described in the Governance Plan and Responsibilities Matrix.

### **8.2 Membership of the AMT**

8.2.1 Subject to the requirements of this Section 8, the AMT membership shall be comprised of the same persons that comprised the AMT membership under the Alliance Development Agreement, as identified in the Project Proposal, unless otherwise agreed to by the Alliance Director and approved by the ALT.

8.2.2 Membership of the AMT may only be amended with the approval of the ALT.

8.2.3 The AMT must comprise:

8.2.3.1 the Alliance Director;

8.2.3.2 senior individuals drawn from the Participants reporting to the Alliance Director; and

8.2.3.3 such other persons (representing any Subcontractor or Stakeholder) as the ALT may approve from time to time, provided any such approval may be withdrawn or varied by the ALT at any time on prior notice to the AMT,

provided that at all times there will be at least one representative drawn from each Participant on the AMT.

### **8.3 Owner Participant to nominate its AMT representatives**

The Owner Participant may at any time by notice to the ALT nominate personnel for inclusion in the AMT (including, for clarity, the Alliance Director).

### **8.4 Participants to ensure continuity of membership of the AMT**

8.4.1 Each Participant must (subject to satisfactory performance by the relevant personnel) use reasonable efforts to ensure that, where appropriate, each person that has been assigned to the AMT by the relevant Participant remains as a member of the AMT for the delivery of the Project or otherwise until the ALT decides that he or she is no longer required for the Project.

- 8.4.2 If a member of the AMT ceases to be a member without the approval of the ALT, then the Owner's Representative may determine that any costs incurred by the Participants in replacing that member of the AMT (including any costs incurred in familiarising the replacement member with the Project) will not be recoverable as Actual Cost under this Agreement.

## 8.5 **Functions of the AMT**

The AMT must perform the functions:

- 8.5.1 described in the Project Proposal;
- 8.5.2 described in the Governance Plan; and
- 8.5.3 as otherwise determined by the ALT from time to time.

## 9. **ALLIANCE PROJECT TEAM**

### 9.1 **Membership of the APT**

- 9.1.1 Subject to the requirements of this Section 9, the Alliance Project Team shall be comprised of the same persons that comprised the Alliance Project Team under the Alliance Development Agreement unless otherwise agreed to by the AMT.
- 9.1.2 The APT must include personnel drawn from each Participant.
- 9.1.3 Membership of the APT may only be amended with the approval of the AMT.

### 9.2 **Owner Participant to nominate its APT representatives**

The Owner Participant may at any time by notice to the Alliance Director nominate personnel for inclusion in the APT (including nominating some personnel for the purpose of gaining training and experience in alliancing).

### 9.3 **Participants to ensure continuity of membership of the APT**

- 9.3.1 Each Participant must (subject to satisfactory performance by the relevant personnel) use reasonable efforts to ensure that, where appropriate, each person that has been assigned to the APT by the relevant Participant remains as a member of the APT for the delivery of the Project or otherwise until the ALT or AMT decides that he or she is no longer required for the Project.
- 9.3.2 If a member of the APT ceases to be a member without the approval of the ALT or the AMT, the Owner's Representative may determine that any costs incurred by that member's Participant in replacing that member (including any costs incurred in familiarising the replacement member with the Project) will not be recoverable as Actual Cost.

### 9.4 **Functions of the APT**

The APT must, under the guidance of the ALT and the AMT, perform:

- 9.4.1 all the functions determined by the ALT and AMT; and

9.4.2 the roles and responsibilities designated to the APT in the Governance Plan and Responsibilities Matrix.

## **10. PROJECT OFFICE**

### **10.1 Provision of Project Office**

Unless otherwise stated in the Project Proposal, the Participants must provide a Project Office from the Commencement Date to the Date of Completion or such other period as specified by the ALT.

## **11. STAKEHOLDER ENGAGEMENT WITH THE ALLIANCE AND COMMUNICATION**

### **11.1 Definition of Stakeholder**

Stakeholders for the purpose of this Section 11 includes, without limitation, representatives of the City of Toronto, Operators, any Governmental Authority, [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], any Railway Company, any Utility Company, any owner of third party infrastructure that affects the Project, any third party developers or the like (each a "Stakeholder").

### **11.2 Consultation with Stakeholder**

11.2.1 Notwithstanding this Section 11, the Participants acknowledge that from time to time they may need to:

11.2.1.1 consult with various Stakeholders;

11.2.1.2 take in to account comments received from Stakeholders following such consultation; and

11.2.1.3 comply with certain requirements of Stakeholders,

in order to deliver the Works in accordance with the VFM Statement and this Agreement.

11.2.2 The Participants acknowledge and agree that they will not, in the performance of the Works, in any way contravene or cause Metrolinx to contravene any agreement entered into by Metrolinx with any Stakeholder.

### **11.3 Attendance of Stakeholders at meetings**

The Owner Participant, ALT, AMT or APT may from time to time invite certain Stakeholders to attend and participate in specified activities of the ALT, AMP and/or APT (including meetings) and the Participants will allow those Stakeholders to so attend and participate.

### **11.4 Representations by Stakeholders at ALT meetings**

The Participants will give full and fair consideration to all representations made by any Stakeholder (whether or not arising at any meeting pursuant to Section 11.3) including any proposals for innovation and savings in either the costs of performing the Works and/or the costs which any Stakeholder may incur directly or indirectly arising out of the Works.

## 11.5 Participants to develop proposals with Stakeholders

Without prejudice to Section 11.2, the Participants will use reasonable efforts to initiate the development of and to develop proposals jointly with any Stakeholder to achieve capital or operating cost savings for:

- 11.5.1 any Stakeholder;
- 11.5.2 any Participant; and/or
- 11.5.3 the Owner.

## 11.6 Owner's direction in respect of a proposal

- 11.6.1 The ALT must refer to the Owner's Representative any proposals agreed with a Stakeholder in accordance with Section 11.5.
- 11.6.2 Following receipt of a proposal under Section 11.6.1 the Owner's Representative may:
  - 11.6.2.1 issue a direction under Section 27 to proceed with the proposal; or
  - 11.6.2.2 direct the ALT not to proceed with the proposal.

## 11.7 Costs of Stakeholder attendance and representations

- 11.7.1 The Participants' costs in complying with this Section 11 are Actual Cost and, for clarity, do not give rise to any adjustment of the Target Outturn Cost, Date for Completion or Key Result Areas.
- 11.7.2 The Owner and any Stakeholder must bear their own costs of complying with this Section 11. The Owner may enter into separate arrangements with any Stakeholder to pay for such attendance, representations and proposals.

## 11.8 Stakeholder is not a Party

- 11.8.1 No Stakeholder has any rights or obligations under this Agreement. As such, no Stakeholder is required to act in Good Faith and the provisions of Sections 6.2 and 6.3 do not apply to any issue arising between a Stakeholder and a Participant.
- 11.8.2 This Section 11 is not intended to nor does create any liability of a Participant to any Stakeholder.

## 11.9 Communications and Public Engagement Protocol

- 11.9.1 The Participants shall comply with the requirements set forth in the Communications and Public Engagement Protocol.



## 12. [INTENTIONALLY DELETED]

### **DESIGN PHASE**

## 13. DESIGN OF THE WORKS

### 13.1 Instruction by the ALT

The Participants must carry out the design of the Works in accordance with this Agreement and as directed by the ALT.

### 13.2 Standard of design

Subject to Section 13.4, the Participants must ensure that design of the Works is undertaken by it:

13.2.1 so as to enable the Works to be completed at the lowest Actual Outturn Cost consistent with meeting all the requirements of this Agreement (including the VFM Statement);

13.2.2 so as to enable the Works to be constructible in accordance with Good Industry Practice; and

13.2.3 in accordance with:

13.2.3.1 the commitments in Section 5;

13.2.3.2 the VFM Statement;

13.2.3.3 the Project Proposal;

13.2.3.4 the Scope of Works;

13.2.3.5 all Consents, applicable Standards and Applicable Law; and

13.2.3.6 Good Industry Practice.

### 13.3 Owner is responsible for the contents of the VFM Statement

The Participants are not responsible for the contents of the VFM Statement.

### 13.4 Participants' design responsibility

13.4.1 Subject to Section 13.3, the Participants are responsible for the entire design of the Works including all design:

13.4.1.1 in the Project Proposal;

13.4.1.2 developed in accordance with this Agreement; and

13.4.1.3 provided by the Owner for the Works (whether before or after the Commencement Date).

13.4.2 The Participants must ensure that the design of the Works meets the VFM Statement.

13.4.3 Subject to Section 13.3, any error, omission and/or discrepancy:

- 13.4.3.1 between the VFM Statement and any Participant Document;
- 13.4.3.2 between a Statutory Requirement and any Participant Document; or
- 13.4.3.3 within or between any Participant Document,

must be corrected by the Participants as directed by the ALT in accordance with the Owner's Representative's direction under Section 2.4.2. Any such correction is not an Adjustment Event.

- 13.4.4 Any failure of the design of the Works to comply with this Section 13 is a Defect and is subject to Sections 6.2 and 6.3.

### **13.5 Whole of life cost**

- 13.5.1 The Participants must design the Works to minimize the whole of life cost of the Works having regard to the:

- 13.5.1.1 requirements of the VFM Statement;
- 13.5.1.2 operating and maintenance requirements stated or reasonably inferred for the use of the Works by the Owner; and
- 13.5.1.3 design lives stated or reasonably inferred for each component of the Works.

### **13.6 Stated Purpose**

- 13.6.1 Each Participant warrants that the Works will, at the Date of Completion:
  - 13.6.1.1 be fit for the Stated Purpose and of the quality and standard of work that is stated in the Project Proposal; and
  - 13.6.1.2 comply with any performance specification or requirement included or referred to in the VFM Statement or Project Proposal or otherwise required by this Agreement.

### **13.7 Performance of design obligations**

- 13.7.1 In the design and engineering of the Project, the Participants and their consultants shall, at a minimum (and without limiting any other obligation under the Agreement), exercise the standard of care normally exercised by licensed or registered professional architectural and engineering personnel having specialized knowledge and experience in performing design activities of a similar nature, scope and complexity.

## **WORKS PHASE**

### **14. COMMENCEMENT OF THE WORKS**

#### **14.1 Instruction by the ALT**

The Participants must carry out and complete the construction of the Works in accordance with this Agreement (including the Project Proposal and any requirements or constraints contained therein) and as directed by the ALT.

## 14.2 Commencement of the Works

Subject to the provisions in respect of track possessions at Section 22 and subject to the rules, restrictions and requirements set forth in the Project Proposal, Schedule 19 (Rail Corridor Access) and Schedule 18 (Lands), each Participant may only commence the Works on the Site to the extent that:

- 14.2.1 prior notice of such commencement has been given by the ALT to the Owner's Representative;
- 14.2.2 the Owner or the relevant Participant has procured insurance pursuant to Section 37 which provides cover in respect of any aspect of carrying out the Works at the Site by that Participant;
- 14.2.3 the requirements set forth in Sections 18.1 and 18.3 have been satisfied;
- 14.2.4 that Participant has received all Consents or access rights required to lawfully commence the Works at the Site, whether such are to be procured by that or any other Participant or the Owner; and
- 14.2.5 that Participant has received all track possessions required by Owner to commence the Work at the Site.

## 15. SITE

### 15.1 Access to Site and Consents

15.1.1 Subject to this Section 15 and the provisions in respect of the track possessions at Section 22, and subject to any rules, restrictions and requirements on the use and access to the Lands as set out in the Project Proposal, Schedule 18 (Lands), Section 22 and Schedule 19 (Rail Corridor Access), the Owner shall grant or have caused to be granted, and shall continuously grant or cause to be granted, to the Participants a non-exclusive licence right of use and access to, on or over the Lands as are required by the Participants and sufficient to allow the Participants to perform the Works, and the Owner is responsible for obtaining any Consents required in connection with the licence rights to the Lands granted to Participants pursuant to this Section 15.1.1. The rights granted to Participants pursuant to this Section 15.1.1 shall be effective on the later of,

15.1.1.1 the Commencement Date; and

15.1.1.2 the commencement date for access to individual parcels of land that comprise the Lands as set out in Schedule 18 (Lands) or, in respect of Additional Owner Permanent Lands, as notified to the Participants by the Owner's Representative.

15.1.2 Subject to this Section 15 and the provisions in respect of track possessions at Section 22, and subject to any rules, restrictions and requirements as set out in the Project Proposal, Schedule 18 (Lands), Section 22 and Schedule 19 (Rail Corridor Access), the Participants are responsible for obtaining all access to and within the Lands and the Site and obtaining Consents required to deliver the Works and discharge all the Participants obligations under this Agreement, except to the extent of the licensed rights to the Lands provided by the Owner pursuant to Section 15.1.1.

- 15.1.3 Except as expressly provided in Section 15.1.1 and subject to the provisions in respect of track possessions at Section 22, the Owner has no obligation to procure any access to or rights over any lands (including Additional Lands) or any Consents required in connection with the Project (whether or not such lands are in the ownership, possession or control of the Owner).
- 15.1.4 To the extent the Participants require Additional Lands to perform the Works, the Participants are responsible for obtaining all access to and rights over such Additional Lands and all Consents required in connection with such Additional Lands. The costs of obtaining any Additional Lands under this Section 15.1.4 are Actual Cost incurred by a Participant and, for clarity, do not give rise to any adjustment to the Target Outturn Cost.
- 15.1.5 As soon as reasonably practicable after the Commencement Date, the Participants may propose, by written request to the Owner's Representative, that the Owner acquire ownership of or a permanent licence, easement or right of access over additional permanent lands, which, in the Participants' opinion, is required for the Project and delivery of the Works (each an "**Additional Permanent Lands Request**"). The Participants shall include in each Additional Permanent Lands Request, for each of the additional permanent lands requested, supporting reasons, justifications and detailed plans, evidencing, at a minimum, (a) the reasons why each of the proposed additional permanent lands are required for the Project and for the delivery of the Works; and (b) that the lands, if acquired, would be sufficient, but not excessive, to achieve the objective described in Section 15.1.5(a). In addition, the Participants shall provide the Owner with such additional information as the Owner's Representative may request from time to time in relation to the Additional Permanent Lands Request. The Owner may, in its sole and absolute discretion, accept or reject any Additional Permanent Lands Request, or prescribe conditions, restrictions and requirements in connection with its agreement to an Additional Permanent Lands Request. In the event the Owner agrees to an Additional Permanent Lands Request, such additional land so acquired (whether by way of ownership interest, licence rights, easement or right of access) by the Owner (the "**Additional Owner Permanent Lands**") will become part of the Lands once such lands acquired by the Owner. The costs to the Owner of obtaining any Additional Owner Permanent Lands under this Section 15.1.5 are not to be considered as Actual Cost of the Owner Participant under this Agreement.

## 15.2 Access for the Owner

- 15.2.1 Without limitation of the rights set forth in Sections 15.3, 15.4 and 15.5, the Owner, the Owner's employees and agents and any other person nominated by the Owner may at any time have access to any part of any Site or any other areas where the Participants are performing the Works for any purpose.
- 15.2.2 At all reasonable times, the Participants will give the Owner and any other person authorized in writing by the Owner access to the Site or any place where Works are being carried out or Materials or Construction Plant are being prepared or stored.
- 15.2.3 In exercising any right of access under this Section 15.2, the Owner must, and must ensure that its employees, agents and invitees, comply with the relevant Site procedures, security requirements and health, safety and environmental conditions.

## 15.3 Other Contractors

- 15.3.1 The Participants acknowledge that the Owner may arrange for or permit other contractors (whether or not engaged by the Owner) to execute works or services on or adjacent to the Site concurrently with the performance of the Works.

- 15.3.2 Without limiting any other obligation of the Participants under this Agreement, the Participants must:
- 15.3.2.1 at all reasonable times allow access to any part of the Site to the other contractors, including any contractor carrying out related works;
  - 15.3.2.2 make available for use by the other contractors all facilities which have otherwise been provided by the Participants in connection with the Works;
  - 15.3.2.3 provide to the other contractors reasonable opportunity to introduce and store their products and use their construction machinery and equipment to execute such contractors' works and services;
  - 15.3.2.4 cooperate with the other contractors to ensure the coordination of the works or services of the other contractors with the performance of the Works by the Participants and compliance with the Participants' obligations under this Agreement;
  - 15.3.2.5 provide to the other contractors, and ensure that all other contractors satisfactorily complete, a site induction program, before commencing work on the Site or in connection with the Works, having regard to each other contractors' requirements for access to a Site to carry out work;
  - 15.3.2.6 avoid interference with or disruption to or delay of the work of the other contractors; and
  - 15.3.2.7 facilitate the works or services of the other contractors.
- 15.3.3 If the execution of any part of the Works is affected by or dependent upon the quality and completeness of work performed by other contractors, the Participants shall inspect the other contractors' work and immediately report all defects (if any) therein to the Owner which, in the opinion of the Participants, render such work unsuitable for the proper execution of the Works.
- 15.3.4 The Participants shall:
- 15.3.4.1 rectify any damage to the Works caused by the Participants failing to adequately protect the Works or failing to co-ordinate with the work of other contractors; and
  - 15.3.4.2 rectify any damage (howsoever caused) to the work of other contractors caused by the Participants or any Subcontractor.

#### 15.4 Access by others

The Participants shall ensure that until the termination of this Agreement, without prejudice to any access rights of any such person as a member of the general public or pursuant to Applicable Law, that it does not restrict access to the Site for:

- 15.4.1 owners or operators of any Third Party Facilities at all reasonable times to exercise any right or power to perform any duty or obligation under any Applicable Law, utility agreement, railway orders or encroachment permits, provided that, wherever consistent with the requirements of Applicable Law and the requirements of this Agreement, Participants may limit such access so as to not unnecessarily impede or restrict traffic flows, the operation of any existing infrastructure or the Works;

- 15.4.2 all Governmental Authorities and Emergency Service Providers in order to carry out work (including surveys and inspections);
- 15.4.3 any Province Person, other contractors, owners or operators of Third Party Facilities, Governmental Authorities, Emergency Service Providers, Utility Companies, Railway Companies, the City of Toronto, transit systems and railway systems for the purposes of access to and from any other lands and/or facilities adjacent to or in proximity of the Lands or any Additional Lands and the works owned or operated by such person or in which such person has any interest; and
- 15.4.4 any Province Person to undertake emergency training in relation to the Works.

**15.5 No interference**

- 15.5.1 Nothing in this Section 15 shall restrict or impede the Owner's or any other third party owner's right to use and access any part of the Lands or any Additional Lands.

**16. CONSTRUCTION OF THE WORKS**

**16.1 Quality of the Works**

- 16.1.1 Without prejudice to their obligations in respect of design of the Works at Section 13, the Participants must ensure that the Works are constructed:

- 16.1.1.1 so as to enable the Works to be completed at the lowest Actual Outturn Cost consistent with meeting all the requirements of this Agreement;

- 16.1.1.2 in accordance with:

- (a) the commitments in Section 5;
    - (b) the VFM Statement;
    - (c) the Project Proposal;
    - (d) the Scope of Works;
    - (e) all Consents, applicable Standards and Applicable Law;
    - (f) Good Industry Practice; and

- 16.1.1.3 in a manner that:

- (a) is in compliance with the Metrolinx Customer Charter and the Safety Charter;
    - (b) is in compliance with all rules, restrictions, requirements and constraints set forth in this Agreement;
    - (c) will not impair the ability of the Owner, the Owner's Representative, any Province Person or any Governmental Authority to comply with Applicable Law; and

- (d) will not impair the performance of Governmental Activities.

## 16.2 Construction Plant and Materials

- 16.2.1 Any Materials and Construction Plant necessary for the Works at the Site must be purchased or leased or hired (as the case may be) on a Best For Project basis.
- 16.2.2 If a NOP acquires Materials, it must ensure that:
  - 16.2.2.1 the benefit of any express warranty attaching to the Materials is assigned to the Owner;
  - 16.2.2.2 the Owner obtains unencumbered title to those Materials upon receipt of such items on the Lands or Additional Lands (if any); and
  - 16.2.2.3 it maintains an up to date register of all assets including a register of all express and implied warranties pertaining to those Materials as provided by the relevant supplier or prescribed by a Statutory Requirement.
- 16.2.3 If a NOP requires Construction Plant which has been paid for by a Participant as an Actual Cost, it must ensure that:
  - 16.2.3.1 the benefit of any express warranty attaching to the Construction Plant is assigned to the Owner;
  - 16.2.3.2 the Owner obtains unencumbered title to the Construction Plant upon payment of such Construction Plant; and
  - 16.2.3.3 it maintains an up to date register of all assets including a register of all express and implied warranties pertaining to those Construction Plant as provided by the relevant supplier or prescribed by a Statutory Requirement.
- 16.2.4 Without limiting Section 16.2.2, the Owner will not pay for any Materials which are not securely stored within the Site unless the Owner's Representative is satisfied that the Materials are unencumbered, protected and insured to the Owner's Representative's satisfaction.
- 16.2.5 Any surplus Materials and all Construction Plant that have been paid for by the Owner as Actual Cost must be disposed of at the direction of the Owner's Representative and the Owner is entitled to the proceeds of that disposal and the Actual Costs must be reduced by the sum of the proceeds from that disposal.
- 16.2.6 Title to each item and part of any Construction Plant which has been paid for by the Owner or any Participant as an Actual Cost shall pass to the Owner (or as the Owner's Representative may direct) upon purchase.
- 16.2.7 Title to each item and part of the Works, including the Materials, but not the risk of loss or damage or destruction thereto or thereof, shall pass to the Owner (or as the Owner's Representative may direct) upon the receipt of such item on the Lands or Additional Lands (if any).

### 16.3 **Project Management System**

The Participants must implement and comply with the Project Management System in performing the Works.

### 16.4 **Care of the Works**

From the Commencement Date until the Date of Completion of the whole of the Works or (if applicable) each Tranche of the Works, the Participants are responsible to protect the Works or (if applicable) each relevant Tranche and property of the Owner and third parties on the Lands and Additional Lands (if applicable) from all of the elements, casualty, damage and destruction which may arise as a result of an act or omission of any Participant and the Participants shall be responsible for such damage and destruction, except for any damage and destruction which occurs as a result of acts or omissions by the Owner or any Owner Party. If all or any part of the Works, any existing infrastructure and property of the Owner or any third party on the Lands or Additional Lands (if applicable) or adjacent to the Lands is damaged or destroyed as a result of an act or omission of any Participant, then the Participants, at their own cost, are responsible to repair, restore, replace, refurbish or rectify, as applicable, the Works (or the relevant Tranche), any existing infrastructure and property of the Owner or any third party on the Lands and Additional Lands (if applicable) and adjacent to the Lands and Additional Lands (if applicable), or part thereof, to at least the condition existing at the commencement of the Works.

### 16.5 **Prevention of nuisance and environmental damage**

The Participants must ensure that the Works:

- 16.5.1 do not cause any unlawful damage to or Pollution of the Environment;
- 16.5.2 are performed in a manner to minimize the risk of claims of nuisance and injurious affection; and
- 16.5.3 cause as little disturbance as possible (having regard to the nature of the Works) to the general public, the Owner, the Owner's employees and other contractors and service providers engaged by the Owner, owners and operators of Third Party Facilities, existing transit systems and rail systems, existing infrastructure, adjacent properties, Province Persons, Stakeholders, MTO, Governmental Authorities and Governmental Activities.

### 16.6 **Performance of the Works**

- 16.6.1 All parts of the Works shall, as required by Applicable Law, be performed and reviewed by licensed and registered professional engineers and architects registered to practise in the Province of Ontario.
- 16.6.2 The Participants must perform and complete the Works in coordination and consultation with the City of Toronto, the Toronto Transit Commission, owners of existing third party infrastructure and adjacent property owners including, without limitation, [REDACTED], [REDACTED] and [REDACTED].
- 16.6.3 In performing and completing the Works, the Participants must not, without the consent of the Owner, create, incur, permit or suffer to exist any Encumbrance filed, issued or registered upon or against the Lands or Additional Lands (if any) or any part of them or any interest in the Lands.



## **17. SITE SECURITY**

### **17.1 Appointment of Relevant NOP by ALT**

- 17.1.1 The ALT must promptly after the Commencement Date and before any work or services are performed at the Site appoint a NOP (the “**Relevant NOP**”) to be responsible for site security under this Section 17 in relation to all or any part of the Site (the “**Relevant Part**”).
- 17.1.2 The ALT may decide that a single Relevant NOP is appointed for the entirety of the Site (such that the Relevant Part in that case is the entire Site) or that a different Relevant NOP is appointed for each Relevant Part within the Site.
- 17.1.3 The ALT may amend an appointment of a Relevant NOP from time to time, including by amending the number and extent of Relevant NOPs and/or Relevant Parts, providing that at all times the ALT ensures it has appointed a Relevant NOP for every part of the Site.
- 17.1.4 The ALT must concurrently notify the Owner’s Representative of each appointment of a Relevant NOP and its Relevant Part, including any amendment thereof from time to time.

### **17.2 Prevention of unauthorized access and removal**

- 17.2.1 Each Relevant NOP must take all necessary steps to prevent unauthorized persons being admitted to the Relevant Part.
- 17.2.2 If the Owner’s Representative gives a Relevant NOP notice that any person is not to be admitted to the Relevant Part or is to be removed from a Relevant Part, the Relevant NOP must take all necessary steps to prevent that person being admitted and take all necessary steps to remove such person from the Relevant Part.

### **17.3 Access over the Owner’s land**

- 17.3.1 Where access to the Site (and each Relevant Part thereof) is required by any NOP by way of the Owner’s land, the route of such access must be submitted by the Alliance Director for approval by the Owner Participant and no such access is permitted until such approval is granted.
- 17.3.2 Each Relevant NOP is responsible for ensuring that no person employed by any Participant trespasses beyond the agreed limits of the working area or access route within or adjoining the Relevant Part.

### **17.4 Trespass onto the railway**

Each Relevant NOP must provide and maintain all necessary temporary fencing required to prevent trespass on the railway or neighbouring land in or adjoining the Relevant Part and which is in accordance with all requirements of this Agreement.

### **17.5 Protest and trespass**

The NOPs shall be responsible for the management of protesters and trespassers at the Site, to the extent such management is not the responsibility of the Police Services.

## 18. SAFETY REQUIREMENTS

### 18.1 General safety requirements

Each of the Participants shall:

18.1.1 comply with the Site Safety Manuals;

18.1.2 perform the Works in accordance with the requirements of the *Occupational Health and Safety Act* (Ontario) (notwithstanding any designation of Metrolinx as the “constructor” for the Project), including:

18.1.2.1 keep the Site and the Works in a safe and orderly state, as appropriate in accordance with Good Industry Practice, to avoid danger to persons on the Site and in the immediate vicinity of the Site;

18.1.2.2 take such measures as are reasonable in accordance with Good Industry Practice and the Access Management Plan to prevent access to the Site of any persons or creatures not entitled to be there;

18.1.2.3 comply with, and cause each NOP Party and Owner Participant Party to comply with:

(a) Applicable Law relating to health and safety, including the *Occupational Health and Safety Act* (Ontario) and all regulations thereto;

(b) the Site Safety Manuals, the Access Management Plan, the rules, restrictions and requirements set out in Schedule 19 (Rail Corridor Access), and all rules, restrictions and requirements relating to access, rail safety and operations and track protection as set out in Project Proposal; and

(c) any direction or instruction from Transport Canada arising from any contractual arrangement or board order involving Transport Canada and one or both of MTO or Metrolinx with respect to the USRC, and facilitate and provide cooperation with respect to any inspections by Transport Canada on the Lands and Additional Lands (if any);

18.1.2.4 provide all information, support and cooperation reasonably required by Metrolinx, to maintain Metrolinx’s designation as the “constructor” for all Works on the Site;

18.1.2.5 cause each of [REDACTED], [REDACTED] and Mass. Electric Construction Canada Co. to provide the Owner with a certificate of good standing from WSIB or any successor thereto once every 90 days;

18.1.2.6 facilitate and provide cooperation with respect to any inquiry or investigation of the MOL with respect to the Project;

18.1.2.7 establish a senior safety leadership group within five (5) Business Days after the Commencement Date; and

18.1.2.8 establish a site induction program immediately after the Commencement Date.

18.1.3 The NOPs shall, with respect to the Works, cause a COR-Certified Construction NOP Party or, prior to receipt of COR Certification, a COR-Qualified Construction NOP Party, to perform, all of the obligations of the “constructor” for and on behalf of Metrolinx.

## 18.2 Third Party Named as “constructor”

18.2.1 If a third party is named “constructor” by MOL or Metrolinx, the Participants shall:

18.2.1.1 not interfere with or delay the third party’s work;

18.2.1.2 not do anything whatsoever that causes the third party to be in contravention of its obligations under the Occupational Health and Safety Act (Ontario); and

18.2.1.3 immediately cease and desist any activity that results or has a likelihood of resulting in such interference with or delay of the work of the third party.

18.2.2 If a third party is named constructor by Metrolinx, the Participants shall comply with the direction and requirements of such third party to the same extent each NOP is required to comply with the direction and requirements of Metrolinx as “constructor”.

## 18.3 COR Certification

18.3.1 The NOPs shall, at all times during the performance of the Works cause each COR-Qualified Construction NOP Party and each COR-Certified Construction NOP Party, as the case may be, to:

18.3.1.1 to the extent a COR-Qualified Construction NOP Party has not obtained COR Certification prior to execution of this Agreement,

(a) use best efforts to obtain its COR Certification no later than 18 months following the date of execution of this Agreement. In the event that Owner is satisfied, in its sole and absolute discretion, that the COR-Qualified Construction NOP Party has used best efforts to obtain its COR Certification in accordance with this Section 18.3.1.1(a) and the COR-Qualified Construction NOP Party has not obtained COR Certification by the end of such 18 month period, then Owner shall establish a time period during which the COR-Qualified Construction NOP Party shall obtain its COR Certification, which time period shall not be less than 30 days, and

(b) maintain in good standing and, as applicable, renew its OHSAS 18001 Accreditation until such time as the COR-Qualified Construction NOP Party has obtained its COR Certification,

18.3.1.2 once the COR-Qualified Construction NOP Party is certified (hereafter referred to as a “**COR-Certified Construction NOP Party**”), maintain in good standing, and, as applicable, renew its COR Certification; and

18.3.1.3 comply with all requirements of its OHSAS 18001 Accreditation (if a COR-Qualified Construction NOP Party) or COR Certification (if a COR-Certified Construction NOP Party), in accordance with its terms.

## **19. APPLICABLE LAW AND CONSENTS**

### **19.1 Compliance with Applicable Law and Consents**

Subject to Section 15.1.1, the Participants:

- 19.1.1 must obtain, maintain, and, as applicable, renew all Consents necessary to perform each particular portion of the Works prior to undertaking that particular portion of the Works;
- 19.1.2 must comply with all Applicable Law and Encumbrances that affect or relate to the performance of the Works and comply with all Consents in accordance with their terms;
- 19.1.3 must pay all costs, charges, fees, compensation and other amounts required to obtain, maintain, renew and comply with all Consents and Applicable Law pursuant to this Section 19.1; and
- 19.1.4 are responsible for all Financial Security Obligations under or in respect of all Consents.

### **19.2 Enforcement and exceptions to Sections 6.2 and 6.3**

Notwithstanding Sections 6.2 and 6.3 (but subject to any determination to the contrary made by the Owner under Section 6.4.4), a failure by a Participant to comply with the requirements of Section 19 confers on the other Participants an enforceable right at law to seek any one of or a combination of specific performance, injunction or damages.

### **19.3 Standards of Applicable Law**

Whenever standards of Applicable Law differ, the most stringent standards shall govern.

## **20. SUBCONTRACTING**

### **20.1 Subcontracting to be authorized by the ALT**

All subcontracting (of any tier) by the Participants must be as set out in the Project Proposal or as agreed by the ALT subject to the principles and restrictions set out in this Section 20.

### **20.2 Subcontracting on a Best For Project basis**

Subcontracts, including in respect of supply chain partners, may only be entered into by any or all of the Participants on a Best For Project basis and otherwise in accordance with the Contracting Strategy and this Section 20. This may involve being entered into by an individual Participant, by two or more Participants or by a Participant entering into a Subcontract both in its own right as principal/employer, and as agent, for and on behalf of the other Participants.

### **20.3 Subcontracting with connected persons**

The Participants recognize that difficulties may arise in the proper calculation of Actual Cost if one or more of the Participants (or any of their subcontractors, of any tier) enters into a contract, arrangement or understanding related to this Agreement with any person that is in any way related

to or associated with the Participant concerned (an “**Affiliated Subcontractor**”). The Participants agree that before any of them (or any of their subcontractors, of any tier) enters into any contract, arrangement or understanding with an Affiliated Subcontractor (an “**Affiliated Subcontract**”), they must first seek the approval of the ALT before entering into that Affiliated Subcontract.

## 20.4 **Affiliated Subcontracts**

20.4.1 The provisions of this Section 20.4 will apply in respect of any Works undertaken by Affiliated Subcontractors unless the ALT has determined otherwise.

20.4.2 Where, in accordance with the Project Proposal and Section 20.3, a NOP enters into an Affiliated Subcontract, then:

20.4.2.1 the Actual Cost that is payable to the NOP in respect of that Affiliated Subcontract will be calculated in accordance with Section 5 of Schedule 9; and

20.4.2.2 the Overhead and Profit payable to the NOP in respect of that Affiliated Subcontract will be:

- (a) calculated in accordance with the Project Proposal and Schedule 10 (Fee), to the extent so stated therein; or
- (b) otherwise determined by the ALT in accordance with Section 20.4.3.

20.4.3 Where Section 20.4.2.2(b) applies, the ALT shall determine any adjustments to the Overhead and Profit payable to the relevant NOPs and their Affiliated Subcontractors having regard to:

20.4.3.1 the weighted average of the percentages of Overhead and Profit for the relevant NOPs and their Affiliated Subcontractors stated in Annex 1 of Schedule 10 (Fee) or otherwise approved by the ALT; and

20.4.3.2 the estimated Actual Costs for the relevant NOPs and their Affiliated Subcontractors.

20.4.4 For the avoidance of doubt:

20.4.4.1 the provisions of this Section 20.4 will also apply (as applicable) to any adjustments to the Fee following a change to the Target Outturn Cost in accordance with this Agreement; and

20.4.4.2 a NOP will only be entitled to an adjustment of the Fee under Section 20.4.3 in respect of an Affiliated Subcontract where such Affiliated Subcontract is entered into by a NOP in accordance with this Section 20.4.

## 20.5 **No Subcontracting with Restricted Persons**

The NOPs shall not enter into a Subcontract with a Restricted Person or an Affiliate of a Restricted Person, or a person whose standing or activities may compromise (i) the Owner’s reputation or integrity; or (ii) the nature of the public transit system in the City of Toronto or the Province of Ontario so as to affect public confidence in the public transit system in the City of Toronto, the Province of Ontario or the Project.

## 20.6 Approval of Key Subcontractor documents

- 20.6.1 Subject to Section 20.6.2, any Subcontract between a NOP and a Key Subcontractor must include provisions:
- 20.6.1.1 complying with Section 20.7;
  - 20.6.1.2 enabling the relevant NOP to assign any of its rights under the Subcontract to the Owner without restriction (including any need to obtain any consent or approval) or payment by the Owner following termination of this Agreement for any reason;
  - 20.6.1.3 requiring the Subcontractor to notify the Owner's Representative promptly in writing of any material non-payment or late payment of any sums properly due to the Subcontractor from the NOP under the Subcontract, under a specified proper invoice and not subject to a genuine dispute;
  - 20.6.1.4 requiring the Subcontractor to provide the Owner's Representative a copy of any written notices of adjudication issued to the NOP and copies of the documents provided to the adjudicator pursuant to section 13.11 of the Construction Act;
  - 20.6.1.5 requiring the Subcontractor to notify the Owner's Representative if it intends to terminate the Subcontract due to a default by the NOP and giving the Owner the right to step-in to the Subcontract in place of the NOP;
  - 20.6.1.6 giving the Owner the right to step-in to the Subcontract in place of the NOP in the event the Owner is entitled to issue an Exclusion Notice to the NOP or is entitled to terminate this Agreement due to a breach by the NOP; and
  - 20.6.1.7 confirming that the rights of step-in granted to the Owner take priority over those rights of any other third party granted rights under such Subcontract.
- 20.6.2 A Key Subcontractor's Subcontract is not required to comply with Section 20.6.1 if the Owner's Representative has otherwise agreed in writing that such compliance is not required.
- 20.6.3 Each NOP agrees to cause any Key Subcontractor to enter into a Subcontractor Direct Agreement, in the form set out in Schedule 20 (Form of Subcontractor Direct Agreement), to evidence, among other things, the matters set forth in this Section 20.6.
- 20.6.4 Each NOP shall deliver each Subcontractor Direct Agreements to the Owner's Representative within 15 days after execution of a Key Subcontract.

## 20.7 Supply chain protection

- 20.7.1 Each Participant shall ensure that unless agreed otherwise by the Owner's Representative in writing, all Subcontracts contain provisions:
- 20.7.1.1 requiring the relevant Participant to pay the Subcontractor within the timeframes set forth in the Construction Act, except for amounts withheld by reason of legitimate dispute which have been identified to the Subcontractor from whom payment has been withheld;

- 20.7.1.2 giving the Owner the right to publish the Participant's compliance with its obligation to pay undisputed invoices within the payment period set forth in the Construction Act;
  - 20.7.1.3 which provide that the Participant retain holdbacks in compliance with the Construction Act;
  - 20.7.1.4 containing insurance provisions that properly flow-down from Section 37 and thereby do not provide for duplication of insurance cover; and
  - 20.7.1.5 requiring the Subcontractor to include a section to the same effect as this Section 20 in any contracts it enters into wholly or substantially for the purpose of performing or contributing to the performance of the whole or any part of the Subcontract.
- 20.7.2 Where requested by the Owner's Representative, the ALT will provide reasonable documentary evidence to the Owner's Representative of compliance with the payment obligations set out in this Section 20.
- 20.7.3 Notwithstanding any provisions of Section 47.9, if the ALT notifies the Owner's Representative that a Participant has failed to pay a Subcontractor's undisputed proper invoice in accordance with the requirements of the Construction Act, or the Owner discovers the same, the Owner shall be entitled to publish the details of the late or non-payment (including on government websites and in the press).

## 20.8 Construction liens

- 20.8.1 Each NOP shall cause any and all construction liens and certificates of action relating to the Works registered or preserved by any Subcontractor, supplier, employee, or any other party to whom the NOP is or may be responsible at law, and provided the Owner has paid all amounts properly owing under this Agreement to the NOP for such Works, to be discharged or vacated, or cause to be discharged or vacated, immediately but in any case no later than five (5) Business Days of the date of registration or reservation, all at the NOP's sole expense. The NOP shall not be entitled to receive any payment from the Owner until all such claims for lien and certificates of action have been vacated or discharged.
- 20.8.2 Each NOP shall cause any and all written notices of lien relating to the Works given to any person, including, but not limited to, the Owner or the Owner's Representative by any Subcontractor, sub-subcontractor, supplier, employee, or any party to whom the NOP is or may be responsible at law, and provided the Owner has paid all amounts properly owing under this Agreement to the NOP for such Works, to be withdrawn or vacated, and the NOP shall do so immediately but in any case no later than five (5) Business Days of the written notice of lien having been given, all at the NOP's sole expense.
- 20.8.3 If the NOP fails to discharge or vacate any such lien or certificate of action, or to have any such written notice of lien withdrawn or vacated, within five (5) Business Days, then the Owner shall have the right but not the obligation, do so and set off and deduct from any amount owing to the NOP, all costs and expenses of so doing, and of defending any related action, including without limitation, the costs of borrowing the appropriate cash, letter of credit or bond as security, and legal fees and disbursements on a full indemnity basis. If there is no amount owing by the Owner to the NOP, then the NOP shall promptly reimburse the Owner for all of the said costs and expenses of so doing.

## 21. IMPLEMENTATION WORKS AND EARLY WORKS

### 21.1 Existence of Implementation Works

To the extent that:

21.1.1 the Owner or the Participants have entered into an Implementation Works Subcontract in connection with the Works prior to the Commencement Date; and

21.1.2 those Implementation Works are described in the Project Proposal,

the provisions of Section 21.2 apply.

### 21.2 Incorporation of Implementation Works

21.2.1 Implementation Works are to be treated as part of the Works and to have been procured by the Participants under this Agreement.

21.2.2 Where Implementation Works have been undertaken by the Owner prior to the Commencement Date:

21.2.2.1 each Implementation Works Subcontract is to be treated as a Subcontract entered into by the Participants under this Agreement in compliance with the Contracting Strategy for the Works and with the approval of the ALT;

21.2.2.2 all payments to or from an Implementation Works Subcontractor under its Implementation Works Subcontract prior to the Commencement Date are to be treated as having been made or received under a Subcontract for the purpose of this Agreement, and all amounts paid or incurred by the Owner under that Subcontract are to be treated as Actual Costs incurred by the Owner Participant and, for clarity, do not give rise to any adjustment to the Target Outturn Cost; and

21.2.2.3 any right, benefit, liability or obligation of a Party as a counterparty to an Implementation Works Subcontract arising prior to the Commencement Date will be treated thereafter for the purpose of this Agreement as a right, benefit, liability or obligation of the Owner as a Participant under a Subcontract.

21.2.3 Without prejudice to Sections 21.1 and 21.2, the ALT may decide to request the Owner's Representative to seek to:

21.2.3.1 amend or terminate any Implementation Works Subcontract at any time after the Commencement Date;

21.2.3.2 procure any outstanding Implementation Works in such other manner as the Participants agree; and/or

21.2.3.3 novate any Implementation Works Subcontract to a NOP.

### 21.3 Incorporation of Early Works

21.3.1 Early Works are to be treated as part of the Works and to have been procured by the Participants under this Agreement.

21.3.2 Where Early Works have been undertaken by the NOPs (or any one of them) prior to the Commencement Date ("**ADA Early Works**"), all payments to or from the NOPs in



respect of such ADA Early Works are to be treated as having been made or received under the Alliance Development Agreement and not under this Agreement, and all amounts paid or incurred by the Owner in respect of ADA Early Works are not to be treated as Actual Costs incurred by the Owner Participant under this Agreement and are not to be included in the Target Outturn Cost.

- 21.3.3 In respect of Early Works commenced prior to the Commencement Date that are not completed in full prior to the Commencement Date (“**Remaining Early Works**”), the portion of such Remaining Early Works are to be treated as part of the Works procured by the Participants under this Agreement, and all amounts incurred by the Owner in respect of such Remaining Early Works performed after the Commencement Date are to be paid for and treated as Actual Costs incurred by the Owner Participant under this Agreement and, for clarity, do not give rise to an adjustment to the Target Outturn Cost.
- 21.3.4 The amounts paid or incurred by the Owner in respect of the Remaining Early Works under this Agreement shall:
- 21.3.4.1 be claimed by the NOPs (or any one of them) under a Proper Invoice with sufficient notation to describe such amounts as referable to the Remaining Early Works, in accordance with Schedule 12 (Payment Procedures);
  - 21.3.4.2 be segregated from the calculation of Actual Outturn Cost; and
  - 21.3.4.3 be segregated from the determination of any Gainshare, Interim Gainshare, Painshare, Interim Painshare, Performance Liability Amount or Performance Reward Amount (if any and as the case may be) under the Risk or Reward Regime.
- 21.3.5 The Parties agree that, for the purposes of the *Construction Act* Early Works is a phase of the Works and all Early Works have been incorporated into this Agreement, in accordance with Section 21.3.1 of this Agreement. Accrued holdback amounts in respect of all Early Works, including ADA Early Works and Remaining Early Works, shall become due and payable on a phased basis upon completion of the Remaining Early Works, in accordance with the requirements of the *Construction Act*, including the conditions set out under Section 26.2 thereof.

## **22. TRACK POSSESSIONS**

### **22.1 Rail Corridor Access Plan and Schedule 19 (Rail Corridor Access)**

- 22.1.1 The Participants shall comply with the Rail Corridor Access Plan.
- 22.1.2 The Participants shall comply with all rules, restrictions and requirements relating to access, rail safety and operational and track protection, all as set out in this Agreement, including, for clarity, Schedule 19 (Rail Corridor Access).

### **22.2 Track possessions**

- 22.2.1 The Participants will be provided with track possessions within the Blockade Zone from a date to be agreed by the Owner’s Representative and the Participants, acting reasonably, (having regard to the Baseline Works Schedule or the Revised Baseline Works Schedule, as applicable), until either: (i) the Date of Completion of the whole of the Works, or (ii) such other date as may be agreed by the Owner’s Representative and the Participants, acting reasonably. The Owner will obtain all such track

possessions in respect of Works to be performed by the Participants within the Blockade Zone during such time period.

22.2.2 In respect of track possessions to perform Works outside of the boundaries of the Blockade Zone, provided that the Participants have complied with all steps, processes, submittal requirements, deliverable requirements, rules, restrictions and conditions set out in or required by this Agreement (including, for clarity, Schedule 19 (Rail Corridor Access)), the Owner will provide to the Participants the number of track possessions per calendar year as set out in the Project Proposal, provided that the dates of such track possessions will be determined by the Owner's Representative (with reference to the Baseline Works Schedule or the Revised Baseline Works Schedule, as applicable).

22.2.3 In the event the Participants (i) require any additional or adjusted track possessions (including, for clarity, overrun track possessions) to perform Works outside the boundaries of the Blockade Zone in addition to the track possessions set out in the Project Proposal; or (ii) become aware that any track possession specified in the Project Proposal is not needed (in whole or in part), the Alliance Director may issue a notice to the Owner's Representative requesting such additional, adjusted or cancelled requirements in accordance with the Owner's current planning procedures in advance of the proposed commencement of work on or near the Union Station Rail Corridor (or any part of the Site which the Owner has designated as falling within the railway environment).

### 22.3 **Additional, adjusted or cancelled track possessions**

22.3.1 While the Owner will use reasonable efforts to obtain any additional, adjusted and/or cancelled requirements requested pursuant to Section 22.2.3, it gives no warranty in that regard.

22.3.2 All costs and expenses incurred by the Owner as a result of obtaining any additional, adjusted (including, for clarity, overrun track possessions) and/or cancelled track possessions under this Section 22.3 (including, without limitation, the costs and expenses incurred by the Owner as a result of train cancellations (passenger and non-passenger trains, whether or not in service), temporary signal and track work required to be performed to establish positive protection, maintenance costs relating to maintaining such track possessions in the area around the locations of the track possessions, flagging costs, ticket refunds, train delays, track interruptions and alternative transportation costs, in each case, anywhere on the Network and which are reasonably and actually incurred by the Owner are to be treated as Actual Cost incurred by the Owner Participant and, for clarity, do not give rise to any adjustment to the Target Outturn Cost. All liabilities incurred by the Owner under its contractual arrangements with Third Parties who operate passenger or freight trains anywhere on the Network as a result of additional, adjusted and/or cancelled track possessions under this Section 22.3 are to be treated as Actual Costs incurred by the Owner Participant and, for clarity, do not give rise to any adjustment to the Target Outturn Cost. For purposes of calculating the Actual Costs incurred by the Owner under this Section 22.3 in respect of overrun track possessions (Failure to Vacate – White Period Possession and Failure to Vacate – Disruptive Possession), Train Delays, Train Cancellations, cancellation by a Participant of White Period Possessions, cancellation by a Participant of Disruptive Possessions, Additional White Period Possessions and Additional Disruptive Possessions, and only in respect of the foregoing circumstances, the costs of the Owner as set forth in Schedule 19 (Rail Corridor Access) in respect of the foregoing are deemed to be the Actual Costs that are incurred by the Owner Participant in respect of the foregoing circumstances.

## 22.4 Owner's right to cancel or adjust track possessions

- 22.4.1 The Owner reserves the right to cancel or alter the dates and times of the agreed track possessions outside of the boundaries of the Blockade Zone on short notice if this proves necessary because of any Emergency Rail Situation.
- 22.4.2 If a cancellation or alteration occurs under Section 22.4.1:
- 22.4.2.1 the Owner will use reasonable efforts to arrange alternative arrangements as soon as the Owner's program permits; and
- 22.4.2.2 any costs reasonably and actually incurred by the Owner in respect of such alternative arrangements are to be treated as an Actual Cost incurred by the Owner Participant and, for clarity, do not give rise to any adjustment to the Target Outturn Cost.
- 22.4.3 Where a cancellation or alteration occurs under Section 22.4.1 which arises as a result of any act or omission of a Participant, the consequences arising therefrom (including liabilities incurred by the Owner under its contractual arrangements with Third Parties who operate passenger or freight trains anywhere on the Network) are to be treated as Actual Costs of the Owner Participant and, for clarity, do not give rise to any adjustment to the Target Outturn Cost. To the extent a cancellation or alteration occurs under Section 22.4.1 which arises as a result of an act or omission of a Participant, for purposes of calculating the Actual Cost incurred by the Owner under Section 22.4.1 in respect of any Train Delays or Train Cancellations arising therefrom, and only in respect of the foregoing circumstances, the costs of the Owner as set forth in Schedule 19 (Rail Corridor Access) in respect of the foregoing are deemed to be the Actual Costs that are incurred by the Owner Participant in the foregoing circumstances.
- 22.4.4 The Owner reserves the right to cancel or alter the dates and times of the agreed track possessions outside of the boundaries of the Blockade Zone on short notice for any operational reason by providing the Participants with a Notice no later than (i) seven (7) days prior to a Disruptive Possession; and (ii) forty-eight (48) hours prior to a White Period Possession.
- 22.4.5 If a cancellation or alteration occurs under Section 22.4.4:
- 22.4.5.1 the Owner will use reasonable efforts to arrange alternative arrangements as soon as the Owner's program permits; and
- 22.4.5.2 unless the cancellation or alteration arises as a result of any act or omission of a Participant, such will be a Scope Variation, subject to the requirements of Section 27.4 of this Agreement being satisfied.
- 22.4.6 Where a cancellation or alteration occurs under Section 22.4.4, which arises as a result of any act or omission of a Participant, the consequence arising therefrom (including liabilities incurred by the Owner under its contractual arrangements with Third Parties who operate passenger or freight trains anywhere on the Network) are to be treated as Actual Costs of the Owner Participant and, for clarity, do not give rise to any adjustment to the Target Outturn Cost. To the extent a cancellation or alteration occurs under Section 22.4.4 which arises as a result of an act or omission of a Participant for purposes of calculating, the Actual Cost incurred by the Owner under Section 22.4.4 in respect of any Train Delays or Train Cancellations arising therefrom, and only in respect of the foregoing circumstances, the costs of the Owner as set forth in Schedule

19 (Rail Corridor Access) in respect of the foregoing are deemed to be the Actual Costs that are incurred by the Owner Participant in the foregoing circumstances.

## **22.5 Adequate arrangements to complete track possessions**

22.5.1 Where part of the Works has to be carried out during an agreed period of a track possession (other than Works performed within the boundaries of the Blockade Zone), the Participants must ensure that such part can commence as scheduled and can be completed as early as possible, and in any case within that period.

22.5.2 Such arrangements must (i) satisfy and ensure compliance with all rules, restrictions and requirements set forth in the Agreement, including, for clarity, Schedule 19 (Rail Corridor Access) and Section 18 (Safety Requirements); and (ii) include the provision of sufficient and suitable Construction Plant (including where practicable standby equipment) and sufficient labour.

## **22.6 Cancellation of track possessions due to Participant default**

22.6.1 Prior to the commencement of any track possession (other than a track possession to perform Works within the boundaries of the Blockade Zone), if the Owner's Representative considers that the Participants have failed to comply with the requirements of Section 22.5, it may, in its sole and absolute discretion, require the Participants to cease performance of the Works under such track possession and cancel the track possession, or reduce the extent of the work that the Participants may carry out during such track possession, and must notify the Participants accordingly.

22.6.2 A cancellation under this Section 22.6 and the consequences arising therefrom are Actual Cost (whether such Actual Cost is incurred by a Participant or the Owner), and, for clarity, does not give rise to any adjustment to the Target Outturn Cost. For purposes of calculating the Actual Cost incurred by the Owner in respect of a cancellation under Section 22.6.1, the costs of the Owner as set forth in Sections 9(d) and 9(e) of Schedule 19 (Rail Corridor Access) are deemed to be the Actual Costs that are incurred by the Owner Participant in respect of the foregoing circumstances.

22.6.3 The Participants acknowledge that the Owner may incur additional costs as a result of the requirement to use and/or obtain additional track possessions in accordance with this Section 22.6, and that the amount of such costs reasonably and actually incurred by the Owner are to be treated as Actual Cost incurred by the Owner Participant and, for clarity, do not give rise to any adjustment to the Target Outturn Cost. For purposes of calculating the Actual Costs incurred by the Owner to obtain Additional White Period Possessions and Additional Disruptive Possessions as a result of a cancellation of a track possession under Section 22.6.1, the costs of the Owner as set forth in Schedule 19 (Rail Corridor Access) in respect of the foregoing are deemed to be the Actual Costs that are incurred by the Owner Participant in respect of the foregoing circumstances. The Participants acknowledge that the Owner may incur liabilities under its contractual arrangements with Third Parties who operate passenger or freight trains anywhere on the Network as a result of the requirement to use and/or obtain additional track possessions in accordance with this Section 22.6, and that, the amount of such liabilities are to be treated as Actual Cost incurred by the Owner Participant and, for clarity, do not give rise to any adjustment to the Target Outturn Cost.

## **22.7 Adjustment of track possessions due to Participant default**

22.7.1 If, during a track possession (other than a track possession to perform Works within the boundaries of the Blockade Zone), the Owner's Representative is of the opinion

that the Participants will be unable to complete the planned work (or any revision thereof proposed by the Participants) to its satisfaction so as to permit the termination of the track possession at the time agreed, the Owner's Representative may direct the Participants to reduce the extent of or vary the dates and times of the work to be carried out during such track possession.

22.7.2 A reduction or variation directed under Section 22.7.1 and the consequences arising therefrom (including the Owner's costs reasonably and actually incurred in connection with a reduction or variation directed under Section 22.7.1 and including any liabilities incurred by the Owner under its contractual arrangements with Third Parties (including, without limitation, passenger and freight train operators) who operate passenger or freight trains anywhere on the Network) are, in each case, to be treated as Actual Costs incurred by the Owner Participant and, for clarity, do not give rise to any adjustment to the Target Outturn Cost.

22.7.3 The Participants acknowledge that the Owner may incur additional costs as a result of the requirement to use and/or obtain additional track possessions in accordance with this Section 22.7, and that the amount of such costs reasonably and actually incurred by the Owner and the amount of liabilities incurred by the Owner under its contractual arrangements with Third Parties who operate passenger or freight trains anywhere on the Network are, in each case, to be treated as Actual Costs incurred by the Owner Participant and, for clarity, do not give rise to any adjustment to the Target Outturn Cost. For purposes of calculating the Actual Costs incurred by the Owner in respect of the requirement to use or obtain Additional White Period Possessions and Additional Disruptive Possessions in accordance with this Section 22.7, the costs of the Owner set forth in Schedule 19 (Rail Corridor Access) in respect of the foregoing are deemed to be the Actual Costs that are incurred by the Owner Participant in respect of the foregoing circumstances.

## 22.8 **Additional Costs incurred by Owner due to unplanned track interruptions**

The Participants acknowledge that the Owner may incur liabilities under its contractual arrangement with Third Parties who operate passenger or freight trains anywhere on the Network caused by unplanned interruption in the use of track or station areas or other railway infrastructure in the performance by the Participants of their obligations under this Agreement, and that the amount of such costs and liabilities incurred by the Owner are to be treated as Actual Costs incurred by the Owner Participant and, for clarity, do not give rise to any adjustment to the Target Outturn Cost. For purposes of calculating the Actual Costs incurred by the Owner in respect of overrun track possessions (Failure to Vacate – White Period Possession and Failure to Vacate – Disruptive Possession), Train Delays, Train Cancellations, cancellations by a Participant of White Period Possessions, cancellation by a Participant of Disruptive Possessions, and cancellation of possessions by the Owner pursuant to Section 22.6 of the Agreement, and only in respect of the foregoing circumstances, the costs of the Owner set forth in Schedule 19 (Rail Corridor Access) in respect of the foregoing are deemed to be Actual Costs that are incurred by the Owner Participant in the foregoing circumstances.

## 23. **USE OF THE WORKS BY THE OWNER PRIOR TO COMPLETION**

### 23.1 **The Owner's use of the Works pre-completion**

The Owner may at any time direct use of any part of:

23.1.1 the Works (whether or not such part is completed); or

23.1.2 any existing rail infrastructure or assets within, over or adjoining the Site relating to the Works,

prior to Completion of that part of the Works, whether or not such use is contemplated in the VFM Statement or Project Proposal.

## **24. COMPLETION**

### **24.1 Obligation to complete the Works**

The Participants must perform the Works to reach Completion by the Date for Completion.

### **24.2 Issue of Certificate of Completion**

24.2.1 By no later than the date that is 20 Business Days before the date the ALT anticipates that Completion will be reached, the ALT must notify the Owner's Representative of the date when Completion is anticipated to be reached.

24.2.2 As soon as the ALT decides that Completion has been reached, it must notify the Owner's Representative of the date when Completion was reached.

24.2.3 The Owner's Representative must, if it agrees that Completion has been reached, within 20 Business Days after receiving the notification of Completion from the ALT, issue a certificate of Completion ("**Certificate of Completion**") to the Participants, stating the Date of Completion as notified by the ALT.

### **24.3 Disagreement whether Completion has been reached**

24.3.1 If the Owner's Representative does not agree that Completion has been reached, it must, within 20 Business Days after receiving the notification from the ALT, notify the ALT that it disagrees and the reasons why it believes that Completion has not been reached.

24.3.2 The ALT must then ensure that the Participants promptly address the matters specified by the Owner's Representative, and when those matters have been addressed, re-notify the Owner that the ALT has decided that Completion has been reached.

24.3.3 The Owner must then re-consider whether it agrees that Completion has been reached. If the Owner's Representative agrees that Completion has been reached, Section 24.2.3 will apply. If the Owner's Representative does not agree that Completion has been reached, Sections 24.3.1 and 24.3.2 will reapply.

### **24.4 Certificate of Completion does not constitute approval**

The issue of a Certificate of Completion does not constitute approval of the Works.

### **24.5 Delay in reaching Completion**

24.5.1 If Completion has not been achieved by the date falling **[REDACTED]** calendar days after the Date for Completion then, for any period of delay after such date until Completion has been achieved, any and all losses, damages, costs and expenses suffered by the Owner arising out of such delay will be treated by the Owner as Actual Costs for purposes of calculating the Actual Outturn Cost under the Agreement; provided that the maximum amount of such losses, damages, costs and expenses must not exceed **[\$[REDACTED]]** in the aggregate for each day of delay.

24.5.2 For clarity:

24.5.2.1 the NOPs will not be entitled to be reimbursed any Actual Costs, nor paid any Fee, in respect of the losses, damages, costs and expenses of the Owner referred to in Section 24.5.1; and

24.5.2.2 Section 24.5.1 will not prevent the NOPs from being reimbursed any Actual Costs, and being paid any Overhead and Profit, for completing the Works after the Date for Completion in accordance with this Agreement.

## **25. DEFECTS**

### **25.1 Care of the Works during Defects Correction Period**

After the Date of Completion of the Works or (if applicable) a Tranche of the Works and until the end of the applicable Defects Correction Period, the Participants remain responsible to protect the care of outstanding works and services forming part of the Works or (if applicable) the relevant Tranche, from all of the elements, casualty, damage and destruction (including rectification of Defects during such period).

### **25.2 Rectifying Defects and completion of outstanding works**

The Participants are responsible for the:

25.2.1 completion of all parts of the Works which are not completed at the Date of Completion of the Works or (if applicable) a Tranche;

25.2.2 rectification of all Defects existing at the Date of Completion of the Works or (if applicable) a Tranche, or arising during the applicable Defects Correction Period; and

25.2.3 repair, restoration, replacement, or refurbishment, as applicable, of other contractors' work (whether or not such other contractor is engaged by the Owner) that may be destroyed or damaged by the rectification of Defects or the completion of Works not completed at the Date of Completion of the Works or (if applicable) a Tranche.

in each case, as soon as reasonably practicable to the reasonable satisfaction of the Owner, and in any event before the end of the relevant Defects Correction Period.

### **25.3 Actual Cost for rectifying Defects**

The Participants are entitled to the Actual Cost reasonably and necessarily incurred in undertaking their responsibilities for the care and protection of the Works, completing any outstanding Works and rectifying Defects under this Section 25 including during the Defects Correction Period.

### **25.4 Network Operation Issue and Defects**

25.4.1 Without prejudice to the Owner's Reserved Powers under Section 27.3, where a Defect or outstanding work pursuant to this Section 25 is causing a Network Operation Issue, either before or during the Defects Correction Period, the Owner's Representative is entitled to direct the ALT to procure that the Participants undertake any works or services when and as the Owner's Representative considers necessary to prevent, address, alleviate or comply with (as applicable) that Network Operation Issue and the costs of doing so are Actual Cost and, for clarity, do not give rise to any adjustment to the Target Outturn Cost.

25.4.2 Where the ALT or Participants are unable or unwilling to carry out or procure the carrying out of any works or services which the Owner's Representative is entitled to direct under Section 25.4.1 (including where the Owner's Representative requires such works or services to be carried out immediately), the Owner may carry out such works or services itself or procure the carrying out of such works or services by a Third Party and the Owner's reasonable costs of doing so are to be treated as though they were Actual Cost incurred by the Owner Participant and, for clarity, do not give rise to any adjustment to the Target Outturn Cost.

## **25.5 Materials warranties**

25.5.1 The Participants shall obtain warranties from the manufacturers of each of the Materials and items of equipment for a duration and in accordance with the applicable requirements specified in the Project Proposal or as otherwise required by the Owner, in the name of and to the benefit of the Participants and the Owner. Where, in respect of a Materials warranty or equipment warranty, neither (i) the Project Proposal specifies a specific duration and/or other requirements, and (ii) the Owner has not specified applicable warranty requirements, then the Participants shall obtain industry-standard warranties from the applicable manufacturers in the name of and to the benefit of each of the Participants and the Owner which shall extend for no less than the Defects Correction Period. The Participants shall ensure that each Materials warranty and equipment warranty is fully assigned to the Owner at the end of the Defects Correction Period.

## **26. FINAL CERTIFICATE**

### **26.1 Issue of Final Certificate**

The Final Certificate is issued in accordance with Schedule 12 (Payment Procedures), and includes ascertainment and reconciliation of final payments due to or from each NOP and the Owner (as applicable).

### **26.2 Final Certificate is evidence that all payments have been made**

Except in the case of Wilful Default, once payment has been made on the Final Certificate, that certificate is evidence that the Works have been completed in accordance with this Agreement on the Date of Final Completion and that all payments required to be made by the Owner or by each NOP (as the case may be) in respect of the Works have been made in full.

## **DIRECTIONS, SCOPE VARIATIONS AND ADJUSTMENT EVENTS**

### **27. DIRECTIONS**

#### **27.1 Directions by the Owner's Representative only**

27.1.1 Any direction under this Section 27 (including a Scope Variation) may only be instructed by notice from the Owner's Representative.

27.1.2 Any direction purported to be made by the Owner under this Section 27 which is made by a person (whether or not an employee of the Owner) who is not entitled to do so in accordance with Section 27.1.1 is to be disregarded by the Participants and must not be complied with, and any costs incurred by any Participant in complying with any such direction are not recoverable as Actual Cost.



27.1.3 The Participants may rely on Section 27.1.2 to refuse to comply with any direction purported to be made by the Owner which is not in accordance with Section 27.1.1.

## 27.2 Type of directions

The Owner's Representative may by notice to the ALT direct the Participants to:

27.2.1 change the design, specifications or requirements of the whole or any part of the Works;

27.2.2 change the Works or any part of the Works;

27.2.3 increase, decrease or omit any part of the Works;

27.2.4 change the character or quality of any material or work that will form part of the Works;

27.2.5 change the timing of the performance of all or any part of the Works;

27.2.6 change the levels, lines, positions or dimensions of any part of the Works;

27.2.7 change the means, methods or techniques of the performance of all or any part of the Works;

27.2.8 execute additional work;

27.2.9 demolish or remove material or work forming part of the Works no longer required by the Owner;

27.2.10 decrease or omit any part of the Works for any purpose including engaging a third party to perform the Works independently of the Alliance;

27.2.11 change, alter or amend the Scope of Works;

27.2.12 change any specified sequence, method or timing of construction;

27.2.13 change the conditions under which the Works are to be carried out, or

27.2.14 without limiting the Owner's rights to create new Tranches of the Works in accordance with Section 27.6, allow the Owner to use any part of:

27.2.14.1 the Works (whether or not such part is completed); or

27.2.14.2 any existing rail infrastructure or assets within, over or adjoining the Site,

prior to Completion whether or not such use is contemplated in the VFM Statement or Project Proposal,

and the Participants must, subject to obtaining any necessary Consent or amendment to an existing Consent and, in the case of a Scope Variation, the Owner's Representative's acknowledgement of receipt of the relevant Scope Variation Report issued by the ALT under Section 27.5.3, within a reasonable time, implement that direction.

## 27.3 Reserved Powers

27.3.1 Without prejudice to the Owner's rights under Section 27.1, the Participants acknowledge that the final decision on the following matters ("**Reserved Powers**") is reserved for unilateral determination by the Owner's Representative:

27.3.1.1 amendment or substitution of the VFM Statement in accordance with Section 3.3.1;

27.3.1.2 the decision to suspend all or part of the Works under Section 32.2;

27.3.1.3 any decisions, directions or actions the Owner's Representative determines are necessary following any event which significantly impacts on the whole or any part of the Works or the achievement of the VFM Statement;

27.3.1.4 any decisions or matters regarding any actual or threatened legal action, litigation or third party claims arising out of or in connection to this Agreement;

27.3.1.5 any decisions, directions or actions the Owner's Representative determines are necessary following the occurrence of a Network Operation Issue;

27.3.1.6 any decision to create one or more new Tranches of the Works in accordance with Section 27.6.2;

27.3.1.7 any decision, direction, matter, approval or thing expressed under this Agreement as being at the discretion, or the like, of the Owner or the Owner's Representative; and

27.3.1.8 unless otherwise specified, the decision to terminate this Agreement where the Owner has such a right under this Agreement.

27.3.2 The impact, if any, that the exercise of a Reserved Power has on any or all of:

27.3.2.1 the Target Outturn Cost;

27.3.2.2 Key Result Areas; and

27.3.2.3 the Date for Completion,

under this Agreement will be calculated in the manner prescribed by this Agreement, and if no manner is prescribed, as determined by the Owner's Representative following a recommendation from the ALT. If this Agreement does not specify the manner of calculation of the impact, if any, that the exercise of an Owner's Reserved Power has on the matters set out in this Section 27.3.2 and the ALT fails to reach agreement on the recommendation to be made to the Owner under this Section 27.3.2, then the Participants must comply with the procedure set out in Schedule 17 (Issue Resolution Procedures) to resolve the issue.

## 27.4 Scope Variations

27.4.1 A "**Scope Variation**" is a direction issued by the Owner's Representative under this Section 27 which amounts to either:

27.4.1.1 a significant change, amendment or alteration to the Scope of Works; or

- 27.4.1.2 a significant change to the fundamental requirements of the Works (including the conditions under which the Works are to be performed).
- 27.4.2 Examples of when a direction by the Owner's Representative in accordance with Section 27 is also a Scope Variation are set out in the Scope Variation Benchmarking Guidelines.
- 27.4.3 The Participants acknowledge and agree that it is their expectation that Scope Variations are unlikely to occur during the performance of this Agreement (but subject always to and without limiting the Owner's right to create new Tranches of the Works in accordance with Section 27.6.2).

## 27.5 Scope Variation Report

- 27.5.1 Where the AMT considers that a direction by the Owner's Representative under Section 27 (including a direction to create a new Tranche of the Works in accordance with Section 27.6.2) is a Scope Variation, the AMT must, prior to implementation by the Participants of the direction, submit a scope change report ("**Scope Variation Report**") to the ALT:
  - 27.5.1.1 identifying the basis on which it considers the direction to be a Scope Variation;
  - 27.5.1.2 providing submissions or recommendations that it believes are appropriate to reduce and/or optimize the impact of the direction on the Actual Outturn Cost, the Participants' performance against the Key Result Areas and the achievement of Completion by the Date for Completion and compliance by the Participants with the VFM Statement and the Alliance Charter; and
  - 27.5.1.3 providing submissions or recommendations on any alteration to the Target Outturn Cost, Key Result Areas and Date for Completion (as the case may be) which are required as a result of the direction.
- 27.5.2 The ALT will consider any Scope Variation Report submitted to it under Section 27.5 and determine whether the direction the subject of the Scope Variation Report is a Scope Variation having regard to:
  - 27.5.2.1 the Works and the assumptions adopted by the Participants in developing the Project Proposal; and
  - 27.5.2.2 the Scope Variation Benchmarking Guidelines.
- 27.5.3 If the ALT determines that a direction the subject of the Scope Variation Report is a Scope Variation, the ALT must issue that Scope Variation Report to the Owner's Representative.
- 27.5.4 Unless agreed in writing by the Owner's Representative, and subject to Section 27.5.5:
  - 27.5.4.1 the ALT must ensure that no work on a Scope Variation is performed by the Participants until the Owner's Representative has acknowledged receipt of the Scope Variation Report and has elected whether or not the Participants should proceed with the relevant services or works; and
  - 27.5.4.2 a direction by the Owner's Representative under Section 27.4 or a determination by the Owner's Representative under Section 27.6.2 which is

implemented by the Participants prior to the Owner's Representative determining whether a Scope Variation and an Adjustment Event has occurred in accordance with Sections 27 and 28, does not at any time entitle the Participants to an alteration of the Target Outturn Cost, the Key Result Areas or the Date for Completion, and will preclude the Participants from making any claim under this Agreement for an alteration of the Target Outturn Cost, the Key Result Areas or the Date for Completion.

27.5.5 Notwithstanding Section 27.5.4, the Owner's Representative may, at any time and in writing, direct immediate compliance by the Participants with a direction under Section 27.4. Notwithstanding that the ALT may believe that the direction constitutes a Scope Variation, the Participants must immediately comply with the direction and requirements of Sections 27 and 28 (other than Section 27.5.4) will, as necessary or required, apply.

## 27.6 Determination of Tranches

27.6.1 At the Commencement Date, the Works are comprised of the following Tranches:

27.6.1.1 **[None]**

27.6.1.2 **[None]**

27.6.2 Without limiting the Owner's other rights under this Section 27, the Owner's Representative may determine by notice in writing to the Participants that:

27.6.2.1 new additional works are to be incorporated into the Scope of Works; and/or

27.6.2.2 the existing Works under the Agreement are to be divided into two or more discrete packages of work,

in either case so as to create two or more new Tranches of the Works, each with their own Date for Completion.

27.6.3 Where the Works under the Agreement are comprised of two or more Tranches, then:

27.6.3.1 the interpretation of:

- (a) "Certificate of Completion";
- (b) "Completion";
- (c) "Date for Completion";
- (d) "Date of Completion"; and
- (e) "Defects Correction Period",

will apply separately to each Tranche and, where appropriate, references to the "Works" will mean so much of the Works as is comprised in the relevant Tranche;

27.6.3.2 each Tranche will have its own Defects Correction Period; and

27.6.3.3 unless the ALT determines otherwise, the calculation of any Gainshare, Painshare, Performance Liability Amount or Performance Reward Amount (if any and as the case may be) under the Risk or Reward Regime must not occur until the Completion of the whole of the Works (including all Tranches), and subject always to any discretionary payment of Interim Gainshare in accordance with Section 2.2 of Schedule 11 (Risk or Reward Regime) or any discretionary determination of Interim Painshare in accordance with Section 2.4 of Schedule 11 (Risk or Reward Regime).

27.6.4 Where the AMT considers that a determination by the Owner's Representative under Section 27.6.2 constitutes a Scope Variation, the provisions of Sections 27.4 and 27.5 will apply.

## 27.7 **Adjustment to the Target Outturn Cost**

27.7.1 Unless the direction is a Scope Variation, no direction by the Owner's Representative under this Section 27 will result in a change to the Target Outturn Cost, Key Result Areas or Date for Completion.

27.7.2 Other than directions determined by the ALT to be a Scope Variation, the NOPs acknowledge and agree that an amount for directions by the Owner's Representative of the kind contemplated by Section 27 is included in the Risk and Contingency Provision component of the Target Outturn Cost.

## 27.8 **Directions do not invalidate this Agreement**

No direction by the Owner's Representative under this Section 27 will invalidate this Agreement.

## 28. **ADJUSTMENT EVENTS**

### 28.1 **No adjustment of Target Outturn Cost except in accordance with Section 28**

The Target Outturn Cost which has been developed by the Participants and accepted by the Owner in accordance with the Alliance Development Agreement:

28.1.1 is fixed and not subject to adjustment under this Agreement except in accordance with this Section 28; and

28.1.2 is inclusive of all Actual Costs, Overhead, Profit and Risk and Contingency Provision.

### 28.2 **ALT agrees an Adjustment Event has occurred**

If the ALT has reached agreement that an Adjustment Event has occurred, it must:

28.2.1 immediately notify the Owner's Representative of that determination giving detailed reasons for reaching such agreement; and

28.2.2 as soon as reasonably practicable, provide full details of any consequential proposed adjustments to the Target Outturn Cost, Key Result Areas or Date for Completion.

### 28.3 **ALT to determine adjustment to Target Outturn Cost**

28.3.1 Following or with any determination under Section 28.2, the ALT must, working with the Alliance Auditor, determine any adjustment to the Target Outturn Cost, Key Result Areas and Date for Completion which needs to be made in accordance with this Agreement.

- 28.3.2 The ALT, in determining an adjustment to the Target Outturn Cost, Key Result Areas and Date for Completion under Section 28.2, must have regard to:
- 28.3.2.1 the provisions of this Agreement (including Annex 2 of Schedule 10, the Scope Variation Benchmarking Guidelines and the Adjustment Event Guidelines).
  - 28.3.2.2 the recommendations and verifications of the Alliance Auditor in respect of any such proposed adjustment;
  - 28.3.2.3 the assumptions adopted by the Participants in the Project Proposal (including the Target Outturn Cost or any part thereof) and approved by the Owner's Representative in writing so as to ensure that any adjustment to the Target Outturn Cost, Key Result Areas or Date for Completion is Best For Project;
  - 28.3.2.4 the Owner's timing requirements and the Date for Completion being of fundamental importance in respect of the carrying out of the Works; and
  - 28.3.2.5 any other matters considered relevant by the ALT in making a Best For Project determination.
- 28.3.3 Upon making any determination under this Section 28 the ALT must, in respect of adjustments to the Target Outturn Cost which will result in the PAA Project Estimate Limit to be exceeded, promptly make a recommendation to the Owner's Representative for its approval (or otherwise) (which recommendation must include all supporting information relating to the recommendation). The Owner's Representative must make its determination in respect of any recommendation from the ALT under this Section 28.3.3 within a reasonable time.
- 28.3.4 In respect of recommended adjustments to the Target Outturn Cost (as determined by the ALT pursuant to Section 28.3.2) which will not result in the PAA Project Estimate Limit to be exceeded, such matter is to be determined by the ALT, and not the Owner, and the ALT will issue a notice to the Owner's Representative and the Participants in respect of the effect of the Adjustment Event on the Target Outturn Cost, Key Result Areas or Date for Completion (as the case may be) and the Target Outturn Cost, Key Result Areas or the Date for Completion (as the case may be) will be adjusted as required by the ALT.

#### **28.4 Owner's Representative's approval of adjustment to Target Outturn Cost**

- 28.4.1 If the Owner's Representative, acting reasonably, approves the ALT's recommendation under Section 28.3.3, then the Owner's Representative will issue a notice to the ALT approving the effect of the Adjustment Event on the Target Outturn Cost, Key Result Areas or Date for Completion (as the case may be) and the Target Outturn Cost, Key Result Areas or Date for Completion (as the case may be) will be adjusted as recommended by the ALT.
- 28.4.2 If the Owner's Representative, acting reasonably, does not approve the ALT's recommendation under Section 28.3.3, the Owner's Representative will issue a notice to the ALT not approving the effect of the Adjustment Event on the Target Outturn Cost, Key Result Areas or Date for Completion (as the case may be) and providing its reasons for not approving the recommendation. The ALT must consider the reasons provided and resubmit its recommendation to the Owner for approval (or otherwise). For clarity, it will be a relevant consideration as to whether the Owner's Representative shall be considered to be acting reasonably for the purposes of this Section 28.4.2 where the Adjustment Event will result in increases in the Target Outturn Cost beyond

the PAA Project Estimate Limit which will require the Owner to secure additional funding for the Works.

## **28.5 Disagreement between ALT and Owner's Representative**

28.5.1 If the ALT disputes any notification by the Owner's Representative under Section 28.4.2, it may refer that matter to be determined by the Expert under Schedule 17 (Issue Resolution Procedures) on the basis of:

28.5.1.1 the circumstances and events notified by the ALT to the Owner's Representative under Section 28.3.3; and

28.5.1.2 the reasons given by the Owner's Representative under Section 28.4.2,

and if the Expert determines that an Adjustment Event has occurred, the Target Outturn Cost, Key Result Area and/or Date for Completion must be adjusted as determined by the Expert pursuant to Schedule 17 (Issue Resolution Procedures).

## **28.6 Participants to mitigate effects of an Adjustment Event**

The Participants must take every reasonable measure available to them to:

28.6.1 mitigate or avoid any adverse or prejudicial effects; and/or

28.6.2 optimize any improvement or positive effects;

of the acts, events or circumstances giving rise to or contributing to the Adjustment Event.

## **PAYMENT, REPORTING AND AUDITING**

### **29. PAYMENT**

#### **29.1 General principles of payment**

29.1.1 Payments are determined and made to or by each NOP individually.

29.1.2 Actual Cost determined in respect of the Owner Participant or the Owner under this Agreement are not payments made and are accounted for as notional payments for determining the Actual Cost incurred by the Owner and the Owner Participant for the purposes of the Risk or Reward Regime.

29.1.3 For the purpose of this Agreement, payments made by electronic transfer shall be deemed to have been made on the day and at the time the electronic transfer is initiated, as confirmed by the initiating bank by a confirmation setting out the details of the transfer.

#### **29.2 Payment of Actual Cost and Fee**

Payments of Actual Cost and Fee are determined in accordance with Schedule 9 (Actual Cost) and Schedule 10 (Fee), and paid under Schedule 12 (Payment Procedures).

#### **29.3 Payment under Risk or Reward Regime**

Payments under the Risk or Reward Regime are determined in accordance with Schedule 11 (Risk or Reward Regime) and paid under Schedule 12 (Payment Procedures).

#### 29.4 **Sole right to payment**

Unless otherwise expressly provided in this Agreement, no matter what events, circumstances, contingencies, conditions, or degree of difficulty is encountered by the Participants in performing the Works, each NOP's entitlement, and only entitlement, to payment by the Owner for the Works is as set out and determined in Schedule 9 (Actual Cost), Schedule 10 (Fee) and Schedule 11 (Risk or Reward Regime) and paid under Schedule 12 (Payment Procedures).

#### 29.5 **Payment is not evidence of satisfactory workmanship**

Subject to Sections 26.2 and 41 and Section 8.6 of Schedule 12 (Payment Procedures), payment of monies is not evidence of the value of the Works, or that the Works have been executed satisfactorily, or an admission of liability, and is payment on account only.

#### 29.6 **Suspension of payment of Overhead and Profit**

29.6.1 If, following receipt of a periodic earned value report under Section 31.3.4, a recommendation from the ALT or otherwise, it is evident to the Owner (and it has been confirmed by the Alliance Auditor) that the aggregate of the Actual Outturn Cost of performing the Works under this Agreement has exceeded or is likely to exceed the Target Outturn Cost, then the Owner's Representative may immediately, by notice in writing to the NOPs, suspend the payment of, but not the entitlement to, Overhead and Profit to the NOPs to the extent necessary to cover the NOPs' potential liability to pay any Painshare under Schedule 11 (Risk or Reward Regime).

29.6.2 Subject to Section 29.6.3, the suspension of payment of Overhead and Profit to the NOPs under Section 29.6.1:

29.6.2.1 will be effective for the period commencing on the date specified by the Owner's Representative and ending on the Date of Final Completion; and

29.6.2.2 must not exceed each NOP's potential liability to pay Painshare under Schedule 11 (Risk or Reward Regime), having regard to the amount by which the Actual Outturn Cost of performing the Works has exceeded or is likely to exceed the Target Outturn Cost (as confirmed by the Alliance Auditor).

29.6.3 If, following receipt of a further periodic earned value report under Section 31.3.4, it is confirmed by the Alliance Auditor that the aggregate of the Actual Outturn Cost of performing the Works under this Agreement has not exceeded (or is no longer likely to exceed) the Target Outturn Cost, then:

29.6.3.1 the Owner's Representative must, by notice in writing to the NOPs resume the payment of, Overhead and Profit to the NOPs; and

29.6.3.2 the Owner will make payment in accordance with Schedule 12 (Payment Procedures) of any Overhead and Profit previously the subject of a suspension under Section 29.6.1, and to which the NOPs are otherwise entitled in accordance with this Agreement.

#### 29.7 **Overhead and Profit not applicable to matters referred to ALT Appointed Expert**

29.7.1 Notwithstanding any other provision of this Agreement, Overhead and Profit shall not be applicable to any Actual Costs incurred by a Participant as a result of a referral of any matter to an ALT Appointed Expert in accordance with Section 3 of Schedule 17 (Issue Resolution Procedures).



### **30. BENCHMARK PERFORMANCE OF THE PARTICIPANTS**

#### **30.1 Benchmarking to demonstrate value for money**

- 30.1.1 The Participants acknowledge that it is the fundamental obligation of the Participants to demonstrate, ensure and deliver value for money in performing the Works.
- 30.1.2 To demonstrate that value for money outcomes are and will be achieved under this Agreement, the Participants have agreed that the Owner may benchmark the performance of each Participant against the performance of other works or projects similar to the Project.
- 30.1.3 The Owner must share the results of any benchmarking exercise with the ALT unless it is able to demonstrate (acting reasonably) that disclosure of any information within the results would cause it to be in breach of a Statutory Requirement, a breach of recognized best practice corporate governance guidelines or its existing confidentiality obligations.
- 30.1.4 In the event that disclosure of any information contained within the benchmarking exercise by the Owner to the ALT would, in the reasonable opinion of the Owner, cause it to be in breach of a Statutory Requirement, a breach of recognized best practice corporate governance guidelines or its existing confidentiality obligations, the Owner shall only be required to share with the ALT a version of the results from which any such information has been redacted or deleted or provide it in a form where it would not breach such requirements (e.g. anonymized and/or aggregated where applicable).

#### **30.2 Disclosure of information for benchmarking**

- 30.2.1 Subject to any Applicable Law preventing disclosure of information, the Participants agree that, for the purposes of benchmarking the performance of the Participants, they will, in a manner consistent with the Alliance Charter, fully disclose all information relating to the actual outturn performance of all aspects of this Agreement, other than that which the ALT determines, in consultation with the Owner's Representative, is genuinely commercial in confidence or financially sensitive ("**Sensitive Information**").
- 30.2.2 Where the ALT determines, in consultation with the Owner's Representative, that information is Sensitive Information, the ALT will determine an acceptable and appropriate manner to mask and/or protect the commercial in confidence or financially sensitive nature of the Sensitive Information but will still be obliged to share the Sensitive Information for the purposes of benchmarking the actual outturn performance of all aspects of this Agreement.
- 30.2.3 Any information determined by the ALT as being Sensitive Information must not be utilized or further disclosed by any member of the ALT outside of the ALT and must only be used by the members of the ALT solely for the purpose of performing their obligations as members of the ALT.
- 30.2.4 Any breach by any member of the ALT of the obligations set out in Section 30.2.3 is a Default by the Participant which that ALT member represents for the purpose of Section 33.1.

#### **30.3 Exemption to disclosure for benchmarking**

- 30.3.1 Nothing in Sections 30.1 and 30.2 will oblige a Participant to make a disclosure of information where the ALT determines that to do so would, or could potentially, involve

a breach of a Statutory Requirement, a breach of recognized best practice corporate governance guidelines or a Participant's existing confidentiality obligations.

30.3.2 In the event that a Participant seeks to invoke and rely upon the exemption from disclosure set out in Section 30.3.1, the ALT representative of that Participant must notify the other ALT representatives of the ALT of:

30.3.2.1 the nature of the information which the ALT representative intends not to disclose; and

30.3.2.2 the genuine reasons for non-disclosure,

and the ALT will consult with that Participant in order to determine whether the information can be provided in a form which would not breach a Statutory Requirement, recognized best practice corporate governance guidelines or that Participant's existing confidentiality obligations or whether the exemption from disclosure set out in Section 30.3 will apply to the information.

## **31. REPORTS, RECORDS, ACCESS AND AUDIT**

### **31.1 Retention of Records**

31.1.1 The Participants must maintain for the Relevant Period:

31.1.1.1 an adequate internal control system (including policies, controls and procedures) for the effective planning, performance and reporting of the Works in accordance with this Agreement;

31.1.1.2 books of account kept in accordance with Canadian GAAP and Good Industry Practice which, among other things, clearly show the amounts that are payable by the Owner under this Agreement and ledgers solely related to the performance of the Works; and

31.1.1.3 all of their records and other documentation referred to in this Agreement that relate to the Works, at the principal place of business in Ontario of any NOP, and in electronic format in accordance with Owner's designated record keeping system.

31.1.2 The Participants must maintain for the Relevant Period a complete set of:

31.1.2.1 all records which show how the Target Outturn Cost was calculated and how any Adjustment Events were valued for the purposes of Section 28;

31.1.2.2 all purchase orders, invoices, accounts, records, bank statements, cost records, timesheets, expenses incurred (to the extent they relate to the Works) under Canadian GAAP showing all of the Actual Cost reasonably and actually incurred in the performance of the Works; and

31.1.2.3 all correspondence, tenders, Subcontracts, minutes of meetings, notes, reports, manuals, plans, certificates, drawings, notices, as-constructed information and all other documentation associated with the Works.

## 31.2 **Audit by the Alliance Auditor**

- 31.2.1 The ALT must maintain the appointment of an independent alliance auditor to undertake the regular audit of the Actual Cost and Fee, the application of the Risk or Reward Regime and any audit of the type required or permitted under this Section 31.
- 31.2.2 The minimum scope of audit is set out in the VFM Statement.
- 31.2.3 The ALT may appoint, remove and replace an Alliance Auditor at any time, and must do so if an existing Alliance Auditor retires, dies or is otherwise removed.
- 31.2.4 The Alliance Auditor must undertake such audits as may be directed by the ALT and the costs of doing so are Actual Cost and do not give rise to any adjustment to the Target Outturn Cost.
- 31.2.5 The Alliance Auditor may inspect and audit documentation referred to in Section 31.1 and during the Relevant Period:
- 31.2.5.1 at the times identified in the audit plan to be developed by the Alliance Auditor promptly after the Commencement Date and approved by the ALT; or
- 31.2.5.2 at any other time as required by the ALT.
- 31.2.6 The ALT must procure that the Alliance Auditor develops and thereafter maintains an audit plan promptly after his or her appointment.
- 31.2.7 The Owner may at any time require the ALT to procure that the Alliance Auditor carries out any audit permitted by this Section 31.2 within such period as the Owner's Representative may reasonably specify. Any costs incurred by the Owner or the Alliance Auditor in relation to any such request or audit are to be borne or paid by the Owner and are not Actual Cost.
- 31.2.8 The ALT must procure that any audit undertaken by the Alliance Auditor is made available to all Participants and the Owner.
- 31.2.9 Each Participant and the Owner (but only to the extent such access relates to the audit of any Actual Cost incurred by the Owner or Owner Participant) must provide the Alliance Auditor with proper access to their personnel and facilities and all assistance required to enable the Alliance Auditor to undertake any audit of the kind set out in this Section 31.2.
- 31.2.10 For the purposes of this Section 31.2, the Participants and the Owner's Representative (but only to the extent such access relates to the audit of any Actual Cost incurred by the Owner or Owner Participant) will on request provide whatever records, documents, access, facilities or assistance is necessary to conduct whatever audit, inspection, transcription, investigation or copying is required by the Alliance Auditor for the purposes of an audit under this Section 31.2.
- 31.2.11 The Participant who holds the original of any of the records referred to in Section 31.1 must on request, make them available to the Alliance Auditor.
- 31.2.12 If an audit under this Section reveals that any Participant is in Default (as that term is defined in Section 33.1), then without limiting any other rights and obligations of a Participant, the Participant in Default is responsible for all costs incurred by the Alliance

Auditor undertaking the audit and those costs are not Actual Cost and Sections 6.2 and 6.3 does not apply to the recovery of such costs.

- 31.2.13 In the course of an audit under Section 31.2, the Alliance Auditor may:
- 31.2.13.1 review and assess the reliability, integrity, timeliness and accuracy of financial operating information relating to the Works, and the means and systems used to identify, measure, classify and report such information; and
  - 31.2.13.2 interview relevant staff of the Participants and the Owner (but only to the extent such interview relates to the audit of any Actual Cost incurred by the Owner or any Participant).
- 31.2.14 At the conclusion of any audit under Section 31.2, the ALT must, acting reasonably, determine the actions (if any) required to be taken by any Participant to rectify problems, weaknesses, deficiencies or non-compliance detected during the audit.
- 31.2.15 Any records or documents provided to the Alliance Auditor or to which the Alliance Auditor has access to or any information obtained through any audit under this Section 31.2 must be treated as Confidential Information in accordance with Section 47.9.
- 31.2.16 If this Agreement is terminated or if a Defaulting Participant is excluded under Section 35 and Schedule 16 (Exclusion and Termination), each NOP or the NOP which is the Defaulting Participant (as the case may be) must give the Owner's Representative any records referred to in Sections 31.1.1 and 31.1.2 and must allow the Owner access to those books of account and records for the Relevant Period.

### 31.3 Reporting requirements

Unless otherwise stated in the Project Proposal, the Participants must ensure that the Alliance Director (using the AMT) prepares, as a minimum, the following reports for the Project:

- 31.3.1 Work Status Reports, including a Progress Works Schedule and an updated Works Schedule Assumptions Report;
- 31.3.2 Key Result Areas performance reports;
- 31.3.3 an updated health and safety report (including accident frequency reports and safety statistics as required by the VFM Statement and Project Proposal);
- 31.3.4 periodic earned value reports which must include:
  - 31.3.4.1 a reconciliation, as at the date of the report, of the Actual Outturn Cost of performing the Works against the Target Outturn Cost;
  - 31.3.4.2 any innovations or breakthroughs which have been made or opportunities which have been realized by the Participants in performing the Works and any innovations or breakthroughs or opportunities which are forecast to be made or realized by the Participants (including as set out in the Alliance Risk and Opportunity Report);
  - 31.3.4.3 the Participants' risk management performance in performing the Works as against the Risk and Contingency Provision; and

31.3.4.4 any material errors or mistakes which have been made in the development of the Target Outturn Cost and identified by the Participants,

in each case, containing the requirements set forth in this Agreement and otherwise as specified by the Owner Participant; and

31.3.5 periodic cash flow statements covering a 28 day rolling period relating to the Works, in a format and at times determined by the AMT after consultation with the Owner's Representative.

#### **31.4 Content of Works Status Reports**

31.4.1 The Participants must procure that Works Status Reports for the Works are submitted in such form and detail as is notified by the Owner's Representative showing:

31.4.1.1 work completed, including a Progress Works Schedule and an updated Works Schedule Assumptions Report;

31.4.1.2 work to be completed;

31.4.1.3 summary of the Actual Cost relating to the work completed (including accrued costs);

31.4.1.4 the earned value calculation based upon the approved integrated program;

31.4.1.5 forecast schedule to Completion;

31.4.1.6 forecast Actual Cost to Completion and Date of Final Completion;

31.4.1.7 update report of the Alliance Risk and Opportunity Report;

31.4.1.8 cash flow forecast up to Completion and Date of Final Completion;

31.4.1.9 current change register for Scope Variations and Adjustment Events;

31.4.1.10 current Target Outturn Costs and forecast Gainshare and/or Painshare (if any); and

31.4.1.11 any other matters set forth in the Project Proposal.

#### **31.5 Reporting to the Owner**

31.5.1 The results of any audit by the Alliance Auditor under Section 31.2 and each report prepared under Section 31.3 must be promptly copied to the Owner's Representative.

31.5.2 The NOPs shall, promptly after receipt thereof, provide the Owner's Representative with a copy of any material notice, order, direction, requirement or other similar communication received by it or by any Subcontractor from any Governmental Authority in relation to the Works, Lands and Additional Lands (if any), and the NOPs shall include relevant terms in all Subcontracts to this effect.

## 31.6 **Cost control and recording**

The ALT must ensure that cost control and cost recovery is in accordance with the VFM Statement and Project Proposal.

## 31.7 **Owner's Rights**

31.7.1 Owner's rights pursuant to this Section 31 shall not limit or restrict any Governmental Authority's right of review, audit, information or inspection under Applicable Law. Owner's rights pursuant to this Section 31 may also be exercised by the Auditor General of Ontario, Her Majesty the Queen in right of Canada and the Auditor General of Canada without the requirement for further action on the part of the Owner.

31.7.2 Without limiting the generality of Section 31 and subject to Sections 47.9.1 and 47.9.4.1, in the event the Owner is required to provide information, including financial information, in relation to the Project, to the Province for corporate or financial reporting purposes, the NOPs shall provide such information to the Owner's Representative as the Owner's Representative may reasonably require in order to comply with its corporate or financial reporting obligations.

## 31.8 **Works Schedule Assumptions Report**

31.8.1 The Works Schedule Assumptions Report shall include (without limitation) the following report sections and related content, at a minimum:

31.8.1.1 Cover page including title "Assumptions Report", the project title, date of the report, issuance date, version date, and the version number of the relevant Baseline Works Schedule or Progress Works Schedule, and the ALT members signature approving the report;

31.8.1.2 "1. Implementation Strategy", including a written narrative of no more than 750 words describing the overall approach, proposed sequencing and work plan to complete the Works required to achieve Completion;

31.8.1.3 "2. Critical Path Risk", including a narrative in tabular form describing the risks to completing the critical path activities to achieve Completion, and Participants' strategy to mitigate or avoid these risks;

31.8.1.4 "3. Planned Working Calendar", including a table defining each of the schedule calendars. For each calendar include the work days (days of the week), normal working hours, number and hours of any shifts, and a list of all assumed non-working days for any part of the Works (such as holidays and environment restricted work windows);

31.8.1.5 "4. Means and Methods", including an executive summary of the intended means and methods for all major elements (key works activities and primary works activities) and include for each a short narrative on the type of work, any constructability issues and if the work will be self-performed by NOPs or sub-contracted; and

31.8.1.6 "5. Resource Plan", including:

- (a) Number of teams and team composition (i.e. manpower requirements) including subcontractor work;

- (b) Number and type of heavy machinery or equipment;
- (c) Anticipated resource constraints (such as union related constraints and limits to the number of any specific heavy machinery available in the region); and
- (d) A written narrative of no more than 250 words describing how NOPs intends to meet the resource requirements.

31.8.2 The Works Schedule Assumptions Report shall be updated to reflect any changes to the Progress Works Schedule in the period.

## **SUSPENSION, DEFAULT, EXPULSION AND TERMINATION**

### **32. SUSPENSION**

#### **32.1 Suspension by the Participants**

Unless agreed otherwise with the Owner, and without prejudice to the right of any NOP (subject to and in accordance with Section 11.2 of Schedule 12 (Payment Procedures)) to suspend the whole or any part of the Works for non-payment, the Participants may only suspend the whole or any part of the Works if there is a real risk of:

- 32.1.1 injury to persons;
- 32.1.2 damage to the Environment in breach of any Statutory Requirement; or
- 32.1.3 material physical damage to any third party property or property of the Owner (other than the Works).

#### **32.2 Suspension by the Owner**

If the Owner considers that suspension of the whole or part of the Works is necessary or appropriate for any reason, the Owner's Representative may direct the Participants in writing to immediately suspend the progress of the whole or any part of the Works for the period specified by the Owner's Representative in writing, and the Participants must promptly suspend the Works.

#### **32.3 Costs of suspension**

The Owner must continue to pay any Actual Costs and Fee due during the period of suspension for the Project if:

- 32.3.1 the Owner's Representative directs suspension (other than as a result of a breach of this Agreement by a NOP or where the suspension is necessary to ensure that the Works comply with the requirements of this Agreement); or
- 32.3.2 the Participants suspend the whole or any part of the Works under Section 32.1.

#### **32.4 Adjustment Event arising from certain suspensions**

If the Owner's Representative directs suspension of the whole or any part of the Works (other than as a result of a breach of this Agreement by a NOP or where the suspension is necessary to ensure that the Works comply with the requirements of this Agreement), that suspension will be an Adjustment Event.

### 32.5 Re-mobilize after suspension

When the Owner becomes aware that the reason for suspension of the whole or any part of the Works no longer exists, the Owner's Representative must direct the Participants to recommence the whole or the relevant part of the Works and the Participants must recommence those Works at the time directed by the Owner's Representative or, if no time is stated, within a reasonable time after the direction.

## 33. DEFAULT NOTICE

### 33.1 Default by a Participant

33.1.1 Sections 33.2 or 33.4 applies if:

33.1.1.1 any Participant commits a Wilful Default;

33.1.1.2 any Participant commits any material breach of Sections 18.1, 18.2, 31, 37, 38, 42, 47.7, 47.8, 47.9, 47.10, 47.14, or 47.17, whether or not amounting to a Wilful Default;

33.1.1.3 any NOP commits a breach of Section 18.3, whether or not amounting to a Wilful Default; or

33.1.1.4 any NOP is the subject of an Insolvency Event (including in the circumstances described in Section 33.1.2),

(each a "**Defaulting Participant**" and each event a "**Default**").

33.1.2 For the purposes of Section 33.1.1.4, a NOP will be subject to an Insolvency Event if:

33.1.2.1 in the case of any NOP:

- (a) a guarantor under a parent company guarantee provided by it in accordance with Section 42;
- (b) where the NOP is an Unincorporated Joint Venture, one of its members; or
- (c) where the NOP is an incorporated joint venture, one of the joint venture shareholders,

is the subject of an Insolvency Event.

### 33.2 Default Notice due to Default by a NOP

Where a NOP is the Defaulting Participant, the Owner's Representative may give notice to the Defaulting Participant and each other Participant of:

33.2.1 the Default and of its intention to exercise its rights under Section 1.1.1 or 2.1.1 of Schedule 16 (Exclusion and Termination) on the expiration of 15 Business Days if the Default is capable of being rectified but is not rectified within the 15 Business Days period; or



33.2.2 its intention to exercise its rights under Section 1.1.1 or 2.1.1 of Schedule 16 (Exclusion and Termination) immediately if the Default is not capable of being rectified, or in the case of an Insolvency Event,

and a notice given under this Section 33.2 must specify that it is a Default Notice.

### **33.3 Default Notice due to Default by the Owner Participant**

Where the Owner Participant is the Defaulting Participant, any NOP may give notice to the Owner's Representative, the Defaulting Participant and each other NOP of:

33.3.1 the Default and of its intention to exercise its rights under Section 2.2.1 of Schedule 16 (Exclusion and Termination) on the expiration of 15 Business Days if the Default is capable of being rectified but is not rectified within the 15 Business Days period; or

33.3.2 its intention to exercise its rights under Section 2.2.1 of Schedule 16 (Exclusion and Termination) immediately if the Default is not capable of being rectified,

and a notice given under this Section 33.3 must specify that it is a Default Notice.

### **33.4 Payment on termination for Default**

33.4.1 If this Agreement is terminated under Sections 33.2 or 33.3 the provisions of Section 2 of Schedule 16 (Exclusion and Termination) shall apply and, subject to the Owner's rights under or in connection with this Agreement:

33.4.1.1 the Owner must pay each NOP; or

33.4.1.2 each NOP must pay the Owner,

(as the case may be), an amount calculated or decided under Section 2 of Schedule 16 (Exclusion and Termination).

33.4.2 The Participants must take all reasonable steps to minimize and mitigate any costs incurred by them arising from termination of this Agreement under Section 33.4.1.

## **34. NO FAULT TERMINATION**

### **34.1 The Owner's right to terminate at any time**

34.1.1 The Owner may terminate this Agreement at any time by serving a notice in writing on each of the NOPs.

### **34.2 Payment on no fault termination**

34.2.1 If the Owner elects to terminate this Agreement under Section 34.1, subject to the Owner's rights under or in connection with this Agreement:

34.2.1.1 the Owner must pay each NOP; or

34.2.1.2 each NOP must pay the Owner,

(as the case may be), an amount calculated or decided under Section 3 of Schedule 16 (Exclusion and Termination).

34.2.2 The Participants must take all reasonable steps to minimize and mitigate any costs incurred by them arising from termination of this Agreement under Section 34.1.

### 34.3 Release agreement

Upon payment of any termination payment by the Owner to each NOP or each NOP to the Owner (as the case may be) under Section 34.2, the Owner and each NOP must enter into a release agreement under which the Owner and each NOP:

34.3.1 agree that all payments required to be made by the Owner or by each NOP (as the case may be) in respect of this Agreement have been made in full; and

34.3.2 release each other from any claims arising out or on in connection with this Agreement other than any claims arising out of Sections 31, 37, 38, 43, 45, 47.9, 47.10, 47.14, 47.15 and 47.17.

## 35. EXCLUSION OF DEFAULTING PARTICIPANT

### 35.1 Exclusion of Defaulting Participant

The provisions relating to exclusion by the Owner of a Defaulting Participant are at Section 1 of Schedule 16 (Exclusion and Termination).

## 36. CONSEQUENCES OF TERMINATION

### 36.1 Immediate cessation of Works

If this Agreement is terminated for any reason, the Participants must immediately at the date of the Termination Notice cease all Works under this Agreement, except to the extent:

36.1.1 agreed otherwise by the Owner and the ALT prior to the date of the Termination Notice; or

36.1.2 work and/or services are to be performed by the Participants under Sections 36.2 and/or 36.4.

### 36.2 The Owner's directions on termination

If this Agreement is terminated for any reason, the Participants must promptly comply with any directions by the Owner including, and to the extent directed, to:

36.2.1 protect property in the possession of any NOP in which the Owner has or may acquire an interest;

36.2.2 demobilize from the Site persons, Construction Plant, vehicles, equipment and other things;

36.2.3 assign or novate to the Owner all rights and benefits under contracts with Third Parties;

36.2.4 deliver to the Owner (to the extent that such items have not already been delivered to the Owner) one complete set of Intellectual Property, including without limitation, the licences set forth in Section 43) relating to the design, construction and completion of the Works; and

36.2.5 provide the Owner with drawings, documents (including Participant Documents), the Project Proposal, design, any other information, samples, models, patterns and the like relating to the Project.

### 36.3 **The Owner's right to continue with others**

If this Agreement is terminated for any reason, the NOPs acknowledge and agree that the Owner is entitled to continue with the Works and the Project:

36.3.1 with entirely new contractors and/or consultants; or

36.3.2 on an alliance, conventional contractual or any other basis that the Owner may decide,

and each NOP must do all things and execute all further documents necessary to ensure that the Owner is entitled to continue with the Works and the Project in the manner set out in this Section 36.3 within the time period prescribed by the Owner.

### 36.4 **Materials, Construction Plant etc. on default termination**

If this Agreement is terminated by the Owner for Default by a NOP pursuant to Section 2.1 of Schedule 16 (Exclusion and Termination), any NOP that is a Defaulting Participant must provide the Owner with possession of all Materials, Construction Plant, vehicles, equipment and other things on the Site or off-site, which are required by the Owner for the purpose of, and for such time as necessary, to complete the Works.

### 36.5 **Survival clause**

Sections 5.1, 6, 29, 31, 33.4, 34, 35, 36, 37, 38, 39, 40, 43, 44, 45, 47.3, 47.4, 47.6, 47.7, 47.9, 47.10, 47.14, 47.15, 47.17 and 49 together with Schedule 9 (Actual Cost), Schedule 10 (Fee), Schedule 11 (Risk or Reward Regime), Schedule 12 (Payment Procedures) and Schedule 16 (Exclusion and Termination):

36.5.1 survive the termination of this Agreement; and

36.5.2 without prejudice to Schedule 16 (Exclusion and Termination), continue to bind an Excluded NOP.

## **INSURANCES, BONDING, INDEMNITIES AND LIABILITIES**

### **37. INSURANCES**

#### **37.1 The Owner insurances**

37.1.1 The Owner shall comply with the provisions of Schedule 13 (Insurance Policies and Bonds).

37.1.2 The Owner will take out on or prior to the Commencement Date and maintain the insurance policies set out in Section 1.1 of Schedule 13 (Insurance Policies and Bonds). The costs reasonably and actually incurred by the Owner in obtaining and maintaining the insurance policies set out in Section 1.1 of Schedule 13 (Insurance Policies and Bonds) are to be treated as Actual Cost incurred by the Owner Participant and, for clarity, do not give rise to any adjustment to the Target Outturn Cost. The Owner may, upon request of the ALT, be required to increase the policy limits in respect of the insurances (or any of them) set out in Section 1.1 of Schedule 13 (Insurance Policies and Bonds), and the costs reasonably and actually incurred by the

Owner in respect of increasing such limit amounts are to be treated as Actual Cost incurred by the Owner Participant and, for clarity, do not give rise to an adjustment to the Target Outturn Cost.

37.1.3 The NOPs acknowledge and agree that when the Owner has taken out the insurance policies set out in Section 1.1 of Schedule 13 (Insurance Policies and Bonds), the NOPs will accept those insurance policies in full satisfaction of the Owner's obligation to insure as imposed by Section 37.1.2 (as it relates to insurance policies set out in Section 1.1 of Schedule 13 (Insurance Policies and Bonds)).

37.1.4 Prior to the Commencement Date, the Owner must make available to the Participants certificates of insurance evidencing that the insurance policies required to be taken out by it under Section 1.1 of Schedule 13 (Insurance Policies and Bonds) have been taken out and are in full force and effect.

### **37.2 Insurance to be taken out by each NOP**

37.2.1 Each NOP shall comply with the provisions of Schedule 13 (Insurance Policies and Bonds).

37.2.2 Each NOP must take out on or prior to the date of this Agreement and maintain the insurance policies set out in Section 1.2 of Schedule 13 (Insurance Policies and Bonds).

37.2.3 Each NOP is free to take out and maintain any other insurance policies they consider necessary in respect of the Works or which they are required to maintain (or cause to be obtained and maintained) by Applicable Law, but the costs of such other insurance policies (including, for clarity, payment of any deductibles thereunder) will not be treated as Actual Cost under this Agreement.

37.2.4 Prior to the Commencement Date, each NOP must make available to the other Participants and the Owner certificates of insurance evidencing that the insurance policies required to be taken out by it under Section 1.2 of Schedule 13 have been taken out and are in full force and effect. Notwithstanding the foregoing, upon request by the Owner's Representative at any time, the NOPs shall provide the Owner with certified copies of insurance in respect of any insurance policies required to be taken out by it under Section 37.2.

### **37.3 No relief from obligations under this Agreement**

Taking out and maintaining the insurance policies required by this Agreement does not in any way limit the liabilities, responsibilities and obligations of the Participants under other provisions of this Agreement.

### **37.4 Insurance claims procedure**

Each Participant must comply with the Insurance Claims Notification and Handling Instructions in the Project Insurance Manual annexed to Schedule 13 (Insurance Policies and Bonds), as may be re-issued and amended by the Owner from time to time, unless the ALT agrees otherwise.

### **37.5 Participants' responsibilities**

At all times the Participants (to the extent applicable) are responsible for complying with the terms and conditions of the policies taken out under this Agreement and, without derogating from any

other obligations under this Agreement, must ensure that their employees, Subcontractors and Subcontractors' employees are made aware of, and comply with, these terms and conditions.

### **37.6 Payment of Deductibles**

- 37.6.1 Each NOP is responsible for the payment of deductibles applicable to those policies effected by that NOP under Section 37.2.2 and such payment will be treated as an Actual Cost. For clarity, the payment of any deductible in accordance with this Section will not alter or lead to a change to the Target Outturn Cost.
- 37.6.2 The Owner is responsible for the payment of deductibles applicable to those policies effected by the Owner under Section 37.1.2 and such payment will be treated as an Actual Cost incurred by the Owner Participant. For clarity, the payment of any deductible in accordance with this Section will not alter or lead to a change to the Target Outturn Cost.
- 37.6.3 The Owner is responsible for the payment of deductibles applicable to those policies effected by the Owner pursuant to Section 1.3 of Schedule 13 (Insurance Policies and Bonds). In the event that Gainshare is calculated to be payable under this Agreement at the time a deductible under such insurance has been paid, the deductible will be treated as an Actual Cost incurred by the Owner Participant, and, for clarity, the payment of a deductible in such circumstance will not alter or lead to a change to the Target Outturn Cost. In the event that, at the time a deductible under such insurance is paid, the aggregate of the Actual Outturn Cost of performing the Works under this Agreement has exceeded the Target Outturn Cost, the deductible paid by the Owner will not be treated as an Actual Cost under this Agreement.

### **37.7 Obligation to notify, assist and cooperate**

- 37.7.1 If an insurer or an insurer's appointed consultant, for underwriting purposes or as a term of an insurance policy, needs to review any part of the performance of this Agreement, the Participants shall: (i) cooperate with the insurer and its consultant, including providing them with such information and documentation as they reasonable require; and (ii) allow the insurer and its consultant to attend meetings between the Participants (or, as applicable, and if reasonably required by the insurer, between Participants and those engaged by or through Participants).
- 37.7.2 Each Participant must immediately notify in writing the other Participants of any relevant changes to the terms and conditions of the insurance policies it is required to maintain under this Agreement including changes to the available coverage or limits, but only to the extent that the relevant Participant's insurance policy does not comply with the insurance requirements specified in this Agreement.
- 37.7.3 The NOPS must provide the Owner Participant with all reasonable assistance and all information reasonably required by the Owner Participant within the time frames and in the format specified by the Owner Participant to enable the Owner Participant to obtain, effect and maintain policies referred to in Section 37.1.1.
- 37.7.4 The NOPS and the Owner shall provide to each other at least five (5) business days prior to the expiry date of any policy of insurance required to be obtained by a NOP or the Owner (as the case may be) pursuant to Section 37.1.1 and 37.2.2 (as applicable) evidence of the renewal of each such policy satisfactory to the NOPS and the Owner, each acting reasonably.

### 37.8 **Owner to be informed of Notices**

Each NOP must ensure that every insurance policy taken out by it under this Agreement includes a provision that requires the NOP, whenever the insurer gives to or serves upon the NOP or Subcontractor a notice of any kind of cancellation or any other notice under or in relation to the policy of insurance, as soon as possible, to inform the Owner's Representative in writing that the notice has been given to or served upon that NOP or Subcontractor.

### 37.9 **Notice is notice by all insureds**

Each NOP and the Owner must ensure that every insurance policy taken out by it under this Agreement contains a provision that provides that a notice of the occurrence of an event out of which the particular insured giving the notice alleges it has suffered, or could suffer, loss or damage or incur a liability must be accepted by the insurer as a notice of the occurrence given by all the insureds.

### 37.10 **Non-compliance**

Notwithstanding Section 6.2, if any NOP does not follow a written request from another Participant or the Owner to fulfill and comply with its obligations under Section 37, the Participant making the request, or the Owner (to the extent the Owner made the request) may take action it considers appropriate to ensure that the non-compliant NOP complies.

### 37.11 **Pass through insurance payments**

37.11.1 Subject to Section 37.11.2, to the extent that a NOP receives payment under an insurance policy that reimburses any amounts that were reimbursed or are reimbursable under this Agreement, then the NOP must, within twenty (20) Business Days of receipt of that payment, pass on full payment to the Owner Participant and the Actual Outturn Cost will be reduced by the amount of any payment made by a NOP to the Owner Participant under this Section 37.11.1. If any Gainshare or Interim Gainshare has been paid to the NOPs or any Painshare or Interim Painshare has been paid by the NOPs, then Section 9 of Schedule 12 (Payment Procedures) applies in respect of any underpayment or overpayment determined to have been made after recalculation of the Gainshare, Interim Gainshare, Painshare or Interim Painshare (if any and as the case may be) on the basis of the adjusted Actual Outturn Cost.

37.11.2 Notwithstanding that a NOP may have lodged a claim under an insurance policy required to be effected and maintained by the Owner, the Owner may require its insurer to make payment directly to the Owner in respect of any claim for loss or damage to the Works.

37.11.3 Notwithstanding Section 6.2 and Section 6.3, the Owner may commence proceedings to recover any amounts payable to it under Section 37.11.1 if that amount is not paid by the NOPs within the time period referred to in Section 37.11.1.

37.11.4 To the extent that the Owner receives payment under an insurance policy that reimburses any amounts that were or are treated as Actual Costs for the purposes of calculating the Actual Outturn Cost under this Agreement, then the Actual Outturn Cost will be reduced by those amounts. If a Gainshare or Interim Gainshare has been paid to the NOPs or a Painshare or Interim Painshare has been paid by the NOPs, then Section 9 of Schedule 12 (Payment Procedures) applies in respect of any underpayment or overpayment determined to have been made after recalculation of the Gainshare, Interim Gainshare, Painshare or Interim Painshare (if any and as the case may be) on the basis of the adjusted Actual Outturn Cost.

### 37.12 **Payments received from insurers**

All payments received by the Owner or any Participant from insurers on account of claims in respect of additional Actual Cost:

- 37.12.1 incurred or to be incurred by any Participant; and
- 37.12.2 arising from an insured event under an insurance policy taken out by the Owner under Section 37.1 or a NOP under Section 37.2,

are credited to the Actual Cost, but, for clarity, the Target Outturn Cost is not adjusted.

### 37.13 **Bonding**

To the extent required by the ALT, the Construction NOPs will take out and maintain in full compliance with the Construction Act the Bonds set out in Schedule 13 (Insurance Policies and Bonds), with any additional Actual Cost and applicable Overhead in respect of such Bonds adjusting the Target Outturn Cost (but only to the extent not previously included therein). Further, to the extent required by the ALT, the Actual Cost and applicable Overhead in respect of such Bonds will be payable by the Owner in accordance with this Agreement, provided that no Profit shall be payable in respect thereof notwithstanding the provisions of Schedule 10 (Fee).

## 38. **INDEMNITIES**

### 38.1 **Non-compliance with insurance requirements by a NOP**

Each NOP (each an “**Indemnifying NOP**”) indemnifies and must keep indemnified:

- 38.1.1 the Owner;
- 38.1.2 the Owner Participant; and
- 38.1.3 each other NOP,

(each an “**Indemnified Person**”), and each Indemnified Person’s directors, officers, employees and agents against losses, damages or claims suffered by any Indemnified Person or its directors, officers, employees and agents as a consequence of non-compliance by the Indemnifying NOP with:

- 38.1.4 the terms and conditions of Section 37 (including any failure of the Indemnifying NOP to take out and maintain any of the insurances required to be taken out and maintained by the Indemnifying NOP under this Agreement); or
- 38.1.5 the terms and conditions of the insurance policies required to be taken out and maintained by the Owner or a NOP under this Agreement (including any act or omission of the Indemnifying NOP which causes an insurance policy required to be taken out and maintained by the Owner or a NOP under this Agreement to not respond to any claim in respect of this Agreement).

### 38.2 **Non-compliance with insurance requirements by the Owner**

The Owner indemnifies and must keep indemnified each NOP (each an “**Indemnified NOP**”) and the directors, officers, employees and agents of the Indemnified NOP against losses, damages or claims suffered by the Indemnified NOP and the directors, officers, employees and agents of the

Indemnified NOP as a consequence of non-compliance by the Owner and/or the Owner Participant with:

38.2.1 the terms and conditions of Section 37 (including any failure of the Owner to take out and maintain any of the insurances required to be taken out and maintained by the Owner under this Agreement); or

38.2.2 the terms and conditions of the insurance policies required to be taken out and maintained by the Owner or a NOP under this Agreement (including any act or omission of the Owner and/or the Owner Participant which causes an insurance policy required to be taken out and maintained by the Owner or a NOP under this Agreement to not respond to any claim in respect of this Agreement).

### 38.3 **Wilful Default by a NOP**

Each Indemnifying NOP indemnifies and must keep indemnified each Indemnified Person and its directors, officers, employees and agents against losses, damages or claims suffered by any Indemnified Person or its respective directors, officers, employees and agents as a consequence of or arising from any Wilful Default by the Indemnifying NOP.

### 38.4 **Wilful Default by the Owner Participant**

The Owner indemnifies and must keep indemnified each Indemnified NOP and its directors, officers, employees and agents against losses, damages or claims suffered by the Indemnified NOP or its directors, officers, employees and agents as a consequence of or arising from any Wilful Default by the Owner Participant.

### 38.5 **Proportionate liability under the indemnities**

38.5.1 The liability of the Indemnifying NOP under the indemnities contained in Sections 38.1 and 38.3 is reduced proportionately to the extent that an act or omission of the Owner and/or the Owner Participant, its directors, officers, employees, agents, contractors or subcontractors (of any tier) (other than the Indemnifying NOP and its subcontractors (of any tier) and agents) has contributed to the loss, damage or claim.

38.5.2 The liability of the Owner under the indemnities contained in Sections 38.2 and 38.4 is reduced proportionately to the extent that an act or omission of a NOP, its directors, officers, employees, agents, contractors or subcontractors (of any tier) has contributed to the loss, damage or claim.

### 38.6 **Conduct of Indemnity Claims**

This Section 38.6 shall apply to the conduct of claims, made by a third person against a Party having, or claiming to have, the benefit of an indemnity pursuant to this Agreement. The Party having, or claiming to have, the benefit of the indemnity is referred to as the "**Beneficiary**" and the Party giving the indemnity is referred to as the "**Indemnifier**".

38.6.1 If the Beneficiary receives any notice, demand, letter or other document concerning any claim for which it appears that the Beneficiary is, or may become entitled to, indemnification under this Section 38, the Beneficiary shall give written notice to the Indemnifier as soon as reasonably practicable and in any event within 10 Business Days of receipt of the same. Such notice shall specify with reasonable particularity, to the extent that information is available, the factual basis for the claim and the amount of the claim.



- 38.6.2 Subject to Sections 38.6.3, 38.6.4 and 38.6.5, on the giving of any such notice by the Beneficiary, where it appears that the Beneficiary is or may be entitled to indemnification from the Indemnifier in respect of all, but not part only, of the liability arising out of the claim, the Indemnifier shall (subject to providing the Beneficiary with a secured indemnity to the Beneficiary's reasonable satisfaction against all costs and expenses that the Beneficiary may incur by reason of such action) be entitled to dispute the claim in the name of the Beneficiary at the Indemnifier's own expense and take conduct of any defence, dispute, compromise, or appeal of the claim and of any incidental negotiations. The Beneficiary shall give the Indemnifier all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim. The Beneficiary shall have the right to employ separate counsel in respect of such claim and the reasonable fees and expenses of such counsel shall be to the account of the Indemnifier only where representation of both the Indemnifier and Beneficiary by common counsel would be inappropriate due to any actual or potential conflicting interests between the Indemnifier and Beneficiary.
- 38.6.3 With respect to any claim conducted by the Indemnifier:
- 38.6.3.1 the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;
- 38.6.3.2 the Indemnifier shall not bring the name or reputation of the Beneficiary into disrepute;
- 38.6.3.3 the Indemnifier shall not pay, compromise or settle such claims without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed;
- 38.6.3.4 the Indemnifier shall not admit liability or fault to any third party without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed; and
- 38.6.3.5 the Indemnifier shall use commercially reasonable efforts to have the Beneficiary named as a beneficiary under any release given by the persons bringing the claim to which this Section 38.6 relates.
- 38.6.4 The Beneficiary shall be free to pay or settle any such claim on such terms as it thinks fit and without prejudice to its rights and remedies under this Agreement if:
- 38.6.4.1 the Indemnifier is not entitled to take conduct of the claim in accordance with Section 38.6.2;
- 38.6.4.2 the Indemnifier fails to notify the Beneficiary of its intention to take conduct of the relevant claim within 10 Business Days of the notice from the Beneficiary under Section 38.6.1 or notifies the Beneficiary that the Indemnifier does not intend to take conduct of the claim; or
- 38.6.4.3 the Indemnifier fails to comply in any material respect with Section 38.6.3.
- 38.6.5 The Beneficiary shall be free at any time to give notice to the Indemnifier that the Beneficiary is retaining or taking over, as the case may be, the conduct of any defence, dispute, compromise or appeal of any claim, or of any incidental negotiations, to which Section 38.6.2 applies. For greater certainty, the NOPs acknowledge and agree that where the Owner is the Beneficiary, the Owner may retain or take over such conduct in any matter involving Personal Information or any matter involving public policy. On

receipt of such notice the Indemnifier shall promptly take all steps necessary to transfer the conduct of such claim to the Beneficiary, and shall provide to the Beneficiary all relevant documentation and all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim. If the Beneficiary gives any notice pursuant to this Section 38.6.5, then the Indemnifier shall be released from any liabilities arising under the applicable indemnity hereunder in respect of the applicable claim.

38.6.6 If the Indemnifier pays to the Beneficiary an amount in respect of an indemnity and the Beneficiary subsequently recovers, whether by payment, discount, credit, saving, relief or other benefit or otherwise, a sum or anything else of value (the "**Recovery Amount**") which is directly referable to the fact, matter, event or circumstances giving rise to the claim under the indemnity, the Beneficiary shall forthwith repay to the Indemnifier whichever is the lesser of:

38.6.6.1 an amount equal to the Recovery Amount less any out-of-pocket costs and expenses properly incurred by the Beneficiary in recovering the same; and

38.6.6.2 the amount paid to the Beneficiary by the Indemnifier in respect of the claim under the relevant indemnity,

provided that there shall be no obligation on the Beneficiary to pursue any Recovery Amount and that the Indemnifier is repaid only to the extent that the Recovery Amount, aggregated with any sum recovered from the Indemnifier, exceeds the loss sustained by the Beneficiary except, however, that if the Beneficiary elects not to pursue a Recovery Amount, the Indemnifier shall be entitled to require an assignment to it of the right to do so.

38.6.7 Any person taking any of the steps contemplated by this Section 38.6 shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Agreement.

## **39. LIABILITY OF THE NOPS**

39.1 **[Intentionally Deleted]**

39.2 **Liability of the NOPS is joint and several**

Except where expressly stated otherwise in this Agreement, each of the NOPS acknowledges and agrees that it is jointly and severally liable to the Owner for the obligations and liabilities of the NOPS (or any one or more of them) under this Agreement.

39.3 **Joint ventures**

If any of the NOPS have formed an Unincorporated Joint Venture:

39.3.1 the NOPS confirm that the Unincorporated Joint Venture was formed pursuant to a joint venture agreement entered into by the members of the Unincorporated Joint Venture ("**Joint Venture Agreement**") in the form approved by the Owner prior to the Commencement Date;

39.3.2 the members of the Unincorporated Joint Venture shall be jointly and severally liable to the Owner for the performance of the NOP's obligations under this Agreement;

- 39.3.3 any duty, right or obligation, if any, of the members of the Unincorporated Joint Venture created by the Joint Venture Agreement or as joint venturers will be subordinate to their obligations under this Agreement;
- 39.3.4 the members of the Unincorporated Joint Venture shall notify the Owner of the Unincorporated Joint Venture leader who shall have authority to bind the NOPs and each member of the Unincorporated Joint Venture for any matter arising out of or in connection with this Agreement; and
- 39.3.5 neither:
- 39.3.5.1 the members of the Unincorporated Joint Venture; nor
- 39.3.5.2 the scope and parts of the Works to be carried out by each member of the Unincorporated Joint Venture; nor
- 39.3.5.3 the legal status of the Unincorporated Joint Venture,
- shall be altered without the prior consent of the Owner (provided that such consent shall not relieve the altered Unincorporated Joint Venture from any liability under this Agreement).

#### **40. EXCLUSION OF CONSEQUENTIAL LOSS**

##### **40.1 Exclusion of consequential loss**

Without prejudice to the inclusion of the amount of liabilities incurred by the Owner under its contractual arrangements with Third Parties who operate passenger or freight trains anywhere on the Network pursuant to Sections 22.3.2, 22.4.3, 22.4.6, 22.6.3, 22.7.2, 22.7.3, 22.8 and Section 24.5 of this Agreement as Actual Cost, and subject to Section 40.2, no Party is liable to any other Party for any Consequential Loss sustained by that other Party, whether caused by that Party's breach of this Agreement, negligence or otherwise.

##### **40.2 Exception to the exclusion of consequential loss**

A Party may be liable to another Party for Consequential Loss to the extent that such Consequential Loss is covered and is recovered under a policy of insurance which is required to be taken out under this Agreement or which the Owner has taken out pursuant to Section 1.3 of Schedule 13 (Insurance Policies and Bonds).

#### **41. SUBCONTRACTOR CLAIMS**

##### **41.1 On-Account Subcontractor Payment**

For the purposes of this Section 41, an "**On-Account Subcontractor Payment**" means an amount incurred by a Participant as a result of the default of the relevant Subcontractor.

##### **41.2 Suspension or adjudication by Subcontractors**

Without prejudice to Section 20.6, if any Subcontractor serves notice of an intention to suspend its works for non-payment and/or bring adjudication proceedings, the Participant which is the counterparty to that Subcontract must promptly notify the ALT of such notice.

### 41.3 **Obligation to recover from Subcontractors**

To the extent that any Subcontractor has any liability under a Subcontract to a Participant in connection with the Works whether arising before or after the relevant Date of Final Completion, that Participant must:

- 41.3.1 on notice to the ALT take all reasonable and proper measures (including by way of legal proceedings, advice or negotiations approved by the ALT) to recover any costs, loss, expense, damages, legal costs and/or interest suffered or incurred by that or any other Participant or the Owner from the defaulting Subcontractor to the extent that the defaulting Subcontractor is liable for such amounts under or in connection with the relevant Subcontract; and
- 41.3.2 account for and promptly repay to that Participant or another Participant or the Owner (as the case may be) any On-Account Subcontractor Payment (or part thereof) recovered from the defaulting Subcontractor.

### 41.4 **Losses recoverable from a Subcontractor to be repaid**

Where the relevant Participant under Section 41.2 is a NOP, any On-Account Subcontractor Payment made:

- 41.4.1 to that NOP or to any other Participant or the Owner or Subcontractor;
- 41.4.2 from the Owner or another Participant; and
- 41.4.3 under this Agreement and/or the relevant Subcontract,

is for the purpose of this Section 41, an interim on-account payment repayable to the Owner or another Participant (as the case may be).

### 41.5 **Subcontracts to exclude no loss claims**

Each NOP must use reasonable efforts to enter into Subcontracts which exclude any claim that an amount is not recoverable from the relevant Subcontractor solely on the basis that the relevant NOP or any other NOP or Subcontractor has received a payment of the type referred to in Section 41.4.

### 41.6 **Costs of proceeding are Actual Cost**

The costs of any legal proceedings, advice or negotiations approved by the ALT under this Section 41 are reimbursable as Actual Cost, and, for clarity, do not give rise to an adjustment to the Target Outturn Cost.

## **MISCELLANEOUS PROVISIONS**

### **42. PARENT COMPANY GUARANTEE**

#### **42.1 Form of guarantee**

42.1.1 Each NOP must ensure that a parent company guarantee in the form set out in Schedule 15 (Parent Company Guarantee) is provided to the Owner's Representative on or before the Commencement Date from:

- 42.1.1.1 the relevant NOP's ultimate holding company; or

42.1.1.2 the companies identified in Schedule 14 (Guarantors) as the guarantor in respect of that NOP.

42.1.2 Each NOP must ensure that, from the Commencement Date until termination of this Agreement, the parent company guarantee in respect of that NOP is in place, in full force and effect and is a valid and binding guarantee of such guarantor in favour of the Owner, and is maintained in the form of guarantee as Schedule 15 (Parent Company Guarantee).

42.1.3 All costs of establishing and maintaining a parent company guarantee (including any costs incurred if the Owner seeks recourse to the parent guarantee) will be the responsibility of and must be paid by the relevant NOP and will not be Actual Costs.

#### **42.2 Failure to provide guarantees by the Commencement Date**

If any NOP fails to provide a guarantee in accordance with and by the date required by Section 42.1, the Owner is entitled to withhold payment of any amount due to that NOP under this Agreement until such time as a guarantee in accordance with Section 42.1 is provided by that NOP and, if such guarantee is not provided within one (1) month of the Commencement Date, it will be deemed to be a Default by that NOP for the purpose of Section 33.1.

#### **42.3 Recourse by the Owner**

The Owner may have recourse to the parent company guarantees in the circumstances contemplated by the parent company guarantees.

#### **42.4 Maintenance of guarantees**

Each NOP must ensure that each parent company guarantee is maintained in the terms specified in Schedule 15 (Parent Company Guarantee) and is otherwise kept in full force and effect for so long as the relevant NOP may have a liability (contingent or otherwise) under or in connection with this Agreement.

#### **42.5 Demand is without prejudice to other rights**

Any agreement between the provider of a parent company guarantee and the Owner with respect to any demands made and amounts paid by the provider to the Owner under that parent company guarantee is without prejudice to the Owner's right to make continuing claims against the relevant NOP in relation to matters for which that parent company guarantee is provided.

#### **42.6 Costs of procuring guarantees are within the Fee**

The costs incurred by each NOP in establishing and maintaining a parent company guarantee are to be treated as included in its Overhead and are not recoverable as Actual Cost.

### **43. INTELLECTUAL PROPERTY**

#### **43.1 Intellectual Property remains vested in the Owner**

43.1.1 Intellectual Property which any NOP has supplied to the Owner or any other Participant in accordance with this Agreement and which that NOP owns or has created or developed for the purposes of performing its obligations under this Agreement will remain vested in that NOP.

43.1.2 Intellectual Property which the Owner or the Owner Participant has supplied to any NOP in accordance with this Agreement and which the Owner or the Owner Participant owns or has created or developed for the purposes of performing its obligation under this Agreement will remain vested in the Owner or the Owner Participant.

#### 43.2 **Grant of licence to use**

43.2.1 Subject to Section 43.4 each NOP hereby grants to:

43.2.1.1 the Owner, an irrevocable, perpetual, royalty free non-exclusive licence to:

- (a) copy, use, adapt and reproduce the relevant NOP's Intellectual Property (including any enhancement, adaptation, change, modification or development to any Intellectual Property) used or provided in the performance of the relevant NOP's obligations under this Agreement for any purpose whatsoever in connection with this Agreement, the Project and the Works and the Owner's operation, maintenance or extension of the Project (including the performance of any works and/or services by others which were capable of forming part of the Works under this Agreement); and
- (b) disclose any or part of the Intellectual Property licenced by the NOP to the Owner pursuant to Section 43.2.1.1(a) (whether created before or during the term of this Agreement, and including, without limitation, any and all information subsisting or referred to within the Project Proposal) to Third Parties who are being assessed by the Owner as part of a formal tendering process to procure goods or services required to enable the Owner to complete, operate, maintain, dismantle, re-assemble, repair, alter, extend and adjust the Works (provided that in such cases, the Owner shall require the relevant recipient of such Intellectual Property to enter into written confidentiality undertakings to protect the confidential nature of such Intellectual Property); and

43.2.1.2 each other NOP and the Owner Participant, an irrevocable, royalty free non-exclusive licence to copy, use, adapt and reproduce the relevant NOP's Intellectual Property for any purpose whatsoever in connection with the Works.

43.2.2 Subject to Section 43.4 the Owner and the Owner Participant hereby grant to the NOPs, an irrevocable, royalty free non-exclusive licence to copy, use, adapt and reproduce the Owner's and the Owner Participant's Intellectual Property for any purpose whatsoever in connection with the Works.

#### 43.3 **Sub-licences and transfer**

The licences granted at Sections 43.2 shall carry with them the right for the relevant Licensee to grant sub-licences, and must be transferable to third parties.

#### 43.4 **Extent of licences for software and proprietary equipment**

Any Licensee under a licence pursuant to Sections 43.2.1 or 43.3 granted by any NOP has no right to:

- 43.4.1 decompile any computer software which forms part of the Intellectual Property licensed by that NOP to that Licensee in respect of Proprietary Plant;
- 43.4.2 attempt to derive any algorithms, techniques or other features of the software or modify or attempt to create any derivative works from the software supplied by that NOP in respect of Proprietary Plant;
- 43.4.3 reproduce or have reproduced the Proprietary Plant supplied by that NOP in part or in whole; or
- 43.4.4 make or have made components or spare parts for the Proprietary Plant which are protected by Intellectual Property vested in that NOP or any of its sub-contractors or suppliers for any purposes whatsoever,

and any sub-licence granted by a licensee must similarly apply these prohibitions to the relevant sub-licensee.

#### 43.5 **Infringement indemnity**

43.5.1 Unless and to the extent caused by any breach by the Owner of this Agreement, each NOP indemnifies the Owner against all loss, damage, costs and expenses for which the Owner is or becomes liable as a result of any infringement or alleged infringement by that NOP of any Third Party's intellectual property rights, provided the Owner or the Owner Participant:

43.5.1.1 promptly gives the relevant NOP notice of any such claim being received or any proceedings in relation to such a claim being threatened or served on the Owner; and

43.5.1.2 permits the relevant NOP (at that NOP's expense and on the basis that such NOP indemnifies the Owner for all legal costs and expenses the Owner may properly incur in respect of such proceedings) to conduct the defence of any such claim and all negotiations for its settlement.

43.5.2 Unless and to the extent caused by any breach by any NOP of this Agreement, the Owner indemnifies each NOP against all loss damage costs and expenses for which the relevant NOP is or becomes liable as a result of any infringement or alleged infringement by the Owner or the Owner Participant of any Third Party's intellectual property rights, provided that the relevant NOP:

43.5.2.1 promptly gives the Owner and the Owner Participant notice of any such claim being received or any proceedings in relation to such a claim being threatened or served on that NOP; and

43.5.2.2 permits the Owner (at the Owner's expense and on the basis that the Owner indemnifies that NOP for all legal costs and expenses that NOP may properly incur in respect of such proceedings) to conduct the defence of any such claim and all negotiations for its settlement.

#### 43.6 **No liability for unlicensed use**

None of the Owner, the Owner Participant or any NOP are liable for any use of any of their respective Intellectual Property licensed under this Section 43 for any purpose other than that for which it was originally prepared or supplied by the supplying party.

#### 43.7 **Waiver of moral rights**

43.7.1 Each NOP waives in favour of the Owner and each other NOP any and all moral rights in any of its designs and drawings.

43.7.2 The Owner and the Owner Participant waive in favour of each NOP any and all moral rights in any of their respective designs and drawings.

### 44. **NOTICES**

#### 44.1 **Form and methods of delivery**

44.1.1 A notice or other communication under this Agreement ("**Notice**") must be in writing and delivered by hand or sent by pre-paid post or by email to a Participant at the address or the email addressees for that Participant set out in Schedule 3 (Owner's and Participants' Contact Details) or as otherwise specified by a Participant by Notice.

44.1.2 A Notice sent by post is regarded as given and received on the second Business Day following the date of postage.

44.1.3 A Notice delivered or received by hand other than on a Business Day or after 5.00pm (recipient's time) is regarded as received at 9.00am on the following Business Day and a Notice delivered or received before 9.00am (recipient's time) is regarded as received at 9.00am.

#### 44.2 **Notice by email**

44.2.1 Any notice by email under Section 44.1 must be sent to the persons or positions and email addresses listed in Schedule 3 (Owner's and Participants' Contact Details) for each Participant, and attaching the relevant signed notice in "PDF" format.

44.2.2 A Notice sent by email is deemed effected on the Business Day after the date of delivery of the email unless after the time sent (as recorded on the device from which the sender had sent the email) the sender receives an automated message that the email has not been delivered.

#### 44.3 **Notice by a corporate entity**

A Notice sent by a company must be signed by a duly authorized officer of the sender.

### 45. **PERSONAL INFORMATION**

#### 45.1 **General**

45.1.1 The NOPs acknowledge the importance of maintaining the confidentiality and privacy of Personal Information.

45.1.2 Each NOP shall, and shall require each NOP Party to, only collect, hold, process, use, store and disclose Personal Information with the prior consent of the Owner and: (i)



shall not collect, hold, process, use or store Personal Information except to the extent necessary to perform the NOP's obligations under this Agreement; and (ii) shall not disclose Personal Information or otherwise permit access to or make Personal Information available to any person except as expressly permitted or instructed by the Owner's Representative.

- 45.1.3 Each NOP shall, and shall require each NOP Party to, at all times treat Personal Information as strictly confidential and shall comply with all Applicable Law, including FIPPA, PIPEDA, and any other Canadian federal or provincial legislation now in force or that may in the future come into force governing the collection, use, disclosure and protection of personal information applicable to the NOPs, each NOP Party or to the Works.
- 45.1.4 Each NOP shall take all necessary and appropriate action, and shall require each NOP Party to take all necessary and appropriate action, against any person who fails to comply with this Section 45.
- 45.1.5 Each NOP shall allow the Owner on reasonable notice to inspect any Personal Information in the custody or possession of the NOP or a NOP Party and to audit a NOP and each NOP Party's compliance with this Section 45, including the measures used by the NOP and each NOP Party to protect Personal Information, and otherwise promptly and properly respond to all reasonable inquiries of the Owner's Representative with respect to the NOP's or each NOP Party's handling of Personal Information.
- 45.1.6 Each NOP shall not subcontract or delegate to any third party any of the Works that involve or may involve the collection, use, storage, processing or any other handling of Personal Information without the express consent of the Owner and without obtaining written contractual commitments of such third party substantially the same as those contained in this Section 45.

## 45.2 **Protection of Personal Information**

- 45.2.1 Each NOP shall implement and use, and shall require each NOP Party to implement and use, appropriate technical, organizational and physical security measures to protect Personal Information against loss, theft and unauthorized access, disclosure, copying, use, modification or disposal, and shall otherwise ensure that the NOP, the NOP Parties, and its and their staff shall protect, secure and keep confidential any Personal Information.
- 45.2.2 Each NOP shall and shall cause each NOP Party to restrict access to Personal Information to only those authorized employees and permitted NOP Parties that require access to such Personal Information to fulfil their job requirements in connection with the Works and that are subject to obligations of confidentiality and Personal Information protection no less stringent than those contained in this Section 45.
- 45.2.3 Upon termination of this Agreement or upon request of the Owner's Representative, whichever comes first, each NOP shall immediately cease all use of and return to the Owner or, at the direction of the Owner's Representative, dispose of, destroy or render permanently anonymous all Personal Information, in each case using appropriate technical, organizational and physical security measures to protect Personal Information against loss, theft and unauthorized access, disclosure, copying, use or modification.

- 45.2.4 To the extent that any of the Works involve or may involve destruction or disposal of Personal Information, including any disposal or destruction pursuant to Section 45, such activities shall include, at a minimum, irreversible destruction, shredding or pulverizing of all documents, records or media containing Personal Information to a size or state that ensures that the document, record or other medium is permanently destroyed and that no information contained therein can be read, reconstructed or deciphered.
- 45.2.5 Each NOP shall immediately inform the Owner's Representative of any actual or suspected loss, theft or accidental or unauthorized access, disclosure, copying, use, modification or destruction of Personal Information by the NOP or any NOP Party or any other breach of this Section 45.
- 45.2.6 The Owner may from time to time require that the NOP and any NOP Party or member of its or their staff execute and deliver within two (2) Business Days after such request an agreement satisfactory to the Owner, acting reasonably, requiring such person to keep Personal Information confidential.

### 45.3 Personal Information – Miscellaneous

- 45.3.1 Each NOP shall provide, and shall cause each NOP Party to provide, in a timely manner, all necessary and reasonable information and co-operation to the Owner and to any regulatory or other governmental bodies or authorities with jurisdiction or oversight over Applicable Law governing the collection, use, disclosure and protection of personal information in connection with any investigations, audits or inquiries made by any such bodies or authorities under such legislation.
- 45.3.2 To the extent of any conflict or inconsistency between this Section 45 and any other provision of this Agreement, this Section 45 shall prevail.
- 45.3.3 The obligations in this Section 45 shall survive the termination of this Agreement.

### 45.4 Application of Section 6

Sections 6.2 and 6.3 do not apply in respect of this Section 45.

## 46. REPRESENTATIONS AND WARRANTIES

### 46.1 NOP representations and warranties

46.1.1 Each NOP represents and warrants, as to itself only (subject to NOP 1 also representing and warranting as to **[REDACTED]** and **[REDACTED]**), to the Owner that as of the Commencement Date:

46.1.1.1 As applicable,

- (a) NOP 1 is a general partnership between **[REDACTED]** and **[REDACTED]**, formed and validly existing under the laws of the Province of **[REDACTED]**, and has all the requisite corporate power and authority to own its properties and assets, to carry on its business as it is currently being conducted, and to enter into this Agreement and to perform its obligations hereunder;
- (b) **[REDACTED]** is a corporation incorporated and validly existing under the laws of the Province of **[REDACTED]**, is in good

standing with the **[REDACTED]** with respect to the filing of annual reports, and has all the requisite corporate power and authority to own its properties and assets, to carry on its business as it is currently being conducted (including the business of NOP 1), to act as a partner of NOP 1, to enter into the Partnership Agreement and to enter into this Agreement and perform the obligations of NOP 1 hereunder in its capacity as a partner of NOP 1;

- (c) **[REDACTED]** is a corporation incorporated and validly existing under the laws of the Province of **[REDACTED]**, is in good standing with the **[REDACTED]** with respect to the filing of annual reports, and has all the requisite corporate power and authority to own its properties and assets, to carry on its business as it is currently being conducted (including the business of NOP 1), to act as a partner of NOP 1, to enter into the Partnership Agreement and to enter into this Agreement and perform the obligations of NOP 1 hereunder in its capacity as a partner of NOP 1;
- (d) NOP 2 is a corporation incorporated and validly existing under the laws of the Province of **[REDACTED]**, is in good standing with **[REDACTED]** with respect to the filing of annual reports, and has all the requisite corporate power and authority to own its properties and assets, to carry on its business as it is currently being conducted, and to enter into this Agreement and to perform its obligations hereunder; and
- (e) NOP 3 is a corporation incorporated and validly existing under the **[REDACTED]**, is in good standing with **[REDACTED]** with respect to the filing of annual reports, and has all the requisite corporate power and authority to own its properties and assets, to carry on its business as it is currently being conducted, and to enter into this Agreement and to perform its obligations hereunder;

46.1.1.2 Each of NOP 1, NOP 2, NOP 3 and each of **[REDACTED]** and **[REDACTED]** has the requisite power, authority and capacity to execute, deliver and perform this Agreement, and to do all acts and things, and execute, deliver and perform all other agreements, instruments, undertakings and documents as are required by this Agreement to be done, executed, delivered or performed by each such person;

46.1.1.3 no steps or proceedings have been taken or are pending to supersede or amend:

- (a) the constating or formation documents of NOP 1;
- (b) the Partnership Agreement; or
- (c) the articles, by-laws or other applicable constating documents of **[REDACTED]**, **[REDACTED]**, NOP 2 or NOP 3,

in each case, in a manner that would impair or limit (i) the ability of **[REDACTED]** or **[REDACTED]** to perform their obligations or the obligations of NOP 1 under this Agreement; or (ii) the ability of NOP 2 or NOP 3 to perform their obligations under this Agreement;

46.1.1.4 this Agreement has been duly authorized, executed, and delivered by NOP 1 and each of [REDACTED] and [REDACTED], each in its capacity as a partner of NOP 1, and constitutes a legal, valid, and binding obligation of each of NOP 1, [REDACTED] and [REDACTED], enforceable against each of them in accordance with its terms, subject only to:

- (a) limitations with respect to the enforcement of remedies by bankruptcy, insolvency, moratorium, winding-up, arrangement, reorganization, fraudulent preference and conveyance and other laws of general application affecting the enforcement of creditors' rights generally; and
- (b) general equitable principles and the fact that the availability of equitable remedies is in the discretion of a court and that a court may stay proceedings or the execution of judgments;

46.1.1.5 this Agreement has been duly authorized, executed, and delivered by each of NOP 2 and NOP 3, and constitutes a legal, valid, and binding obligation of each of NOP 2 and NOP 3, enforceable against each of them in accordance with its terms, subject only to:

- (a) limitations with respect to the enforcement of remedies by bankruptcy, insolvency, moratorium, winding-up, arrangement, reorganization, fraudulent preference and conveyance and other laws of general application affecting the enforcement of creditors' rights generally; and
- (b) general equitable principles and the fact that the availability of equitable remedies is in the discretion of a court and that a court may stay proceedings or the execution of judgments;

46.1.1.6 the execution, delivery, and performance of this Agreement by NOP 1, [REDACTED] and [REDACTED], NOP 2 and NOP 3 does not and will not violate or conflict with, or constitute a default under:

- (a) its constating, formation, organizational documents, including any by-laws, or the Partnership Agreement;
- (b) any Applicable Law; or
- (c) any covenant, contract, agreement, or understanding to which it is a party or by which it or any of its properties or assets is bound or affected;

46.1.1.7 there are no actions, suits, proceedings, or investigations pending or threatened against NOP 1, [REDACTED], [REDACTED], NOP 2 or NOP 3, or to NOP 1's, NOP 2's or NOP 3's knowledge, any NOP Party at law or in equity before any Governmental Authority or arbitral body (whether or not covered by insurance) that individually or in the aggregate could result in any material adverse effect on the business, properties, or assets, or the condition, financial or otherwise of any of NOP 1, [REDACTED] [REDACTED], NOP 2 or NOP 3, or in any impairment of the ability

of any of NOP 1, [REDACTED] (in its capacity as a general partner of NOP 1), [REDACTED] (in its capacity as a general partner of NOP 1), NOP 2 and NOP 3 to perform NOP 1's, NOP 2's or NOP 3's obligations under this Agreement, and none of NOP 1, NOP 2 or NOP 3, [REDACTED] or [REDACTED] has knowledge of any violation or default with respect to any order, writ, injunction, or decree of any Governmental Authority or arbitral body that could result in any such material adverse effect or impairment;

- 46.1.1.8 each of NOP 1, [REDACTED], [REDACTED], NOP 2 and NOP 3 is able to meet its obligations as they generally become due;
- 46.1.1.9 NOP 1 is registered under Division V of Part IX of the Excise Tax Act (Canada) and its registration number is [REDACTED];
- 46.1.1.10 NOP 2 is registered under Division V of Part IX of the Excise Tax Act (Canada) and its registration number is [REDACTED];
- 46.1.1.11 NOP 3 is registered under Division V of Part IX of the Excise Tax Act (Canada) and its registration number is [REDACTED];
- 46.1.1.12 each of NOP 1, [REDACTED], [REDACTED], NOP 2 and NOP 3 is not a Non-Resident;
- 46.1.1.13 no Restricted Person has Direct or Indirect Power or Control over any member of NOP 1's NOP Group in relation to its decisions, management, actions or policies or in relation to the operation, management and ownership of the Project;
- 46.1.1.14 no Restricted Person has Direct or Indirect Power or Control over any member of NOP 2's NOP Group in relation to its decisions, management, actions or policies or in relation to the operation, management and ownership of the Project;
- 46.1.1.15 no Restricted Person has Direct or Indirect Power or Control over any member of NOP 3's NOP Group in relation to its decisions, management, actions or policies or in relation to the operation, management and ownership of the Project;
- 46.1.1.16 to the knowledge of the NOP 1, no Restricted Person has directly or indirectly, an any right to receive, directly or indirectly and whether in cash or in kind, a payment, repayment, fee, interest, dividend, distribution, redemption or any other consideration of benefit or value of any nature whatsoever, but excluding wages, salaries or other employment-related benefits, from NOP 1, [REDACTED], [REDACTED] or the Project;
- 46.1.1.17 to the knowledge of the NOP 2, no Restricted Person has directly or indirectly, an any right to receive, directly or indirectly and whether in cash or in kind, a payment, repayment, fee, interest, dividend, distribution, redemption or any other consideration of benefit or value of any nature whatsoever, but excluding wages, salaries or other employment-related benefits, from NOP 2 or the Project; and
- 46.1.1.18 to the knowledge of the NOP 3, no Restricted Person has directly or indirectly, an any right to receive, directly or indirectly and whether in cash or in kind, a payment, repayment, fee, interest, dividend, distribution, redemption or any other consideration of benefit or value of any nature whatsoever, but excluding wages, salaries or other employment-related benefits, from NOP 3 or the Project.

## 46.2 Owner representations and warranties

46.2.1 Metrolinx represents and warrants to the NOPs that as of the Commencement Date:

46.2.1.1 Metrolinx is a non-share capital corporation continued under the *Metrolinx Act*, 2006, S.O. 2006, c. 16 and has all of the requisite corporate power and authority to own its properties and assets, to carry on its business as it is currently being conducted, and to enter into this Agreement in its own name as a Crown agency of the Province in accordance with section 3 of the *Metrolinx Act*, 2006, S.O. 2006, c. 16;

46.2.1.2 subject to Sections 46.2.1.5(c), 46.2.1.5(d) and 46.2.1.5(e), Metrolinx is entering into this Agreement in its own name as a Crown agency of the Province and has the requisite power, authority and capacity to execute and deliver this Agreement and to bind itself personally to this Agreement and to provide recourse to the Province in accordance with the provisions of the *Metrolinx Act*, 2006, S.O. 2006, c. 16, including section 35 thereof, and the NOPs are entitled to rely upon Metrolinx's authority to bind itself and the recourse to the Province on such basis in respect of all other agreements, instruments, undertakings and documents executed and delivered by Metrolinx that are required by this Agreement to be executed and delivered by Metrolinx;

46.2.1.3 subject to Sections 46.2.1.5(c), 46.2.1.5(d) and 46.2.1.5(e), Metrolinx has the requisite power, authority and capacity to perform its obligations under this Agreement and to do all acts and things, and execute, deliver and perform all other agreements, instruments, undertakings and documents as are required by this Agreement to be done, executed, delivered or performed;

46.2.1.4 Metrolinx has obtained all necessary approvals to enter into this Agreement as a Crown agency;

46.2.1.5 this Agreement has been duly authorized, executed, and delivered by Metrolinx and constitutes a legal, valid, and binding obligation of Metrolinx, enforceable against Metrolinx, subject to the provisions of the *Metrolinx Act*, 2006, S.O. 2006, c. 16, in accordance with its terms, subject only to:

- (a) limitations with respect to the enforcement of remedies by bankruptcy, insolvency, moratorium, winding-up, arrangement, reorganization, fraudulent preference and conveyance and other laws of general application affecting the enforcement of creditors' rights generally;
- (b) general equitable principles and the fact that the availability of equitable remedies such as specific performance and injunction may not be available against Metrolinx and the Province and that a court may stay proceedings or the execution of judgments;
- (c) statutory limitations of general application respecting the enforceability of claims against Metrolinx or the Province or the property of Metrolinx or the Province;
- (d) any terms and conditions set out in the approval that has been provided in connection with this Agreement for the

purposes of section 28 of the *Financial Administration Act*, R.S.O. 1990, c. F.12; and

- (e) with regard to the recourse against the Province, section 35 of the *Metrolinx Act*, 2006, S.O. 2006, c. 16 and the powers of the Minister of Finance to effect set offs against amounts owing by the Province pursuant to section 43 of the *Financial Administration Act*, R.S.O. 1990, c. F.12; and

46.2.1.6 the execution, delivery, and performance by Metrolinx of this Agreement does not and will not violate or conflict with, or constitute a default under:

- (a) the *Metrolinx Act*, 2006, S.O. 2006, c. 16, or any regulations made in respect thereof;
- (b) any Applicable Law; or
- (c) any covenant, contract, agreement, or understanding relating to the Project or the Lands to which it is a party or by which it or any of its properties or assets is bound or affected.

## **47. GENERAL**

### **47.1 Owner Participant under this Section 47**

For the purpose of this Section 47 only, the Owner Participant is treated as a Party unless the context requires otherwise.

### **47.2 Costs of this Agreement**

Each Party must pay its own costs and disbursements in connection with the negotiations, preparation and execution of this Agreement, and these costs are not recoverable as Actual Cost.

### **47.3 Severability**

Each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law. If any term or part of this Agreement is or becomes for any reason invalid or unenforceable at law, then in that event, that term or part of this Agreement will be and be hereby deemed to be severed from this Agreement without thereby affecting the remainder of this Agreement and the remainder of this Agreement will continue to be valid and enforceable in all respects. If any such provision of this Agreement is invalid, unenforceable or illegal, the Parties shall, acting in good faith, promptly negotiate new provisions to eliminate such invalidity, unenforceability or illegality and to restore this Agreement as near as possible to its original intent and effect.

### **47.4 Waiver**

47.4.1 No Party to this Agreement may rely on the words or conduct of any other Party as a waiver of any right unless the waiver is in writing and signed by the Party granting the waiver.

47.4.2 Failure by either Party to exercise any of its rights, powers and remedies under this Agreement or its delay to do so shall not constitute a waiver of those rights, powers or

remedies. The single or partial exercise of a right, power or remedy shall not prevent its subsequent exercise or the exercise of any other right, power or remedy.

47.4.3 In this Section 47.4:

47.4.3.1 “**conduct**” includes delay in the exercise of a right;

47.4.3.2 “**right**” means any right arising under or in connection with this Agreement and includes the right to rely on this Section; and

47.4.3.3 “**waiver**” includes an election between rights and remedies, and conduct which might otherwise give rise to an estoppel.

#### 47.5 **Amendments to this Agreement**

Amendment of this Agreement must be in writing and signed by each Party (and in the case of the Owner in its capacity as client and not as or by the Owner Participant).

#### 47.6 **Entire agreement**

47.6.1 Except where provided otherwise in this Agreement, this Agreement states all the express terms of this Agreement between each Party in respect of its subject matter.

47.6.2 This Agreement supersedes all prior discussions, negotiations, understandings and agreements in respect of its subject matter.

#### 47.7 **Assignment**

47.7.1 A NOP shall not sell, assign, transfer, charge, mortgage, encumber, dispose of or otherwise alienate all or any part of any interest, whether legal or beneficial, in this Agreement without the prior written consent of the Owner, which consent may be withheld in the sole and absolute discretion of the Owner, provided however that no sale, assignment, transfer, charge, disposition, mortgage, encumbrance or other alienation shall be permitted to a person where that person or its Affiliate is a Restricted Person or a person whose standing or activities may compromise (i) the Owner’s reputation or integrity, or (ii) the nature of the public transit system in the City of Toronto or the Province of Ontario so as to affect public confidence in the public transit system in the City of Toronto, the Province of Ontario or the Project.

47.7.2 The Owner may assign, transfer, dispose of or otherwise alienate any interest in this Agreement or any agreement in connection with this Agreement to which the NOPs and the Owner are parties:

47.7.2.1 to the Province;

47.7.2.2 as may be required to comply with Applicable Law;

47.7.2.3 to any minister of the Province;

47.7.2.4 to an agency of the Province having the legal capacity, power, authority and ability to become a party to and to perform the obligations of the Owner under this Agreement provided that such person confirms in writing to the NOPs that it will perform all of the Owner’s obligations hereunder in respect of the period from and after the assignment; and



47.7.2.5 in circumstances other than those described in Sections 47.7.2.1 to 47.7.2.4, with the prior written consent of each of the NOPs (such consent not to be unreasonably withheld or delayed); provided that the person to whom any such assignment, transfer, disposition or other alienation is made has the capacity to perform, and confirms in writing to the NOPs that it will perform all the obligations of the Owner hereunder and under any agreement in connection with this Agreement to which the NOPs and the Owner are parties in respect of the period from and after the assignment.

#### 47.8 Changes in ownership and control

47.8.1 No Restricted Person or a person whose standing or activities are inconsistent with the Province's reputation or integrity shall be permitted to have at any time or acquire Direct or Indirect Power or Control over any NOP Group or any guarantor of a NOP (under the parent company guarantee to be provided under Section 42.1) in relation to the decisions, management, actions or policies of the NOP or the guarantor or in relation to the operation, management and ownership of the Project.

47.8.2 No Change in Ownership of a NOP, or its guarantor under the parent company guarantee to be provided under Section 42.1, or of any Control Party, shall be permitted:

47.8.2.1 where the person acquiring the ownership interest is a Restricted Person or a person whose standing or activities may compromise (i) Owner's reputation or integrity, or (ii) the nature of the public transit system in any of the City of Toronto or the Province of Ontario so as to affect public confidence in the public transit system in the City of Toronto, the Province of Ontario or the Project; or

47.8.2.2 if such Change in Ownership would have a material adverse effect on the performance of the Works or the Governmental Activities.

47.8.3 In the event that a person having Direct or Indirect Power or Control over any member of the NOP Group (including any guarantor of a NOP under the parent company guarantee to be provided under Section 42.1) in relation to the decisions, management, actions or policies of the NOP or in relation to the operation, management and ownership of the Project becomes a Restricted Person, the Owner may:

47.8.3.1 in the case of an individual who becomes a Restricted Person, require that such Restricted Person be divested of his or her Direct or Indirect Power or Control; or

47.8.3.2 in any other circumstance, require a Change in Ownership so that the Restricted Person shall be divested of its Direct or Indirect Power or Control,

in each case, on such terms as are satisfactory to Owner, in its discretion.

47.8.4 Each NOP shall provide notice to the Owner's Representative of any Change in Ownership of the NOP, its guarantor under the parent company guarantee to be provided under Section 42.1, or of any Control Party, as the case may be, that is not a Change in Control within five (5) Business Days after such Change in Ownership, and such Notice shall include a statement identifying all persons with an ownership interest in the NOP, its guarantee under the parent company guarantee to be provided under Section 42.1, or the relevant Control Party, as the case may be, and their respective

holdings of such ownership interests, in each case prior to and following such Change in Ownership.

47.8.5 Subject to Sections 47.8.1, 47.8.2, 47.8.3 and 47.8.4, no Change in Control of a NOP, any guarantor of a NOP under the parent company guarantee to be provided under Section 42.1, or of any Control Party, shall be permitted without the prior written consent of the Owner and the other NOPs.

47.8.6 Each NOP shall provide notice to the Owner's Representative of any proposed Change in Control of the NOP, any guarantor of a NOP under the parent company guarantee to be provided under Section 42.1, or of any Control Party, as the case may be, not less than 20 Business Days prior to such proposed Change in Control, and such notice shall include:

47.8.6.1 a statement identifying all persons with an ownership interest in the NOP or the relevant Control Party, as the case may be, and their respective holdings of such ownership interests in each case prior to and following any such proposed Change in Control; and

47.8.6.2 as applicable, the legal name, registered address, directors and officers of, and nature of the business and activities carried on by, the person who would acquire control over the NOP, the guarantor or the relevant Control Party pursuant to such Change in Control.

Following the delivery to the Owner's Representative of the notice referred to in this Section 47.8.6, the NOP shall provide the Owner with such other information pertaining to the proposed or actual Change in Control as the Owner may reasonably request (including information in respect of the financial and technical capability of the Third Party acquiring or exercising control over the relevant NOP), and shall attend any meetings requested by the Owner's Representative including arranging for attendance at those meetings by the Third Party acquiring or exercising control over the relevant NOP or Control Party.

47.8.7 Upon request by a NOP and delivery of the information required by the Owner, the Owner's Representative shall advise the NOP whether the person described in such particulars is a Restricted Person or a person whose standing or activities may compromise (i) the Owner's reputation or integrity, or (ii) the nature of the public transit system in the City of Toronto or the Province of Ontario so as to affect public confidence in the public transit system in the City of Toronto, the Province of Ontario or the Project.

47.8.8 Notwithstanding the definition of "Control Parties" set out in Schedule 1 (Definitions and Interpretation), this Section 47.8 shall not apply to a Change in Ownership or Change in Control of persons whose equity securities or units evidencing ownership or any other ownership interests are listed on a recognized stock exchange.

47.8.9 Section 47.8.4 shall not apply to a Change in Ownership of a Control Party that arises from a change in the shareholdings of such Control Party or an Affiliate of such Control Party (the "**Relevant Entity**") owned by an employee of such Relevant Entity, unless such changes individually or in the aggregate determined since the date of this Agreement, would result in a Change of Control of a NOP, in which case Section 47.8.6 shall apply.

## 47.9 Confidentiality and disclosure

### 47.9.1 Disclosure

47.9.1.1 Subject to Sections 47.9.1.2, 47.9.1.3 and 47.9.4, but notwithstanding anything else in this Agreement to the contrary, each NOP acknowledges and agrees that the Owner has a right to disclose or publish (including on websites) this Agreement, any or all terms hereof, including any or all contractual submissions and other records kept in accordance with this Agreement, any information related to the performance of the NOPs (or any NOP Party or any guarantor of a NOP who has provided a guarantee under Section 42.1) or any information derived from this Agreement or the information related to the performance of a NOP (or any NOP Party) as the Owner, in its sole and absolute discretion, may consider appropriate. In exercising its discretion, the Owner will be guided by the principles set out in Sections 47.9.1.2 and 47.9.1.3.

47.9.1.2 The Owner will not disclose portions of this Agreement, any terms hereof, including any contractual submissions or other records kept in accordance with this Agreement, any information related to the performance of a NOP (or any NOP Party or any guarantor of a NOP who has provided a guarantee under Section 42.1) or any information derived from this Agreement or the information related to the performance of a NOP (or any NOP Party or any guarantor of a NOP who has provided a guarantee under Section 42.1) which would be exempt from disclosure under section 17(1) of FIPPA.

47.9.1.3 Notwithstanding Section 47.9.1.2, but subject to Section 47.9.4, where a compelling public interest in the disclosure of the information clearly outweighs the public interest in limiting the disclosure of the information supplied by a NOP (or any NOP Party or any guarantor of a NOP who has provided a guarantee under Section 42.1), the Owner may disclose such information.

47.9.1.4 Notwithstanding anything else in this Agreement to the contrary, each NOP acknowledges and agrees that this Agreement and any or all terms hereof are subject to the Open Data Directive and that the Ontario ministries and agencies are required to disclose or publish certain data in accordance with the Open Data Directive.

#### 47.9.2 **Acknowledgement**

47.9.2.1 Each NOP acknowledges and agrees that subject to compliance with FIPPA, the Owner will be free to use, disclose or publish (including on websites) any information, including Confidential Information, on such terms and in such manner as the Owner sees fit. The NOPs hereby disclaims any right, title or interest of any nature whatsoever it may have in or to this Agreement that might prohibit or otherwise interfere with Owner's ability to use this Agreement in any manner desired by the Owner.

47.9.2.2 For greater certainty, each NOP acknowledges and agrees that, subject only to the removal of any information which the NOP is (or would be) entitled to refuse to disclose pursuant to section 17(1) of FIPPA, this Agreement, any contractual submissions or other records kept in accordance with this Agreement, any information related to the performance of a NOP (or any NOP Party or any guarantor of a NOP who has provided a guarantee under Section 42.1) or any information derived from this Agreement or the information related to the performance of a NOP (or any NOP Party or any guarantor of a NOP who has provided a guarantee under Section 42.1) are public documents and information and, as such, may be disclosed by the Owner.

#### 47.9.3 **Consent**

47.9.3.1 The NOPs hereby consent to the use by the Owner of this Agreement, and any portion thereof, subject to compliance with FIPPA and to the removal by the Owner (in consultation with the NOPs) of any information supplied in confidence to the Owner by a NOP in circumstances where disclosure may be refused under section 17(1) of FIPPA.

#### 47.9.4 **Redaction**

47.9.4.1 Prior to disclosing or publishing this Agreement, any terms hereof, including any contractual submissions or other records kept in accordance with this Agreement, any information related to the performance of a NOP (or any NOP Party or any guarantor of a NOP who has provided a guarantee under Section 42.1) or any information derived from this Agreement or the information related to the performance of a NOP (or any NOP Party or any guarantor of a NOP who has provided a guarantee under Section 42.1), the Owner shall provide to the NOPs a redacted version of this Agreement or other documents or information to be disclosed or published, on the basis that the information so redacted constitutes information which should not be disclosed pursuant to Section 47.9.1.2. The Parties acknowledge and agree that the Target Outturn Cost, but not any breakdown thereof, may be disclosed.

#### 47.9.5 **Use and Disclosure of Confidential Information**

47.9.5.1 Except as authorized hereunder, each Party shall hold in confidence, not disclose and not permit any person any manner of access to, whether directly or indirectly, any Confidential Information obtained in the course of conduct of this Agreement (whether supplied before or after the Commencement Date), provided that this Section 47.9 shall not restrict either Party from disclosing such Confidential Information to its professional advisors, to the extent necessary, to enable that Party to perform, to cause to be performed, or to enforce, its rights or obligations under this Agreement.

47.9.5.2 A NOP may disclose in confidence to any NOP Party and their professional advisors, such Confidential Information as is necessary for the performance by that NOP Party's obligations under this Agreement.

47.9.5.3 Each NOP acknowledges that the Owner may use the Confidential Information of the NOP for purposes not specific to the Project, but for other general governmental purposes. The Owner will advise the NOP prior to using any Confidential Information of the NOP for non-Project purposes.

47.9.5.4 Subject to the foregoing, neither Party shall use, or directly or indirectly cause, authorize or permit any other person to use, any Confidential Information obtained by the Parties in the course of conduct of this Agreement (whether supplied before or after the Commencement Date) except for the purposes of this Agreement, as permitted by this Agreement or as authorized by the disclosing Party in writing.

47.9.5.5 Each Party shall:

- (a) protect all Confidential Information of the disclosing Party with the same degree of care as it uses to prevent the unauthorized use, disclosure, publication, or dissemination of its own confidential information of a similar nature or character, but in no event with less than a reasonable degree of care;

- (b) if legally compelled to disclose any Confidential Information:
  - (i) provide the disclosing Party with prompt notice to that effect to allow the disclosing Party to seek any appropriate remedies and cooperate with the disclosing Party and its legal counsel; and
  - (ii) disclose only that portion of the Confidential Information that it is legally required to disclose; and
- (c) provide Confidential Information to the disclosing Party upon demand by the disclosing Party.

Section 47.9.5.5(c) shall not apply to Confidential Information in relation to which a Party has been provided a licence pursuant to this Agreement provided that the use of such Confidential Information is in accordance with this Agreement.

47.9.5.6 Nothing in this Agreement shall prevent the Owner from disclosing the NOPs' Confidential Information:

- (a) to the Crown, any other Governmental Authority or Governmental Entities. All Governmental Authorities and Governmental Entities receiving such Confidential Information shall be entitled to further disclose the Confidential Information to other government departments on the basis that the information is confidential and is not disclosed to a third party which is not part of the Crown, any Governmental Authorities or any Governmental Entities;
- (b) for the purpose of the examination and certification of the Owner's accounts; or
- (c) for the purpose of using a NOP's Intellectual Property in accordance with any licence granted to the Owner under Section 43 and/or for the purposes of granting sub-licences to other persons in relation to the same.

#### 47.9.6 **Exceptions**

47.9.6.1 Information of a Party (the "**Proprietor**"), other than Government Sensitive Information and other than Personal Information, will not be considered to be Confidential Information in the following circumstances:

- (a) the Proprietor advises the other Party to whom the information has been disclosed (the "**Confidant**") that the information is not required to be treated as Confidential Information;
- (b) the information is as of the date of this Agreement, or becomes at any time thereafter, generally available to or

accessible by the public through no fault or wrongdoing of the Confidant;

- (c) the information is a matter of public record or in the public domain;
- (d) the information was in the possession of the Confidant prior to its disclosure and the Confidant came into possession of such information without being in breach of this Agreement;
- (e) the information is received by the Confidant on a non-confidential basis from a source other than the Proprietor, provided that to the best of the Confidant's knowledge such source is not bound by a confidentiality agreement with the Proprietor or otherwise prohibited from disclosing the information to the Confidant by a contractual, legal or fiduciary obligation;
- (f) the information was independently developed by the Confidant without access to the Confidential Information, as evidenced by written records;
- (g) the information is required to be disclosed pursuant to Applicable Law, provided that the Confidant provides the Proprietor with reasonable notification and an opportunity to contest such requirement prior to disclosure; or
- (h) the information is disclosed to the Owner upon a termination of this Agreement, pursuant to Section 34 or is otherwise required by the Owner for the purposes of performing (or having performed) the Works, including the design or construction of the Works, or any other operations or services the same as, or similar to, the Works.

#### 47.9.7 **Subcontracts**

47.9.7.1 Each NOP must ensure that provisions in this Section 47.9 are incorporated in any Subcontracts or supply orders and that employees, agents or representatives of all or any of the Subcontractors or suppliers comply with the same.

47.9.7.2 Each NOP must and must procure that its Subcontractors must provide such access to its or their books and records as may be required from time to time by the Auditor General of Ontario and Auditor of Canada for the purpose of their audit and examination of the accounts of the Owner.

#### 47.9.8 **Application**

47.9.8.1 Notwithstanding Sections 6.2 and 6.3, a failure by a Party to comply with the requirements of this Section 47.9 confers on the other Parties an enforceable right at law or in equity to seek any one or more of a combination of specific performance, injunction or damages.

#### 47.9.9 **Survival of Confidentiality**

47.9.9.1 This Section 47.9 shall remain binding on the NOPs notwithstanding the completion or termination of this Agreement for any reason.

**47.9.10 Confidentiality of Intellectual Property**

47.9.10.1 Nothing in this Section 47.9 shall prevent the Owner from exercising any right granted to the Owner pursuant to Section 43 of this Agreement. The Owner shall have the right to disclose Confidential Information of NOP Parties when exercising the rights granted pursuant to Section 43 of this Agreement in accordance therewith.

**47.10 Freedom of Information and Protection of Privacy Act**

47.10.1 The Parties acknowledge and agree that:

47.10.1.1 FIPPA applies to the Owner, and that the Owner is required to fully comply with FIPPA; and

47.10.1.2 MFIPPA may apply to the owners of any Works to be owned by third parties, and that such owners are required to fully comply with MFIPPA.

47.10.1.3 The Owner shall, within the time periods provided in FIPPA for a party to exercise rights to prevent disclosure of information, advise a NOP of any request for Confidential Information that relates to a NOP (or any NOP Party) or of the Owner's intention to voluntarily release any information or documents which contain Confidential Information that relates to a NOP (or any NOP Party).

47.10.2 Each NOP must and must ensure that its Subcontractors must:

47.10.2.1 provide all necessary assistance and cooperation as reasonably requested by the Owner's Representative to enable it to comply with its obligations under the FIPPA and MFIPPA;

47.10.2.2 transfer to the Owner's Representative all requests for information relating to this Agreement that it receives as soon as practicable and in any event within two (2) Business Days of receipt;

47.10.2.3 provide the Owner's Representative with a copy of all information belonging to the Owner requested in the request for information which is in its possession or control in the form that the Owner requires within five (5) Business Days (or such other period as the Owner may reasonably specify) of the Owner requesting such information; and

47.10.2.4 not respond directly to a request for information unless authorized in writing to do so by the Owner.

47.10.3 Section 6.2 and Section 6.3 do not apply in respect of this Section 47.10.

**47.11 No partnership created**

47.11.1 Nothing in this Agreement gives a Party authority to bind any other Party in any way.

47.11.2 The NOPs are an independent contractors of the Owner (and all representatives of the Owner within or comprising the Owner, the Owner's Representative, the ALT, AMT and APT).

- 47.11.3 The employees, agents and subcontractors of any Party will not be deemed to be employees, agents or subcontractors of any other Party.
- 47.11.4 This Agreement, and the alliance relationship created by it, is not intended to create, nor will it be construed as creating, any partnership, joint venture, fiduciary obligation, employer/employee relationship, master/servant relationship, principal/agent relationship with regard to, or as between the Parties.

#### **47.12 Inability to comply with financial obligations**

Each Party must immediately notify the other Parties in writing if it forms the opinion that it will be unable to, or be unlikely to be able to, satisfy any of its financial obligations in relation to this Agreement from the financial resources available, or likely to be available to it, at the time the financial obligation is due.

#### **47.13 No fetter of the Owner's statutory rights and obligations**

Nothing in this Agreement shall in any way fetter the right, authority and discretion of the Owner or any Province Person or Government Entity in fulfilling its statutory or other functions under Applicable Law, and each NOP understands and agrees that nothing in this Agreement shall preclude Metrolinx's board of directors (or any respective designate appointed by them) from performing, discharging or exercising its duties, responsibilities, and powers under Applicable Law.

#### **47.14 Prohibited Acts**

##### **47.14.1 Occurrence of a Prohibited Act:**

47.14.1.1 If a NOP of any NOP Party (or anyone employed by or acting on their behalf) commits any Prohibited Act, then the Owner shall be entitled to act in accordance with the following:

- (a) if the Prohibited Act is committed by a NOP or by an employee acting under the direction of a director or officer of a NOP, then the Owner may give written notice to the NOP and Section 33 shall apply;
- (b) if the Prohibited Act is committed by an employee of a NOP acting independently of a direction of a director or officer of the NOP, then the Owner may give written notice to the NOP and Section 33 shall apply, unless, within 30 days after receipt of such notice, the NOP terminates the employee's employment and ensures that the relevant part of the Works shall be performed by another person;
- (c) if a Prohibited Act is committed by a NOP Party or by an employee of that NOP Party not acting independently of a direction of a director or officer of that NOP Party, then the Owner may give written notice to the NOP and Section 33 shall apply, unless, within 30 days after receipt of such notice, the NOP terminates the relevant subcontract and ensures that the relevant part of the Works shall be performed by another person, where relevant, in accordance with this Agreement;



- (d) if the Prohibited Act is committed by an employee of a NOP Party acting independently of a direction of a director or officer of that NOP Party, then the Owner may give notice to the NOP and Section 33 shall apply, unless, within 30 days after receipt of such notice, the NOP causes the termination of the employee's employment and ensures that the relevant part of the Works shall be performed by another person; and
- (e) if the Prohibited Act is committed on behalf of a NOP or a NOP Party by a person not specified in Sections 47.14.1.1(a) to 47.14.1.1(d), then the Owner may give notice to the NOP and Section 33 shall apply, unless, within 30 days after receipt of such notice, the NOP causes the termination of such person's employment or the appointment of their employer and, if necessary, ensures that the relevant part of the Works shall be performed by another person.

47.14.1.2 Any breach of this Section 47.14 by a NOP will be deemed a Default under the Agreement.

47.14.1.3 Sections 6.2 and 6.3 do not apply in respect of this Section 47.14.

#### 47.14.2 Permitted Payments

47.14.2.1 Nothing contained in this Section 47.14 shall prevent a NOP or any other person from paying any proper commission, fee or bonus whether to its employees within the agreed terms of their employment or otherwise, and such commission fee or bonus shall not constitute a Prohibited Act.

#### 47.14.3 Notification

47.14.3.1 A NOP shall notify the Owner's Representative of the occurrence and details of any Prohibited Act promptly on the NOP becoming aware of its occurrence.

#### 47.14.4 Replacement of NOP Party

47.14.4.1 Where a NOP is required to replace any NOP Party pursuant to this Section 47.14, the party replacing such NOP Party shall from the time of replacement be deemed to be a NOP Party and the provisions of this Agreement shall be construed accordingly.

### 47.15 **Governing law**

47.15.1 This Agreement, and each of the documents contemplated by or delivered under or in connection with this Agreement, shall be governed by and construed in accordance with the laws of Ontario and the laws of Canada applicable therein and shall be treated in all respects as an Ontario contract, without regard to conflict of laws principles.

47.15.2 Each Party irrevocably attorns to the exclusive jurisdiction of the courts of the Province of Ontario and all courts competent to hear appeals therefrom.

47.15.3 Each Party irrevocably waives any objection to the venue of any legal process in these courts on the basis that the process has been brought in an inconvenient forum.

47.15.4 Nothing in this Agreement affects the rights, protections and immunities of the Crown under the *Crown Liability and Proceedings Act*, 2019, S.O. 2019, c. 7, Sched. 17.

#### 47.16 **Building Information Modelling**

The Parties shall comply with respective obligations set out in the BIM Protocol stated in the Project Proposal. Any additional procedures or requirements which the Participants are to adopt in support of or as part of the BIM Protocol and/or associated IT systems shall be set out in the Information Protocol. The Parties shall have the benefit of any rights granted to them in the BIM Protocol and of any limitations or exclusions of liability contained within it.

#### 47.17 **Corporate Tax**

47.17.1 Each NOP shall keep (and shall procure that its Subcontractors keep) records of all expenditure, costs and other outgoings incurred in the performance of its obligations under this Agreement, to enable, validate and support claims and compliance requirements made by the Owner under the applicable tax legislation. In particular, but without limitation, the NOPs shall provide (and shall procure that any Subcontractors provide) a breakdown of costs at a sufficiently granular level to enable identification of costs attributable to assets qualifying for tax deduction, depreciation or capital cost allowance.

47.17.2 Each NOP shall provide (and shall ensure that its Subcontractors provide) such records in the form that the Owner's Representative may request and such other documentation as they may have in their possession for the purposes set out in Section 47.17.1.

#### 47.18 **Security vetting**

47.18.1 Participant Personnel shall comply with the security arrangements as may be in force from time to time for the conduct of personnel at the Site and/or the Owner's property and in the use of Owner IT networks, including:

47.18.1.1 Each Participant Personnel is required to complete and deliver a criminal records search form to the Participant;

47.18.1.2 Each Participant Personnel is required to be questioned concerning Relevant Convictions; and

47.18.1.3 Each Participant shall prevent Participant Personnel who are unable to obtain the required security clearances from accessing Owner premises and Owner IT networks.

47.18.2 To the extent permitted by Applicable Law, each NOP shall, and shall cause each NOP Party to, ensure that no person who discloses any Relevant Conviction, or who is found to have any Relevant Conviction following the completion of a criminal records search, in either case of which the NOP or a NOP Party is aware or ought to be aware, is allowed access to the Lands or Additional Lands (if any) to perform any Works, without the prior written consent of the Owner, in its sole and absolute discretion.

47.18.3 To the extent permitted by Applicable Law, each NOP shall ensure that the Alliance Director is kept immediately notified and kept advised at all times of any person employed or engaged by the NOP or any NOP Party in the provision of any of the Works who, subsequent to the commencement of such employment or engagement, (i) has been arrested or detained; (ii) receives a Relevant Conviction; or (iii) is charged

with an offence that could lead to a Relevant Conviction (of which the NOP or a NOP Party becomes aware or whose previous Relevant Convictions become known to the NOP or a NOP Party). Each NOP shall use commercially reasonable efforts to obtain, or to cause all NOP Parties to obtain, all consents as may be required by Applicable Law or otherwise authorizing the disclosure of such information to the Owner's Representative as contemplated in this Section 47.18.

47.18.4 Sections 6.2 and 6.3 do not apply in respect of this Section 47.18.

#### **47.19 Right to designate**

At any time and from time to time, the Crown may designate any ministry, branch, agency, division, department or office of the Government of Ontario to carry out administrative responsibility for the rights and obligations of the Owner under this Agreement (including review of all documentation submitted by NOPs, the Owner Participant, the Owner's Representative, a NOP Party and an Owner Participant Party for review, approval, comment, consideration, evaluation or otherwise as described in this Agreement, engagement in discussions, consultations and meetings with Participants, Owner directions, submission of Notices and documentation to the Owner, issuances of Notices, documentation, Scope Variations and related matters) and Participants may deal exclusively with the designated person in respect of all such matters and is entitled to rely on the actions, directions, requests, Notices, consents, approvals, waivers, and comments relating to the review of documentation and other administrative matters and decisions determined by such designated person from time to time, until the Crown has notified the NOPs in writing that such designated person is no longer the person designated by the Crown hereunder and such Notice shall have effect on the later of the date of delivery of such Notice and the date specified in the written Notice. The Crown shall advise the NOPs in writing of any designation hereunder. The rights and obligations of the parties to this Agreement shall be in no way affected by reason of any such designation. The NOPs acknowledge the right of the Crown to delegate administrative responsibilities hereunder as set forth in this Section 47.19.

#### **47.20 Enurement**

This Agreement and any other agreement entered into in connection with the Project to which the Owner and each of the Participants are parties shall enure to the benefit of, and be binding on, the Owner, and each of the Participants and their respective successors and permitted transferees and assigns.

#### **47.21 Remedies cumulative**

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

#### **47.22 Counterparts**

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the Parties shall constitute a full, original and binding agreement for all purposes. Counterparts may be executed either in original or faxed form provided that any Party providing its signature in faxed form shall promptly forward to the other Party an original signed copy of this Agreement which was so faxed.

### **48. COPYRIGHT NOTICE**

The Parties acknowledge that the Queen's Printer for Ontario is the exclusive owner of the copyright in this Agreement.

## **49. TAXES**

### **49.1 Information and assistance provided by NOPs**

- 49.1.1 The NOPs shall, at the Owner's Representative's request and cost, assist the Owner in applying for and obtaining all remissions and credits of Taxes to which the Owner is entitled.
- 49.1.2 The Owner may apply for a global or general exemption, waiver, remission, or refund of some or all Taxes which may otherwise be applicable in relation to this Agreement. The NOPs shall, at the Owner's cost, assist the Owner in making any applications for such global or general exemption, waiver, remission or refund and shall provide the Owner with such documentation as the Owner's Representative may reasonably require to support such application and, in any event, shall provide such consent as the Owner may require. Any exemption, waiver, remission, refund or other recovery of Taxes obtained by the Owner through such application shall accrue to the sole benefit of the Owner.
- 49.1.3 The NOPs will provide the Owner with any information reasonably requested by the Owner's Representative from time to time in relation to any Taxes chargeable in accordance with this Agreement and payable by the Owner to the NOPs from time to time.

### **49.2 Residency – Income Tax Act (Canada)**

- 49.2.1 None of the NOPs shall undertake any action or transaction that, if undertaken, would cause or result in any NOP becoming a Non-Resident without the Owner's prior written consent, which consent may be withheld in the Owner's sole and absolute discretion.

### **49.3 Taxes – General**

- 49.3.1 The NOPs shall not, without the prior written consent of the Owner (which consent may be withheld in its sole and absolute discretion), undertake any action or transaction that, if undertaken, would cause the Owner to have (or result in the Owner having) any obligation to deduct, withhold or remit any Taxes that are required by Applicable Law to be deducted, withheld or remitted from any amounts paid or credited to any NOP or any NOP Party under this Agreement or under any other ancillary document executed in connection with this Agreement.

### **49.4 Taxes – Withholding and indemnity**

- 49.4.1 If the Owner is or becomes required by Applicable Law to deduct or withhold any amount in respect of Taxes on or in respect of any amounts paid or credited to a NOP or to a NOP Party by the Owner under the Agreement ("**Withholding Taxes**"), then the Owner shall be entitled to make any such deductions or withholdings. All amounts paid or credited by the Owner under this Agreement to a NOP or a NOP Party shall be paid or credited net of such deductions or withholdings. The gross amount paid or credited by the Owner under this Agreement is to be treated as Actual Cost incurred by the Owner Participant and, for clarity, does not give rise to an adjustment to the Target Outturn Cost.
- 49.4.2 If the Owner is or becomes required by Applicable Law to deduct and withhold any Withholding Taxes, the relevant NOP shall indemnify and hold harmless the Owner for (i) the full amount of all Taxes ("**Indemnifiable Taxes**") that arise, are imposed on or are required to be paid by the Owner in respect of any amounts paid or credited by the

Owner to a NOP or any NOP Party under this Agreement less any amount withheld or deducted in respect of Withholding Taxes by the Owner, and (ii) any liability payable or incurred in connection with Indemnifiable Taxes (including penalties, interest and reasonable expenses associated with Tax compliance, reporting and contesting such liability for Indemnifiable Taxes, including reasonable professional expenses payable or incurred in connection therewith) arising from or with respect to Indemnifiable Taxes, whether or not they were correctly or legally asserted (“**Associated Liabilities**”). Payment under this indemnification shall be made within 30 days after the date the Owner makes written demand for it. A certificate containing reasonable detail as to the amount of Indemnifiable Taxes and Associated Liabilities submitted to the NOPs by the Owner shall be conclusive evidence, absent manifest error, of the amount due from the NOP to the Owner. The Owner shall be entitled to exercise its rights of set off under Section 12.1 of Schedule 12 (Payment Procedure) against any amounts owing under this indemnification.

**50. OWNER’S DUE DILIGENCE**

The Owner’s reasonable due diligence costs (including fees of professional advisors) in connection with any consent required of the Owner or the Owner’s determination of a NOPs compliance with Sections 20.3, 20.4, 20.5, 20.6, 47.7 or 47.8 whether or not such consent is granted, are to be treated as an Actual Cost incurred by the Owner Participant and, for clarity, do not give rise to an adjustment to the Target Outturn Cost.

**51. DOCUMENTS TO BE DELIVERED ON THE COMMENCEMENT DATE**

On or before the Commencement Date: (i) the NOPs shall deliver to the Owner the documents referred to in Section 1 of Schedule 7 – Completion Documents of the Alliance Development Agreement; and (ii) the Owner shall deliver to the NOPs the documents referred to in Section 2 of Schedule 7 – Completion Documents of the Alliance Development Agreement.

**IN WITNESS** whereof the Parties have executed this Agreement as of the date first above written.

**METROLINX**

Per: \_\_\_\_\_

Name: **[REDACTED]**

Title: **[REDACTED]**

I have authority to bind the corporation.

**KIEWIT-ALBERICI UNION GENERAL PARTNERSHIP**

By its partners:

**[REDACTED]**

Per: \_\_\_\_\_

Name: **[REDACTED]**

Title: **[REDACTED]**

**[REDACTED]**

Per \_\_\_\_\_

Name: **[REDACTED]**

Title: **[REDACTED]**

We have authority to bind the partnership.

**MASS. ELECTRIC CONSTRUCTION CANADA CO.**

Per: \_\_\_\_\_

Name: **[REDACTED]**

Title: **[REDACTED]**

I have authority to bind the corporation.

**WSP CANADA INC.**

Per: \_\_\_\_\_

Name:

Title:

I have authority to bind the corporation.

*(Signature Page to Project Alliance Agreement)*

# SCHEDULE 1

## DEFINITIONS AND INTERPRETATION

### 1. Definitions

Unless the context otherwise requires, in this Agreement the following words and expressions have the meanings set out below:

**“Access Management Plan”** the access management plan for the Project set out in the Project Proposal.

**“Actual Cost”** has the meaning given at Section 1.1 of Schedule 9 (Actual Cost).

**“Actual Outturn Costs” or “AOC”** means the total verified sum of:

- (a) all Actual Costs reasonably and actually incurred by the NOPs in performing the Works;
- (b) all Actual Costs reasonably and actually incurred by the Owner Participant in performing the Works or in connection with this Agreement;
- (c) all Actual Costs reasonably and actually incurred by the Owner which are expressly stated by this Agreement to be Actual Costs; and
- (d) all Overhead and Profit paid by the Owner to the NOPs under this Agreement,

until the Final Completion Date.

**“Actualized Category”** means any skill type category, grade and/or band against which any NOP allocated and remunerates its personnel engaged in the Works and which is either specified in the Project Proposal or subsequently approved by the ALT for the purposes of determining any Actualized Rates for that NOP.

**“Actualized Period”** means the period for determining and reconciling Actualized Rates pursuant to Section 7.2 of Schedule 9 (Actual Cost), being any period of three (3) months commencing on the anniversary of January 1, April 1, July 1 or October 1 of any calendar year.

**“Actualized Rates”** means the rates calculated in accordance with the methodology set out in the Project Proposal in accordance with Schedule 9 (Actual Cost) as the proxy for Actual Costs.

**“AD Phase”** has the meaning given in the Alliance Development Agreement.

**“ADA Early Works”** has the meaning given in Section 21.3.2.



<b>“Additional Disruptive Possession”</b>	has the meaning given in Schedule 19 (Rail Corridor Access).
<b>“Additional Lands”</b>	means those temporary lands acquired or to be acquired by a Participant in which a Participant acquires temporary rights of access or permission to enter in order to perform the Works.
<b>“Additional Owner Permanent Lands”</b>	has the meaning given in Section 15.1.5.
<b>“Additional Permanent Lands Request”</b>	has the meaning given in Section 15.1.5.
<b>“Additional White Period Possession”</b>	has the meaning given in Schedule 19 (Rail Corridor Access).
<b>“Adjusted Actualized Amount”</b>	has the meaning given in Section 7.2.7 of Schedule 9 (Actual Cost).
<b>“Adjustment Event”</b>	any of the following acts, events or circumstances: <ul style="list-style-type: none"> <li>(a) a Scope Variation;</li> <li>(b) a change to a Statutory Requirement after the Commencement Date which substantially and materially affects the Works (including the carrying out and/or performance of any works or services forming part of the Works);</li> <li>(c) a change to a Standard after the Commencement Date which substantially and materially affects the Works (including the carrying out and/or performance of any works or services forming part of the Works);</li> <li>(d) any suspension by the Owner of all or part of the Works under Section 32 which substantially and materially affects the Works (other than as a result of a breach of this Agreement by a Participant or where the suspension is necessary to ensure that the Works comply with this Agreement);</li> <li>(e) the Owner committing a breach of its obligations under Section 15.1.1 (other than as a result of a breach by a Participant of its obligations under this Agreement) which substantially and materially affects the Works;</li> <li>(f) a Force Majeure Event; or</li> <li>(g) any event which constitutes an “Adjustment Event” in accordance with the Adjustment Event Guidelines, but only to the extent that such event substantially and materially effects the Works.</li> </ul>

**“Adjustment Event Guidelines”** the “adjustment event guidelines” identified as such in the Project Proposal which may:

- (a) identify additional Adjustment Events; and/or
- (b) provide examples of events or circumstances which amount (or do not amount) to an Adjustment Event to be used as a comparative tool in determining whether an Adjustment Event has occurred.

**“Affiliate”** means, as to a person, means any other person who, directly or indirectly, controls, or is controlled by, or is under common control with, such person, and for these purposes:

- (a) a body corporate is controlled by one or more persons if (i) securities of the body corporate to which are attached more than 50% of the votes that may be cast to elect directors of the body corporate are beneficially owned by the person or persons, and (ii) the votes attached to those securities are sufficient to elect a majority of the directors of the body corporate;
- (b) an association, partnership or other organization is controlled by one or more persons if (i) more than 50% of the partnership or other ownership interests, however designated, into which the association, partnership or other organization is divided are beneficially owned by the person or persons, and (ii) the person or persons are able to direct the business and affairs of the association, partnership or other organization or the appointment of its management;
- (c) a body corporate, association, partnership or other organization is controlled by one or more persons if the person or persons have, directly or indirectly, control in fact of the body corporate, association, partnership or other organization;
- (d) a body corporate, association, partnership or other organization that controls another body corporate, association, partnership or other organization is deemed to control any body corporate, association, partnership or other organization that is controlled or deemed to be controlled by the other body corporate, association, partnership or other organization; and
- (e) “control”, “controlled” and similar expressions have corresponding meanings.

**“Affiliate Subcontract Fee”** that part of the total price payable or to be credited to an Affiliated Subcontractor which is attributable to the Affiliated Subcontractor’s overhead and profit for the part of the Works undertaken pursuant to the relevant Affiliated Subcontract.

**“Affiliated Subcontract”** has the meaning given in Section 20.3.

<b>“Affiliated Subcontractor”</b>	has the meaning given in Section 20.3.
<b>“Agreement”</b>	this agreement.
<b>“Alliance”</b>	the collaborative team and relationships formed by the Participants as set out and subject to this Agreement for the purposes of delivering the Project in accordance with the Alliance Charter.
<b>“Alliance Auditor”</b>	the independent auditor appointed by the ALT prior to or during the AD Phase, and any other replacement Alliance Auditor (as applicable) appointed under Section 31.2.1.
<b>“Alliance Charter”</b>	the alliance charter (including the Alliance Principles, Alliance Goals and Alliance Values) for the performance of the Works as set out in Schedule 5 (Alliance Charter) which, together with the other terms of this Agreement, governs the relationship between the Participants under this Agreement.
<b>“Alliance Development Agreement”</b>	the alliance development agreement for the Project entered into by the Owner and the NOPs under which, among other things, the Project Proposal was developed for approval (or otherwise) of the Owner.
<b>“Alliance Director”</b>	the person specified in Section 8.1 or any other person appointed as the Alliance Director in accordance with the terms of this Agreement for the purposes of this Agreement from time to time.
<b>“Alliance Goals”</b>	are set out in Schedule 5 (Alliance Charter).
<b>“Alliance Leadership Team” or “ALT”</b>	the leadership team for the Alliance established under Section 7.1.
<b>“Alliance Management Team” or “AMT”</b>	the management team for the Alliance established under Section 8.2.
<b>“Alliance Principles”</b>	are set out in Schedule 5 (Alliance Charter).
<b>“Alliance Project Team” or “APT”</b>	the project team for the Alliance to be established under Section 9.1.
<b>“Alliance Risk”</b>	any risk, instruction, decision, determination, direction, approval, event, circumstance or the like occurring under this Agreement or in connection with the carrying out of the Works which (and to that extent): <ul style="list-style-type: none"> <li>(a) is not an Adjustment Event; or</li> <li>(b) does not entitle the Participants to receive any loss, expenses, costs, damages or payment under this Agreement, other than any payment due to any NOP in respect of Actual Cost, Overhead, or Profit.</li> </ul>

<b>“Alliance Risk and Opportunity Report”</b>	the alliance risk and opportunity report set out in the Project Proposal which includes the Risk and Contingency Provision.
<b>“Alliance Values”</b>	are set out in Schedule 5 (Alliance Charter).
<b>“ALT Appointed Expert”</b>	has the meaning given in Section 2.1.2 of Schedule 17 (Issue Resolution Procedure).
<b>“Amtrak”</b>	Amtrak National Railroad Passenger Corporation and any successors thereto.
<b>“Applicable Law”</b>	<p>(a) any statute or proclamation or any delegated or subordinated legislation including regulations and by-laws;</p> <p>(b) any Authority Requirements; and</p> <p>(c) any judgment of a relevant court of law, board, arbitrator or administrative agency which is a binding precedent in the Province of Ontario,</p> <p>in each case, in force in the Province of Ontario, or otherwise binding on the Owner, any Participant, any NOP Party, any Owner Party, any Owner Participant Party or any Province Person.</p>
<b>“Associated Liabilities”</b>	has the meaning given in Section 49.4.2.
<b>“Authority Requirements”</b>	any order, direction, directive, request for information, policy, administrative interpretation, guideline or rule of or by any Governmental Authority and includes, for clarity, any direction or instruction from Transport Canada arising from any contractual arrangement or board orders involving Transport Canada and one or both of MTO or Metrolinx with respect to the Union Station Rail Corridor or the Network (or any part thereof).
<b>“Bank Account”</b>	for each NOP, its nominated bank account for payments by the Owner as described in Section 3.3 of Schedule 12 (Payment Procedures).
<b>“Bankruptcy and Insolvency Act (Canada)”</b>	the <i>Bankruptcy and Insolvency Act</i> , R.S.C. 1985, c. B-3, as amended from time to time.
<b>“Baseline Costs”</b>	has the meaning given in Section 2.14 of Annex 2 to Schedule 10.
<b>“Baseline Works Schedule”</b>	the baseline works schedule included in the Project Proposal which incorporates all activities and milestones necessary to complete the Works.
<b>“Beneficiary”</b>	has the meaning given in Section 38.6.1.
<b>“Best For Project”</b>	an approach, determination, decision, method, solution, interpretation, outcome or resolution that is consistent with the VFM Statement and the Alliance Charter.

<b>“BIM Protocol”</b>	where stated to apply in the Project Proposal, is the CIC/BIM Protocol first edition 2013 or such other Building Information Modelling protocol stated in this Agreement.
<b>“Blockade Zone”</b>	means the blockade zone cross-hatched in red in the sketch attached as Appendix “B” to Schedule 18 – Lands.
<b>“Bonds”</b>	any one or more of the Performance Bonds and the Labour and Material Payment Bonds described in Section 5 of Schedule 13 (Insurance Policies and Bonds) and, collectively, means all of them.
<b>“Business Day”</b>	any day other than a Saturday, a Sunday, a statutory holiday in the Province of Ontario or any day on which banks are not open for business in the City of Toronto, Ontario.
<b>“Canadian GAAP”</b>	shall be deemed to be the generally accepted accounting principles from time to time approved by the Canadian Institute of Chartered Accountants, or any successor institute, applicable as at the date on which such calculation is made or required to be made in accordance with generally accepted accounting principles, as such principles may be amended or varied by International Financial Reporting Standards then in effect in Canada, in any case consistently applied from one period to the next.
<b>“Certificate of Completion”</b>	the certificate defined in Section 24.2.3.
<b>“Certificate of Recognition”</b>	the certification issued by IHSA to a person confirming that the health and safety management systems of such person comply with the terms, provisions and conditions of the COR Program.
<b>“Certificate of Substantial Performance of the Works”</b>	the certificate defined in Section 5.3 of Schedule 12 (Payment Procedures).
<b>“Change in Control”</b>	with respect to a person: <ul style="list-style-type: none"> <li>(a) any Change in Ownership, where the effect of such change is to result in control of the decisions made by or on behalf of such person subsequently being with a different entity or entities than prior to such change;</li> <li>(b) any other change in respect of the power to elect a majority of the directors of the person or otherwise control the decisions made on behalf of such person; or</li> <li>(c) any other change of direct or indirect power or authority through any contractual right or other power or interest with or over a person to influence, direct, cause to change or prevent from changing the approval of a decision, direction of the management, actions or policies of such person, to direct or cause the direction of the management, actions or policies of such person.</li> </ul>

<b>“Change in Ownership”</b>	with respect to a person, any change in ownership, whether beneficial or otherwise, of any of the shares or units of ownership of such person, or in the direct or indirect power to vote or transfer any of the shares or units of ownership of such person.
<b>“City of Toronto”</b>	the City of Toronto and all operating divisions thereof.
<b>“CN”</b>	the Canadian National Railway Company and any successors thereto.
<b>“Commencement Date”</b>	is the date of this Agreement.
<b>“Communications and Public Engagement Protocol”</b>	the communications and public engagement protocol set out in the Project Proposal.
<b>“Completion”</b>	<p>the stage in the performance of the Works when:</p> <ul style="list-style-type: none"> <li>(a) the Works are complete and in accordance with this Agreement except for minor Defects: <ul style="list-style-type: none"> <li>(i) which do not prevent the Works from being reasonably capable of being used for the Stated Purpose;</li> <li>(ii) which the Participants have reasonable grounds for not promptly rectifying; and</li> <li>(iii) rectification of which will not prejudice the immediate, efficient, safe and convenient use of the Works for the Stated Purpose;</li> </ul> </li> <li>(b) the requirements of all relevant certifying authorities and insurance surveyors for the purposes of achieving Completion have been met;</li> <li>(c) all testing and commissioning which is required under this Agreement and any Applicable Law to be carried out and passed before the Works reach Completion have been satisfactorily carried out and passed and certified as such by the Alliance Director; and</li> <li>(d) the Owner has received all documents and information about the design and construction of the Works including all design documentation, surveys and as constructed information and drawings and any other documentation reasonably required by the Owner with respect to the Works, including all documents and other information and things essential for the maintenance, operation or use of the Works.</li> </ul>
<b>“Companies’ Creditors Arrangement Act (Canada)”</b>	the <i>Companies’ Creditors Arrangement Act</i> , R.S.C. 1985, c. C-36, as amended from time to time.

<b>“Composite Rate”</b>	any rate or price set forth in the Project Proposal which was derived from a combination of Resource Unit Rates and used in the development of the Target Outturn Cost.
<b>“Confidential Information”</b>	any information that ought to be considered as confidential and proprietary information (however it is conveyed or on whatever media it is stored) and may include information whose disclosure would, or would be likely to, prejudice the commercial interests of any person and Intellectual Property and all Personal Information which is supplied by or on behalf of a Party, whether before or after the date of this Agreement.
<b>“Consent”</b>	any agreement, approval, authorization, authority certificate consent, exemption, filing, notarization, licence, permission, permit or registration from, by or with a Governmental Authority or a Third Party.
<b>“Consequential Loss”</b>	<p>loss of use and/or interruption of operations (other than interruption of operations of Third Parties who operate passenger or freight trains anywhere on the Network to the extent provided for in Sections 22.3.2, 22.4.3, 22.4.6, 22.6.3, 22.7.2, 22.7.3, 22.8 and 24.5 of the Agreement), loss of production, loss of revenue, loss of profit or anticipated profit or loss of business reputation, but does not include any loss expressly stated in Section 40.2 or any loss or increased costs to a Party caused by:</p> <ul style="list-style-type: none"> <li>(a) reduction in the Actual Cost or Fee payable by the Owner to any NOP by virtue of Schedule 9 (Actual Cost) or Schedule 10 (Fee);</li> <li>(b) an increase in the Actual Cost or Fee payable by the Owner to any NOP by virtue of Schedule 9 (Actual Cost) or Schedule 10 (Fee);</li> <li>(c) a reduction in the amount payable by the Owner to any NOP by virtue of Schedule 11 (Risk or Reward Regime); or</li> <li>(d) an increase in the amount payable by the Owner to any NOP by virtue of Schedule 11 (Risk or Reward Regime).</li> </ul>
<b>“Construction NOPs”</b>	NOP 1 and NOP 2, being the NOPs responsible for providing the construction and installation services components of the Works.
<b>“Contractor Site Specific Safety Plan”</b>	the document describing the NOPs’ health and safety management program for the Project and the Site set out in the Project Proposal.
<b>“Construction Act”</b>	the <i>Construction Act</i> , R.S.O. 1990, c. C.30, and regulations enacted thereunder, all as amended from time to time and subject to the application of the transition provisions in s. 87.3 of the <i>Construction Act</i> .
<b>“Construction Plant”</b>	apparatus, facilities, plant, equipment, materials, products, processes, temporary works, machinery and other things used in performing the Works but not forming part of the Works.
<b>“Contracting Strategy”</b>	the contracting strategy set out in the Project Management System in the Project Proposal.

<b>“Control Party”</b>	(a) any person with any form of direct ownership interest in a NOP; (b) <b>[REDACTED]</b> ; (c) <b>[REDACTED]</b> ; and (d) <b>[REDACTED]</b> .
<b>“COR Certification”</b>	in respect of a person, receipt by such person of its (a) Certificate of Recognition; and (b) Letter of Good Standing.
<b>“Copyrights”</b>	all copyrights (registered or otherwise) and registrations and applications for registration thereof, and all rights therein provided by multinational treaties or conventions.
<b>“COR-Certified Construction NOP Party”</b>	has the meaning given in Section 18.3.1.2 of this Agreement.
<b>“COR Program”</b>	the national safety program known as “The Certificate of Recognition (COR™)”, being a safety program that enables persons to assess their health and safety management systems to manage risks, establish controls, and minimize the incidence of injury and illness to their workers, and being nationally trademarked and endorsed by participating members of the Canadian Federation of Construction Safety Associations, or such other national safety program approved by the Owner.
<b>“COR-Qualified Construction NOP Party”</b>	each of the following: (a) where the Construction NOP is a single legal entity, the Construction NOP; (b) where the Construction NOP is a joint venture, each member of the joint venture; or (c) where the Construction NOP is a partnership, each partner of the partnership,  provided that each such person has current OHSAS 18001 Accreditation in good standing.
<b>“Cost Element Allocation Tables”</b>	the tables at Annex 1 to Schedule 9 (Actual Cost).
<b>“CP”</b>	Canadian Pacific Railway Company and any successors thereto.
<b>“Credit Note”</b>	means a credit note as defined for the purposes of the ETA to be issued by a NOP in respect of overpayment as contemplated in Section 10.5 of Schedule 12 (Payment Procedures).
<b>“Crown”</b>	Her Majesty the Queen in right of Ontario.



<b>“Current Actualized Period”</b>	means any Actualized Period during which payment of Actual Costs is measured using Actualized Rates determined in respect of the relevant Preceding Period in accordance with Section 7.2.7 of Schedule 9 (Actual Cost).
<b>“Date for Completion”</b>	the date for Completion of the whole of the Works or (if applicable) a Tranche of the Works, as stated in the Project Proposal or as otherwise determined in accordance with Section 27.6.2, and subject always to any adjustments made in accordance with the express terms of this Agreement.
<b>“Date of Completion”</b>	the date of Completion of the whole of the Works or (if applicable) a Tranche of the Works, as stated in the relevant Certificate of Completion.
<b>“Date of Final Completion”</b>	the final completion date of the whole of the Works (including all Tranches of the Works) as stated in the relevant Final Certificate.
<b>“Date of Works Commencement”</b>	the earliest date for commencement of the Works stated in the Project Proposal.
<b>“Default”</b>	has the meaning given in Section 33.1.
<b>“Default Interest Rate”</b>	with respect to an amount and a specified period of time, such amount multiplied by (a) such period of time in days divided by the actual number of days in the current year multiplied by (b) <b>[REDACTED]</b> % per annum.
<b>“Default Notice”</b>	a notice given by the Owner’s Representative under Section 33.3 or by any NOP under Section 33.2.
<b>“Defaulting Participant”</b>	has the meaning given in Section 33.1.
<b>“Defect”</b>	any error, omission, defect, non-conformity, deficiency or discrepancy in any part of the Works or any other matter that is not in accordance with this Agreement.
<b>“Defects Correction Period”</b>	unless stated otherwise in the Project Proposal for, a period of two (2) years commencing on the Date of Completion of the Works or (if applicable) a Tranche of the Works (with the expiry of such period being subject to the rectification of all Defects existing at the relevant Date of Completion or arising during the relevant 2 year period).
<b>“Designer NOP”</b>	NOP 3, being the NOP responsible for providing the design component of the Works.
<b>“Direct or Indirect Power or Control”</b>	the direct or indirect power or control over the decisions, management, actions or policies of a person, including through the direct or indirect power or control over the decisions, management, actions or policies of any persons having direct or indirect power or control over the decisions, management, actions or policies of any other person, whether through: <ul style="list-style-type: none"> <li>(a) ownership, beneficial or otherwise, of greater than five percent of any of the shares, units or equity interests of a person;</li> </ul>

- (b) the direct or indirect power to vote any of the shares, units or equity interests of a person where an individual's ownership, beneficial or otherwise, is equal to or exceeds five percent of the voting securities, units or equity interests of such person; or
- (c) the direct or indirect power or authority to influence or direct the approval of a decision, the management, actions or policies of a person or to prevent the approval of a decision, the management, actions or policies of a person through any contractual right or other power or interest with or over a person.

<b>“Disruptive Possession”</b>	has the meaning given in Schedule 19 (Rail Corridor Access).
<b>“Draft Invoice”</b>	an invoice submitted pursuant to Section 2.5.1 of Schedule 12 (Payment Procedures)
<b>“Due Date for Final Payment”</b>	has the meaning given in Section 8.7.1 of Schedule 12 (Payment Procedures).
<b>“Due Date for Interim Payment”</b>	has the meaning given in Section 3.2.1 of Schedule 12 (Payment Procedures).
<b>“Due Date for Refund”</b>	has the meaning given in Section 3.2.3 of Schedule 12 (Payment Procedures).
<b>“Early Works”</b>	those works and services identified as “Early Works” in the Alliance Development Agreement which are provided during the AD Phase in accordance with the Alliance Development Agreement, and a part of which may, if applicable, be provided after the Commencement Date.
<b>“Emergency Rail Situation”</b>	means a derailment, accident, collision or other situation arising that causes an immediate and serious threat or damage to any one or more of the public, the Owner, the Owner Participant, any Owner Participant Party, any Owner Party, any NOP Party, or any NOP Personnel, or that causes an immediate and serious threat to Metrolinx’s railway operations.
<b>“Emergency Service Providers”</b>	any Police Service, firefighting service, ambulance service, armed forces or other authority with emergency service authority pursuant to Applicable Law which may require access to the Site and the Works from time to time.
<b>“Employed Staff”</b>	for any NOP, any person employed by that NOP to which Table B of the Cost Element Allocation Table in Schedule 9 (Actual Cost), is applicable.
<b>“Encumbrance”</b>	has the meaning given in Schedule 21 (Encumbrances).
<b>“Environment”</b>	means the air, land and water, or any combination or part thereof, of the Province of Ontario and includes air within buildings and air within other natural or man-made structures above or below ground.
<b>“ETA”</b>	means Part IX of the Excise Tax Act (Canada), as amended.
<b>“Excluded NOP”</b>	is defined in Section 1.1.1 of Schedule 16 (Exclusion and Termination).

<b>“Exclusion Notice”</b>	a notice in accordance with Section 1.1.1 of Schedule 16 (Exclusion and Termination).
<b>“Expert”</b>	has the meaning in Section 2.1.3.2 of Schedule 17 (Issue Resolution Procedures).
<b>“Failure to Vacate – Disruptive Possession”</b>	has the meaning given in Schedule 19 (Rail Corridor Access).
<b>“Failure to Vacate – White Period Possession”</b>	has the meaning given in Schedule 19 (Rail Corridor Access).
<b>“Fee”</b>	for each NOP, the amount of Overhead and Profit either stated in or determined by the Project Proposal and/or Schedule 10 (Fee) at the Commencement Date in connection with the Works, as adjusted from time to time: <ul style="list-style-type: none"> <li>(a) in accordance with Schedule 10 (Fee); or</li> <li>(b) otherwise in accordance with this Agreement.</li> </ul>
<b>“Final Certificate”</b>	the certificate defined in Section 8.5.1 of Schedule 12 (Payment Procedures).
<b>“Final Completion Date”</b>	the date of the Final Certificate.
<b>“Final Date for Final Payment”</b>	has the meaning in Section 8.7.2 of Schedule 12 (Payment Procedures).
<b>“Financial Establishment Audit”</b>	the financial establishment audit carried out in accordance with the Alliance Development Agreement and prior to the Parties entering into this Agreement.
<b>“Financial Security Obligations”</b>	the provision of any letters of credit, instruments of guarantee, bonds or security deposits, or any other financial security obligations.
<b>“Financial Year”</b>	any period of 12 months commencing on 1 April and ending on the next 31 March.
<b>“FIPPA”</b>	the <i>Freedom of Information and Protection of Privacy Act</i> (Ontario), R.S.O. 1990, c. F.31, as amended from time to time.
<b>“Force Majeure Events”</b>	any of the following events or circumstances which substantially and materially affects the Works: <ul style="list-style-type: none"> <li>(a) war, civil war, armed conflict, acts of foreign enemies or hostilities;</li> <li>(b) nuclear or radioactive contamination of the Works and/or the Lands, unless a Participant, a Subcontractor, any NOP Party or any Owner Participant Party is the source or cause of the contamination;</li> </ul>

	<ul style="list-style-type: none"> <li>(c) chemical or biological contamination of the Works and/or the Lands from any event referred to in item (a) above;</li> <li>(d) the discovery of any fossils, artifacts and other objects having artistic, historic, archaeological or monetary value, including human remains and burial sites, which, as a result of Applicable Law, requires the Works to be abandoned; or</li> <li>(e) any official or unofficial strike, lockout, work to rule or other labour-related action generally affecting the construction industry (or a significant sector of that industry) in the Province of Ontario, but only to the extent any such event substantially and materially affects the Works (including the carrying out and/or performance of any works or services forming part of the Works).</li> </ul>
<b>“Gainshare”</b>	the gainshare (if any) which will be calculated as at the Date of Final Completion in accordance with Schedule 11 (Risk or Reward Regime).
<b>“GO Transit”</b>	GO Transit, an operating division of Metrolinx, or UP Express, as applicable, and its successors.
<b>“Good Faith”</b>	in the context of this Agreement means: <ul style="list-style-type: none"> <li>(a) acting in accordance with the Alliance Charter, Alliance Principles, Alliance Goals and Alliance Values both in a literal sense and with their intent;</li> <li>(b) undertaking, adopting and implementing all things reasonably necessary to ensure a Best For Project outcome; and</li> <li>(c) being fair, honest and reasonable and acting with integrity at all times.</li> </ul>
<b>“Good Industry Practice”</b>	using standards, practices, methods and procedures to a good commercial and rail safety standard, conforming to Applicable Law and exercising that degree of skill and care, expertise, diligence, prudence and foresight which would reasonably and ordinarily be expected from a qualified, skilled and experienced person engaged in an undertaking of a similar scope, type and complexity, and under the same or similar circumstances.
<b>“Governance Plan”</b>	the governance plan set out in the Project Proposal.
<b>“Governmental Activities”</b>	the provision of all governmental services and the conduct of all activities provided in connection or otherwise associated with the Lands and Additional Lands (if any) and the Works by any Governmental Authority or Emergency Service Provider.
<b>“Governmental Authority”</b>	any federal, provincial, territorial, regional, municipal or local governmental authority, quasi-governmental authority, court, government or self-regulatory organization, commission, board, tribunal, organization, or any regulatory, administrative or other agency, or any political or other subdivision, department, or branch of any of the foregoing, having legal jurisdiction in any way over the Owner, any aspect of the performance of the Agreement, the operation of the System or the Governmental

Activities, in each case to the extent it has or performs legislative, judicial, regulatory, administrative or other functions within its jurisdiction.

<b>“Government Entity”</b>	any one or more of the Province, IO and MOI.
<b>“Government Sensitive Information”</b>	any information which is designated as such by the Owner from time to time, or which a reasonable person having regard to the circumstances, would regard as sensitive, including (i) all confidential information that is designated as such by Applicable Law, and (ii) any record, the disclosure of which could be injurious to the interests of the Owner.
<b>“Home Office”</b>	has the meaning given at Table A of the Cost Element Allocation Tables.
<b>“HST” or “Harmonized Sales Tax”</b>	the value-added tax imposed pursuant to Part IX of the <i>Excise Tax Act</i> (Canada), <i>S.C. 1985, c. E-15</i> , as amended from time to time and any successor legislation thereto.
<b>“IHSA”</b>	Infrastructure Health and Safety Association, a not-for-profit occupational safety organization formed on January 1, 2010 that provides health and safety training material and services to Ontario construction, electrical utilities and transportation industries, and is accredited in Ontario to issue and grant Certificates of Recognition and Letters of Good Standing, or such other person so accredited in Ontario to issue and grant Certificates of Recognition and Letters of Good Standing.
<b>“Implementation Works”</b>	the work and services provided and/or to be provided by an Implementation Works Subcontractor as described in the Project Proposal.
<b>“Implementation Works Subcontractor”</b>	any subcontractor named in the Project Proposal and engaged by or to be engaged by the Owner to provide Implementation Works.
<b>“Implementation Works Subcontract”</b>	a contract between the Owner and the Implementation Works Subcontractor for Implementation Works.
<b>“Indemnifiable Taxes”</b>	has the meaning given in Section 49.4.2.
<b>“Indemnified NOP”</b>	has the meaning given in Section 38.2.
<b>“Indemnified Person”</b>	has the meaning given in Section 38.1.
<b>“Indemnifier”</b>	has the meaning given in Section 38.6.1.
<b>“Information Protocols”</b>	if BIM is applicable (Section 47.16) shall be as notified by the Owner’s Representative.

<b>“Infrastructure Ontario” or “IO”</b>	Ontario Infrastructure and Lands Corporation, a Crown agent, continued under the <i>Ontario Infrastructure and Lands Corporation Act, 2011</i> , S.O. 2011.
<b>“Initial Actualized Amount”</b>	has the meaning given in Section 7.2.7 of Schedule 9 (Actual Cost).
<b>“Insolvency Event”</b>	<p>in relation to a NOP or a Subcontractor, the relevant entity:</p> <p>(a) admits in writing its inability to pay its debts as they become due, or makes a general assignment for the benefit of creditors, or a receiver, manager, administrator, administrative receiver, receiver and manager, trustee, custodian or other similar official or any other like person is appointed by or on behalf of or at the instance of a creditor of the relevant entity with respect to the relevant entity or any of the property, assets or undertaking of the relevant entity, or any creditor of the relevant entity takes control, or takes steps to take control, of the relevant entity or any of the relevant entity’s assets, or any proceedings are instituted against the relevant entity that result in the relevant entity being declared or ordered bankrupt or in administration, liquidation, dissolution, winding-up, reorganization, compromise, arrangement, adjustment, protection, relief or composition of it or with respect to it or its debts or obligations, or any such proceedings are instituted by the relevant entity seeking any such result, or any such proceedings are instituted by any other person (other than the relevant entity or a person related to it) seeking such result (where such proceedings have not been withdrawn, stayed, discharged, or are otherwise of no further effect, within 90 days after being instituted), under any Applicable Law (including the Bankruptcy and Insolvency Act (Canada) and the Companies’ Creditors Arrangement Act (Canada)) relating to bankruptcy, insolvency or reorganization of or relief with respect to debtors or debtors’ obligations or assets or other similar matters, or seeking the appointment of a receiver, manager, administrator, administrative receiver, receiver and manager, trustee, custodian or other similar official or like person for it or with respect to any of its assets, or any resolutions are passed or other corporate actions of the relevant person are taken to authorize any of the actions set forth in this definition;</p> <p>(b) ceases performing all or a substantial portion of its business, or all or a substantial portion of such business is suspended or is not being performed, whether voluntarily or involuntarily; or</p> <p>(c) suffers any event, or any event or set of circumstances occurs or comes about, analogous to the foregoing events or sets of circumstances set out in this definition in any jurisdiction in which it is incorporated or resident.</p>
<b>“Intellectual Property”</b>	all intellectual and industrial property, including: (a) Trade-Marks; (b) Patents; (c) Copyrights; (d) inventions, whether or not patentable, whether or not reduced to practice or whether or not yet made the subject of a pending patent application or applications; (e) ideas and conceptions of potentially patentable subject matter, including any patent disclosures, whether or not reduced to practice and whether or not yet made the

subject of a pending patent application or applications; (f) trade secrets and confidential, technical or business information (including ideas, formulas, compositions, designs, inventions, and conceptions of inventions whether patentable or unpatentable and whether or not reduced to practice); (g) whether or not confidential, technology (including know-how and show-how), manufacturing and production processes and techniques, methodologies, research and development information, drawings, specifications, designs, plans, proposals, technical data, copyrightable works, marketing and business data, pricing and cost information, business and marketing plans; (h) copies and tangible embodiments of all the foregoing, in whatever form or medium; (i) all rights to obtain and rights to apply for any of the foregoing and all rights therein provided by multinational treaties or conventions; (j) all rights under any agreements or instruments with respect to items in (a) to (i) above; and (k) all rights to sue and recover and retain damages and costs and attorneys' fees for present and past infringement or other violation of any of the intellectual property rights hereinabove set out.

<b>“Interim Gainshare”</b>	the estimated amount of Gainshare which is payable by the Owner to the NOPs: (a) at the Date of Completion of the whole of the Works in accordance with Section 2.1.3 of Schedule 11 (Risk or Reward Regime); or (b) if applicable, at the Date of Completion of a Tranche of the Works (if so determined by the ALT in accordance with Section 27.6.3.3); or (c) if applicable, as a discretionary payment of Gainshare made in accordance with Section 2.2 of Schedule 11 (Risk or Reward Regime).
<b>“Investment Canada Act”</b>	means the <i>Investment Canada Act</i> , R.S.C. 1985, c.28 (1 <sup>st</sup> Supp.), and regulations enacted thereunder, all as amended from time to time.
<b>“Joint Venture Agreement”</b>	has the meaning given in Section 39.3.1.
<b>“Interim Painshare”</b>	the estimated amount of Painshare which is payable by the NOPs to the Owner: (a) at the Date of Completion of the whole of the Works in accordance with Section 2.3.3 of Schedule 11 (Risk or Reward Regime); or (b) if applicable, at the Date of Completion of a Tranche of the Works (if so determined by the ALT in accordance with Section 27.6.3.3); or (c) if applicable, as a discretionary payment of Painshare made in accordance with Section 2.4 of Schedule 11 (Risk or Reward Regime).
<b>“Key Performance Indicator” or “KPI”</b>	the key performance indicators in respect of each Key Result Area, as detailed in Table 2 of Annex 1 of Schedule 11 (Risk or Reward Regime).
<b>“Key Result Areas” or “KRAs”</b>	have the meaning given in Schedule 11 (Risk or Reward Regime).
<b>“Key Subcontractor”</b>	shall include (a) any Subcontractor with a subcontract value or total estimated cost over the course of the Project in excess of [REDACTED] (\$[REDACTED]); and (b) any Subcontractor identified as a Key Subcontractor in the Project Proposal.

<b>“KPI Maximum Liability Amount”</b>	has the meaning given in Section 3.4.1.2 of Schedule 11 (Risk or Reward Regime) and specified in Table 2 of Annex 1 of Schedule 11 (Risk or Reward Regime).
<b>“KPI Maximum Reward Amount”</b>	has the meaning given in Section 3.5.1.2 of Schedule 11 (Risk or Reward Regime) and specified in Table 2 of Annex 1 of Schedule 11 (Risk or Reward Regime).
<b>“KPI Performance Liability Amount”</b>	has the meaning given in Section 3.4.1 of Schedule 11 (Risk or Reward Regime).
<b>“KPI Performance Reward Amount”</b>	has the meaning given in Section 3.5.1 of Schedule 11 (Risk or Reward Regime).
<b>“Key Performance Score” or “KPS”</b>	is the key performance score for the relevant KPI calculated in accordance with Table 2 of Annex 1 of Schedule 11 (Risk or Reward Regime).
<b>“Labour and Material Payment Bonds”</b>	the Labour and Material Payment Bond (and Multiple Obligee Rider to Labour and Material Payment Bond, as required under the Construction Act) described in Section 5.3 of Schedule 13 (Insurance Policies and Bonds).
<b>“Lands”</b>	means (a) the permanent lands owned or to be acquired by Metrolinx as set out in Schedule 18 (Lands); (b) the temporary lands in which Metrolinx has acquired or will acquire certain rights of access or permission to enter, as set out in Schedule 18 (Lands); and (c) the Additional Owner Permanent Lands, and excludes, for clarity, the Additional Lands.
<b>“Letter of Good Standing”</b>	the document issued by IHSA to a person confirming that the internal maintenance audit performed by such person regarding its health and safety management systems has been approved by IHSA, and that such person has successfully completed such internal audit pursuant to the terms and conditions of the COR Program.
<b>“Licensee”</b>	the Owner or any NOP being a person granted a licence in respect of Intellectual Property under Section 43.
<b>“Manifest Error”</b>	means an error of judgment obvious on its face, in disregard of the facts, the applicable rule or law and/or evidence, and which is easily demonstrable without extensive investigation or enquiry.
<b>“Materials”</b>	material, machinery, equipment and fixtures forming part of the Works but does not include material, equipment or machinery used to prepare, fabricate, convey or erect the Works.
<b>“Maximum Performance Liability Amount”</b>	has the meaning given in Section 3.4.4 of Schedule 11 (Risk or Reward Regime).
<b>“Maximum Performance Reward Amount”</b>	has the meaning given in Section 3.5.4 of Schedule 11 (Risk or Reward Regime).



<b>“MCOS Performance”</b>	the minimum conditions of satisfaction or benchmark level of performance for each Key Result Area and/or KPI as further detailed in Schedule 11 (Risk or Reward Regime).
<b>“Metrolinx”</b>	Metrolinx, a non-share capital corporation continued under the <i>Metrolinx Act, 2006</i> , S.O. 2006, c.16 and a Crown agency in accordance with the <i>Crown Agency Act</i> , R.S.O. 1990, c.48 and includes all operating divisions thereof and any successors thereto.
<b>“Metrolinx CSMP”</b>	the Metrolinx Capital Projects Group Construction Safety Management Program, as amended from time to time.
<b>“Metrolinx Customer Charter”</b>	the Metrolinx passenger charter set out on GO Transit’s website ( <a href="http://www.gotransit.com/passengercharter/en/passenger_charter.aspx">http://www.gotransit.com/passengercharter/en/passenger_charter.aspx</a> ), as amended from time to time.
<b>“MFIPPA”</b>	the <i>Municipal Freedom of Information and Protection of Privacy Act</i> (Ontario), R.S.O. 1990, c. M.56, as amended from time to time.
<b>“MOI”</b>	Her Majesty the Queen in right of Ontario as represented by the Minister of Infrastructure, and includes any successors thereto or persons exercising delegated power under the Minister’s authority.
<b>“MOL”</b>	Her Majesty the Queen in right of Ontario as represented by the Minister of Labour, and includes any successors thereto or persons exercising delegated power under the Minister’s authority.
<b>“MTO”</b>	Her Majesty the Queen in right of Ontario, as represented by the Minister of Transportation, and includes any successors thereto or persons exercising delegate power and such Minister’s authority.
<b>“Network”</b>	the GO Transit transit network in the Toronto and Greater Toronto Area.
<b>“Network Operation Issue”</b>	any: <ul style="list-style-type: none"> <li>(a) risk to the health and safety of any individual or risk of damage or destruction to any property, or any incident which may reduce the safety integrity levels of any item of infrastructure;</li> <li>(b) situation or circumstance which the Owner reasonably considers requires immediate or urgent action in order to maintain or restore the effective operation of the Network or any part of it;</li> <li>(c) compliance with a Statutory Requirement;</li> <li>(d) direction, requirement, instruction or rule of a Governmental Authority legally binding on any of the Participants;</li> <li>(e) requirement of the licence (if any) to operate the Network granted to the Owner;</li> <li>(f) contractual commitment of the Owner existing on or prior to the Commencement Date; or</li> </ul>

	(g) requirement to utilize the original copy held by a Third Party of any approved engineering record, drawing or other document in respect of the Network, which is immediately necessary to address an issue arising under any of paragraphs (a) to (f) above.
<b>“Non Owner Participant” or “NOP”</b>	<p>(a) any of the persons other than the Owner listed as a Party to this Agreement as the context so requires and <b>“NOPs”</b> is all of them;</p> <p>(b) <b>“NOP 1”</b>, <b>“NOP 2”</b> or <b>“NOP 3”</b> is respectively the Party named and defined as such in this Agreement; and</p> <p>(c) NOP excludes the Owner in its capacity as the Owner and as Owner Participant.</p>
<b>“Non-Resident”</b>	a person that is, at the relevant time, not a resident in Canada for the purposes of the <i>Income Tax Act</i> (Canada).
<b>“NOP Group”</b>	a NOP together with any person or group of persons, who, either individually or collectively, have Direct or Indirect Power or Control of the NOP.
<b>“NOP Party”</b>	means any person engaged by a NOP from time to time as may be permitted by this Agreement to procure or manage the provision of the Works (or any of them), and, in respect of each of the above, their subcontractors of any tier, agents, employees, officers and directors.
<b>“NOP Personnel”</b>	means in respect of each NOP, all directors, officers, employees, agents, consultants and contractors of the NOP and/or of any Subcontractor engaged by the NOP under this Agreement.
<b>“NOP Risk Cap”</b>	has the meaning given in Section 5.1.1 of Schedule 11 (Risk or Reward Regime).
<b>“NOP Split”</b>	has the meaning given in Section 1.3.1 of Schedule 11 (Risk or Reward Regime).
<b>“Notice”</b>	has the meaning given in Section 44.1.
<b>“OCIP”</b>	has the meaning given in Section 1 of Schedule 13 (Insurance Policies and Bonds).
<b>“Officer”</b>	in respect of any Participant: <ul style="list-style-type: none"> <li>(a) a director or secretary of a Participant; or</li> <li>(b) a person: <ul style="list-style-type: none"> <li>(i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the Participant;</li> <li>(ii) who has the capacity to affect significantly the Participant’s financial standing; or</li> <li>(iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed</li> </ul> </li> </ul>

to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the Participant).

<b>“OHSAS 18001 Accreditation”</b>	in respect of a person, such person having received certification in respect of its health and safety management systems that such systems comply with the requirements of OHSAS 18001.
<b>“On-Account Subcontractor Payment”</b>	has the meaning given in Section 41.1.
<b>“Open Data Directive”</b>	the Management Board of Cabinet's Open Data Directive dated April 29, 2016, as may be amended from time to time.
<b>“Operator”</b>	any person directly engaged by Metrolinx to carry out all of the tasks to be performed in connection with the operation of the System.
<b>“Overdue Date for Interim Payment”</b>	has the meaning given in Section 11.1 of Schedule 12 (Payment Procedures).
<b>“Overhead”</b>	for each NOP, the amount of corporate overhead for the relevant NOP determined in accordance with Section 1.1 of Schedule 10 (Fee), as may be adjusted from time to time in accordance with this Agreement.
<b>“Overpayment”</b>	has the meaning given in Section 9.1 of Schedule 12 (Payment Procedures).
<b>“Owner”</b>	has the meaning given in the recitals of this Agreement.
<b>“Owner Activities”</b>	the provision of all governmental services and the conduct of all activities provided in connection with or otherwise associated with rail transit and other similar services, including the operation and maintenance of the live rail system on the Network (including the Union Station Rail Corridor).
<b>“Owner Participant”</b>	the Owner in its capacity as a Participant for the performance of the Works, excluding the Owner in its capacity as the client under this Agreement.
<b>“Owner Participant Party”</b>	any person engaged by the Owner Participant from time to time as may be permitted by this Agreement to procure or manage the provision of Works (or any of them) and, in respect of each of the above, their subcontractors of any tier, agents, employees, officers and directors.
<b>“Owner Participant Rates”</b>	has the meaning given in Section 1.3 of Annex 2 to Schedule 9 (Actual Cost).
<b>“Owner Party”</b>	any of the Owner and its respective agents, contractors and subcontractors of any tier and its on their directors, officers and employees, and other persons engaged by any of the foregoing in respect of Owner Activities, but excluding the Owner Participant, the NOPs, any NOP Party and any Owner Participant Party, and <b>“Owner Parties”</b> shall be construed accordingly.

<b>“Owner’s Representative”</b>	the person named as such in Schedule 2 (Representatives), as may be amended from time to time by the Owner in accordance with this Agreement.
<b>“PAA Project Estimate Limit”</b>	means the total budget for the costs of the Project incurred after the Commencement Date, including all Owner Participant costs, and all Owner costs to be treated as Actual Costs under this Agreement, but excluding any other Owner costs.
<b>“Painshare”</b>	the painshare (if any) which will be calculated as at the Date of Final Completion in accordance with Schedule 11 (Risk or Reward Regime).
<b>“Party”</b>	any of the Owner, NOP 1, NOP 2 or NOP 3 and <b>“Parties”</b> means all of them, as the context requires, but, for greater certainty, such definition does not include MOI.
<b>“Participant”</b>	is any of the NOPs or the Owner Participant and <b>“Participants”</b> means all of them.
<b>“Participant Document”</b>	<p>is any document, calculation, design, drawing, measurement, record or information (whether in physical or electronic form):</p> <ul style="list-style-type: none"> <li>(a) forming part of the Project Proposal;</li> <li>(b) used by the Participants to determine the Target Outturn Cost (or any adjustment or component thereof); or</li> <li>(c) otherwise used or submitted by a Participant for performing its obligations under this Agreement (whether before or after the Commencement Date),</li> </ul> <p>notwithstanding that such document may be provided in whole or part by the Owner before or after the Commencement Date, but excluding the VFM Statement.</p>
<b>“Participant Personnel”</b>	means in respect of each Participant, all directors, officers, employees, agents, consultants and contractors of the Participant and/or of any Subcontractor engaged by the Participant under this Agreement.
<b>“Patents”</b>	includes all national (including the United States and Canada), regional and multinational statutory invention registrations, patents, patent registrations, patent applications, provisional patent applications, industrial designs, industrial models, including all reissues, divisions, continuations, continuations-in-part, extensions and re-examinations, and all rights therein provided by multinational treaties or conventions and all improvements to the inventions disclosed in each such registration, patent or application.
<b>“Partnership Agreement”</b>	<b>[REDACTED]</b>
<b>“Payment Certificate”</b>	has the meaning given in Section 3.1.1 of Schedule 12 (Payment Procedures).

<b>“Payment Expert”</b>	the independent person appointed under Section 4 of Schedule 16 (Exclusion and Termination).
<b>“Payment Period”</b>	a one (1) month period during which Work was performed, with the start and end dates of a Payment Period being the first (1 <sup>st</sup> ) calendar day of the month and the last calendar day of the month, respectively.
<b>“Payment Period Amount”</b>	has the meaning given in Section 2.3.6 of Schedule 12 (Payment Procedures).
<b>“Performance Bond”</b>	the Performance Bond described in Section 5.3 of Schedule 13 (Insurance Policies and Bonds).
<b>“Performance Liability Amount”</b>	the amount (if any) determined as payable for Poor Performance in the Key Result Areas calculated in accordance with Schedule 11 (Risk or Reward Regime).
<b>“Performance Reward Amount”</b>	the amount (if any) determined as payable for performance that is better than MCOS Performance in the Key Result Areas as calculated in accordance with Schedule 11 (Risk or Reward Regime).
<b>“Personal Information”</b>	all personal information (as the term “personal information” is defined in PIPEDA) in the custody or control of a NOP other than personal information of the employees of the NOP and other than personal information that is wholly unrelated to the Works and not derived directly or indirectly from the Owner, the Owner’s Representative or an Owner Participant in respect of the Project.
<b>“PIPEDA”</b>	the <i>Personal Information Protection and Electronic Documents Act</i> , S.C. 2000, c. 5, as amended from time to time.
<b>“Police Service”</b>	the Royal Canadian Mounted Police, the Ontario Provincial Police, the Toronto Police Service and any other law enforcement agency with jurisdiction pursuant to Applicable Law, as applicable.
<b>“Pollution”</b>	a solid, liquid, gas, odour, heat, sound, vibration, radiation or substance of any kind which results in or may result in any segment of the Environment: <ul style="list-style-type: none"> <li>(a) unsafe, unfit or harmful for habitation, use or occupation by any person or animal;</li> <li>(b) degraded in any way; or</li> <li>(c) not comply with any Statutory Requirements.</li> </ul>
<b>“Poor Performance”</b>	the level of poor performance for each Key Result Area, being worse than MCOS Performance, as further described in Schedule 11 (Risk or Reward Regime).
<b>“Preceding Period”</b>	means the Actualized Period immediately preceding any Current Actualized Period.

**“Profit”** for each NOP, the amount for profit for the relevant NOP stated in Schedule 10 (Fee), as may be adjusted from time to time in accordance with this Agreement.

**“Progress Works Schedule”** the working schedule that is:

- (a) Traceable to and progressed from the Baseline Works Schedule, or the Revised Baseline Works Schedule, as applicable; and
- (b) Traceable to and progressed from the Progress Works Schedule of the immediately preceding month.

**“Prohibited Act”** (a) offering, giving or agreeing to give to the Owner or any public body (or anyone employed by or acting on their behalf), or to any family member of such person, any gift or consideration of any kind as an inducement or reward:

- (i) for doing or not doing, or for having done or not having done, any act in relation to the obtaining or performance of this Agreement or any other agreement with the Owner or any public body in connection with the Project; or
- (ii) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other agreement with the Owner or any public body in connection with the Project,

provided that this Section (a) shall not apply to a NOP or any NOP Party (or anyone employed by or acting on their behalf) providing consideration to the Owner or any public body in the ordinary course, or as reasonably necessary, to fulfill or comply with the obligations and liabilities of the applicable NOP under this Agreement or any other agreement with the Owner or any public body in connection with the Project;

- (b) entering into this Agreement or any other agreement with the Owner or any public body in connection with the Project if a commission or a fee has been paid or has been agreed to be paid by a NOP, or on its behalf or to its knowledge, to the Owner or any public body (or anyone employed by or acting on their behalf), or to any family member of such person, unless, before the relevant agreement is entered into, particulars of any such commission or fee have been disclosed in writing to the Owner, provided this Section (b) shall not apply to a fee or commission paid by a NOP or any NOP Party (or anyone employed by or acting on their behalf) to the Owner or any public body pursuant to an agreement where such fee or commission is paid in the ordinary course, or as reasonably necessary, to fulfill or comply with the obligations and liabilities of the NOP under this Agreement or any other agreement with the Owner or any public body in connection with the Project without contravening the intent of Section 47.14 of the Agreement;
- (c) breaching or committing any offence under Applicable Law in respect of corrupt or fraudulent acts in relation to this Agreement

or any other agreement with the Owner or any public body in connection with the Project; or

- (d) defrauding or attempting to defraud or conspiring to defraud the Owner or any other public body.

<b>“Project”</b>	the design and construction of infrastructure upgrades required at Union Station, including, without limitation, the design and construction of two platforms and a new concourse south of the existing trainshed, all as more fully described in the VFM Statement, as may be varied by the Owner from time to time in accordance with Section 27.
<b>“Project Insurance Manual”</b>	the project insurance manual set out in the Project Proposal.
<b>“Project Management System”</b>	the project management system set out in the Project Proposal, which incorporates the systems and plans required by the VFM Statement.
<b>“Project Office”</b>	the office or offices provided by any Participant (which is not a Home Office of that Participant) in accordance with Section 10 for the purpose of performing the Works.
<b>“Project Proposal”</b>	the Participants’ proposals for the Project set out at Schedule 8 (Project Proposal) (if any) for delivering the Works and meeting the VFM Statement as at the Commencement Date, as such proposals may be varied by the Owner from time to time in accordance with Section 27.
<b>“Proper Invoice”</b>	has the meaning given to it in the Construction Act and, in addition, any Proper Invoice must also comply with the requirements set forth in Sections 2.1, 2.2, 2.3 and 2.4 of Schedule 12 (Payment Procedures).
<b>“Proper Invoice Submission Date”</b>	has the meaning given in Section 2.5.2 of Schedule 12 (Payment Procedures).
<b>“Proprietary Plant”</b>	any part of the Works identified in the Project Proposal as being proprietary plant, systems or Materials to be supplied by a NOP.
<b>“Province”</b>	Her Majesty the Queen in right of Ontario.
<b>“Province Person”</b>	the Owner and, while attending in their official capacity at the Lands, the following: <ul style="list-style-type: none"><li>(a) any person to which authority is designated and any agents and employees of any such person; and</li><li>(b) contractors of Owner and subcontractors of any tier and its or their directors, officers and employees,</li></ul> but excluding the NOPs and any NOP Party.
<b>“Quantitative Cost Risk”</b>	a quantitative cost risk analysis, being a process for assessing the total cost risk exposure for a project using discrete risks, estimating uncertainty and schedule outputs to determine an appropriate level of

<b>“Analysis” or “QCRA”</b>	cost contingency to supplement the project estimate and provide confidence that the budgetary allowance will not be surpassed.
<b>“Quantitative Schedule Risk Analysis” or “QSRA”</b>	a quantitative schedule risk analysis, being a process for assessing task duration uncertainty and discrete risks to a project schedule so as to provide a level of confidence in meeting key deliverable dates.
<b>“Rail Corridor Access Plan”</b>	the rail corridor access plan for the Project set out in the Project Proposal.
<b>“Recovery Amount”</b>	has the meaning given in Section 38.6.6.
<b>“Relevant Conviction”</b>	a charge or conviction, at any time within the previous six years of any offence: (a) of moral turpitude in Canada or elsewhere; (b) for which records exist under the <i>Criminal Records Act</i> ; or (c) otherwise designated as a Relevant Conviction by the Owner from time to time, and that conviction remains in effect at the time and is one for which a pardon has not been granted.
<b>“Remaining Early Works”</b>	has the meaning given in Section 21.3.3.
<b>“Relevant NOP”</b>	has the meaning given in Section 17.1.
<b>“Relevant Part”</b>	has the meaning given in Section 17.1.
<b>“Relevant Participant”</b>	has the meaning given in the definition of Wilful Default.
<b>“Relevant Period”</b>	the period starting on the Commencement Date and expiring on the date following 7 years from the Date of Final Completion or date of termination of this Agreement (as the case may be) or such longer period as may be required by Applicable Law.
<b>“Replacement NOP”</b>	has the meaning given in Section 1.6.1 of Schedule 16 (Exclusion and Termination).
<b>“Reserved Powers”</b>	the Owner’s powers as set out in Section 27.3.1.
<b>“Resource Unit Rate”</b>	any individual rate or price for the supply of a single unit of labour, staff, goods, materials, plant or equipment set forth in the Project Proposal and/or used in the development of the Target Outturn Cost.
<b>“Responsibilities Matrix”</b>	the responsibilities matrix showing the division and the description of roles and responsibilities between the ALT, Alliance Director, AMT and/or APT at Schedule 6 (Responsibilities Matrix), as may be amended from time to time by the ALT or the Project Proposal.
<b>“Restricted Person”</b>	any person who, or any member of a group of persons acting together, any one of which:



- (a) has, directly or indirectly, its principal or controlling office in a country that is subject to any economic or political sanctions imposed by Canada or Ontario;
- (b) has as its primary business the illegal manufacture, sale, distribution or promotion of narcotics substances or arms, or is or has been involved in terrorism;
- (c) (i) is subject to a final order (including being subject to conditions or undertakings prescribed by the order) issued under Part IV.1 of the *Investment Canada Act* (Investments Injurious to National Security) that would prevent such person from undertaking the Project in whole or in part in a manner which the Owner considers unacceptable in their sole discretion or (ii) is currently, or could become, subject to a review of an investment by a non-Canadian under Part IV.1 of the *Investment Canada Act* (Investments Injurious to National Security) that could result in an order described in (i) being issued (as determined by the Owner in their sole discretion);
- (d) in the case of an individual, (i) he or she has been convicted of any indictable offence less than five years prior to the date at which the consideration of whether such individual is a “Restricted Person” is made hereunder, whether or not such person received a custodial sentence; or (ii) he or she has been sentenced to a custodial sentence, other than a suspended sentence, for any regulatory offence other than under the *Highway Traffic Act* (Ontario) or corresponding legislation in any other jurisdiction less than five (5) years prior to the date at which the consideration of whether such individual is a “Restricted Person” is made hereunder;
- (e) in the case of a person other than an individual, (i) it or any of the members of its (or its general partner’s) board of directors or its senior executive managers has been convicted of any indictable offence less than five years prior to the date at which the consideration of whether such person is a “Restricted Person” is made hereunder, whether or not such person received a custodial sentence; or (ii) any of the members of its (or its general partner’s) board of directors or its senior executive managers has been sentenced to a custodial sentence, other than a suspended sentence, for any regulatory offence other than under the *Highway Traffic Act* (Ontario) or corresponding legislation in any other jurisdiction less than five years prior to the date at which the consideration of whether such person is a “Restricted Person” is made hereunder;
- (f) has as its primary business the acquisition of distressed assets or investments in companies or organizations which are or are believed to be insolvent or in a financial standstill situation or potentially insolvent;
- (g) is subject to a material claim of the Owner under any proceedings (including regulatory proceedings) which have been concluded or are pending at the time at which the consideration of whether such person is a “Restricted Person” is made hereunder, and

which (in respect of any such pending claim, if it were to be successful) would, in the Owner's view, in either case, be reasonably likely materially to affect the ability of a NOP to perform its obligations under this Agreement; or

(h) has a material interest in the production of tobacco products.

<b>“Revised Baseline Works Schedule”</b>	a revised baseline works schedule as approved by the ALT.
<b>“Risk and Contingency Provision”</b>	for all Participants the provision for all possible Actual Cost which may be incurred by the relevant Participant or all Participants (as the case may be) associated with Alliance Risks that may arise in performing the Works as set out in the Project Proposal at the Commencement Date and as adjusted from time to time in accordance with this Agreement.
<b>“Risk or Reward Regime”</b>	the risk or reward regime set out in Schedule 11 (Risk or Reward Regime).
<b>“Safety Charter”</b>	the Metrolinx safety charter dated as of January 4, 2018, as amended from time to time.
<b>“Scope of Works”</b>	the physical scope of the Works as set out in the Project Proposal, as may be varied from time to time in accordance with Section 27.
<b>“Scope Variation”</b>	a direction to vary the Works in accordance with Section 27.4.1.
<b>“Scope Variation Benchmarking Guidelines”</b>	the Scope Variation benchmarking guidelines included in the Project Proposal which set out indicative examples of when a direction by the Owner's Representative in accordance with Section 27.1 may also be a Scope Variation.
<b>“Scope Variation Report”</b>	the report defined in Section 27.5.
<b>“Sensitive Information”</b>	has the meaning given in Section 30.2.
<b>“Sharing Arrangement”</b>	has the meaning given in Section 5.6.2.
<b>“Site”</b>	any land or any part of land where any part of the Works is to be performed or to which access is reasonably required in order to perform such Works.
<b>“Site Labour”</b>	for any NOP, any person employed by that NOP to which Table C of Schedule 9 (Actual Cost) is applicable.
<b>“Site Safety Manuals”</b>	the Metrolinx CSMP and the Contractor Site Specific Safety Plan.
<b>“Stakeholder”</b>	has the meaning given in Section 11.1.
<b>“Standards”</b>	(a) all:

	<ul style="list-style-type: none"> <li>(i) technical standards to which the design and construction of the infrastructure forming part of the Works must conform;</li> <li>(ii) operating procedures with which the operators of the station and railway assets must comply; and</li> <li>(iii) all standards documents (or the equivalent of such documents) issued by the Owner for its own use as amended by the Owner from time to time in relation to USRC and in relation to the Network as a whole.</li> </ul>
<b>“Stated Purpose”</b>	<p>the intended purpose of the Works:</p> <ul style="list-style-type: none"> <li>(a) stated by the Owner (including performance, design and functional requirements) or those purposes necessarily inferred from the contents of this Agreement; and</li> <li>(b) includes any purpose which, having regard to the nature of the Works and what is stated in this Agreement, could be reasonably inferred by a person experienced and competent in the performance of or implementation of works or rail infrastructure similar to the Works.</li> </ul>
<b>“Statutory Requirements”</b>	<ul style="list-style-type: none"> <li>(a) Applicable Law; and</li> <li>(b) Consents required by or from a Governmental Authority.</li> </ul>
<b>“Stretch Performance”</b>	the level of stretch performance for each Key Result Area, being better than MCOS Performance, as further described in Schedule 11 (Risk or Reward Regime).
<b>“Subcontract”</b>	any contract or purchase order, or arrangement made in respect of the Works between any Participant and a Subcontractor.
<b>“Subcontractor”</b>	any person engaged by a Participant to perform any part of the Works and includes, where it is not inconsistent with the context, that person’s subcontractors, suppliers agents and consultants. A Subcontractor includes a Supply Chain Partner and any Implementation Works Subcontractor and a Subcontractor may include the counterparty to a subcontract with the Owner Participant.
<b>“Subcontractor Direct Agreement”</b>	an agreement entered into among the Owner, a NOP and Key Subcontractors in the form set out in Schedule 20 (Form of Subcontractor Direct Agreement).
<b>“Supplier”</b>	has the meaning given in Section 10.3 of Schedule 12 (Payment Procedures).
<b>“Surety”</b>	the person issuing the Bonds.
<b>“System”</b>	the Metrolinx transit system in the Union Station Rail Corridor and the Network.

<b>“Target Outturn Cost”</b>	<p>the specific sum identified as the Target Outturn Cost in the Project Proposal, being the aggregate of:</p> <ul style="list-style-type: none"> <li>(a) the estimate of the Actual Costs for each NOP;</li> <li>(b) the estimate of the Actual Costs for the Owner Participant;</li> <li>(c) the estimate of the Actual Costs for the Owner, but only to the extent such costs are expressly stated by this Agreement to be Actual Costs;</li> <li>(d) the Risk and Contingency Provision for all the Participants; and</li> <li>(e) the Fee for each NOP,</li> </ul> <p>required to achieve MCOS Performance, perform the Works and bring the Works to a stage where the Final Certificate can be issued in accordance with this Agreement, and as the same may be adjusted in accordance with this Agreement at the relevant time.</p>
<b>“Temporary Lands”</b>	has the meaning given in Section 15.1.4.
<b>“Termination Notice”</b>	a notice given in accordance with Section 2.1.1 or 2.2.1 of Schedule 16 (Exclusion and Termination).
<b>“Third Party”</b>	a person who is not the Owner, the Owner Participant or a NOP or a director, officer or employee of the Owner, Owner Participant or a NOP or an Affiliate of the Owner, the Owner Participant or a NOP.
<b>“Third Party Facilities”</b>	transit shelters, telephone facilities, infrastructure and other property of Utility Companies and Railway Companies and other public facilities and associated equipment, plant, materials and apparatus installed and operated or to be installed and operated on the Lands or Additional Lands (if any) by any transit authority, communications provider, Utility Company, Railway Company or other third party (not including, for the avoidance of doubt, the NOPs).
<b>“Total Project Estimate Limit”</b>	means the aggregate of the ADA Project Estimate Limit and the PAA Project Estimate Limit.
<b>“Toronto Terminals Railway”</b>	Toronto Terminals Railway Co. Ltd. and any successors thereto.
<b>“Traceable”</b>	prepared in such a way that the ALT has the ability to maintain, track and trace all activities and milestones including any activity ID’s, descriptions, activity codes, logistical sequences, interdependencies and data consistency between and/or within the Project Works Schedule, Baseline Works Schedule or Revised Baseline Works Schedule, as applicable.
<b>“Trade-Marks”</b>	all trademarks, service marks, trade dress, logos, distinguishing guises and indicia, trade names, corporate names, business names, domain names, whether or not registered, including all common law rights, and registrations, applications for registration and renewals thereof, including,

but not limited to, all marks registered in the Canadian Intellectual Property Office and the trademark offices of other nations throughout the world, and all rights therein provided by multinational treaties or conventions.

<b>“Train Cancellation”</b>	has the meaning given in Schedule 19 (Rail Corridor Access).
<b>“Train Delay”</b>	has the meaning given in Schedule 19 (Rail Corridor Access).
<b>“Tranche”</b>	a portion of the Works that has its own Date for Completion and which may: <ul style="list-style-type: none"><li>(a) be identified and defined within the Scope of Works at the Commencement Date; or</li><li>(b) created after the Commencement Date by way of a notice issued by the Owner's Representative in accordance with Section 27.6.2.</li></ul>
<b>“Underpayment”</b>	has the meaning given in Section 9.2 of Schedule 12 (Payment Procedures).
<b>“Unincorporated Joint Venture”</b>	a joint venture, association, consortium or other unincorporated grouping of two or more persons (whether in the form of a partnership or otherwise).
<b>“Union Station”</b>	the railway station located at 65 Front Street West in Toronto, Ontario, including the headhouse, the trainshed, the teamways and concourses, the platforms and all tracks.
<b>“Union Station Rail Corridor” or “USRC”</b>	the portion of the rail corridor owned by Metrolinx that is (a) marked on the west side of Union Station by mile marker 1.9W on the Oakville subdivision, mile marker 1.9W on the Weston subdivision and mile marker 1.9W on the Galt subdivision and (b) marked on the east side of Union Station by mile marker 2.1E on the Bala subdivision, mile marker 2.1E on the Belleville subdivision and mile marker 1.7E on the Kingston subdivision.
<b>“UP Express”</b>	UP Express, an operating division of Metrolinx and any successors thereto.
<b>“Utility Company”</b>	the owner or operator of any Utility Infrastructure.
<b>“Utility Infrastructure”</b>	privately, publicly or cooperatively owned lines, facilities or systems for transmitting or distributing electricity, lighting, data, communications, gas, oil and petroleum products, water, storm water or sewage, wireless, or other similar commodity or substance which serve the public directly or indirectly, including underground, surface and overhead facilities as well as facilities which use common poles, ducts or conduits on a shared basis, and all related infrastructure.
<b>“VIA Rail”</b>	Via Rail Canada and its successors.
<b>“VFM Statement”</b>	the value for money proposition as set out in Schedule 7 (VFM Statement), as may be amended from time to time in accordance with Section 27.

**“White Period Possessions”**

has the meaning given in Schedule 19 (Rail Corridor Access).

**“Wilful Default”**

in respect of any Participant (including the Owner Participant but excluding the Owner) (the **“Relevant Participant”**):

- (a) a deliberate and purposeful act or omission carried out, or real and substantial evidence of a deliberate and purposeful act or omission carried out, with a reckless disregard or calculated regard for the consequences of the act or omission by the Relevant Participant, its respective Officers, or any representative of the Relevant Participant on the ALT or AMT, which is a breach of a duty or any obligation, arising out of or in connection with this Agreement, or which is a breach of a duty or obligation owed by the Relevant Participant to the Owner or any other NOP however arising (which includes a breach of the Alliance Charter);
- (b) a fraudulent act or omission, arising out of or in connection with this Agreement, by the Relevant Participant, any director, officer, employee or agent the Relevant Participant, or any representative of the Relevant Participant on the ALT or AMT;
- (c) a repudiation or abandonment of this Agreement by the Relevant Participant; or
- (d) any deliberate or reckless act or omission by the Relevant Participant or any of its officers or directors or any of its representatives appointed to the ALT or AMT which:
  - (i) is a breach of any Applicable Law; or
  - (ii) prevents a non-defaulting Participant from performing a role, responsibility or function or discharging an obligation under any Applicable Law;
- (e) a failure of a NOP to comply with Section 47.7;
- (f) a failure of a NOP to comply with Section 47.8;
- (g) any act or omission by an officer, representative or employee of the Relevant Participant that:
  - (i) would, if done by an Officer, constitute a Wilful Default;
  - (ii) has come to the attention of an Officer of the Relevant Participant, or any representative of the Relevant Participant appointed to the ALT or AMT; and
  - (iii) the relevant Officer or representative of the Relevant Participant appointed by the ALT or AMT has not taken reasonable action to address,

but does not include (with the exception of paragraph (f)) any error of judgement, mistake, act or omission, whether negligent or not, which is made in Good Faith by:

- (a) the Relevant Participant;
- (b) any director, officer, employee or agent of the Relevant Participant; or
- (c) any representative of the Relevant Participant on the ALT, AMT or APT.

**“Withholding Taxes”**

has the meaning given in Section 49.4.1.

**“Work Breakdown Structure” or “WBS”**

means the work breakdown structure agreed by the Owner’s Representative in accordance with the Alliance Development Agreement.

**“Works”**

the whole of the works, services and obligations (including all Tranches) to be performed by the Participants from the Date of Works Commencement until the Date of Final Completion in:

- (a) adopting, preparing and completing all design required to deliver the Works;
- (b) delivering the Scope of Works;
- (c) compliance with any direction by the Owner in accordance with Section 27 (including any Scope Variation);
- (d) managing any Adjustment Event;
- (e) managing all Alliance Risks;
- (f) the supply of any Construction Plant;
- (g) all things reasonably necessary to meet the VFM Statement and MCOS Performance;
- (h) rectification work necessary to make good any Defects arising before and during any Defects Correction Period; and
- (i) the performance of all other obligations under this Agreement,

provided that the Works excludes any works or services performed by the Participants which are not directly referable to the VFM Statement, the Scope of Works or any assumptions expressly adopted by the Participants in developing the Target Outturn Cost.

**“Works Schedule Assumptions Report”**

means a narrated report including all applicable data that documents the assumptions made by Participants to generate the Progress Works Schedule or any Revised Baseline Works Schedule, and shall include, at a minimum, the content set forth in Section 31.8 of this Agreement.

<b>“Works Status Reports”</b>	the monthly reports prepared by the AMT and submitted to the ALT in accordance with Section 31.4.
<b>“WSIB”</b>	the Ontario Workplace Safety and Insurance Board that is responsible for administering the <i>Workplace Safety and Insurance Act</i> (Ontario).

## 2. Interpretation

- 2.1** A reference to any statute, treaty or legislative provision or to a provision of it must be construed, at any particular time, as including any amendments, consolidations, extensions, replacements or re-enactments at any time in force and to all subordinate legislation made under it.
- 2.2** A reference to a section, party, Schedule, attachment, annexure or exhibit is a reference to a section of, and a party, Schedule, attachment, annexure or exhibit to, this Agreement and a reference to this Agreement includes any section, Schedule, attachment, annexure and exhibit.
- 2.3** Except where the context requires otherwise (irrespective of whether some, but not all, references in a Schedule specifically refer to that Schedule or to other portions of this Agreement) references to specific Sections, Articles, Clauses, Paragraphs, Subparagraphs, Schedules, and other divisions of this Agreement are references to such Sections, Articles, Clauses, Paragraphs, or Subparagraphs of, Schedules to, or divisions of this Agreement and the terms “Section”, “Article” and “Clause” are used interchangeably and are synonymous.
- 2.4** Except where the context requires otherwise, references to specific Sections, Articles, Clauses, Paragraphs, Subparagraphs, Schedules, and other divisions of this Agreement followed by a number are references to the whole of the Section, Article, Clause, Paragraph, Subparagraphs, Schedule or other division of this Agreement as applicable, bearing that number, including all subsidiary provisions containing that same number as a prefix.
- 2.5** The Schedules to this Agreement are an integral part of this Agreement and a reference to this Agreement includes a reference to the Schedules.
- 2.6** The singular includes the plural and vice versa.
- 2.7** Words of any gender include all genders.
- 2.8** Words denoting natural persons include any other persons.
- 2.9** Headings, table of contents and bold type are for convenience only and do not affect the interpretation or construction of this Agreement.
- 2.10** A reference to a document (including this Agreement) is that document as varied, amended, novated, supplemented, modified, ratified or replaced at that time.
- 2.11** Other parts of speech and grammatical forms of a word or phrase defined in this Agreement have a corresponding meaning.
- 2.12** The words “**include**” or “**for example**” or similar expressions do not limit what else is included. The words “**hereof**”, “**herein**”, “**hereto**”, “**hereinafter**” or similar expressions are not limited in



applicability to the specific provision within which such references are set forth but instead refer to this Agreement taken as a whole.

- 2.13** In construing this Agreement, the rule known as the *ejusdem generis* rule shall not apply nor shall any similar rule or approach apply to the construction of this Agreement and, accordingly, general words introduced or followed by the word “other” or “including” or “such as” or “in particular” shall not be given a restrictive meaning because they are followed or preceded (as the case may be) by particular examples intended to fall within the meaning of the general words.
- 2.14** The word “**law**” includes common law and any statute, regulation, constitution, decree, judgement, legislation, order, ordinance, by-law, treaty or other legislative measure.
- 2.15** The word “**Party**” means a party to this Agreement and includes its successors in title, permitted assignees and permitted transferees.
- 2.16** An expression importing a person includes any company, partnership, joint venture, association, corporation or other body corporate and any government, state or any agency of a government or state as well as an individual.
- 2.17** A reference to a body (including an institute, association or authority), other than a party to this Agreement, whether statutory or not which ceases to exist or whose powers or functions are transferred to another body, is a reference to the body which replaces it or which substantially succeeds to its powers or functions.
- 2.18** All money referred to under this Agreement is in Canadian Dollars (CAD).
- 2.19** Unless otherwise provided in this Agreement, all accounting and financial terms used in this agreement shall be interpreted and applied in accordance with Canadian GAAP.
- 2.20** Where the day on or by which any thing is to be done is not a Business Day, that thing must be done on or by the next Business Day.
- 2.21** Any reference to time of day or date means the local time or date in Toronto, Ontario. Any reference to a stipulated “day” which is not specifically referred to as a “Business Day” shall be deemed to be a calendar day measured from midnight to midnight.
- 2.22** All capitalized terms used in a Schedule shall have the meanings given to such terms in this Schedule 1, unless stated otherwise in a particular Schedule in which case such definition shall have the meaning given to it in that Schedule.
- 2.23** References to any standard, principle, agreement or document include (subject to all relevant approvals and any other provisions of this Agreement concerning amendments) a reference to that standard, principle, agreement or document as amended, supplemented, restated, substituted, replaced, novated or assigned.
- 2.24** A reference to any right, power, obligation or responsibility of any Governmental Authority shall be deemed to be a reference to the Governmental Authority that, pursuant to Applicable Laws has such right, power, obligation or responsibility at the relevant time.

**SCHEDULE 2**  
**REPRESENTATIVES**

<b>Section</b>	<b>Representative</b>	<b>Particular</b>
Section 2.2	Owner's Representative	[REDACTED]
Section 7.1	ALT representatives	<b>Owner Participant</b> [REDACTED] <b>NOP 1</b> [REDACTED] <b>NOP 2</b> [REDACTED] <b>NOP 3</b> [REDACTED]
Section 7.5	Alternative ALT representatives	<b>Owner Participant</b> [REDACTED] <b>NOP 1</b> [REDACTED] <b>NOP 2</b> [REDACTED] <b>NOP 3</b> [REDACTED]
Section 8.1	Alliance Director	[REDACTED]

## SCHEDULE 3

### OWNER'S AND PARTICIPANTS' CONTACT DETAILS

#### 1. The Owner

Address: Metrolinx  
97 Front St West  
Toronto, Ontario  
M5J 1E6

Attention: [REDACTED]  
Tel: [REDACTED]  
Email: [REDACTED]

#### 2. Owner's Representative

Address: Metrolinx  
97 Front St West  
Toronto, Ontario  
M5J 1E6

Attention: [REDACTED]  
Tel: [REDACTED]  
Email: [REDACTED]

#### 3. Owner Participant

Address: Metrolinx  
97 Front St West  
Toronto, Ontario  
M5J 1E6

Attention: [REDACTED]  
Tel: [REDACTED]  
Email: [REDACTED]

#### 4. NOP 1

Address: Kiewit-Alberici Union General Partnership

[REDACTED]

Attention: [REDACTED]  
Tel: [REDACTED]  
Email: [REDACTED]

and to: [REDACTED]

Attention: [REDACTED]  
Tel: [REDACTED]  
Email: [REDACTED]

#### 5. NOP 2

Address: Mass. Electric Construction Canada Co.  
1405 North Service Road East, Unit 4  
Oakville, Ontario  
L6H 1A7

Attention: **[REDACTED]**  
Tel: **[REDACTED]**  
Email: **[REDACTED]**

**6. NOP 3**

Address: WSP Canada Inc.  
1600 Boulevard Rene-Levesque West  
11<sup>th</sup> Floor  
Montreal, Quebec  
H3H 1P9

Attention: **[REDACTED]**  
Tel: **[REDACTED]**

## **SCHEDULE 4**

### **OWNER'S REPRESENTATIVE**

#### **1. ROLE OF THE OWNER'S REPRESENTATIVE**

##### **1.1 Extent of role**

The Owner's Representative may perform any of the Owner's obligations in the Owner's capacity as the Owner for the performance of the Works under this Agreement and must perform the roles and responsibilities of the Owner's Representative as stated in this Schedule 4 (Owner's Representative) or otherwise under this Agreement.

##### **1.2 The Owner's Representative acts on behalf of the Owner**

In performing any role under this Agreement, the Owner's Representative acts on behalf of the Owner in its capacity as the client for the performance of the Works and not as Owner Participant.

#### **2. RESPONSIBILITIES OF THE OWNER'S REPRESENTATIVE**

##### **2.1 General**

The Owner's Representative's responsibilities can be divided into 4 categories:

- 2.1.1 scope of Works (as further described in Section 2.2 below);
- 2.1.2 financial accountability with respect to the Owner's cost elements of the Project (as further described in Section 2.3 below);
- 2.1.3 liason and facilitation (as further described in Section 2.4 below); and
- 2.1.4 ownership and access to the Lands (as further described in Section 2.5 below).

##### **2.2 Scope of Works**

The Owner's Representative:

- 2.2.1 must facilitate the Participants' access to documentation, which describes the Owner's requirements for the design, documentation and construction of the Works; and
- 2.2.2 may direct the Participants in writing to change the Works in accordance with Section 27.1 of the Agreement (including for any Scope Variation).

##### **2.3 Financial Accountability**

The Owner's Representative must:

- 2.3.1 specify the required format and intervals for reporting to the Owner on financial and other matters;
- 2.3.2 determine whether to approve any recommendation by the ALT to adjust the Target Outturn Cost in excess of the PAA Project Estimate Limit where an Adjustment Event occurs;

- 2.3.3 ensure that all payments by the Owner to each NOP for the Actual Cost that the relevant NOP incurs are made in accordance with this Agreement;
- 2.3.4 ensure that all payments by the Owner to each NOP of any Gainshare and Performance Reward Amount due are made in accordance with this Agreement (after taking into account any Interim Gainshare and/or Interim Painshare previously paid or due from that NOP);
- 2.3.5 receive the performance security (including the Labour and Material Payment Bonds, Performance Bonds and parent company guarantees) and other security for performance required to be provided by each NOP under this Agreement;
- 2.3.6 where required and, in accordance with the terms of this Agreement, make a demand on the performance security (including the Labour and Material Payment Bonds, Performance Bonds and parent company guarantees) and other security for performance provided by each NOP; and
- 2.3.7 ensure that all payments by the Owner on the Final Certificate to each NOP are made in accordance with this Agreement.

## **2.4 Liaison and facilitation**

The Owner's Representative must:

- 2.4.1 communicate directly with the chairperson of the ALT and the Alliance Director on operational issues;
- 2.4.2 communicate with the Alliance Auditor on any financial matters;
- 2.4.3 attend ALT meetings as required, and other meetings by agreement with the Alliance Director or as required by this Agreement;
- 2.4.4 ensure that the Owner provides relevant information in a timely manner;
- 2.4.5 communicate to the Owner issues arising from the Participants;
- 2.4.6 facilitate access to relevant resources and expertise in the Owner for the benefit of the Participants; and
- 2.4.7 ensure relevant support staff within the Owner understand the nature of the alliance, and the obligations placed on the Participants.

## **2.5 Ownership and access to Lands**

The Owner's Representative must:

- 2.5.1 to the extent that the Owner is required to do so under Section 15.1.1 of the Agreement, and subject to the terms, conditions, rules, restrictions and requirements set forth or referenced in Section 15.1.1 of the Agreement, ensure the Participants are given such non-exclusive access to the Lands or part thereof (provided that the Owner's Representative is not required to procure any access for the Project which is the responsibility of the Owner Participant and/or any NOP to procure under this Agreement);
- 2.5.2 issue the Certificate of Completion to the Participants on behalf of the Owner in accordance with Section 24.2.3 of the Agreement;

- 2.5.3 confirm to the Participants that defects or omissions are rectified by the end of the Defects Correction Period;
- 2.5.4 receive all documents and information in respect of the design and construction of the Works, including all design documentation, surveys and as constructed information together with any other documentation, which is held by the Owner with respect to the Works;
- 2.5.5 to the extent required, make payment to each NOP on the Final Certificate in accordance with this Agreement; and
- 2.5.6 if necessary, suspend the progress of the whole or part of the Works in accordance with Section 32.2 of the Agreement.

**SCHEDULE 5**  
**ALLIANCE CHARTER**

**[REDACTED]**



## SCHEDULE 6

### RESPONSIBILITIES MATRIX

Description of role or responsibility		Responsibility		
		ALT	Alliance Director	AMT
1.	Delivery and performance of the obligations of the Participants in connection with this Agreement.	X		
2.	Provide corporate support for the Participants in connection with their obligations as such under this Agreement.	X		
3.	Development and deployment of the strategic Alliance framework.	X	X	
4.	Creating a culture necessary to achieve exceptional results in delivery.	X	X	X
5.	Ensuring that all actions, decisions and behaviours are consistent with Alliance Principles.	X	X	X
6.	Development and deployment of a transparent Governance Plan for the Participants in connection with their obligations as such under this Agreement.	X		
7.	Compliance with the Governance Plan and the Responsibilities Matrix.	X	X	X
8.	Determining the functions of the Alliance Director from time to time.	X		
9.	Determining the functions of the AMT from time to time.	X	X	
10.	Decision making on AMT escalated issues.		X	
11.	Reviewing and amending (as necessary) the Alliance Charter from time to time.	X	X	
12.	Making recommendations to the Owner as to how to resolve any ambiguity, discrepancy or inconsistency in this Agreement and the documents comprised in it.	X		
13.	Establishing and ensuring the implementation of the strategic leadership and direction of the Participants.	X		
14.	Establishing and implementing transparent governance and accountability structures for the Participants.	X	X	
15.	Assuming responsibility for the performance of the Participants under this Agreement.	X		
16.	Ensuring that structure and resourcing of the Participants for the performance of their obligation under this Agreement is such that the MCOS Performance will be met or exceeded.	X	X	

Description of role or responsibility		Responsibility		
		ALT	Alliance Director	AMT
17.	Ensuring that all members of the AMT understand the Alliance Charter and perform the Works in accordance with the Alliance Charter.	X	X	
18.	Making recommendations and/or requests to the Owner where required to do so under this Agreement.	X		
19.	Proposing the structure of the AMT		X	
20.	Endorsing the structure and composition of the AMT.	X		
21.	Nominating AMT representatives	X		
22.	Approving amendments to the AMT.	X		
23.	Determining the period required for the Project Office.	X		
24.	Notifying the Owner no later than 20 Business Days from the date it is anticipated that Completion will be reached.	X		
25.	Notifying the Owner when Completion has been reached.	X		
26.	If necessary, ensuring matters raised by the Owner or the Owner's Representative to allow the Certificate of Completion to be issued are dealt with promptly and re-notifying the Owner's Representative when those matters have been addressed.	X	X	
27.	Developing the submission requirements and review process for a Draft Invoice pursuant to Section 2.5.1 of Schedule 12 (Payment Procedures).			X
28.	Agreeing upon the submission requirements and review process for a Draft Invoice pursuant to Section 2.5.1 of Schedule 12 (Payment Procedures).	X		
29.	Developing a form of Proper Invoice for each Participant (containing the information referred to in Sections 2.2, 2.3 and 2.4 of Schedule 12 (Payment Procedures)).			X
30.	Agreeing upon a form of Proper Invoice for each Participant developed by the AMT (containing the the information referred to in Sections 2.2, 2.3 and 2.4 of Schedule 12 (Payment Procedures)).	X		
31.	Reviewing and validating amounts contained in any Proper Invoice (along with the Alliance Auditor).		X	

Description of role or responsibility		Responsibility		
		ALT	Alliance Director	AMT
32.	Reviewing and validating the draft Final Certificate and final account.	X		
33.	Issuing the Final Certificate (containing the information referred to in Section 8.5 of Schedule 12 (Payment Procedures)) to the Owner's Representative and each Participant.		X	
34.	If necessary, ensuring that the matters raised in relation to the Final Certificate are dealt with promptly and re-submitting the Final Certificate when those matters have been addressed.		X	X
35.	Determining if an Adjustment Event has occurred, and if so, determining if it results in any adjustment to the Target Outturn Cost, Key Result Areas and Date for Completion and notifying the Owner's Representative.	X		
36.	Development and submission of a Scope Variation Report (that complies with Section 27.5 of the Agreement) to the ALT where a direction by the Owner is considered to be a Scope Variation prior to implementing it.		X	X
37.	Reviewing Scope Variation Reports and determining whether or not they are a Scope Variation.	X		
38.	Submitting a Scope Variation Report to the Owner's Representative where a Scope Variation has occurred and ensuring that the Scope Variation is not performed until Scope Variation Report is agreed by the Owner.	X		
39.	Reviewing approvals sought by Participants to enter into any contract, subcontract, arrangement or understanding which is in any way associated with the Participant and the Works.	X		
40.	Determining what information is sensitive information in conjunction with the Owner.	X		
41.	Determining an acceptable and appropriate manner to mask and/or protect Sensitive Information.	X		
42.	Determining where disclosure of information would, or could potentially, involve a breach of Applicable Law, recognized best practice corporate governance guidelines or any Participant's existing confidentiality obligations.	X		
43.	Approving the audit plan developed by the Participants.	X		

Description of role or responsibility		Responsibility		
		ALT	Alliance Director	AMT
44.	Determining how the costs associated with Intellectual Property licences under this Agreement are to be borne.	X		
45.	Determining the basis for allocation of costs if Construction Plant is to be used for purposes other than the Works.	X		
46.	Determining the basis for allocation of costs if a Site's accommodation and storage facilities are also used for purposes other than the Works.	X		
47.	Determining the extent that the cost of insurance not specific to this Agreement should be apportioned for the purpose of being Actual Cost.	X		
48.	Determining costs that should be Actual Cost.	X		
49.	Calculating (or instructing the Alliance Auditor to calculate) Interim Gainshare or Interim Painshare at any time.	X		
50.	Calculating (or instructing the Alliance Auditor to calculate) the Gainshare or Painshare at the Date of Final Completion.	X		
51.	Calculating (or instructing the Alliance Auditor to calculate) the Performance Reward Amount or Performance Liability Amount as and when required by this Agreement.	X		
52.	[Intentionally Deleted]	X		
53.	Appointing an Alliance Auditor and determining his or her duties.	X		
54.	Acting in accordance with the commitments given under Section 5 of the Agreement to resolve all issues arising.	X	X	X
55.	Approving the processes for payment proposed by the AMT.	X		
56.	Providing leadership of the AMT and APT.	X	X	X
57.	Developing and deploying the AMT and APT and defining of roles and responsibilities.		X	
58.	Preparing and implementing training plans for the APT and workforce to ensure continuous improvement of personnel and methods of working.		X	X
59.	Developing and deploying of management plans and processes for the AMT and APT.		X	X

Description of role or responsibility		Responsibility		
		ALT	Alliance Director	AMT
60.	Developing and implementing a communications strategy for the Participants in connection the performance of their obligation as such under this Agreement.		X	X
61.	Developing processes and procedures as required under the terms of this Agreement.		X	X
62.	Performing the Works in accordance with the Alliance Charter.	X	X	X
63.	Preparing work status reports in a format and at times acceptable to the Owner.		X	X
64.	Achieving the Key Result Areas and KPIs set by the Owner and the ALT		X	X
65.	Preparing Key Result Areas performance reports in a format and at times acceptable to the Owner and the ALT.		X	X
66.	Preparing of periodic earned value reports (incorporating the information set out in Section 31.3.4 of the Agreement in a format and at times acceptable to the ALT.		X	X
67.	Preparing periodic cash flow statements covering a 28 day rolling period in a format and at times determined by the AMT after consultation with the Owner's Representative.		X	X
68.	Performing the functions determined by the ALT.		X	X
69.	Exercising Good Industry Practice in the performance of the Works.		X	X
70.	Selecting the APT.		X	X
71.	Attending ALT meetings as required by the ALT.		X	
72.	Developing and submitting any reports required by the ALT in connection with a proposed adjustment to the Target Outturn Cost in accordance with the requirements of Schedule 10 and Schedule 11.		X	X
73.	Developing and implementing a system to manage the HST implications of the Works.		X	X
74.	Preparing and delivering Notices to the ALT at a time and in a format approved by the ALT which detail Actual Cost payable under this Agreement and the entitlement of each NOP to Overhead and Profit.		X	X

Description of role or responsibility		Responsibility		
		ALT	Alliance Director	AMT
75.	Satisfying the Owner's concerns with any Notice issued in accordance with item 74 above.		X	X
76.	Developing the necessary procedures to define in detail the processes for payment (based on the principles set out in this Agreement) and seek the approval of the ALT to them.		X	X
77.	Performing the functions determined by the ALT as required.		X	X

**TITLE:** ALT

**ROLE:** To promote strategic direction, support, governance and oversight to the Alliance and continuity over the Project.

<b>VFM RESPONSIBILITIES</b>	
1.	Provide the overall management and coordination of the Alliance and act as the governing body for the administration of this Agreement.
2.	At all times act in the best interest of the Alliance and not for the individual interest of the Participant that they represent.
3.	To act as the prudent financial managers of the Alliance and its budgets.
4.	Provide strategic direction and set policy.
5.	Commit the resources of their respective organizations as required by the Project.
6.	Make timely decisions, informed by Alliance Principles and characteristics.
7.	Empower the Alliance Director.
8.	Challenge the Alliance Director and the AMT, to ensure effective leadership and top performance.
9.	Ratify the Alliance Director's recommendation for membership and structure of the AMT.
10.	Set, review and revise as required limits of delegation to the Alliance Director.
11.	Conduct periodic performance and development reviews of the Alliance Director.
12.	Review the Alliance Director's engagement plan of interventions designed to engage and maintain engagement of members of the AMT.
13.	Review the Alliance Director's responsibilities.
14.	Provide support and advice to the Alliance Director when appropriate.
15.	Facilitate the development of an inspirational mission that engages all the Participants.
16.	Provide high level support and stakeholder interfaces requested by the Alliance Director.
17.	Monitor the performance of the Alliance against the Baseline Works Schedule or the Revised Baseline Works Schedule, as applicable, and Key Result Areas and KPIs and take corrective action as required.
18.	Monitor the health of the alliance culture, the volume of collaboration and take corrective actions as required.
19.	Set reporting requirements for the Alliance Director and AMT.
20.	Support the delivery of Key Result Areas and KPIs set by the Owner.

- 21.** Review the Works Status Reports prepared by the AMT and investigate and advise on measures to overcome any adverse trends.
- 22.** Confirm approval of the Works Status Reports for the relevant period or where no approval is given instruct the Alliance Director to take appropriate steps at the meeting to allow the ALT to approve the same or if this is not possible to take appropriate steps to re-submit the Works Status Report for approval at the earliest opportunity.
- 23.** Issue directions, approvals and decisions as required by this Agreement.



**TITLE:** Alliance Director

**ROLE:** To provide the leadership of the AMT and APT, to deliver the Works and ensure that the quality of the Works meets the VFM Statement and that the Key Result Areas and KPIs where set are met or exceeded

<b>VFM RESPONSIBILITIES</b>	
1.	Undertake the day to day management of the AMT and APT acting as the leader thereof.
2.	To deliver to the ALT the Works Status Reports and such other reports and data required.
3.	To take and implement the instructions of the ALT.
4.	To act as the daily point of contact with the Owner's Representative.
5.	To develop an organization structure for the AMT and APT and recommend to the ALT, the appointment of the AMT members.
6.	To optimize through the life of the Project the size of the APT as necessary to ensure the delivery of the Works for the Project and the careful management of the budget for the APT.
7.	Develop risk mitigation strategies and value management plans to ensure that the Project risks are properly managed and controlled.

**TITLE:** AMT

**ROLE:** To undertake the day to day management and administration of the Project through the leadership of the Alliance Director including the audit of quality and the maintenance of the Project.

<b>VFM RESPONSIBILITIES</b>	
1.	Ensure that all necessary resources are available to undertake the Works.
2.	Implement actions necessary to meet objectives and stretch targets set by the ALT.
3.	Seek out areas of scope re-allocation between the Participants for consideration by the ALT.
4.	Consider strategies to contain adverse trends or increase value provision recommended by the Participants and respond accordingly.
5.	Establish procedures in conjunction with the ALT, where applicable for the commissioning of the Works and the issue of Completion notices, when ready.
6.	Manage interfaces between the Alliance and any Implementation Works Subcontractors.
7.	Develop and maintain an execution plan for the Project.
8.	Submit risk management and mitigation reports to the Alliance Director, and ensure that the risk register is properly managed and controlled.
9.	Ensure that all applicable health and safety, environmental and quality requirements are maintained in accordance with the requirements of the Agreement and in accordance with the policies of the Alliance and its objectives, including, without limitation, the Communications and Public Engagement Protocol.
10.	Monitor the overall status of the Project against measures covering cost, quality, works schedule, behaviour and in particular where Key Result Areas and KPIs are set. Prepare the Works Status Reports for the Alliance Director to present to the ALT.
11.	Ensure compliance with all applicable laws, regulations, standards relevant to the Works.
12.	Establish health and safety regimes and monitoring to ensure that the impartial and fair monitoring of the Participants is undertaken.
13.	Establish roles and responsibilities with regards to safety approvals and the like.
14.	Develop a system engineering approach to ensure overall integration between all design disciplines, and verification of requirements and outputs.
15.	Develop and maintain procedures for the inspection, examination and testing and certification of all materials and workmanship and the performance of all Construction Plant.

**SCHEDULE 7**  
**VFM STATEMENT**

**[REDACTED]**

**SCHEDULE 8**  
**PROJECT PROPOSAL**

**[REDACTED]**

## **SCHEDULE 9**

### **ACTUAL COST**

#### **1. INTRODUCTION**

##### **1.1 Definition of Actual Cost**

Subject to Sections 4 and 6 of this Schedule 9 (Actual Cost) and any specific exclusions contained in this Agreement, "**Actual Costs**" means those costs and expenses that are both:

1.1.1 reasonably and actually incurred by the Participants in connection with the Works (excluding any corporate overhead component not specific to the Works and any profit or mark up of any kind); and

1.1.2 described in Annex 1 and Annex 2 to this Schedule 9 (Actual Cost), or which this Agreement otherwise expressly provides will be Actual Cost.

##### **1.2 Exclusion of overheads and profit from Actual Cost**

It is a fundamental underlying principle of this Agreement that, except for Overhead and Profit, no Participant will derive any mark-up, overhead, profit or unreasonable advantage from the utilization of their resources for the Works.

##### **1.3 Set Off of recovered damages**

The Owner may set off any damages (liquidated and unliquidated) recovered by any Participant from its sub-contractors, suppliers and the like against any Actual Costs to be paid to that Participant.

#### **2. COST ELEMENT ALLOCATION TABLES**

##### **2.1 Allocation of cost elements in Tables A to I**

Tables A to I of Annex 1 to this Schedule 9 (Actual Cost) ("**Cost Element Allocation Tables**") allocate various cost elements between Actual Cost, Overhead or Profit.

#### **3. OWNER PARTICIPANT**

##### **3.1 Owner Participant Actual Costs**

The categories of Owner Participant Actual Cost are included at Annex 2 to this Schedule 9 (Actual Cost).

#### **4. THE ALT MAY DETERMINE ACTUAL COST**

##### **4.1 ALT determination as to Actual Cost**

The ALT may determine, in accordance with Section 7.8 of this Agreement, that any cost, notwithstanding that it is not otherwise an Actual Cost in accordance with this Schedule 9 (Actual Cost), shall be considered an Actual Cost.

## **5. AFFILIATED SUBCONTRACTS**

### **5.1 Works Undertaken by Affiliated Subcontractors**

The provisions of this Section 5 will apply in respect of any Works undertaken by Affiliated Subcontractors unless the ALT has agreed otherwise in respect of a specific NOP and its proposed Affiliated Subcontract:

5.1.1 Notwithstanding Section 1 of this Schedule 9, the amount allowable as Actual Costs in relation to an Affiliated Subcontract is:

5.1.1.1 the amount payable under and in accordance with the Affiliated Subcontract; less

5.1.1.2 the Affiliate Subcontract Fee.

Accordingly, the Affiliate Subcontract Fee is deemed only to be recoverable by the relevant NOP within the Overhead and Profit (if any) payable to that NOP in respect of the Actual Costs incurred under the applicable Affiliated Subcontract.

5.1.2 Where and to the extent that an Affiliated Subcontract is priced on an actual cost basis (e.g. cost reimbursable, target cost or otherwise):

5.1.2.1 the component of the Actual Cost (excluding the Affiliate Subcontract Fee) that is payable to the relevant NOP in respect of that Affiliated Subcontract must be determined on the basis that Schedule 9 (Actual Cost) is deemed to apply to the determination of those actual costs under the Affiliated Subcontract; and

5.1.2.2 for clarity, Section 5.1.3 will apply notwithstanding the terms of the relevant Affiliated Subcontract, or the amount actually payable in respect of such actual costs under that Affiliated Subcontract.

5.1.3 An authorised representative of each NOP must:

5.1.3.1 within 20 Business Days of the end of each Financial Year; and

5.1.3.2 at the end of the final Defects Correction Period of the Project,

certify that all Actual Costs claimed by the relevant NOP are net of all discounts, incentives, benefits and the like that may have been provided to the NOP by any supplier or subcontractor and the like during the relevant Financial Year.

5.1.4 The certification under Section 5.1.3 of this Schedule 9 in respect of any NOP must confirm for that NOP and its Affiliated Subcontractor that:

5.1.4.1 no Overhead has been recovered as Actual Costs; and

5.1.4.2 no mark-up, profit and the like other than the Profit has been recovered,

by that NOP and its respective Affiliated Subcontractors and any such recovery of Actual Costs or profit discovered in the course of any audit must be repaid forthwith by the relevant NOP.

## **6. EXCLUSIONS**

### **6.1 Exclusions from Actual Cost**

The following costs incurred by the Participants will not be Actual Cost (and to the extent that they have previously been recognized as Actual Cost will be credited against Actual Cost):

- 6.1.1 any costs incurred by a Participant in performing any works or services which are not directly referable to the VFM Statement, the Scope of Works and the express assumptions adopted by the Participants in developing the Target Outturn Cost that have been approved by the Owner's Representative, or which do not otherwise form part of the Works;
- 6.1.2 any legal costs incurred by a Participant in defending any prosecution or claim brought against a Participant by a Governmental Authority by reason of an alleged breach of Applicable Law, except where the Owner's Representative determines otherwise by notice in writing to the Participants, having regard to the nature of the breach and the effect of the breach on the Project, the Works and the Owner;
- 6.1.3 any costs, liabilities or payments incurred or made by a Participant in indemnifying another Participant in accordance with this Agreement;
- 6.1.4 any costs, liabilities or payments incurred by a Participant in defending or prosecuting lawsuits or claims (including payment of judgments, awards, orders, damages, restitution, compensation or interest) by or against another Participant in accordance with Sections 6.2 and 6.3 of this Agreement;
- 6.1.5 any costs incurred by a Participant in providing any difference in insurance coverage to supplement the insurance requirements referred to in this Agreement;
- 6.1.6 any costs, losses, damages and expenses suffered or incurred by the Defaulting Participant arising out of or in connection with a Default and/or exclusion and/or termination under Sections 33 and 35 of this Agreement;
- 6.1.7 any corporate or personal income tax or capital gains tax imposed on a Participant;
- 6.1.8 HST;
- 6.1.9 any penalties or fines in respect of the payment of any fees, charges, duties royalties, licences and statutory charges of any kind imposed with respect to the Works;
- 6.1.10 any costs incurred by a NOP, or to be incurred by a NOP, which were excluded from Actual Cost as part of the Project Proposal;
- 6.1.11 any costs or expenses (including legal costs and expenses) arising out of or in connection with the relocation of personnel or human resources by Participants, unless expressly approved by the ALT or pursuant to an expense policy approved by the ALT;
- 6.1.12 any costs associated with pre-existing medical conditions and medical examinations for current employees nominated for the Project;
- 6.1.13 any costs or expenses (including legal costs and expenses) arising out of or in connection with any vacation or personal leave escalation, or additional net accrual

- for increasing an employee's employment entitlements, beyond the accrual in the employment related on-costs;
- 6.1.14 other than as expressly approved by the ALT, living away from home allowances or any other living allowances or supplementary payments;
  - 6.1.15 any costs arising out of or in connection with specialized personnel's travel, relocation or accommodation, except where expressly approved by the ALT or under an expense policy approved by the ALT;
  - 6.1.16 except where expressly allowed for under the Alliance Development Agreement and included within the Target Outturn Cost, any cost or expense incurred by a Participant prior to the date of this Agreement, including:
    - 6.1.16.1 prequalification, procurement, proposal or submission costs; and
    - 6.1.16.2 formulation and execution of this Agreement;
  - 6.1.17 any costs or expenses arising out of or in connection with business development and professional development which is not specific to the Alliance;
  - 6.1.18 any costs or expenses arising out of or in connection with corporate training, including cost of training and cost of time of attending the training, unless otherwise in accordance with an ALT approved training program;
  - 6.1.19 information technology support staff or system administrators from corporate head office, unless directly related to supporting Project Office located Employed Staff or Site Labour;
  - 6.1.20 software development costs associated with corporate software, being software for which the prime application is not delivery of the Project;
  - 6.1.21 any costs or expenses arising out of or in connection with reimbursement for a handling fee or mark-up on disbursements and sub-consultants;
  - 6.1.22 any contribution to corporate overhead costs or expenses, or any profit or unreasonable advantage from the utilization of people, plant, equipment, software or resources;
  - 6.1.23 any amount paid or payable by or on behalf of a Participant to a supplier to the extent that the Participant is entitled to claim and retain an input tax credit in respect of that payment;
  - 6.1.24 a Change in Control under Section 47.8 of this Agreement;
  - 6.1.25 any legal or consultant costs in connection with an arbitration or adjudication to resolve a dispute in accordance with Schedule 17 of this Agreement (Dispute Resolution Procedure) other than the costs of the ALT Appointed Expert as approved by the ALT;
  - 6.1.26 any legal or consultant costs in connection with a Payment Expert determination to resolve an issue that arises between the Owner and the NOPs in respect of the amount payable under paragraph 3 of Schedule 16 (Exclusion and Termination) of this Agreement other than the costs of the Payment Expert as approved by the ALT and the Owner;



- 6.1.27 any amount paid or payable by or on behalf of a NOP to a supplier which is an Affiliate of the relevant NOP on account of profit or corporate overhead, except where expressly approved by the ALT;
- 6.1.28 any labour and salary costs of the ALT representatives in their performance of ALT duties under this Agreement; and
- 6.1.29 any costs incurred by a Participant, or to be incurred by a Participant, specifically excluded under this Agreement as being an Actual Cost.

## **7. Use of Actualized Rates**

**7.1** Any Actualized Rate for a NOP may be used under this Agreement as a proxy for Actual Cost (otherwise derived in accordance with this Agreement) for that NOP where and to the extent such Actualized Rate has been approved for use by the ALT in accordance with Section 7.2.1 of this Schedule 9 (Actual Costs). For the avoidance of doubt, any approval, deemed approval or provisional approval given by the ALT to the use of Actualized Rates of any NOP under this Section 7.1 does not extend to any other NOP, Affiliated Subcontractor of a NOP, or Subcontractor.

**7.2** The provisions of this Section 7.2 apply to the use of Actualized Rates as a proxy for Actual Cost by any NOP in accordance with this Agreement:

7.2.1 The ALT may from time to time acting reasonably approve an Actualized Rate (or revised Actualized Rate) proposed by any NOP in respect of that NOP's Employed Staff (Table B) and/or Site Labour (Table C) engaged on the Works during each Actualized Period on production of a worked example by that NOP in respect of the proposed Actualized Rate showing:

- 7.2.1.1 the specific account codes where the actual salary costs and employer on-costs are debited in that NOP's accounting systems;
- 7.2.1.2 the specific accounting codes where the staff costs, based on rates charged to other projects are credited in that NOP's accounting system;
- 7.2.1.3 a demonstration of that NOP's proposed regular reconciliation process which compares actual salary costs to the costs charged to projects and how any differences are subsequently reflected in adjusted rates;
- 7.2.1.4 the calculation of the Actualized Rate is in accordance with the methodology stated in the Project Proposal for the relevant Works; and
- 7.2.1.5 such other information or substantiation as the ALT may reasonably require,

and the ALT may require the Alliance Auditor to review or investigate any such proposed Actualized Rate and/or its worked example and may approve the use of an Actualized Rate on a provisional basis (which may be withdrawn by the ALT on a retrospective basis at any time) pending satisfaction of such conditions as the ALT may reasonably require. For the avoidance of doubt, a failure to submit a satisfactory worked example entitles the ALT to withhold approval of the relevant proposed Actualized Rate.

7.2.2 Subject to Section 7.2.7, where and to the extent Actualized Rates have been approved and determined in accordance with this Section 7.2 in respect of any:

- 7.2.2.1 NOP;
- 7.2.2.2 Actualized Category; and
- 7.2.2.3 Current Actualized Period,

notwithstanding any other provision in this Schedule 9 (Actual Cost), the Actual Costs payable to that NOP pursuant to this Schedule 9 (Actual Costs) in respect of that NOP's Employed Staff and/or Site Labour in that Actualized Category during the Current Actualized Period are to be deemed to be the aggregate of:

- 7.2.2.4 the relevant Actualized Rates; multiplied
- 7.2.2.5 by the total hours which would otherwise be recoverable as Actual Costs (excluding for the avoidance of doubt all non-cost hours such as overhead allocation, or where the resources used receive no pay in respect of the hours worked, or where the total daily hours exceed the standard daily hours assumed in the calculation of the relevant Actualized Rate),

for all such Employed Staff and/or Site Labour in that Actualized Category during the period within the Current Actualized Period to which any payment of Actual Cost relates.

- 7.2.3 Where at any time the use of Actualized Rates by a NOP are found following an audit (carried out by the Alliance Auditor) not to fairly represent a proxy for Actual Costs, then the ALT may, at their sole discretion (for which determination the NOP concerned shall not be entitled to vote) revoke the approval to use Actualized Rates and the NOP concerned shall forthwith present its Actual Costs as defined herein (less any Actual Costs allowed for or included by the NOP as part of the Overhead) for reimbursement in lieu of Actualized Rates. If Actual Costs the subject of Actualized Rates remain unaudited for twenty (20) Business Days following a request by the Owner's Representative or ALT to do so or if any audit shows that any Actualized Rates are not a proxy for their related Actual Costs, then either the Owner's Representative or the ALT may decide, at their sole discretion, to discontinue the use of Actualized Rates by the relevant NOP as a proxy for Actual Cost for the period since the date of the last satisfactory audit of those Actualized Rates to such date as the Owner's Representative or ALT may notify.

- 7.2.4 The Actualized Rate for each:

- 7.2.4.1 NOP;
- 7.2.4.2 Actualized Category; and
- 7.2.4.3 Current Actualized Period,

is determined at the expiry of the Preceding Period in accordance with the methodology stated in the Project Proposal.

- 7.2.5 Actualized Rates for each relevant NOP shall be subject to reconciliation not less than once annually (and otherwise where determined by the ALT) by the relevant NOP to demonstrate that the recovery of cost by the use of Actualized Rates for any resource used in performing the Works is not significantly different to the Actual Cost incurred

by that NOP for that resource, and such reconciliation shall be audited by the Alliance Auditor.

7.2.6 Where any discrepancy in the reconciliation is discovered by the Alliance Auditor in an audit under Section 7.2.5, the matter shall be referred to the ALT for resolution and the ALT must direct that any overpayment is repaid by the relevant NOP to the Owner or that any underpayment is paid by the Owner to the relevant NOP as Actual Cost.

7.2.7 For each NOP, each Actualized Category and each Current Actualized Period, as soon as practicable following:

7.2.7.1 the end of the relevant Preceding Period; and

7.2.7.2 the determination of the Actualized Rates for the relevant Current Actualized Period,

the total amount paid or payable at Actualized Rates to the relevant NOP during that Preceding Period (the “**Initial Actualized Amount**”) must be recalculated using the relevant adjusted Actualized Rate determined in accordance with Section 7.2.7.2 (the “**Adjusted Actualized Amount**”) and the difference between the Initial Actualized Amount and the Adjusted Actualized Amount (if any) paid to the Owner from the relevant NOP or to the relevant NOP from the Owner (as the case may be) in the next payment otherwise due under this Agreement following determination of such difference (if any) or, if no payment is otherwise due, as a debt due to the Owner or the NOP (as the case may be).

7.2.8 Each NOP using Actualized Rates as a proxy for Actual Costs for Employed Staff and/or Site Labour in each Actualized Category must maintain a review of the trends of its costs and billable hours for each Actualized Category between each Actualized Period, and must promptly report, explain and justify to the ALT any significant difference to the Actual Costs being incurred by it in the relevant Actualized Category during each Current Actualized Period, in order to ensure that any such person has the opportunity to mitigate any adverse trends that may lead to an overspend of the relevant NOP’s estimated expenditure in connection with the Works.

7.2.9 The determination and use as a proxy for Actual Cost of all Actualized Rates, Initial Actualized Amounts and Adjusted Actualized Amounts under this Agreement must be approved by the ALT and may be audited by the Alliance Auditor at any time.

## **8. Disputes as to Actual Costs**

**8.1** To the extent that Actual Costs are alleged by a Participant to be not clear, any dispute shall be resolved by the AMT or in default of agreement, by the ALT.

**8.2** In the event the review team within the AMT fails to agree on whether a particular estimated or incurred Actual Cost submitted by a Participant is allowable in accordance with this Agreement or not, the matter shall be referred to the ALT. The ALT may then either consider the matter without further review or may require the Alliance Auditor to audit the matter in dispute only and report back to the ALT within fourteen days of his/her being appointed to carry out the audit.

**8.3** The level of detail required to support a Participant’s Actual Costs will be determined and agreed by the ALT subject to the amount of documentary evidence and records that will be required to be provided by each Participant in accordance with this Schedule 9 (Actual Costs) and Section 31 of this Agreement.

## **9. Cost Control**

**9.1** [Intentionally Deleted].

**9.2** On a monthly basis, each Participant must prepare estimates of the next three month's Actual Costs that are likely to be incurred in respect of the Works in sufficient detail to identify:

9.2.1 man-hours;

9.2.2 rates per category of staff;

9.2.3 activities to be undertaken; and

9.2.4 rates, or estimates, or prices for those activities,

and in the event of any such estimate being in insufficient detail for either the AMT or an individual Participant to be able to assess whether the estimated Actual Costs are relevant to the Works, the Participant providing the estimate shall provide such further information as may be required by the AMT.

**9.3** The AMT may determine the manner of recording and the level of approval required for time and costs incurred by each Participant's staff and labour (including subcontract labour, agency labour, consultants and the like) which is to be recovered as Actual Costs.

**9.4** Each Participant must, on a monthly basis, submit to the AMT copies of all the Participant's (including its subcontractor of any tier) approved timesheets for all the staff and labour which the Participant wishes to recover as Actual Costs approved by a designated manager of the Participant and showing the relevant WBS code and activity code. If additional information or documentation is required to substantiate the Actual Costs claimed, the Participant shall provide such information or documentation, upon request by the Alliance Auditor or the Owner's Representative.

**9.5** Each Participant must, on a monthly basis, submit to the AMT expense reports and digital copies of all significant supplier and subcontractor invoices which it wishes to recover as Actual Costs. All such invoices shall state the works undertaken, the location of the Works and the relevant order number under which the Works were undertaken. If additional information or documentation is required to substantiate the Actual Costs claimed, the Participant shall provide such information or documentation, upon request by the Alliance Auditor or the Owner's Representative.

**9.6** Each Participant must submit verifiable copies of approved timesheets, invoices, receipts, expense sheets and such other information or substantiation by electronic means for the purpose of establishing Actual Costs in the electronic format approved by the AMT at six-monthly intervals to establish Actual Costs claimed by the Participant during such period.

**9.7** Any reallocation of Actual Costs (including time costs) by a Participant shall only be made by agreement with the AMT and only via an auditable process approved by the Alliance Auditor.

## **10. Audit**

**10.1** The Alliance Auditor shall carry out the audits described in Section 31.2 of this Agreement.

**10.2** The Alliance Auditor may with the approval of the Alliance Director utilize members of the AMT or APT to carry out elements of any audit work under the direction of the Alliance Auditor where it is considered beneficial and cost effective.

- 10.3** In the spirit of the open-book philosophy set out in Section 5.4 of this Agreement and in this Schedule 9 (Actual Cost), each Participant has in addition to the audit rights set out in Section 31.2 of this Agreement the right to review the estimated and incurred Actual Costs of the other Participants. In the event of a Participant exercising this right, a review team of one authorised representative from each Participant shall be formed within the AMT and shall undertake such reviews as may be directed by the ALT. The Participant to be audited will be given fourteen (14) days' written notice of such review. Such a review will be in addition to and not in substitution of the audits carried out by the Alliance Auditor.
- 10.4** In the event the review team within the AMT fail to agree on whether a particular estimated or incurred Actual Cost submitted by a Participant is allowable against this Agreement or not, the matter shall be referred to the ALT. The ALT may then either consider the matter without further review or may require the Alliance Auditor to audit the matter in dispute only and report back to the ALT within fourteen days of being appointed to carry out the audit.

**Annex 1 to Schedule 9 (Actual Cost) – Cost Element Allocation Tables**

<b>Table A</b>			
<b>NOP's Overhead and Corporate Office Costs</b>			
<b>Ref</b>	<b>Cost Element</b>	<b>Cost Category</b>	
		<b>Actual Cost</b>	<b>Overhead</b>
A.	<i>Corporate Office and corporate overhead costs</i>	[REDACTED]	
B.	<i>Overhead costs of Affiliated Subcontractors</i>	[REDACTED]	
C.	<i>Franchises, royalties, licences</i>	[REDACTED]	
D.	<i>Taxes (e.g. property tax, business tax, income tax, etc.)</i>	[REDACTED]	
E.	<i>Interest, financing charges, banking charges</i>	[REDACTED]	
F.	<i>Corporate or entity accounting / auditing costs</i>	[REDACTED]	
G.	<i>Research and development costs (unless specifically approved by the ALT)</i>	[REDACTED]	
H.	<i>Business insurance, professional indemnity insurance (excluding insurance taken out by the Owner), product liability insurance</i>	[REDACTED]	
I.	<i>Insurance premiums relating to the insurances required to be obtained and maintained by the NOPs as set out in Section 1.2 of Schedule 13 (Insurance Policies and Bonds) (excluding premiums in respect of insurance taken out by the NOPs which are specifically identified in the Project Proposal provided that this exclusion shall not apply to the insurances required to be obtained and maintained by the NOPs as set out in Section 1.2 of Schedule 13 (Insurance Policies and Bonds) other than WSIB premiums for NOP's Site Labour and Project Specific Costs for NOP's Employed Staff, as described in Table B and Table C respectively, of this Schedule 9 (Actual Cost)), including the cost of insurance premiums for events which are at the NOP's risk and which this Agreement requires the NOP or the Owner to insure as individual legal entities</i>	[REDACTED]	
J.	<i>Corporate Office<sup>1</sup> paper, printing and stationery</i>	[REDACTED]	
K.	<i>Marketing, sales, and industry conferences</i>	[REDACTED]	

<sup>1</sup> "**Corporate Office**" means for purposes of this Schedule 9 (Actual Cost) any office or location where the Participant operates its business that is not a Project Office (approved by the ALT). It includes the Participant's corporate or head office, as well as any regional, divisional or subsidiary offices.

**Table A**  
**NOP's Overhead and Corporate Office Costs**

Ref	Cost Element	Cost Category	
		Actual Cost	Overhead
L.	General fees paid on a regular basis (excluding Project Specific general fees instructed by the the Owner)	[REDACTED]	
M.	Legal advice, fees and services (excluding costs identified in: Table G, Ref B)	[REDACTED]	
N.	Advertising, including agency fees and publication costs	[REDACTED]	
O.	Corporate Office management, technical (exclusive of designated Project Specific Designer NOP staff), administration and service staff and non-Project Specific staff, including HR, Finance, Commercial, Accounts, Purchasing, Occupational Health and Safety, Quality, Environment, and IT	[REDACTED]	
P.	Company cars, where not allocated directly to Project specific staff, including all costs and expenses (except for expenses pre-authorized by the ALT)	[REDACTED]	
Q.	All Corporate Office accommodation costs, including all services, administration, maintenance, furniture, equipment, rent, rates, taxes, telephone, fax, reprographics, couriers, postage (except for any Workstation Charges approved by the ALT)	[REDACTED]	
R.	Corporate Office computer hardware and software systems (except for any Workstation Charges approved by the ALT)	[REDACTED]	
S.	Corporate office recruitment costs, including both staff and agency costs and statutory pay in lieu of notice, and any Corporate Office human resources/industrial relations management staff (see Table B, Ref M in respect of Project Specific recruitment costs)	[REDACTED]	
T.	Procurement or tendering costs (except where expressly permitted under this Agreement or pre-authorized by the ALT)	[REDACTED]	
U.	Charitable donations and entertaining, unless pre-authorized by the ALT	[REDACTED]	
V.	Training (except where expressly permitted under this Agreement or pre-authorized by the ALT)	[REDACTED]	
W.	Parent Company Performance Guarantee	[REDACTED]	

**Table A**  
**NOP's Overhead and Corporate Office Costs**

<b>Ref</b>	<b>Cost Element</b>	<b>Cost Category</b>	
		<b>Actual Cost</b>	<b>Overhead</b>
X.	<i>Membership fees in trade bodies and professional fees (except where expressly pre-authorized by the ALT)</i>	<b>[REDACTED]</b>	
Y.	<i>Additional Lands</i>	<b>[REDACTED]</b>	



<b>Table B</b>			
<b>Designated Project Specific<sup>2</sup> Costs of NOP's Employed Staff – Including AMT Members</b>			
<b>Ref</b>	<b>Cost Element</b>	<b>Cost Category</b>	
		<b>Actual Cost</b>	<b>Overhead</b>
A.	<i>NOP's staff who are principally engaged in carrying out work on the Project, including the design and/or design approval process, provided they are detailed on the staff organizational chart approved by the ALT, regardless of whether such staff are located at a Corporate Office, Project Office, or some other location identified in the Project Proposal, or as otherwise approved by the ALT.</i>	<b>[REDACTED]</b>	
B.	<i>Project Specific secretarial/clerical personnel as detailed on the staff organizational staff approved by the ALT</i>	<b>[REDACTED]</b>	
C.	<p><i>Staff payroll burden consisting of:</i></p> <ul style="list-style-type: none"> <li><i>i. actual salaries (excluding bonuses and incentive payments related to the profitability of the NOP's business);</i></li> <li><i>ii. pre-authorized overtime, week-end or vacation pay allowances, and sick pay (in accordance with the NOP's standard HR policies);</i></li> <li><i>iii. WSIB premiums in accordance with Applicable Laws;</i></li> <li><i>iv. employer contributions to private health/dental insurance and life insurance as per the employee's contract of employment;</i></li> <li><i>v. Employer Health Tax installment amounts and/or annual amounts (as applicable) in accordance with Applicable Laws;</i></li> <li><i>vi. employer contributions to approved pension schemes (excluding discretionary contributions and special pension contributions that the employer may have to make to the pension fund to make up any shortfall);</i></li> <li><i>vii. employer contributions in respect of Canada Pension Plan (CPP) and Employment Insurance (EI) in accordance with Applicable Law; and</i></li> <li><i>viii. Project Specific staff training inclusive of time spent and course fees, subject to prior written approval by the ALT.</i></li> </ul>	<b>[REDACTED]</b>	

<sup>2</sup> “**Project Specific**” means for purposes of this Schedule 9 (Actual Cost) staff members who principally carry out work of any description in respect of the Project, with the prior approval of the ALT, excluding support staff who fall within the definition of Corporate Office staff. No distinction shall be made between staff working for different divisions within the same legal entity.

<b>Table B</b>			
<b>Designated Project Specific<sup>2</sup> Costs of NOP's Employed Staff – Including AMT Members</b>			
<b>Ref</b>	<b>Cost Element</b>	<b>Cost Category</b>	
		<b>Actual Cost</b>	<b>Overhead</b>
D.	<i>Actualized Rates for staff where these have been approved by the ALT for use as the proxy for Actual Costs in accordance with Section 7 of this Schedule 9 (Actual Costs)</i>	<b>[REDACTED]</b>	
E.	<i>Employee stock or share purchase plans (unless specifically approved in writing by ALT)</i>	<b>[REDACTED]</b>	
F.	<i>All costs for company cars for Project Specific staff (where allocated directly to staff), including insurance, depreciation, and maintenance. Fuel and fuel allowances to be reimbursed in accordance with the NOP's standard conditions of employment for individual members of the NOP's Project Specific staff.</i>	<b>[REDACTED]</b>	
G.	<i>Staff employee benefits not identified in Ref C above (unless otherwise approved by the ALT)</i>	<b>[REDACTED]</b>	
H.	<i>Travel (domestic), accommodation and subsistence costs (including location allowances) for Site personnel, Project Office based staff, and designated Designer NOP staff, to Site and other authorized Project Specific destinations, subject to the Alliance's expense policy. Any excess costs incurred above those permitted under the Alliance expense policy (approved by the ALT) will not be an Actual Cost.</i>	<b>[REDACTED]</b>	
I.	<i>Travel (domestic), accommodation and subsistence costs (including location allowances) for Corporate Office based personnel (excluding identified Project Specific staff per Ref A), to Site and other authorized Project Specific destinations (unless otherwise approved by the ALT)</i>	<b>[REDACTED]</b>	
J.	<i>Maternity or parental leave payments where the recipient has been engaged on the Works for a reasonable period of time</i>	<b>[REDACTED]</b>	
K.	<i>Long term sickness payments in excess of 3 months or Applicable Law (unless approved by ALT)</i>	<b>[REDACTED]</b>	
L.	<i>Long term sickness payments up to 3 months or Applicable Law where the recipient has been engaged in the Works for a reasonable period of time</i>	<b>[REDACTED]</b>	
M.	<i>Project Specific recruitment costs (subject to ALT approval)</i>	<b>[REDACTED]</b>	

<b>Table B</b>			
<b>Designated Project Specific<sup>2</sup> Costs of NOP's Employed Staff – Including AMT Members</b>			
<b>Ref</b>	<b>Cost Element</b>	<b>Cost Category</b>	
		<b>Actual Cost</b>	<b>Overhead</b>
<i>N.</i>	<i>Statutory pay in lieu of notice where the recipient has been engaged on the Works for a reasonable period of time (subject to ALT approval)</i>	<b>[REDACTED]</b>	
<i>O.</i>	<i>Project Specific bonus or incentive payments, not related to the profitability of the NOP's broader business</i>	<b>[REDACTED]</b>	
<i>P.</i>	<i>Laptop computers (hardware and software), tablets and mobile phones assigned to Project Specific Staff.</i>	<b>[REDACTED]</b>	
<i>Q.</i>	<i>Personal professional fees and subscriptions</i>	<b>[REDACTED]</b>	

**Table C**  
**NOP's Site Labour**

Ref	Cost Element	Cost Category	
		Actual Cost	Overhead
A.	<p><i>Site Labour costs burden consisting of:</i></p> <ul style="list-style-type: none"> <li>i. <i>Worker's total earnings, including pre-authorized overtime (excluding bonuses);</i></li> <li>ii. <i>Payments in respect of public holidays and pre-authorized vacation;</i></li> <li>iii. <i>WSIB premiums in accordance with Applicable Laws;</i></li> <li>iv. <i>Sickness or injury payments;</i></li> <li>v. <i>Employer's contributions in respect of Canada Pension Plan (CPP), Employment Insurance and Employer Health Tax installment amounts and/or annual amounts (as applicable), in each case in accordance with Applicable Laws;</i></li> <li>vi. <i>Employer's contributions to annual vacation credits, pensions, death benefit and other employment benefit schemes (excluding special pension contributions that the NOP (as employer) may have to make to the pension fund to make up any shortfall);</i></li> <li>vii. <i>Fares or pre-authorized lodging allowances (not relocation allowances);</i></li> <li>viii. <i>Tool allowances;</i></li> <li>ix. <i>Medical examinations where approved by the ALT (except in the case of pre-existing medical conditions);</i></li> <li>x. <i>Protective clothing (subject to standard NOP policy); and</i></li> <li>xi. <i>Project Specific employee training inclusive of time spent and course fees, subject to prior written authorisation by the ALT.</i></li> </ul>	<b>[REDACTED]</b>	
B.	<i>Labour only sub-contract</i>	<b>[REDACTED]</b>	
C.	<i>Statutory pay in lieu of notice where the recipient has been engaged on the Works for a reasonable period of time (subject to ALT approval).</i>	<b>[REDACTED]</b>	
D.	<i>Project Specific bonus or incentive payments, not related to the profitability of the NOP's broader business (subject to ALT approval).</i>	<b>[REDACTED]</b>	

<b>Table D</b>			
<b>Alliance Project Office(s), Site Establishment and Site Charges (NOP's Equipment)</b>			
<b>Ref</b>	<b>Cost Element</b>	<b>Cost Category</b>	
		<b>Actual Cost</b>	<b>Overhead</b>
A.	<i>Offices, stores and workshops etc.</i>	[REDACTED]	
B.	<i>Partitioning, racking and fitting out</i>	[REDACTED]	
C.	<i>Temporary foundations and services</i>	[REDACTED]	
D.	<i>Installation and running costs of utilities including water, gas, electricity and other services</i>	[REDACTED]	
E.	<i>Documentation, printing, photocopying and consumables</i>	[REDACTED]	
F.	<i>Project Specific computer hardware and software systems</i>	[REDACTED]	
G.	<i>Cleaning and maintenance</i>	[REDACTED]	
H.	<i>Safety requirements, including first aid, clothing, training, protection systems, inspecting and all other measures required to satisfy Applicable Laws</i>	[REDACTED]	
I.	<i>Project Specific telephones, mobile phones and site communication systems</i>	[REDACTED]	
J.	<i>Security and CCTV</i>	[REDACTED]	
K.	<i>Consumables, tea, coffee, paper and the like</i>	[REDACTED]	
L.	<i>Furniture, fixtures, fittings and equipment</i>	[REDACTED]	
M.	<i>Stationery, postage, courier services and the like</i>	[REDACTED]	
N.	<i>Photography</i>	[REDACTED]	
O.	<i>Temporary roads and hard-standings</i>	[REDACTED]	
P.	<i>Temporary fencing, hoarding and security</i>	[REDACTED]	

<b>Table D</b>			
<b>Alliance Project Office(s), Site Establishment and Site Charges (NOP's Equipment)</b>			
<b>Ref</b>	<b>Cost Element</b>	<b>Cost Category</b>	
		<b>Actual Cost</b>	<b>Overhead</b>
Q.	<i>Petty cash</i>	[REDACTED]	
R.	<i>Lunch rooms, drying and messing rooms as may be required including maintenance</i>	[REDACTED]	
S.	<i>Road-sweeping, waste disposal</i>	[REDACTED]	
T.	<i>Project Specific technical equipment for surveying and testing, etc</i>	[REDACTED]	
U.	<i>Rent (including other lease costs incurred by virtue of a property lease approved by the ALT), rates and other municipal and statutory charges</i>	[REDACTED]	
V.	<i>Office and equipment costs associated with designated NOP staff working on the Project, wherever they may be located ("<b>Workstation Charge</b>")</i>	[REDACTED]	
W.	<i>Any other related site establishment and site charges not included in the above (subject to ALT approval)</i>	[REDACTED]	
<p>“√*” means for purposes of this Table D that costs may be charged at quoted rates approved by the ALT ("<b>Actualized Costs</b>"), but only to the extent that such costs are directly related to the Project.</p>			

<b>Table E</b>			
<b>Other NOP Machinery and Equipment</b>			
<b>Ref</b>	<b>Cost Element</b>	<b>Cost Category</b>	
		<b>Actual Cost</b>	<b>Overhead</b>
A.	<i>Machinery and equipment purchased for incorporation within the Works.</i>	<b>[REDACTED]</b>	
B.	<i>Machinery, tools, consumables and equipment required for the design, installation, testing, commissioning and management of the Works, forming part of the Works, either purchased, hired or leased (including track installation and tamping plant; cranes, wheeled and tracked machinery, engineering trains, locomotives and wagons).</i>	<b>[REDACTED]</b>	
C.	<p><i>Own 'internal' NOP's machinery and equipment.</i></p> <p><i>Where the machinery and equipment is purchased specifically for use by the NOP to execute the Works, the cost is the purchase price or the first cost if the NOP assembled, fabricated or otherwise produced the item of equipment. The cost is credited with residual values, as actually realized or if not, as approved by the ALT after that equipment is no longer required by the NOP to execute the Works.</i></p> <p><i>Where the equipment is hired or rented by the NOP from an Affiliate, the costs should be at reasonable market hire or rental rates approved by the ALT.</i></p> <p><i>Where the equipment is owned by the NOP but not purchased specifically for use by the NOP to execute the Works, the costs should be at reasonable market hire or rental rates, subject to approval by the ALT.</i></p>	<b>[REDACTED]</b>	
D.	<i>Hired 'external' NOP's machinery and equipment.</i>	<b>[REDACTED]</b>	
E.	<i>Transportation, erection and dismantling, fuels, oils and other consumables for Participant's own and hired or rented NOP's machinery and equipment.</i>	<b>[REDACTED]</b>	
F.	<i>Spare parts and maintenance for NOP's own and hired or rented machinery and equipment.</i>	<b>[REDACTED]</b>	
G.	<i>Site transport (if specified).</i>	<b>[REDACTED]</b>	

<b>Table F</b>			
<b>Materials</b>			
<b>Ref</b>	<b>Cost Element</b>	<b>Cost Category</b>	
		<b>Actual Cost</b>	<b>Overhead</b>
A.	<i>Materials for incorporation as part of the Works including transportation of materials and insurance (if such insurance is not covered under OCIP) whilst in storage and transit. Also included is the cost of samples and tests and providing and removing packaging. The cost is credited with payments received for the disposal of materials and return packaging.</i>	<b>[REDACTED]</b>	
B.	<i>Subcontractor's materials for incorporation as part of the Works including transportation of materials and insurance (if such insurance is not covered under OCIP) whilst in storage and transit.</i>	<b>[REDACTED]</b>	
C.	<i>Materials for temporary works including formwork, earthwork support, etc.</i>	<b>[REDACTED]</b>	



<b>Table G</b>			
<b>Miscellaneous</b>			
<b>Ref</b>	<b>Cost Element</b>	<b>Cost Category</b>	
		<b>Actual Cost</b>	<b>Overhead</b>
A.	<i>The cost of surety bonds required by this Agreement.</i>	<b>[REDACTED]</b>	
B.	<i>Legal advice, fees and services specific to the Project instructed and approved by the ALT.</i>	<b>[REDACTED]</b>	
C.	<i>Costs and expenses incurred by a NOP in respect of the ALT Appointed Expert in accordance with Section 3.6 of Schedule 17 (Issue Resolution Procedures)</i>	<b>[REDACTED]</b>	
D.	<i>Small tools (picks, shovels, barrows, buckets and similar non-mechanical tools, including small portable power tools).</i>	<b>[REDACTED]</b>	
E.	<i>Haulage and disposal.</i>	<b>[REDACTED]</b>	
F.	<i>The cost of scrap recovery where undertaken by the NOP shall be credited with the payments received for scrap sold or held by the NOP.</i>	<b>[REDACTED]</b>	
G.	<i>Consumables (e.g. welding rods, oxyacetylene, personal protective equipment and clothing etc).</i>	<b>[REDACTED]</b>	
H.	<i>Project expenses (except where incurred for the furtherance or promotion of the individual NOP's business or other interests outside the Alliance), either purchased, rented, leased, or hired and approved by the ALT.</i>	<b>[REDACTED]</b>	
I.	<i>Team building events and other special team functions approved by the ALT.</i>	<b>[REDACTED]</b>	
J.	<i>Manufactured products and goods at the lowest discounted market price current at the date of their supply. The cost is credited with payments received for the disposal of materials and return packaging.</i>	<b>[REDACTED]</b>	
K.	<i>Community engagement costs directly related to the performance of the Works.</i>	<b>[REDACTED]</b>	
L.	<i>Other corporate services or events, including any off-Site administrative support function which is not directly involved in performing the Work and not in the immediate control and direction of the ALT.</i>	<b>[REDACTED]</b>	

<b>Table H</b>			
<b>Costs Payable to the NOPs for Subcontracts</b>			
<b>(exclusive of Affiliated Subcontracts)<sup>3</sup></b>			
<b>Ref</b>	<b>Cost Element</b>	<b>Cost Category</b>	
		<b>Actual Cost</b>	<b>Overhead</b>
A.	<i>Design supply and construct</i>	[REDACTED]	
B.	<i>Supply and construct</i>	[REDACTED]	
C.	<i>Construct only</i>	[REDACTED]	
D.	<i>Design only</i>	[REDACTED]	
E.	<i>Supply only</i>	[REDACTED]	
F.	<i>Labour only</i>	[REDACTED]	
G.	<i>Implementation Works Subcontracts</i>	[REDACTED]	
H.	<i>Specialist contractors, including legal advisors engaged for the purposes of making or defending a claim against the Alliance, subject to approval by the ALT</i>	[REDACTED]	
I.	<i>Consultants<sup>4</sup> where specifically approved by the ALT</i>	[REDACTED]	

**Note:** In respect of Affiliated Subcontracts, the provisions of Section 20 of this Agreement (Subcontracting) and Section 5 of this Schedule 9 (Actual Costs) shall apply.

<sup>3</sup> See note immediately below Table H.

<sup>4</sup> “**Consultants**” means for purposes of this Schedule 9 (Actual Cost) any person who is engaged by the NOP to deliver Works under a services contract which is not a contract of employment.

<b>Table I</b>				
<b>Profit</b>				
<b>Ref</b>	<b>Cost Element</b>	<b>Cost Category</b>		
		<b>Profit</b>	<b>Actual Cost</b>	<b>Overhead</b>
A.	<i>Profit / return for the NOP</i>	[REDACTED]		
B.	<i>Affiliate Subcontract Fee (in connection with Affiliated Subcontracts)</i>	[REDACTED]		
C.	<i>Loss of potential profit/return arising from the performance of the Works and the actual recovery of Actual Cost, Overhead and Profit in accordance with this Agreement being less than the amount the NOP had anticipated or budgeted on recovering in respect of profit/return at the Commencement Date as result of the project, performance and business risks borne by the NOP under or in connection with this Agreement.</i>	[REDACTED]		
D.	<i>Loss of potential profit/return arising from the performance of the Works and the actual recovery of Actual Cost, Overhead and Profit in accordance with this Agreement being less than the amount the NOP could have recovered had it been able to utilize all or part of the resources undertaking the Works to undertake other works or services in the market as result of market forces increasing the potential profit/return on such other works or services and/or reducing the project, performance or business risks to be borne by the NOP in connection with such other works or services.</i>	[REDACTED]		
E.	<i>Bonuses or incentive amounts paid to staff and labour which is related to the profitability of the NOP's business (non-Project specific or non-personal objective specific)</i>	[REDACTED]		

## **Annex 2 to Schedule 9 (Actual Cost)**

### **Owner Participant's Actual Cost**

#### **1. OWNER PARTICIPANT'S ACTUAL COST**

##### **1.1 Principle Categories of Owner Participant's Costs**

The principle categories of Owner Participant's costs consists of:

- 1.1.1 Project management costs;
- 1.1.2 Track possession management and compensation costs;
- 1.1.3 Materials, trains and on track machines
- 1.1.4 Utilities; and
- 1.1.5 Permit and approval costs.

##### **1.2 Owner Participant's Actual Cost table**

The categories of Owner Participant's Actual Cost are included in the table below. This list is non-exhaustive. Owner Participant's Actual Cost include any other costs and expenses to which this Agreement otherwise expressly provides will be an Owner Participant Actual Cost. Any additional costs which are to be included within the scope of Owner Participant's Actual Cost shall be agreed and stated in the Project Proposal or otherwise approved by the ALT.

##### **1.3 Project Management**

The salary costs of staff and consultants employed by the Owner and assigned to the AMT and APT for the performance of the Works, as determined by the Owner Participant on the basis of the relevant individual's base salary as established by payroll records and including unproductive time, benefits overhead, managerial overhead, HR corporate overhead, finance corporate overhead, rent usage and workstation usage ("**Owner Participant Rates**").

The Owner Participant will from time to time submit a table of Owner Participant Rates to the ALT for purposes of calculating the Owner Participant's Actual Costs for the Project. The ALT may request the Alliance Auditor to review such Owner Participant Rates and confirm that they generally reflect the cost components noted above or otherwise chargeable by the Owner. Owner Participant Rates shall be updated annually to take account of increases in Owner staffing costs, including inflation and market conditions.

##### **1.4 Track Access and Compensation Costs**

Costs, expenses and liabilities (as applicable) incurred by the Owner in respect of the following:

- 1.4.1 Providing additional, adjusted (including overrun track possessions) and/or cancelled track possessions pursuant to Section 22.2.3 of the Agreement or Section 22.7 of the Agreement, including, without limitation, required flagging for the Project, train cancellation costs (including, without limitation, ticket refunds), costs associated with trains delays, track interruptions and alternative transportation and including liabilities to Third Parties who operate passenger or freight trains anywhere on the Network;

- 1.4.2 Making alternate arrangements as a result of cancellation of track possessions in an Emergency Rail Situation pursuant to Section 22.4.1 and 22.4.2 of the Agreement;
- 1.4.3 Cancellations or alterations to track possessions arising from an act or omission of a Participant pursuant to Sections 22.4.3 or 22.4.6 of the Agreement or arising in the circumstances described in Section 22.6.1 of the Agreement;
- 1.4.4 Amounts payable, whether in contract, tort or otherwise by the Owner to any Third Party who operates passenger or freight trains anywhere on the Network pursuant to its contractual arrangements with such Third Party, in respect of additional, adjusted (including overrun track possession) and/or cancelled track possessions in the circumstances described in Section 22 of the Agreement; and
- 1.4.5 Costs and charges as set forth in Schedule 19 (Rail Corridor Access)

### 1.5 Materials, Trains and On-Track Machines

The materials, trains and on-track machines costs consist of specific items that are supplied by Metrolinx on behalf of the Owner Participant rather than being supplied by a NOP. These items and their respective rates are to be discussed when preparing the Project Proposal, having regard to the relevant scope of work and means and methods employed.

<b>Owner Participant's Actual Cost Table</b>				
<b>Ref</b>	<b>Cost Element</b>	<b>Cost Category</b>		
		<b>Profit</b>	<b>Actual Cost</b>	<b>Overhead</b>
A.	<i>TTR track/signal TMD support services</i>	[REDACTED]		
B.	<i>Environmental Management Costs</i>	[REDACTED]		
C.	<i>Public Relations/Communications costs specific to the Alliance</i>	[REDACTED]		
D.	<i>Security requirements specific to the Project (e.g. fencing, hoarding, security guards etc.)</i>	[REDACTED]		
E.	<i>Independent Advisors as required by the Alliance and detailed in the VFM Statement and/or Project Proposal</i>	[REDACTED]		
F.	<i>Station operations team costs arising in connection with Works activities</i>	[REDACTED]		
G.	<i>Train timetable and/or station performance modelling arising in connection with the Project</i>	[REDACTED]		

<b>Owner Participant's Actual Cost Table</b>				
<b>Ref</b>	<b>Cost Element</b>	<b>Cost Category</b>		
		<b>Profit</b>	<b>Actual Cost</b>	<b>Overhead</b>
H.	<i>Consent and consultation costs in respect of the Project (e.g. CN, Via Rail, adjacent landowners, etc.)</i>		[REDACTED]	
I.	<i>Insurance costs specific to the Project</i>		[REDACTED]	
J.	<i>The non-recoverable portion of HST (currently [REDACTED]%)</i>		[REDACTED]	
K.	<i>Relevant Owner in-house services specific to the Project and the Works, e.g. Engineering &amp; Design Services, Rail Operations, Legal, Environmental, Risk Management, etc.</i>		[REDACTED]	
L.	<i>Owner staff, consultants and seconded staff (e.g. staff supplied by [REDACTED], [REDACTED], [REDACTED], [REDACTED], etc.) who are engaged in carrying out work on the Project, including Project Controls, design and/or the design approval process, who are detailed on the staff organizational chart approved by the ALT, regardless of whether such personnel are located at a Project Office or some other location identified in the Project Proposal, or as approved by the ALT</i>		[REDACTED]	
M.	<i>Cost of Early Works performed after the Commencement Date</i>		[REDACTED]	
N.	<i>Utility costs specific to the Project</i>		[REDACTED]	
O.	<i>Permit and approval costs specific to the Project, e.g. site plan review by City of Toronto</i>		[REDACTED]	
P.	<i>Costs and expenses incurred by the Owner in respect of the ALT Appointed Expert in accordance with Section 3.6 of Schedule 17 (Issue Resolution Procedures)</i>		[REDACTED]	
Q.	<i>Additional Lands</i>		[REDACTED]	

√\* Indicates Owner Participant Rates to be used as a proxy for Actual Cost.

## SCHEDULE 10

### FEE

#### 1. OVERHEAD AND PROFIT

##### 1.1 Overhead

The total Overhead payable by the Owner to each NOP under this Agreement is a lump sum amount comprising:

- (a) for NOP 1: [REDACTED]% of NOP 1's Actual Cost component of the Target Outturn Cost for self-performed Work; and [REDACTED]% of NOP 1's Actual Cost component of the Target Outturn Cost for Works performed by way of a Subcontract;
- (b) for NOP 2: [REDACTED]% of NOP 2's Actual Cost component of the Target Outturn Cost for self-performed Work; and [REDACTED]% of NOP 2's Actual Cost component of the Target Outturn Cost for Works performed by way of a Subcontract; and
- (c) for NOP 3: [REDACTED]% of NOP 3's Actual Cost component of the Target Outturn Cost for self-performed Work; and [REDACTED]% of NOP 3's Actual Cost component of the Target Outturn Cost for Works performed by way of a Subcontract.

##### 1.2 Profit

The total Profit payable by the Owner to each NOP under this Agreement is a lump sum amount comprising:

- (a) for NOP 1: [REDACTED]% of NOP 1's Actual Cost component of the Target Outturn Cost for self-performed Work; and [REDACTED]% of NOP 1's Actual Cost component of the Target Outturn Cost for Works performed by way of a Subcontract;
- (b) for NOP 2: [REDACTED]% of NOP 2's Actual Cost component of the Target Outturn Cost for self-performed Work; and [REDACTED]% of NOP 2's Actual Cost component of the Target Outturn Cost for Works performed by way of a Subcontract; and
- (c) for NOP 3: [REDACTED]% of NOP 3's Actual Cost component of the Target Outturn Cost for self-performed Work; and [REDACTED]% of NOP 3's Actual Cost component of the Target Outturn Cost for Works performed by way of a Subcontract.

##### 1.3 Percentage is not adjusted

The percentage figures specified above will apply for the duration of the Project and will not be adjusted, split, modified or altered in any way for any reason or purpose including for the purpose of: (a) recognizing that each NOP may have a different internal percentage figure that is normally applied in other contracting arrangements; or (b) the allocation or reallocation of work and services comprising the Works between the Participants as agreed by the Participants and/or directed by the ALT.

##### 1.4 Payment Procedure

The procedure for payment of Overhead and Profit is set out in Schedule 12 (Payment Procedures). Subject to the overall lump sum amounts calculated in accordance with Section 1.1 and 1.2 above, Overhead and Profit is a mark-up on each NOP's Actual Cost reasonably and actually incurred by



the relevant NOP in performing the Works, whether by way of self-performing the Works or by way of a Subcontract.

**1.5 Overhead is inclusive of all overhead costs**

The Participants agree that Overhead is, unless the Agreement expressly provides to the contrary, inclusive of all overhead costs.

**2. ADJUSTMENTS TO OVERHEAD AND PROFIT ARISING FROM ADJUSTMENTS TO THE TARGET OUTTURN COST**

**2.1** Any adjustment to the lump sum amount for Overhead and Profit applicable to each NOP under this Schedule 10 shall be in accordance with Sections 2 and 3 of this Schedule 10, and the further provisions relating to adjustments to the Target Outturn Cost set out in Annex 2 to this Schedule 10.

**2.2** For each NOP, the adjusted lump sum for its Overhead and Profit arising from a positive or negative adjustment permitted under this Agreement is calculated by multiplying:

2.2.1 the adjusted Actual Cost component of the Target Outturn Cost for the relevant portion of the Works; and

2.2.2 the applicable percentage stated in Section 1.1 and 1.2 for that NOP and the relevant portion of the Works,

but subject to any further adjustments determined by the ALT for work performed by Affiliated Subcontractors in accordance with Section 20.4 of this Agreement.

**2.3** For the avoidance of doubt, the percentages in Sections 1.1 and 1.2 of this Schedule 10:

2.3.1 are inclusive of and take into account the Financial Establishment Audit; and

2.3.2 are exclusive of any adjustment on account of work to be undertaken by Affiliated Subcontractors in accordance with Section 20.4 of this Agreement.

**2.4** In the event of any adjustment to the Target Outturn Cost, the adjusted lump sum amount for Overhead and Profit for each NOP calculated pursuant to Sections 2.1 to 2.3 of this Schedule 10

will replace the original lump sum amount calculated in accordance with Sections 1.1 and 1.2 of this Schedule 10 (or any other amount previously calculated under Sections 2.1 to 2.3).

**3. ADJUSTMENTS TO OVERHEAD AND PROFIT ARISING FROM THE RE-ALLOCATION OF WORKS OR SERVICES BETWEEN PARTICIPANTS**

- 3.1** Any re-allocation of work and/or services between the NOPs or between the Owner Participant and the NOPs after the Commencement Date must be on a Best for Project basis, approved by the ALT and otherwise made in accordance with this Agreement.
- 3.2** In the event of any such re-allocation, the Overhead and Profit for each NOP will be adjusted as set out in Sections 3.3 to 3.7 of this Schedule 10 (inclusive).
- 3.3** Where Section 3.1 applies:
- 3.3.1 the Overhead and Profit of the NOP donating work scope is reduced and the Overhead and Profit of the NOP's receiving work scope is increased, in accordance with the percentages contained in Sections 1.1 and 1.2;
- 3.3.2 any difference in Overhead and Profit between the donating and receiving NOP is notionally drawn from or added to the Risk and Contingency Provision; and
- 3.3.3 the NOP Split for Interim Gainshare, Interim Painshare, Painshare, Performance Reward Amount or Performance Liability Amount will be adjusted for the purposes of, and in accordance with, Section 1.3 of Schedule 11.
- 3.4** Where Section 3.1 applies and results in an increase or reduction (as applicable) in the allocation of work and/or services to be undertaken by any one or more Affiliated Subcontractors of a NOP, the ALT shall determine any further adjustments to the Overhead and Profit payable to the relevant NOPs and their Affiliated Subcontractors in accordance with Section 20.4 of this Agreement.
- 3.5** Notwithstanding any other provision in this Agreement, any adjustments to the NOPs' Overhead and Profit in accordance with Sections 3.3 to 3.4 (inclusive) cannot result in any increase in the aggregate amount of Overhead and Profit payable to all NOPs, when taken together with the amount of the Risk and Contingency Provision.
- 3.6** The AMT must assess (and the ALT must approve) the proposed change to the relevant NOPs lump sum allocation of Overhead and Profit in accordance with Sections 3.3 to 3.5 (inclusive).
- 3.7** The Alliance Auditor must verify the proposed change to the allocation of Overhead and Profit for each NOP assessed by the AMT pursuant to Section 3.6, and no change to any such amount is made until the Alliance Auditor has verified and agreed such assessment.

## **Annex 1 to Schedule 10**

### **Pre-approved Affiliated Subcontractors**

**[REDACTED]**

## **Annex 2 to Schedule 10**

### **PROCEDURE FOR ADJUSTMENTS TO THE TARGET OUTTURN COST**

#### **1. PROCEDURE FOR DETERMINING ADJUSTMENTS TO THE TARGET OUTTURN COST**

**1.1** The Target Outturn Cost is only adjusted as a result of an Adjustment Event under Section 28 of this Agreement or (in the case of a Scope Variation) under Section 27 of this Agreement.

**1.2** Where there is a change to the Target Outturn Cost, each Participant shall prepare its estimate of the changes to its:

1.2.1 Actual Cost component of the Target Outturn Cost;

1.2.2 Overhead;

1.2.3 Profit; and

1.2.4 Risk and Contingency Provision,

in the manner set out in this Annex 2 (using where appropriate the rates referenced in this Annex 2 or elsewhere in this Agreement), and then submit that estimate to the AMT for consideration and evaluation.

**1.3** The AMT shall evaluate in conjunction with each Participant its proposed estimate of change to the Target Outturn Cost, and the result shall be subject to a process of due diligence by all Participants through their representatives on the AMT.

**1.4** The Alliance Auditor shall review the proposed changes to the Target Outturn Cost prior to their submission to the ALT for approval; provided that, in such circumstances, the NOP Split for Interim Gainshare, Interim Painshare, Painshare, Performance Reward Amount or Performance Liability Amount shall only be changed in accordance with Section 1.3 of Schedule 11.

**1.5** Any changes to the Target Outturn Cost including the Fee and Risk and Contingency Provision must only be implemented in accordance with Section 27 or 28 of this Agreement.

#### **2. DETAILED METHODOLOGY FOR ADJUSTMENTS TO THE TARGET OUTTURN COST PROJECT**

**2.1** This Section 2 sets out the methodology for adjusting each component of the Target Outturn Cost.

**2.2** In the absence of agreement between the ALT and Owner's Representative in relation to any adjustment to the Target Outturn Cost, such adjustment is to be determined on a fair and reasonable basis.

### ***(1) Adjustments to the Target Outturn Cost***

- 2.3** In estimating any adjustment to the Target Outturn Cost, the Participants must:
- 2.3.1 apply first principles estimating procedures utilising a pricing structure that has been approved by the ALT to determine the reasonable and realistic level of resources, rates and prices required to make that adjustment; and
  - 2.3.2 benchmark any proposed adjustment against all relevant rates (including Resource Unit Rates and Composite Rates) referenced in this Agreement (adjusted where appropriate for indexation) to demonstrate that, so far as is practicable in the circumstances, the proposed adjustment is not materially inconsistent with the Project Proposal.
- 2.4** The component of the adjusted Target Outturn Cost for the Project relating to any work or services to be performed by the Owner Participant in respect of the Project Alliance Agreement must be included within the build-up of the adjusted Target Outturn Cost.
- 2.5** For clarity, any component of the adjusted Target Outturn Cost relating to the Owner Participant will be:
- 2.5.1 disregarded in calculating any Fee; and
  - 2.5.2 included within the adjusted Target Outturn Cost; and
  - 2.5.3 by virtue of its inclusion within the adjusted Target Outturn Cost, taken into account in determining the Risk and Contingency Provision.
- 2.6** Any Actualized Rates for Staff and/or Site Labour used in determining Actual Cost (determined in accordance with Section 7 of Schedule 9 (Actual Cost)) must include the relevant elements of Actual Cost of Staff and/or Site Labour to ensure that the Actual Cost is a true pre-estimate of the likely Actual Costs to be incurred.

### ***(2) Adjustments to Fee***

- 2.7** Adjustments to the lump sum Overhead and Profit arising from an Adjustment Event (including a Scope Variation) must be determined in accordance with the relevant provisions of Schedule 10.

### ***(3) Adjustments to the Risk and Contingency Provision***

- 2.8** To determine any adjustments to the Risk and Contingency Provision arising from an Adjustment Event (including a Scope Variation) the Participants must:
- 2.8.1 compile a risk schedule of all contemplated Alliance Risks;
  - 2.8.2 apply a “three point” estimate to each identified Alliance Risk;
  - 2.8.3 apply a “three point” assessment of probability for each Alliance Risk; and
  - 2.8.4 carry out a QCRA at [REDACTED]% and [REDACTED]% probability values.

- 2.9 The value of the QCRA at [REDACTED]% probability shall be used by the Participants to determine the Risk and Contingency Provision within the Target Outturn Cost.

***(4) Other adjustments and requirements for due diligence***

- 2.10 In estimating the change to the Target Outturn Cost which necessitates a change to the composition or duration of the APT, the change must be separately priced based on the organization changes that are approved by the AMT and the ALT, and using rates that have been approved by the AMT, the ALT and the Alliance Auditor.
- 2.11 Where a change includes the cost of expenses (such as travel, accommodation, subsistence and the like) the rates used for estimating the change to the Target Outturn Cost must reflect the costs likely to be incurred in the locality of the worksites, and in any event shall not exceed the current expenses policy and limits of the Participants to which such expenses relate.
- 2.12 All rates used shall be net of all discounts and HST and must reflect the reasonable costs of the elements to be priced.
- 2.13 The process for settling changes to the Target Outturn Cost must include the submission of a scope change report by members of the AMT who represent each Participant prior to any proposal being submitted to the ALT for the Owner's Representative's agreement in accordance with Section 27 or 28 of this Agreement.
- 2.14 Where rates and other pricing information used in the calculation of the Target Outturn Cost as stated in the Project Proposal ("**Baseline Costs**") are used to calculate any change in the Target Outturn Cost in accordance with this Annex 2 to Schedule 10, for the purposes calculating the value of such change for the Project only, the relevant Baseline Costs shall be indexed (in accordance with any indices of the Project Proposal) for the period from the Commencement Date to the date of calculation of the change (and prior to the calculation of the Fee for each Adjustment Event or Scope Variation) where this is considered reasonable by the ALT and the Alliance Auditor having regard to the timing of execution of the work.
- 2.15 For the avoidance of doubt, any re-allocation of work and/or services between the NOPs or the Owner Participant and the NOPs in accordance with Section 3 of Schedule 10 does not result in any change to the Target Outturn Cost.

## SCHEDULE 11

### RISK OR REWARD REGIME

#### 1. GENERAL

##### 1.1 Risk or Reward Regime

1.1.1 This Schedule 11 (Risk or Reward Regime) sets out the general principles as to the manner in which the Risk or Reward Regime is to operate. Further details and matters in respect of the Risk or Reward Regime (including any mechanisms and/or illustrations for calculating the Gainshare or Painshare) are set out in the Project Proposal.

1.1.2 The Risk or Reward Regime is separated into two components, namely:

1.1.2.1 the cost component set out in Section 2 of this Schedule 11 (Risk or Reward Regime), in respect of the Actual Outturn Costs underrun or overrun from the Target Outturn Cost, which may result in a Gainshare payable by the Owner to the NOPs or a Painshare payable by the NOPs to the Owner (if any and as the case may be); and

1.1.2.2 the non-cost component set out in Section 3 of this Schedule 11 (Risk or Reward Regime), in respect of Key Result Areas, which may result in a Performance Reward Amount payable by the Owner to the NOPs or a Performance Liability Amount payable by the NOPs to the Owner (if any and as the case may be).

##### 1.2 Demonstrating reasons for cost savings

1.2.1 The NOPs acknowledge and agree that:

1.2.1.1 the NOPs must submit a report to the Owner at each time that any Gainshare (including any Interim Gainshare) is calculated to be payable under this Agreement which:

- (a) details each of the cost savings which have been achieved by the NOPs against the Actual Outturn Costs;
- (b) provides reasoning as to how the cost savings have been achieved by the NOPs;
- (c) demonstrates how the NOPs, in achieving the cost savings, have performed the Works in accordance with the VFM Statement, the Alliance Charter or otherwise in accordance with this Agreement; and
- (d) otherwise meets any requirements of the guidelines set out in the Project Proposal for demonstrating the matters set out in this Section 1.2.1.1.

1.2.1.2 the NOPs must submit a report to the Owner at each time that any Performance Reward Amount is calculated to be payable to the NOPs under this Agreement demonstrating to the Owner that the Performance Reward Amount has been calculated to reflect performance against the Key Result Areas under this Agreement that is better than the MCOS Performance, and which otherwise meets the requirements of the guidelines set out in the Project Proposal for demonstrating such matters.

### 1.3 NOP Split

- 1.3.1 Where this Schedule 11 refers to an amount of Interim Gainshare, Gainshare, Interim Painshare, Painshare, Performance Reward Amount or Performance Liability Amount, payable to or by the NOPs (as applicable) such amount is to be allocated amongst the NOPs in the same proportion as each NOP's share of the overall Fee portion of the Target Outturn Cost, expressed as a percentage and calculated at the date of the relevant assessment ("**NOP Split**").

## 2. ACTUAL OUTTURN COSTS UNDERRUN OR OVERRUN (COST COMPONENT)

### 2.1 Gainshare

#### Gainshare Amount

- 2.1.1 For the purposes of calculating Interim Gainshare and Gainshare under Sections 2.1.3, 2.1.5 and 2.2.2, if the Actual Outturn Costs are less than the Target Outturn Cost, a Gainshare amount will be calculated on the following basis:

$$\text{Gainshare amount} = [\text{REDACTED}] \% \times (\text{Target Outturn Cost} - \text{Actual Outturn Costs})$$

- 2.1.2 The amount of any Interim Gainshare and Gainshare calculated in accordance with Section 2.1.1 will be allocated amongst the NOPs in accordance with the NOP Split.

#### Interim Gainshare payment at the Date of Completion

- 2.1.3 As soon as practicable after the Date of Completion of the whole of the Works:

2.1.3.1 the ALT will, or will instruct the Alliance Auditor to, calculate the Interim Gainshare (if any and as the case may be) following determination of the sum of the Actual Outturn Costs in performing the Works to reach the Date of Completion of the whole of the Works; and

2.1.3.2 subject to Section 1.2.1.1, the Owner will make a payment (if any) to the NOPs in accordance with Schedule 12 (Payment Procedures).

- 2.1.4 Where:

2.1.4.1 the Works are comprised of two or more Tranches; and

2.1.4.2 the ALT has made a determination in accordance with Section 27.6.3.3 of the Agreement that the calculation of Interim Gainshare is to be made at the Date of Completion for each Tranche of the Works,

then the calculation and payment of Interim Gainshare referred to in Section 2.1.3 will be made at the Date of Completion for each Tranche (instead of at the Date of Completion for the whole of the Works).

#### Gainshare payment at the Date of Final Completion

- 2.1.5 As soon as practicable after the Date of Final Completion, the ALT will, or will instruct the Alliance Auditor to, calculate the Gainshare payable by the Owner to the NOPs.



## 2.2 Interim Gainshare payments at the ALT's discretion

- 2.2.1 Notwithstanding Section 2.1, the ALT may, at any time from the Commencement Date to the Date of Final Completion, release interim payments of Interim Gainshare to the NOPs in accordance with this Section 2.2.
- 2.2.2 At its sole discretion, the ALT may instruct the Alliance Auditor to determine and notify the Owner's Representative and the ALT of the amount of the Interim Gainshare for each NOP available at that time based on:
- 2.2.2.1 the Target Outturn Cost at the applicable date; and
- 2.2.2.2 an estimate at the applicable date of the Actual Outturn Costs in performing the Works which are likely to be incurred to reach the Date of Final Completion.
- 2.2.3 Following receipt of an Alliance Auditor's determination under Section 2.2.2, the ALT may (acting as a prudent financial manager) having regard to the Project as a whole, notify the Owner's Representative of the proportion of the amount notified by the Alliance Auditor which the ALT considers should be released to the NOPs.
- 2.2.4 Subject to Section 1.2.1.1 of this Schedule 11 (Risk or Reward Regime), if the Owner's Representative authorizes payment of Interim Gainshare under this Section 2.2, then, following receipt of the notice under Section 2.2.3, the Owner will pay the NOPs that Interim Gainshare in accordance with Schedule 12 (Payment Procedures).
- 2.2.5 The NOPs acknowledge that any payments of Interim Gainshare under this Schedule 11 are payments on-account of the Gainshare, and accordingly agree that: (i) any payments arising from any Gainshare will be adjusted against any Interim Gainshare payments that have already been made; and (ii) any payments on-account of Gainshare are reimbursable to the Owner in the event of subsequent Painshare.

## 2.3 Painshare

### Painshare Amount

- 2.3.1 For the purposes of calculating Interim Painshare and Painshare under Sections 2.3.3, 2.3.5 and 2.4.1, if the Actual Outturn Costs are greater than the Target Outturn Cost, a Painshare amount will be calculated on the following basis:

$$\text{Painshare amount} = [\text{REDACTED}]\% \times (\text{Actual Outturn Costs} - \text{Target Outturn Cost})$$

- 2.3.2 The amount of any Interim Painshare and Painshare calculated in accordance with Section 2.3.1 will be allocated amongst the NOPs in accordance with the NOP Split.

### Interim Painshare at the Date of Completion

- 2.3.3 As soon as practicable after the Date of Completion of the whole of the Works:
- 2.3.3.1 the ALT will, or will instruct the Alliance Auditor to, calculate the Interim Painshare (if any and as the case may be) following determination of the sum of the Actual Outturn Costs in performing the Works to reach the Date of Completion of the whole of the Works; and
- 2.3.3.2 each NOP will make a payment (if any) to the Owner (as the case may be) of its respective share of the Interim Painshare in accordance with Schedule 12

(Payment Procedures).

2.3.4 Where:

2.3.4.1 the Works are comprised of two or more Tranches; and

2.3.4.2 the ALT has made a determination in accordance with Section 27.6.3.3 of the Agreement that the calculation of Interim Painshare is to be made at the Date of Completion for each Tranche of the Works,

then the calculation and payment of Interim Painshare referred to in Section 2.3.3.2 will be made at the Date of Completion for each Tranche (instead of at the Date of Completion for the whole of the Works).

#### **Painshare at the Date of Final Completion**

2.3.5 As soon as practicable after the Date of Final Completion, the ALT will, or will instruct the Alliance Auditor to, calculate the Painshare (if any and as the case may be) following determination of the Actual Outturn Costs.

2.3.6 Following receipt of ALT's or the Alliance Auditor's determination under Section 2.3.5, the Owner may, by notice in writing to the NOPs, deduct each NOP's share of the Painshare from any payment due to that NOP or, if no payment is due, require the NOP to pay the NOP's share of the Painshare to the Owner in accordance with Schedule 12 (Payment Procedures).

#### **2.4 Interim Painshare where the Target Outturn Cost is (or is likely to be) exceeded**

2.4.1 In addition to the Owner's rights under Section 29.6 of the Agreement (Suspension of Overhead and Profit), if, before the Date of Final Completion it is evident to the Owner that the aggregate of the Actual Outturn Costs has exceeded (or is likely to exceed) the Target Outturn Cost, then the Owner's Representative (in its sole and absolute discretion) may instruct the ALT or the Alliance Auditor (as the case requires) to calculate and require the NOPs to pay Interim Painshare in accordance with Sections 2.4.2 and 2.4.3.

2.4.2 Where the ALT or the Alliance Auditor has received an instruction from the Owner's Representative under Section 2.4.1, the ALT or the Alliance Auditor must determine and notify the NOPs of the amount of the Interim Painshare that each NOP is to pay to the Owner which shall be based on:

2.4.2.1 the Target Outturn Cost at the applicable date; and

2.4.2.2 an estimate at the applicable date of the Actual Outturn Costs in performing the Works which are likely to be incurred at the Date of Final Completion.

2.4.3 Following receipt of ALT's or the Alliance Auditor's determination under Section 2.4.2, the Owner may, by notice in writing to the NOPs, deduct from any payment due to a NOP, that NOP's share of the Interim Painshare or, if no payment is due, require the NOP to pay the NOP's share of the Painshare to the Owner in accordance with Schedule 12 (Payment Procedures).

### **3. KEY RESULT AREAS (NON-COST COMPONENT)**

#### **3.1 Principles**

- 3.1.1 The non-cost component of the Risk or Reward Regime is based upon the NOPs' performance in the Key Result Areas that are determined by the Owner and measured in accordance within the Key Result Areas set out in Annex 1 to this Schedule 11 and the Project Proposal.
- 3.1.2 The Risk or Reward Regime with respect to the NOPs' performance of the Agreement provides the NOPs with incentives to:
  - 3.1.2.1 exceed MCOS Performance for specific KPIs where the Owner has determined that exceeding MCOS Performance will improve the overall value for money outcome achieved by the Owner; and
  - 3.1.2.2 at a minimum, meet MCOS Performance for all KPIs.
- 3.1.3 The non-cost component of the Risk or Reward Regime will be applied such that:
  - 3.1.3.1 Stretch Performance against the Key Result Areas (i.e. performance which is better than MCOS Performance against the Key Result Areas) will result in a Performance Reward Amount being payable by the Owner to the NOPs; and
  - 3.1.3.2 Poor Performance against the Key Result Areas (i.e. performance which is worse than MCOS Performance against the Key Result Areas) will result in a Performance Liability Amount being payable by the NOPs to the Owner.

#### **3.2 Key Result Areas**

- 3.2.1 The Key Result Areas are set out in Annex 1 to this Schedule 11 and further detailed in the Project Proposal.
- 3.2.2 Each Key Result Area contains:
  - 3.2.2.1 the key performance indicators;
  - 3.2.2.2 the weighting of each Key Result Area compared to the other Key Result Areas;
  - 3.2.2.3 what constitutes Poor Performance, MCOS Performance and Stretch Performance;
  - 3.2.2.4 methodologies and frequency for measuring performance and calculating a performance score; and
  - 3.2.2.5 the relationship between the performance score and calculation of the Performance Reward Amount or Performance Liability Amount (if any).

#### **3.3 Risk or Reward KPI Caps - Maximum Amounts**

- 3.3.1 A capped Performance Liability Amount and/or Performance Reward Amount is stipulated for each Key Result Area where, for each KPI:
  - 3.3.1.1 the KPI Maximum Liability Amount defines the maximum Performance Liability Amount payable by the NOPs to the Owner for each KPI; and

3.3.1.2 the KPI Maximum Reward Amount defines the maximum Performance Reward Amount payable by the Owner to the NOPs for each KPI,

in accordance with this Agreement and as set out in Annex 1 to this Schedule 11.

### 3.4 Performance Liability Amount

3.4.1 For each KPI in respect of which the NOPs' performance fails to achieve MCOS Performance, the KPI Performance Liability Amount will be calculated as follows:

**KPI Performance Liability Amount** = (KPS/-100) x KPI Maximum Liability Amount

Where:

3.4.1.1 "**KPS**" is the Key Performance Score for the relevant KPI calculated in accordance with Table 2 of Annex 1 of this Schedule 11; and

3.4.1.2 "**KPI Maximum Liability Amount**" is the maximum Performance Liability Amount that the NOPs will be liable to pay the Owner for the relevant KPI as specified in Table 2 of Annex 1 of this Schedule 11.

3.4.2 The Performance Liability Amount is equal to the sum of all KPI Performance Liability Amounts.

3.4.3 The Performance Liability Amount will be allocated amongst the NOPs in accordance with the NOP Split.

3.4.4 The maximum aggregate of the Performance Liability Amounts that the NOPs may become liable to pay the Owner in respect of all Key Result Areas and KPIs under this Agreement is equal to the sum of all KPI Maximum Liability Amounts (the "**Maximum Performance Liability Amount**").

### 3.5 Performance Reward Amount

3.5.1 For each KPI in respect of which each NOP's performance exceeds MCOS Performance, the KPI Performance Reward Amount will be calculated as follows:

**KPI Performance Reward Amount** = KPS/100 x KPI Maximum Reward Amount

Where:

3.5.1.1 "**KPS**" is the Key Performance Score for the relevant KPI calculated in accordance with Table 2 of Annex 1 of this Schedule 11; and

3.5.1.2 "**KPI Maximum Reward Amount**" is the maximum Performance Reward Amount that the Owner will be liable to pay to the NOPs for the relevant KPI as specified in accordance with Table 2 of Annex 1 of this Schedule 11.

3.5.2 The Performance Reward Amount is equal to the sum of all KPI Performance Reward Amounts.

3.5.3 The Performance Reward Amount will be allocated amongst the NOPs in accordance with the NOP Split.

3.5.4 The maximum aggregate of the Performance Reward Amounts that the Owner may

become liable to pay the NOPs in respect of all Key Result Areas and KPIs under this Agreement is equal to the sum of all KPI Maximum Reward Amounts (the “**Maximum Performance Reward Amount**”).

### **3.6 Calculation of Performance Reward Amounts and Performance Liability Amounts**

#### **At Date of Completion**

3.6.1 As soon as practicable after the Date of Completion of the whole of the Works, the ALT will, or will instruct the Alliance Auditor to, calculate the Performance Reward Amount or the Performance Liability Amount (if any and as the case may be) for the period from the Commencement Date to the Date of Completion of the whole of the Works.

3.6.2 Where:

3.6.2.1 the Works are comprised of two or more Tranches; and

3.6.2.2 the ALT has made a determination in accordance with Section 27.6.3.3 of the Agreement that the calculation of any Performance Liability Amount or Performance Reward Amount (if any and as the case may be) is to be made at the Date of Completion for each Tranche of the Works,

then the calculation and payment of the Performance Liability Amount or Performance Reward Amount referred to in Section 3.6.1 will be made at the Date of Completion for each Tranche (instead of at the Date of Completion for the whole of the Works).

3.6.3 The Owner will make a payment to each NOP, or the NOPs will make a payment to the Owner (if any and as the case may be) in accordance with Schedule 12 (Payment Procedures).

#### **At Date of Final Completion**

3.6.4 As soon as practicable after the Date of Final Completion, the ALT will, or will instruct the Alliance Auditor to, calculate the Performance Reward Amount or the Performance Liability Amount which will be calculated (if any and as the case may be) for the period from the Date of Commencement to the Date of Final Completion.

3.6.5 The Owner will make a payment to each NOP, or the NOPs will make a payment to the Owner (if any and as the case may be) in accordance with Schedule 12 (Payment Procedures).

3.6.6 The NOPs and the Owner both acknowledge that payments of any Performance Liability Amount and/or Performance Reward Amount (as the case may be) made in accordance with Sections 3.6.1 to 3.6.3 are payments on-account, and agree that any payments to be made under Section 3.6.5 will be adjusted against any payments that have already been made.

### **4. [INTENTIONALLY DELETED]**

### **5. NOP RISK CAP**

5.1.1 The maximum liability of each NOP to pay any Painshare, Interim Painshare and/or any Performance Liability Amount under this Agreement is capped at, and shall not exceed a sum equal to the Fee portion of the Target Outturn Cost attributable to each NOP (the “**NOP Risk Cap**”). For clarity, the NOP Risk Cap will be adjusted to reflect any adjustments

of the Target Outturn Cost (and each NOP's corresponding Fee portion of the Target Outturn Cost) made in accordance with the terms of this Agreement.

## **6. GAINSHARE AND PAINSHARE ON TERMINATION OR EXCLUSION**

### **6.1 Exclusion**

On exclusion of a NOP under Section 35 of this Agreement and Schedule 16 (Exclusion and Termination), any amounts recoverable on account of increased Painshare and/or reduced Gainshare are determined in accordance with Section 35 of this Agreement and Schedule 16 (Exclusion and Termination).

### **6.2 Default termination**

On termination of this Agreement by either the Owner or a NOP due to Default pursuant to Section 33 of this Agreement and Schedule 16 (Exclusion and Termination), any amounts recoverable on account of increased Painshare and/or reduced Gainshare are determined in accordance with Section 35 of this Agreement and Schedule 16 (Exclusion and Termination).

## Annex 1 to Schedule 11 – KRAs and KPIs

### 7. Performance Spectrum

- 7.1 The non-cost component of the Risk or Reward Regime is based on the NOPs' performance in the KRAs determined by the Owner and measured in accordance with specific measures for each KPI set out in the below tables.
- 7.2 A performance spectrum is defined for each KPI with an associated KPS from **[REDACTED]** (Poor) to 0 (MCOS Performance), to **[REDACTED]** (Stretch). The performance spectrum for each KPI is defined as follows:
- 7.2.1 **Stretch Performance** – performance that exceeds MCOS Performance in accordance with the criteria for measurement defined in this Annex 1 for each KPI;
  - 7.2.2 **MCOS Performance** – performance expected by the Alliance as defined by the measures for MCOS Performance stated in this Annex 1 for each KPI; and
  - 7.2.3 **Poor Performance** – performance that fails to achieve the MCOS Performance and represents the measures for Poor Performance defined in this Annex 1 for each KPI.
- 7.3 Where the KPS for each individual KPI is:
- 7.3.1 Equal to **[REDACTED]** (Poor), a Performance Liability Amount will be payable by the NOPs to the Owner in respect of that KPI;
  - 7.3.2 Equal to **[REDACTED]** (MCOS Performance) no Performance Liability Amount is payable nor a Performance Reward Amount receivable in respect of that KPI; or
  - 7.3.3 In the range of greater than **[REDACTED]** (MCOS Performance) to **[REDACTED]** (Stretch), a Performance Reward Amount will be payable by the Owner to the NOPs in respect of that KPI.

## 8. Key Result Areas and Maximum Reward/Liability Amounts

8.1 The Maximum Performance Reward Amount is \$[REDACTED].

8.2 The Maximum Performance Liability Amount is \$[REDACTED].

**Table 1: KRAs and Total Maximum Reward/Liability Amounts**

The KRA Maximum Reward Amount is calculated for each KRA by multiplying the KRA Weighting % for that KRA by the Maximum Performance Reward Amount.

The KRA Maximum Liability Amount is calculated for each KRA by multiplying the KRA Weighting % for that KRA by the Maximum Performance Liability Amount.

Key Result Area (KRA)	KRA Weighting %	KRA Maximum Liability Amount	KRA Maximum Reward Amount
1 Health and Safety	[REDACTED]%	[REDACTED]% x Maximum Performance Liability Amount	[REDACTED]% x Maximum Performance Reward Amount
2 Achieving the Plan	[REDACTED]%	[REDACTED]% x Maximum Performance Liability Amount	[REDACTED]% x Maximum Performance Reward Amount
3 High Performing Team	[REDACTED]%	[REDACTED]% x Maximum Performance Liability Amount	[REDACTED]% x Maximum Performance Reward Amount
4 Innovation and Continuous Improvement	[REDACTED]%	[REDACTED]% x Maximum Performance Liability Amount	[REDACTED]% x Maximum Performance Reward Amount
5 Stakeholder and Community Management	[REDACTED]%	[REDACTED]% x Maximum Performance Liability Amount	[REDACTED]% x Maximum Performance Reward Amount
6 Sustainability	[REDACTED]%	[REDACTED]% x Maximum Performance Liability Amount	[REDACTED]% x Maximum Performance Reward Amount
7 Quality Management	[REDACTED]%	[REDACTED]% x Maximum Performance Liability Amount	[REDACTED]% x Maximum Performance Reward Amount
<b>Total</b>	<b>100%</b>	<b>Maximum Performance Liability Amount</b>	<b>Maximum Performance Reward Amount</b>



**Table 2: KPIs**

<b>KRA 1 Health and Safety</b>			
<b>KPI 1.1 [REDACTED]</b>			
Description and Measures	[REDACTED]		
		KPI Maximum Liability Amount	KPI Maximum Reward Amount
KPI Weighting:	[REDACTED]	[REDACTED]	[REDACTED]
Basis of Stretch Measurement:	[REDACTED]	Basis of Calculating KPS at Completion:	[REDACTED]
Period of Measurement:	[REDACTED]	Completion:	[REDACTED]
Performance Spectrum	Poor	MCOS	Stretch
	[REDACTED]	[REDACTED]	[REDACTED]
Performance Score Calculation	Measure	Key Performance Score (KPS)	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	



<b>KPI 1.2 [REDACTED]</b>			
Description and Measures	[REDACTED]		
		KPI Maximum Liability Amount	KPI Maximum Reward Amount
KPI Weighting:	[REDACTED]	[REDACTED]	[REDACTED]
Basis of Stretch Measurement:	[REDACTED]	Basis of Calculating KPS at Completion:	[REDACTED]
Period of Measurement:	[REDACTED]	Completion:	[REDACTED]
Performance Spectrum	Poor	MCOS	Stretch
	[REDACTED]	[REDACTED]	[REDACTED]
Performance Score Calculation	Measure	Key Performance Score (KPS)	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	

<b>KPI 1.3 [REDACTED]</b>			
Description and Measures	[REDACTED]		
		KPI Maximum Liability Amount	KPI Maximum Reward Amount
KPI Weighting:	[REDACTED]	[REDACTED]	[REDACTED]
Basis of Stretch Measurement:	[REDACTED]	Basis of Calculating KPS at Completion:	[REDACTED]
Period of Measurement:	[REDACTED]	Completion:	[REDACTED]
Performance Spectrum	Poor	MCOS	Stretch
	[REDACTED]	[REDACTED]	[REDACTED]
Performance Score Calculation	Measure	Key Performance Score (KPS)	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	

## KRA 2 Achieving the Plan

### KPI 2.1 [REDACTED]

Description and Measures	[REDACTED]		
		KPI Maximum Liability Amount	KPI Maximum Reward Amount
KPI Weighting:	[REDACTED]	[REDACTED]	[REDACTED]
Basis of Stretch Measurement:	[REDACTED]	Basis of Calculating KPS at Completion:	[REDACTED]
Period of Measurement:	[REDACTED]	Completion:	[REDACTED]
Performance Spectrum	Poor	MCOS	Stretch
	[REDACTED]	[REDACTED]	[REDACTED]
Performance Score Calculation	Measure	Key Performance Score (KPS)	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	

**KRA 3 High Performing Team**

**KPI 3.1 [REDACTED]**

Description and Measures	[REDACTED]		
		KPI Maximum Liability Amount	KPI Maximum Reward Amount
KPI Weighting:	[REDACTED]	[REDACTED]	[REDACTED]
Basis of Stretch Measurement:	[REDACTED]	Basis of Calculating KPS at Completion:	[REDACTED]
Period of Measurement:	[REDACTED]	Completion:	[REDACTED]
Performance Spectrum	Poor	MCOS	Stretch
	[REDACTED]	[REDACTED]	[REDACTED]
Performance Score Calculation	Measure	Key Performance Score (KPS)	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	

<b>KPI 3.2 [REDACTED]</b>			
Description and Measures	[REDACTED]		
		KPI Maximum Liability Amount	KPI Maximum Reward Amount
KPI Weighting:	[REDACTED]	[REDACTED]	[REDACTED]
Basis of Stretch Measurement:	[REDACTED]	Basis of Calculating KPS at Completion:	[REDACTED]
Period of Measurement:	[REDACTED]	Completion:	[REDACTED]
Performance Spectrum	Poor	MCOS	Stretch
	[REDACTED]	[REDACTED]	[REDACTED]
Performance Score Calculation	Measure	Key Performance Score (KPS)	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	

## KRA 4 Innovation and Continuous Improvement

### KPI 4.1 [REDACTED]

Description and Measures	[REDACTED]		
		KPI Maximum Liability Amount	KPI Maximum Reward Amount
KPI Weighting:	[REDACTED]	[REDACTED]	[REDACTED]
Basis of Stretch Measurement:	[REDACTED]	Basis of Calculating KPS at Completion:	[REDACTED]
Period of Measurement:	[REDACTED]	Completion	[REDACTED]
Performance Spectrum	Poor	MCOS	Stretch
	[REDACTED]	[REDACTED]	[REDACTED]
Performance Score Calculation	Measure	Key Performance Score (KPS)	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	



<b>KPI 4.2 [REDACTED]</b>			
Description and Measures	[REDACTED]		
		KPI Maximum Liability Amount	KPI Maximum Reward Amount
KPI Weighting:	[REDACTED]	[REDACTED]	[REDACTED]
Basis of Stretch Measurement:	[REDACTED]	Basis of Calculating KPS at Completion:	[REDACTED]
Period of Measurement:	[REDACTED]	Completion	[REDACTED]
Performance Spectrum	Poor	MCOS	Stretch
	[REDACTED]	[REDACTED]	[REDACTED]
Performance Score Calculation	Measure	Key Performance Score (KPS)	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	

## KRA 5 Stakeholder and Community Management

### KPI 5.1 [REDACTED]

Description and Measures	[REDACTED]		
		KPI Maximum Liability Amount	KPI Maximum Reward Amount
KPI Weighting:	[REDACTED]	[REDACTED]	[REDACTED]
Basis of Stretch Measurement:	[REDACTED]	Basis of Calculating KPS at Completion:	[REDACTED]
Period of Measurement:	[REDACTED]	Completion:	[REDACTED]
Performance Spectrum	Poor	MCOS	Stretch
	[REDACTED]	[REDACTED]	[REDACTED]
Performance Score Calculation	Measure	Key Performance Score (KPS)	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	

**KPI 5.2 [REDACTED]**

Description and Measures	[REDACTED]		
		KPI Maximum Liability Amount	KPI Maximum Reward Amount
KPI Weighting:	[REDACTED]	[REDACTED]	[REDACTED]
Basis of Stretch Measurement:	[REDACTED]	Basis of Calculating KPS at Completion:	[REDACTED]
Period of Measurement:	[REDACTED]	Completion:	[REDACTED]
Performance Spectrum	Poor	MCOS	Stretch
	[REDACTED]	[REDACTED]	[REDACTED]
Performance Score Calculation	Measure	Key Performance Score (KPS)	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	

<b>KPI 5.3 [REDACTED]</b>			
Description and Measures	[REDACTED]		
		KPI Maximum Liability Amount	KPI Maximum Reward Amount
KPI Weighting:	[REDACTED]	[REDACTED]	[REDACTED]
Basis of Stretch Measurement:	[REDACTED]	Basis of Calculating KPS at Completion:	[REDACTED]
Period of Measurement:	[REDACTED]	Completion:	[REDACTED]
Performance Spectrum	Poor	MCOS	Stretch
	[REDACTED]	[REDACTED]	[REDACTED]
Performance Score Calculation	Measure	Key Performance Score (KPS)	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	

**KRA 6 Sustainability**

**KPI 6.1 [REDACTED]**

Description and Measures	[REDACTED]		
		KPI Maximum Liability Amount	KPI Maximum Reward Amount
KPI Weighting:	[REDACTED]	[REDACTED]	[REDACTED]
Basis of Stretch Measurement:	[REDACTED]	Basis of Calculating KPS at Completion:	[REDACTED]
Period of Measurement:	[REDACTED]	[REDACTED]	[REDACTED]
Performance Spectrum	Poor	MCOS	Stretch
	[REDACTED]	[REDACTED]	[REDACTED]
Performance Score Calculation	Measure	Key Performance Score (KPS)	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	

## KRA 7 Quality Management

### KPI 7.1 [REDACTED]

Description and Measures	[REDACTED]		
		KPI Maximum Liability Amount	KPI Maximum Reward Amount
KPI Weighting:	[REDACTED]	[REDACTED]	[REDACTED]
Basis of Stretch Measurement:	[REDACTED]	Basis of Calculating KPS at Completion:	[REDACTED]
Period of Measurement:	[REDACTED]	Completion:	[REDACTED]
Performance Spectrum	Poor	MCOS	Stretch
	[REDACTED]	[REDACTED]	[REDACTED]
Performance Score Calculation	Measure	Key Performance Score (KPS)	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	

**KPI 7.2 [REDACTED]**

Description and Measures	[REDACTED]		
		KPI Maximum Liability Amount	KPI Maximum Reward Amount
KPI Weighting:	[REDACTED]	[REDACTED]	[REDACTED]
Basis of Stretch Measurement:	[REDACTED]	Basis of Calculating KPS at Completion:	[REDACTED]
Period of Measurement:	[REDACTED]	Completion:	[REDACTED]
Performance Spectrum	Poor	MCOS	Stretch
	[REDACTED]	[REDACTED]	[REDACTED]
Performance Score Calculation	Measure	Key Performance Score (KPS)	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	

## **SCHEDULE 12**

### **PAYMENT PROCEDURES**

#### **1. INTRODUCTION**

##### **1.1 General principles**

Subject to the provisions of this Agreement and in accordance with Applicable Law, including the Construction Act, the Owner shall:

1.1.1 pay each NOP the undisputed amounts payable under Proper Invoices provided to the Owner in accordance with this Agreement, on account of the:

1.1.1.1 Actual Costs reasonably and actually incurred by the relevant NOP in performing the Works; and

1.1.1.2 Fee, which is calculated by multiplying the applicable Overhead and Profit percentages set out in Schedule 10 (Fee) by the Actual Costs for the relevant Payment Period (but subject to the overall lump sum Fee payable under Schedule 10),

in each case as further determined in accordance with Schedule 9 (Actual Cost), Schedule 10 (Fee) and this Schedule 12 (Payment Procedures);

1.1.2 upon each yearly anniversary of the Commencement Date, pay each NOP the unpaid balance of all holdbacks that have accrued during the 365 calendar days that preceded the previous payment of holdback made pursuant to this Agreement in connection with Works supplied by such NOP, in accordance with Section 4 (Release of Accrued Holdback on Annual Basis) of this Schedule 12 (Payment Procedures); and

1.1.3 upon issuance of the Final Certificate, make payment to each NOP in accordance with Section 8 (Final Payment) of this Schedule 12 (Payment Procedures).

##### **1.2 Calculation of aggregate amount due to each NOP**

Payments due to or from the NOPs under this Agreement are to be determined by calculating:

1.2.1 the aggregate amount due to the NOPs from the Commencement Date to the relevant payment ascertainment date; and

1.2.2 deducting the aggregate of all previous payments due to the NOPs under this Agreement.

##### **1.3 General principles for payments under the Risk or Reward Regime**

Following the Date of Completion, the Date of Final Completion, and such other times as expressly provided for under this Agreement prior to the Date of Completion:

1.3.1 the Owner will pay each NOP its share (if any and as the case may be) of:

1.3.1.1 Gainshare (or Interim Gainshare, if applicable); and/or

1.3.1.2 Painshare previously deducted where and to the extent subsequent Painshare is reduced or extinguished; and/or



1.3.1.3 the Performance Reward Amount (if applicable),

in each case, as determined in accordance with Schedule 11 (Risk or Reward Regime); and

1.3.2 each NOP will pay the Owner its share (if any and as the case may be) of:

1.3.2.1 Painshare (or any Interim Painshare, if applicable); and/or

1.3.2.2 Interim Gainshare previously paid or payable by the Owner where and to the extent subsequent Interim Gainshare or Gainshare is reduced or extinguished; and/or

1.3.2.3 following the Date of Completion and the Date of Final Completion, the Performance Liability Amount (if applicable),

as determined in accordance with Schedule 11 (Risk or Reward Regime).

## **1.4 Holdbacks**

1.4.1 The Owner shall retain an amount equal to the amount required to be held back pursuant to the Construction Act in respect of liens that may be claimed from each sum otherwise payable to the NOPs under this Agreement that is not a release of any monies so retained.

1.4.2 Subject to Section 1.4.3 of this Schedule 12 (Payment Procedures), any holdbacks retained pursuant to Section 1.4.1 of this Schedule 12 (Payment Procedures) shall not be due and payable until after the expiry of the applicable period for preservation of liens under the Construction Act, and provided that no liens are preserved by persons supplying the Works.

1.4.3 Notwithstanding any provision of this Agreement:

1.4.3.1 no sum shall be payable by the Owner to the NOPs pursuant to this Agreement if, at the time such sum would otherwise be payable, there is outstanding and unsatisfied any claim for lien which has been preserved pursuant to the Construction Act by any person for goods and or Works provided directly or indirectly to the NOPs to enable performance of any part(s) of the Works or the Owner has received a written notice of lien; and

1.4.3.2 where any sum which would otherwise be payable by the Owner to the NOPs is not so payable because a claim for lien has been preserved pursuant to the Construction Act, or the Owner has received written notice of such a lien, such sum shall be payable to the NOPs only at such time when all liens or written notices of a lien which may be claimed against that sum have expired or been satisfied, withdrawn, discharged or vacated by an order made pursuant to a payment into court in accordance with the Construction Act.

## **2. PROPER INVOICES**

### **2.1 Agreed form of Proper Invoice**

On or as soon as possible after the Commencement Date, the AMT must develop and the ALT must agree upon a form of Proper Invoice to be provided by each NOP detailing the information referred to in Section 2.2 of this Schedule 12 (Payment Procedures) and which will enable ready identification of Actual Costs, holdbacks and payments to Subcontractors.

## 2.2 Proper Invoice

For the purposes of this Agreement, “**Proper Invoice**” shall mean a written bill or other request for payment for services and materials comprising the Works performed under this Agreement issued by each NOP, provided such bill or request shall:

- 2.2.1 contain the information set out in Section 6.1 of the Construction Act;
- 2.2.2 set out the cumulative Actual Cost, Fee and other amounts certified by the Alliance Director for all Works performed by the NOP up to the end of the calendar month immediately prior to the current Payment Period;
- 2.2.3 identify the amounts due to or from the NOP, including Actual Cost, Fee and other amounts, for all Works performed by the NOP up to the end of the Payment Period and the calculation of each such amount, together with all supporting information and verification as may be required by this Agreement, including, without limitation, the supporting information set out in Section 9.4 and Section 9.5 of Schedule 9 (Actual Cost);
- 2.2.4 outline the aggregate amount of the holdback retained by the Owner under this Agreement, the allocation of such holdback as between the NOPs, and the amount of the holdback to be retained under and applicable to the current Proper Invoice;
- 2.2.5 evidence of compliance with workers’ compensation insurance requirements in respect of Works performed on or in the vicinity of the Site, including a WSIB clearance certificate;
- 2.2.6 attach a statutory declaration on an original form of CCDC Document 9A-2018 Statutory Declaration of Progress Payment Distribution by Contractor, declaring that payments in connection with the Works, as noted in the statutory declaration, have been made to the end of the calendar month immediately preceding the Payment Period covered by the current application (the statutory declaration shall be dated the same date as the Proper Invoice);
- 2.2.7 attach a statutory declaration from any Subcontractor, as may be identified by the Alliance Director, on an original form of CCDC Document 9B-2018 Statutory Declaration of Progress Payment Distribution by Subcontractor (the statutory declaration shall be dated the same date as the Proper Invoice);
- 2.2.8 for advance payment for Materials not yet incorporated into the Works: (1) list such Materials (and the advance payment calculations in respect thereof) as a separate line item; and (2) be supported by invoices and such other evidence as the Alliance Director may reasonably request to establish the value and delivery date of such Materials;
- 2.2.9 satisfy invoicing requirements of Applicable Law in respect of tax and, in particular, include the NOP’s registration number for HST and list the total amount of HST separate from the total amount payable and list the total amount due (total amount of HST plus the amount payable for the work completed in the current Payment Period);
- 2.2.10 include a statement in large font all in uppercase as follows: “THE CONSTRUCTION ACT, AS REVISED, IS APPLICABLE TO THIS INVOICE”; and
- 2.2.11 meet the additional requirements as outlined in Section 2.3, Section 2.4 and Section 2.5 of this Schedule 12 (Payment Procedures).

## 2.3 Statement of amount due

In addition to the information required by Section 2.2 above, each Proper Invoice must set out for each NOP:

- 2.3.1 the Actual Costs reasonably and actually incurred by the relevant NOP in performing the Works during the applicable Payment Period;
- 2.3.2 the Fee claimed in respect of the relevant Payment Period, which will be calculated by multiplying the applicable Overhead and Profit percentages set out in Schedule 10 by the Actual Costs for that Payment Period (but subject to the overall lump sum Fee payable under Schedule 10);
- 2.3.3 any adjustment to the cumulative Actual Cost previously certified up to the end of the current Payment Period, including any adjustments required in accordance with this Agreement (and the amount determined at this Section 2.3.2 may be a negative amount);
- 2.3.4 the cumulative Fee due up to the end of the Payment Period in accordance with Schedule 10 (Fee), including any adjustments required in accordance with this Agreement;
- 2.3.5 following the Date of Completion, the Date of Final Completion and at such other times as expressly provided for under this Agreement prior to the Date of Completion, its share of:
  - 2.3.5.1 Gainshare, Interim Gainshare, Painshare, Interim Painshare (if any and as the case may be); and
  - 2.3.5.2 the Performance Reward Amount or Performance Liability Amount (if any and as the case may be),as determined in accordance with Schedule 11 (Risk or Reward Regime), noting that any Painshare, Interim Painshare or Performance Liability Amount to be is treated as a negative amount; and
- 2.3.6 the net amount for the current Payment Period ("**Payment Period Amount**"), being:
  - 2.3.6.1 the total adjusted amount due in respect of Actual Cost and Fee (and this may be a negative amount); and
  - 2.3.6.2 the total of all other amounts due to the relevant NOP from the Owner in accordance with this Agreement;  
  
LESS
  - 2.3.6.3 the aggregate of all previous payments paid or payable in respect of the relevant NOP; and
  - 2.3.6.4 the total of all other amounts due to the Owner from the relevant NOP in accordance with this Agreement,and if the amount determined in accordance with this Section 2.3.6 is a negative amount, the amount due under the relevant Proper Invoice is an amount due from that NOP to the Owner.

- 2.3.7 Each Proper Invoice submitted by a Participant must be certified as correct by that Participant and must be supported by such certified documentation as may be required by the Alliance Director from time to time.

## **2.4 Owner Participant's Statement**

- 2.4.1 The Owner Participant's statement for each Payment Period must set out the Actual Costs notionally incurred by it for the relevant Works.
- 2.4.2 The Owner Participant's share of any Gainshare (including any Interim Gainshare) or Painshare (including any Interim Painshare) is nil and the Owner Participant is not entitled to any Fee.

## **2.5 Submission and review process**

- 2.5.1 On or as soon as possible after the Commencement Date, the AMT shall develop and the ALT must agree upon the process for the submission and review of a Draft Invoice, to be submitted by a Participant for the Works performed within the relevant Payment Period. Such Draft Invoice shall contain the documents and information set out in Section 2.2 and Section 2.3.
- 2.5.2 On a monthly basis, the Participant shall submit simultaneously to the Owner (c/o the Owner's Finance Department) and to the Alliance Director, a Proper Invoice for payment, for the immediately preceding Payment Period, on **[REDACTED]** of the month following the conclusion of such Payment Period (the "**Proper Invoice Submission Date**").
- 2.5.3 If the Proper Invoice is received by either the Owner or the Alliance Director after the Proper Invoice Submission Date or at any time on a non-Business Day, the Proper Invoice shall be deemed to be received on the following Business Day;
- 2.5.4 The Alliance Director shall review and certify the Proper Invoice, in accordance with Section 3.1.1;
- 2.5.5 In the event that all or a portion of the Proper Invoice is disputed by the Alliance Director, the Alliance Director shall (on behalf of the Owner) issue a notice of non-payment of such disputed portion of the Proper Invoice in accordance with the *Construction Act*. The Participant shall amend the Proper Invoice and submit to both the Owner and the Alliance Director, a revised Proper Invoice for the non-disputed portion of the Proper Invoice within **[REDACTED]** Business Days following receipt of the Owner's notice of non-payment, incorporating all of the information set out in the original Proper Invoice applicable to the non-disputed portion thereof. For clarity, the form and date of the Proper Invoice cannot change despite such a revision.
- 2.5.6 All supporting documentation relating to the amounts contained in the Proper Invoice shall be available for inspection and audit by the Alliance Director and the Alliance Auditor.

## **3. PAYMENT PROCEDURE FOR INTERIM PAYMENTS**

### **3.1 Alliance Director to certify**

- 3.1.1 The Alliance Director must certify the amount (if any) due for payment in accordance with Section 2.3.6 by:
- 3.1.1.1 the Owner to the relevant NOP; or

3.1.1.2 the relevant NOP to the Owner,

and the basis on which that amount is calculated ("**Payment Certificate**") within **[REDACTED]** after receipt by the Alliance Director of the Proper Invoice submitted by the relevant Participant.

- 3.1.2 The Payment Certificate issued by the Alliance Director must be issued to the Owner, the Owner Participant and to each NOP on the date that it is certified.
- 3.1.3 A Payment Certificate must be issued even if the Alliance Director considers the amount due to be zero.

### **3.2 Due dates for interim payments**

In respect of any Payment Certificate:

- 3.2.1 subject to the provisions of the *Construction Act*, if the Owner receives the Proper Invoice on the Proper Invoice Submission Date, the Owner must pay the sum certified by the Alliance Director in the Payment Certificate (together with any HST thereon) to the relevant NOP within **[REDACTED]** of the Proper Invoice Submission Date (the "**Due Date for Interim Payment**");
- 3.2.2 If the Proper Invoice is received after the Proper Invoice Submission Date, the Owner must pay the sum certified by the Alliance Director in the Payment Certificate (together with any HST thereon) to the relevant NOP, on the first Monday or Thursday, whichever is earlier, falling on a Business Day, which is 10 Business Days after the date the Proper Invoice was actually submitted to the Owner;
- 3.2.3 where there is a sum due to the Owner from any NOP, that NOP must pay the sum due to the Owner no later than the date that is ten (10) Business Days after the NOP's receipt of the Payment Certificate ("**Due Date for Refund**");
- 3.2.4 On receipt of payment from the Owner or notice of non-payment from the Alliance Director, the NOP shall comply with the Construction Act and either cause payment to be made to all Subcontractors, trade contractors, workers and suppliers promptly when due in accordance with the Construction Act or issue notices of non-payment in accordance with the timelines and requirements of the Construction Act. Additionally, the NOP shall take all necessary steps to ensure that its Subcontractors comply with the payment requirements of the Construction Act.
- 3.2.5 Nothing in this Schedule 12 (Payment Procedures) limits the Owner's rights to withhold or deduct payments in accordance with this Agreement, Applicable Law, or pursuant to any statutory rights it possesses.

### **3.3 Establishing Bank Account**

- 3.3.1 Within five (5) Business Days of the Commencement Date, each NOP must notify the Owner in writing of its nominated bank account for payments by the Owner to each NOP under this Agreement ("**Bank Account**").
- 3.3.2 Any NOP may change its Bank Account by notifying the Owner in writing of that NOP's new nominated bank account for payments by the Owner to that NOP under this Agreement, provided that notice under this Section 3.3.2 is given by that NOP to the Owner at least ten (10) Business Days prior to the due date for payment under this Agreement.

#### 4. RELEASE OF ACCRUED HOLDBACK ON AN ANNUAL BASIS

4.1 On each yearly anniversary of the Commencement Date, each NOP shall:

4.1.1 submit an application to the Owner's Representative requesting the release of the applicable holdback amount that has accrued during the preceding 365 calendar days;

4.1.2 attach a statutory declaration on an original form CCDC 9A – 2018 Statutory Declaration stating that all accounts for services, subcontracts, Materials, Construction Plant, and other indebtedness which may have been incurred by the NOP in connection with this Agreement during the 365 calendar day period referred to in Section 4.1.1 above and for which the Owner might in any way be held responsible have been paid in full, except for amounts properly retained as a holdback or as an identified amount in dispute and, if requested by the Owner, attach a statutory declaration from any Subcontractor, as may be identified by the Owner, on an original form of CCDC Document 9B – 2018 Statutory Declaration of Progress Payment Distribution by Subcontractor; and

4.1.3 provide confirmation to the Owner and the Alliance Auditor in writing that:

4.1.3.1 there are no preserved or perfected liens in respect of the Agreement or in respect of any Subcontractors, suppliers or other subtrades or sub-subtrades of the NOP; or

4.1.3.2 all liens in respect of the Agreement, and all liens in respect of any of Subcontractors, suppliers or other subtrades or sub-subtrades of the NOP, have been satisfied, discharged or otherwise provided for under the Construction Act and the NOP shall provide proof of same to the Owner and the Alliance Auditor;

4.2 After the receipt of applications from the NOPs requesting release of the holdback and the documents required by Sections 4.1.2 and 4.1.3 above, the Owner's Representative will certify payment of the accrued holdback amounts.

4.3 This Agreement shall be subject to the Construction Act. In accordance with the Construction Act, the Owner may retain any amounts which are required by law to satisfy any liens against the Works.

#### 5. COMPLETION

5.1 As soon as the ALT considers that Completion has been reached, it shall deliver to the Owner's Representative a comprehensive list of items to be completed or corrected. Failure to include an item on the list does not alter the responsibility of the Participants to complete the Works.

5.2 Immediately prior to the issuance of the Certificate of Completion in accordance with Section 24.2 of this Agreement, the Participants, in consultation with the Owner's Representative, shall establish reasonable dates for finishing the Works and correcting deficiencies, and the construction schedule shall be deemed to be amended to include this completion schedule.

5.3 Within seven (7) calendar days of receiving a copy of the Certificate of Completion signed by the Owner's Representative, the Participants shall publish a certification or declaration of the substantial performance of the Agreement ("**Certificate of Substantial Performance of the Works**") in accordance with the requirements of the Construction Act in a construction trade newspaper (as that term is defined in the Construction Act or the regulations promulgated thereunder) and shall provide to the Owner's Representative a copy of such certificate and confirmation of the date of publication and the name of the construction trade newspaper in which the publication occurred. If the Participants fail to comply with this provision, the Owner may publish a copy of the certificate and the costs so incurred by the Owner will be treated as Actual Costs

incurred by the Owner Participant, and, for clarity, will not give rise to any adjustment to the Target Outturn Cost.

## **6. RELEASE OF HOLDBACK ON COMPLETION**

**6.1** After due publication of the Certificate of Substantial Performance of the Works, each NOP shall:

6.1.1 submit an application requesting the release of the applicable holdback amount;

6.1.2 attach a statutory declaration on an original form CCDC 9A – 2018 Statutory Declaration to state that all accounts for labour, Subcontracts, Materials, Construction Plant, and other indebtedness which may have been incurred by the NOP in connection with the Completion of the Works and for which the Owner might in any way be held responsible have been paid in full, except for amounts properly retained as a holdback or as an identified amount in dispute and, if requested by the Owner, attach a statutory declaration from any Subcontractor, as may be identified by the Owner, on an original form of CCDC Document 9B – 2018 Statutory Declaration of Progress Payment Distribution by Subcontractor; and

6.1.3 by no later than thirty (30) days following the date of publication of the Certificate of Substantial Performance of the Works, provide confirmation to the Owner and the Alliance Auditor in writing that:

6.1.3.1 there are no preserved or perfected liens in respect of the Agreement or in respect of any Subcontractors, suppliers or other subtrades or sub-subtrades of the NOP; or

6.1.3.2 all liens in respect of the Agreement, and all liens in respect of any of the Subcontractors, Suppliers or other subtrades or sub-subtrades of the NOP, have been satisfied, discharged or otherwise provided for under the Construction Act and the NOP shall provide proof of same to the Owner and the Alliance Auditor.

**6.2** After the receipt of applications from the NOPs requesting release of the holdback and the documents as provided in Sections 6.1.2 and 6.1.3 above, the Owner's Representative will certify payment of the accrued holdback amounts.

**6.3** The statutory holdback amount authorized by the certificate for payment referred to in Section 5.2 above is due and payable on the day following the expiry of the holdback period specified in the Construction Act for the retention of basic holdback funds following substantial performance of the work, unless (i) a claim for lien has been registered against title to the Site; (ii) the Owner has received a valid written notice of lien in respect of the Works; or (iii) the Owner has published a notice of non-payment in the form prescribed by the Construction Act prior to the fortieth (40<sup>th</sup>) calendar day following the publication of the Certificate of Substantial Performance of the Works.

## **7. RELEASE OF FINISHING HOLDBACK**

**7.1** Prior to release of the holdback for finishing work provided for under the Construction Act, each NOP shall submit:

7.1.1 a written request for release of the holdback for finishing work (if applicable), including a declaration that the NOP's obligations relating to the subject Works, including all obligations arising during the Defects Correction Period, have been completed;

7.1.2 written confirmation that no written notices of lien have been received by it;

7.1.3 a statutory declaration on an original form CCDC 9A – 2018 Statutory Declaration to state that all accounts for labour, Subcontracts, Materials, Construction Plant, and other indebtedness which may have been incurred by the NOP in connection with the finishing Works and for which the Owner might in any way be held responsible have been paid in full; and

7.1.4 a final WSIB clearance certificate.

## **8. FINAL PAYMENT**

### **8.1 Final submission by NOPs**

Within sixty (60) days of all the Participants having complied with all of their respective obligations relating to the whole of the Works, including all obligations arising during the Defects Correction Period, each NOP must each submit to the AMT (copied to the ALT) a statement of final account stating the final amounts due to or from it under this Agreement (if any and as the case may be) in respect of:

8.1.1 Actual Cost;

8.1.2 Overhead;

8.1.3 Profit;

8.1.4 its share of any Gainshare or Painshare;

8.1.5 its share of any Performance Reward Amount or Performance Liability Amount;

8.1.6 any other amounts due to or from it under this Agreement; and

8.1.7 all payments received or made by that NOP.

### **8.2 Final submission by the Owner Participant**

Within sixty (60) days of all the Participants having complied with all of their respective obligations relating to the whole of the Works, including all obligations arising during the Defects Correction Period, the Owner Participant must submit to the AMT (copied to the ALT) a statement of final account stating the final amounts due to or from it under this Agreement (if any and as the case may be) in respect of Actual Cost.

### **8.3 AMT to prepare final account**

8.3.1 The AMT must calculate the Actual Cost on the basis of the final statements provided by the Participants under Sections 8.1 and 8.2 and submit a consolidated statement of final account to the ALT copied to each Participant stating for each Participant all:

8.3.1.1 Actual Cost;

8.3.1.2 Overhead;

8.3.1.3 Profit;

8.3.1.4 payments due under the Risk or Reward Regime (if any);

8.3.1.5 other payments due under this Agreement; and



8.3.1.6 all payments made to or from the relevant Participant.

8.3.2 The AMT must prepare the draft Final Certificate in accordance with Section 8.5 of this Schedule 12 (Payment Procedures) and submit it for approval by the ALT and Alliance Auditor with the final account prepared under Section 8.3.1 above for the Project.

#### **8.4 Agreement of final account by ALT and Alliance Auditor**

8.4.1 The ALT and the Alliance Auditor must consider the consolidated statement of final account and draft Final Certificate submitted by the AMT under Section 8.3 within three (3) months.

8.4.2 The ALT and/or Alliance Auditor may request the AMT to provide further information and/or substantiation of the final account and draft Final Certificate submitted by the AMT under Section 8.3. The Alliance Auditor may provide comments to the ALT on the final account and draft Final Certificate.

8.4.3 Should the ALT disagree with the final account and/or draft Final Certificate submitted by the AMT under Section 8.3, it must promptly notify the Participants and AMT giving all the reasons for the failure to agree.

8.4.4 The ALT must ensure that the Participants promptly address the reasons for disagreement given by the ALT under Section 8.4.3 and when those reasons have been addressed, re-consider and seek to agree to all matters relating to the final account and draft Final Certificate.

8.4.5 The process in this Section 8.4 is repeated until the final account and draft Final Certificate is agreed by the ALT and the Alliance Auditor and the Alliance Director is notified by the ALT of such agreement.

8.4.6 The AMT must endeavour to re-determine and resubmit the final account and draft Final Certificate in accordance with the ALT's requirements within ten (10) Business Days (or such later date as is fair and reasonable having regard to any delay by the Participants) and in any case within such period to enable the Alliance Director to issue a Final Certificate in accordance with Section 8.5 of this Schedule 12 (Payment Procedures).

#### **8.5 Final Account and Final Certificate**

8.5.1 The Alliance Director must issue a final payment certificate to reflect the final account and draft Final Certificate notified and agreed in accordance with Section 8.4 above ("**Final Certificate**").

8.5.2 The Alliance Director must issue the Final Certificate to the Owner and each Participant:

8.5.2.1 within twenty (20) Business Days of the agreement of the Final Certificate by the ALT;

8.5.2.2 within three (3) months of the agreement by the ALT of the final account; or

8.5.2.3 by the date the Participants have complied with all of their obligations relating to the whole of the Works, including all obligations arising during the Defects Correction Period,

whichever is the latest.

8.5.3 A Final Certificate must be issued even if the amount due is zero.

- 8.5.4 In the Final Certificate, the Alliance Director must certify:
- 8.5.4.1 that all the Participants' obligations relating to the Works have been properly completed in accordance with this Agreement; and
  - 8.5.4.2 the Final Completion Date.
- 8.5.5 In the Final Certificate, the Alliance Director must certify the following amounts:
- 8.5.5.1 the aggregate of all Actual Cost and Fee due to each NOP;
  - 8.5.5.2 the aggregate Actual Cost incurred by the Owner Participant;
  - 8.5.5.3 the amount paid by the Owner to each NOP prior to the date of the Final Certificate (including its share of any Gainshare);
  - 8.5.5.4 the amount paid by each NOP to the Owner prior to the date of the Final Certificate (including its share of any Painshare);
  - 8.5.5.5 the calculation of any Gainshare or Painshare under the Risk or Reward Regime and each NOP's share thereof;
  - 8.5.5.6 the calculation of any Performance Reward Amount or Performance Liability Amount under the Risk or Reward Regime and each NOP's share thereto;
  - 8.5.5.7 any other amounts due to each NOP from the Owner;
  - 8.5.5.8 any other amounts due from each NOP to the Owner under this Agreement; and
  - 8.5.5.9 the net amount which is finally due and payable to each NOP by the Owner or from each NOP to the Owner (as the case may be).

## **8.6 Final Payment**

The Owner makes payment to each NOP and/or each NOP makes payment to the Owner (as the case may be) of any amount certified in the Final Certificate issued in accordance with Section 8.5.

## **8.7 Due date for final payment**

- 8.7.1 The due date for any payment due under the Final Certificate is three (3) months from the date of receipt by the ALT of a consolidated statement of final account in accordance with Section 8.1 and 8.2 and the information reasonably required for its verification ("**Due Date for Final Payment**").
- 8.7.2 The Owner and/or each NOP (as the case may be) must make the payment certified in the Final Certificate within seven (7) days of the Due Date for Final Payment, which is the final date for payment of the final payment ("**Final Date for Final Payment**").

## **9. OVERPAYMENTS AND UNDERPAYMENTS**

**9.1** If the payments made to a NOP are greater than that NOP's entitlement to payment under this Agreement (the difference being an "**Overpayment**"), then the Owner may either:

- 9.1.1 deduct an amount equal to the Overpayment from any consideration due or becoming due to that NOP, whether under this Agreement or otherwise; or

- 9.1.2 require that NOP to reimburse to the Owner an amount equal to the Overpayment.
- 9.2** If the payments made to a NOP are less than that NOP's entitlement to payment under this Agreement (the difference being an "**Underpayment**"), then that NOP may require the Owner to pay an amount equal to the Underpayment to that NOP.
- 9.3** Where it is determined that a payment is required under this Section 9, such payment shall be considered to be an increase or reduction, as applicable, of the consideration for the supply by the NOP of the Works.
- 9.4** If a Party is required to make a payment under this Section 9, such Party must make that payment within twenty one (21) Business Days of a written request for payment being made.
- 9.5** The Owner or any NOP may take steps to recover any amount payable to them under this Section 9 which is not paid in accordance with Section 9.4.
- 10. Harmonized Sales Tax**
- 10.1** Unless expressly included, the consideration for any supply made under or in connection with this Agreement does not include an amount on account of HST in respect of the supply.
- 10.2** Any amount referred to in this Agreement (other than an amount referred to in Section 10.6 of this Schedule 12 (Payment Procedures)) which is relevant in determining a payment to be made by one of the Parties to another is, unless indicated otherwise, a reference to that amount expressed on a HST exclusive basis.
- 10.3** To the extent that HST is payable in respect of any supply made by a Party ("**Supplier**") under or in connection with this Agreement, the recipient of the supply shall pay the applicable HST upon receipt of a Proper Invoice in addition to the amount otherwise payable under this Agreement.
- 10.4** Each NOP shall issue to the Owner a receipt evidencing payment by the Owner of any amount paid by the Owner pursuant to this Agreement (including HST).
- 10.5** In the case of an Overpayment under Section 9.1 of this Schedule 12: (i) where HST calculated on the amount of the Overpayment was charged but not collected, the NOP shall adjust the amount of HST charged by subtracting the portion of HST that was calculated on the amount of the Overpayment; and (ii) where HST calculated on the Overpayment was collected, the NOP shall pay or credit to the Owner an amount equal to the HST that had been collected on the amount of the Overpayment and issue a Credit Note containing the information prescribed under the ETA.
- 10.6** If a Party is entitled to be reimbursed or indemnified for a loss, cost, expense or outgoing incurred in connection with this Agreement, then the amount of the reimbursement or indemnity payment must first be reduced by an amount equal to any input tax credit or HST rebate to which the Party being reimbursed or indemnified (or its representative NOP) is entitled in relation to that loss, cost, expense or outgoing and, then, if the amount of the payment is consideration or part consideration for a taxable supply, it must be increased on account of HST under Section 10.1.
- 10.7** Notwithstanding Section 10.6 above, where a NOP is a Defaulting Participant and the Owner is entitled under this Agreement to employ a Third Party to fulfill such NOP's obligations, the NOP shall reimburse and indemnify the Owner for any HST incurred by the Owner that is not recoverable

through an input tax credit or similar mechanism to the extent such HST exceeds the unrecoverable HST that would have been payable by the Owner had there been no Default.

## **11. LATE PAYMENTS**

### **11.1 Interest on late payments**

Without prejudice to any other rights a NOP may have in respect of late payments due to it from the Owner or the Owner may have in respect of late payments due to it from any NOP under this Agreement (as the case may be), to the extent that any such amount due to the Owner or any NOP is not paid to that person in accordance with this Schedule 12 (Payment Procedures) by:

11.1.1 the twenty-eighth (28<sup>th</sup>) day of receiving the Proper Invoice (“**Overdue Date for Interim Payment**”) for Interim Payment under Section 3.2.1 of this Schedule 12 (Payment Procedures);

11.1.2 the Due Date for Refund under Section 3.3.2 of this Schedule 12 (Payment Procedures);  
or

11.1.3 the Final Date for Final Payment under Section 8.7.2 of this Schedule 12 (Payment Procedures),

interest will accumulate on such unpaid amount at the Default Interest Rate until the date of payment by the Owner or the relevant NOP (as the case may be) in accordance with this Agreement and such interest is payable by the Owner to the relevant NOP or by the relevant NOP to the Owner (as the case may be) as an amount due under this Agreement.

### **11.2 Suspension for Late Payment by the Owner**

Where the Owner fails to make any payment due and payable to a NOP under this Agreement by the Overdue Date for Interim Payment, that NOP may give seven (7) days’ written notice of its intention to suspend the execution of the Works or part thereof by it and such suspension will continue until payment in full is made. Any such suspension is not an Adjustment Event.

## **12. SET OFF**

### **12.1 The Owner’s right of set off**

Without prejudice to any other rights the Owner may have under this Agreement or at law, the Owner may on notice to any NOP set off any amount due to it from that NOP under this Agreement against any amount due by the Owner to that NOP under this Agreement.

## **SCHEDULE 13**

### **INSURANCE POLICIES AND BONDS**

#### **1. Insurance policies to be effected and maintained by the Owner and each NOP**

**1.1** From and after the execution of this Agreement, the Owner shall obtain and maintain exclusively through the Metrolinx Construction Insurance Program ("OCIP") the following insurances as further described in Appendix A to this Schedule 13:

1.1.1 "All Risks" Course of Construction Property, including Boiler and Machinery as outlined in A1 of Appendix A to this Schedule 13;

1.1.2 "Wrap Up" Commercial General Liability and Non-Owned Automobile Liability as outlined in A2 of Appendix A to this Schedule 13;

1.1.3 Project Specific Pollution Liability as outlined in A3 of Appendix A to this Schedule 13; and

1.1.4 Project Specific Professional Insurance as outlined in A4 of Appendix A to this Schedule 13.

**1.2** From and after execution of this Agreement, each NOP (as applicable) shall obtain and maintain, or cause to be maintained, the following insurances as further described in Appendix B to this Schedule 13:

1.2.1 Automobile Liability on a Standard Owners Form as outlined in B1 of Appendix B to this Schedule 13;

1.2.2 Commercial General Liability and Non-Owner Automobile Liability as outlined in B2 of Appendix B to this Schedule 13;

1.2.3 "All Risks" Marine Cargo (if any exposure) as outlined in B3 of Appendix B to this Schedule 13;

1.2.4 "All Risks" Contractors' Equipment (if any exposure) as outlined in B4 of Appendix B to this Schedule 13; and

1.2.5 Any other insurance required by Applicable Law including, but not limited to, WSIB as outlined in B5 of Appendix B to this Schedule 13.

#### **1.3 Insurance of Owner's Property**

1.3.1 The Owner may obtain and maintain, in its sole and absolute discretion, a policy or policies of insurance in respect of loss or damage to property of the Owner arising out of or in connection with the Works, and business interruption costs consequent upon such loss or damage. Notwithstanding the foregoing, the Owner may terminate such insurance policies at any time. The cost of these insurance policies will not be treated as Actual Costs under this Agreement.

## **2. Policy Terms and Conditions**

- 2.1** All policies of insurance to be obtained (or caused to be obtained) by NOPs in accordance with this Schedule 13 shall comply with the requirements set out in Appendix B to this Schedule 13 and shall be subject to approval by the Owner, which approval will not be unreasonably withheld.
- 2.2** To achieve the minimum limits for any type of insurance required under Appendix A and Appendix B to this Schedule 13, it is permissible to arrange the insurance under a single policy, or by a combination of primary, umbrella and/or excess policies.

## **3. Insurers**

- 3.1** All policies of insurance outlined in this Schedule 13 must be issued by an insurer with a financial strength rating of not lower than S&P "A-" or AM Best A.

## **4. Project Insurance Manual**

The Project Insurance Manual at the Commencement Date is attached as Appendix C to this Schedule 13. The Parties must comply with the Project Insurance Manual as may be amended or reissued by the Owner from time to time, unless the ALT agrees otherwise.

## **5. Bonding Requirements**

- 5.1** The Construction NOPs shall obtain and deliver to the Owner originally executed Bonds in accordance with the requirements agreed by the ALT and in accordance with the requirements of the Construction Act on the dates specified by the ALT. The Actual Cost and applicable Overhead in respect of the Bonds will be payable by the Owner under this Agreement provided no Profit shall be payable in respect thereof notwithstanding the provisions of Schedule 9 (Actual Costs). Each of the Bonds shall be properly executed by a Surety or by an agent or attorney in fact for the Surety, in which latter case, the Construction NOPs is required to submit with such Bonds a power of attorney to the signatory agent or the attorney in fact executed by the Surety in a form satisfactory to the Owner to evidence the authority of the agent or the attorney in fact.
- 5.2** Such Bonds shall be issued by an insurer duly licensed under the *Insurance Act* (Ontario) to write surety and fidelity insurance in the Province of Ontario and shall be maintained in good standing until the fulfillment of the Agreement.
- 5.3** Such Bonds shall include:
- 5.3.1 a Labour and Material Payment Bond in accordance with the requirements of the Construction Act; and
- 5.3.2 a Performance Bond in accordance with the requirements of the Construction Act,
- with the amount of each Bond being determined by the ALT on a Best for Project basis.

**APPENDIX A TO SCHEDULE 13  
OWNER INSURANCE REQUIREMENTS**

**Works Insurance – Union Station Enhancement Project**

**Insurances to be provided, or caused to be provided, by the Owner through the Metrolinx Construction Insurance Program (“OCIP”)**

Type (Occurrence)	Amount	Period of Insurance	Maximum Deductible	Principal Cover
<b>Appendix A - Insurance 1 (A1)</b> <b>“All Risks” Course of Construction Including Boiler and Property and Machinery</b>	<p>Value declared including Soft Costs representing [REDACTED]% of Recurring / Continuing Soft Costs) to be equal to the estimated completed project value of the Works, including Property of Every Description and all other property supplied by Owner or Owner Parties for incorporation into the Works. For clarity, this does not include any existing assets on the Lands or any Additional Lands.</p> <p>Extra and Expediting Expense (minimum \$[REDACTED] sub-limit)</p> <p>Principal Extensions:</p> <ul style="list-style-type: none"> <li>• Replacement Cost Valuation (Property)</li> <li>• Most Recent Technology Replacement Cost Valuation (Equipment or Machinery) Extended Maintenance 24 months</li> <li>• Flood (to policy limit with annual aggregate)</li> <li>• Natural or man-made earth movement, including earthquake, landslide or subsidence (to policy limit with annual aggregate)</li> <li>• Electronic Data Processing equipment and media, including data restoration and re-creation costs</li> <li>• Transit</li> <li>• Unnamed locations</li> <li>• Bylaws (with respect to Existing or Renovated Buildings) (minimum \$[REDACTED] sub-limit)</li> <li>• Debris Removal (minimum \$[REDACTED] sub-limit)</li> <li>• Off Premises Services (\$[REDACTED] sub-</li> </ul>	Commencement Date to date of Completion plus 24 months Extended Maintenance	<p>[REDACTED]% of loss value / \$[REDACTED] minimum Earthquake</p> <p>\$[REDACTED] Flood</p> <p>\$[REDACTED] Testing and Commissioning</p> <p>\$[REDACTED] LEG 3</p> <p>\$[REDACTED] Extended Maintenance</p> <p>\$[REDACTED] All other losses</p> <p>30 day waiting period for Soft Costs</p> <p>48 hour waiting period applicable to Off Premises Services Service Interruption</p>	“All Risks” Course of Construction Property Insurance covering the full insurable replacement cost of the Works including cold and hot testing / commissioning, of Boiler & Machinery equipment, including HVAC, Soft Costs, with no early occupancy restriction. Plus 24 months Extended Maintenance.

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Type (Occurrence)	Amount	Period of Insurance	Maximum Deductible	Principal Cover
	<ul style="list-style-type: none"> <li>limit)</li> <li>• Professional Fees (minimum \$[REDACTED] sub-limit)</li> <li>• Fire Fighting Expenses (minimum \$[REDACTED] sub-limit)</li> <li>• Valuable Papers (minimum \$[REDACTED] sub-limit)</li> <li>• Accounts Receivable (minimum \$[REDACTED] sub-limit)</li> <li>• Defence Costs (subject to a \$[REDACTED] sub-limit)</li> <li>• Radioactive contamination caused by sudden and accidental release of radioactive isotopes (resulting from an accident to measuring, testing or medical equipment and subject to a \$[REDACTED] sub-limit)</li> <li>• Contamination Clean-up or Removal (minimum \$[REDACTED] sub-limit)</li> <li>• Ammonia Contamination (minimum \$[REDACTED] sub-limit)</li> <li>• Civil Authority Access Interruption (8 weeks)</li> <li>• Prevention of Ingress/Egress (8 weeks)</li> <li>• Permission for Partial Occupancy prior to date of Completion</li> <li>•</li> <li>• Margin of Profit Extension for Contractors</li> <li>• Testing and Commissioning (120 day limitation each component)</li> <li>• Sanctions Clause</li> </ul> <p>Permitted Exclusions:</p> <ul style="list-style-type: none"> <li>• Cyber risk</li> <li>• Mould, fungi and fungal derivatives</li> <li>• Faulty workmanship, materials construction, or design but resultant damage to be insured to a minimum LEG 3 standard</li> <li>• War risk</li> <li>• Terrorism</li> <li>• Nuclear or radioactive contamination, except re radioactive isotopes intended for scientific, medical, industrial or commercial use</li> </ul>			

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Type (Occurrence)	Amount	Period of Insurance	Maximum Deductible	Principal Cover
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- Contractors' equipment

Type (Occurrence)	Amount	Period of Insurance	Maximum Deductible	Principal Cover
<i>Comments</i>				<ul style="list-style-type: none"> <li>• Named Insured includes NOPs, the Owner, all other parties engaged in the Works or with an insurable interest or required to be Named, Additional Named and/or Additional insured by contract or agreement including but not limited to subcontractors, sub-subcontractors, consultants, sub-consultants, and IO, as their respective interests may appear</li> <li>• No provision permitted allowing a coinsurance penalty</li> <li>• Insurance shall be primary without right of contribution of any other insurance carried by any Named Insured</li> <li>• Policy to be non-cancellable except for premium non-payment, material change to the risk, abandonment material misrepresentation or concealment of facts, or a material breach of any condition of the policy. Policy cancellable at anytime by the Owner subject to minimum retained premium</li> <li>• Additional key extensions of coverage: <ul style="list-style-type: none"> <li>– Underground services, temporary works involved in the Project such as scaffolding, hoarding, etc., site preparation, including excavation and associated improvements, landscaping and property of others used in the Project</li> <li>– Waiver of subrogation against all Named, Additional Named and Additional Insureds , including but not limited to NOPs, NOP Parties, Owner, Owner Participant, Owner Parties subcontractors, professional consultants (other than for their professional consulting risk), as well as officers, directors and employees, servants, and agents of the foregoing where required by contract or agreement.</li> <li>– Frost or freezing to concrete – but only resultant damage from a peril not otherwise excluded</li> <li>– Liberalization Clause</li> <li>– Errors and Omissions</li> <li>– Breach of Conditions</li> </ul> </li> </ul>

**Works Insurance – Union Station Enhancement Project**

Insurances to be provided, or caused to be provided, by the Owner through the Metrolinx Construction Insurance Program (“OCIP”)

Type (Occurrence)	Amount	Period of Insurance	Maximum Deductible(s)	Principal Cover
<p><b>Appendix A - Insurance 2 (A2)</b>  <b>“Wrap-Up” Commercial General Liability and Non-Owned Automobile Liability</b></p>	<p>\$(REDACTED) each occurrence, and in the aggregate with respect to Broad Form Products and Completed Operations</p> <p>Sub-limits:</p> <ul style="list-style-type: none"> <li>• \$(REDACTED) Non-Owned Automobile Liability</li> <li>• \$(REDACTED) Sudden and Accidental Pollution and Hostile Fire Pollution Liability</li> <li>• \$(REDACTED) “All Risks” Tenants’ Legal Liability</li> <li>• \$(REDACTED) Prairie or Forest Fire Fighting Expenses</li> <li>• \$(REDACTED) Employee Benefits Administrative Errors and Omissions</li> <li>• \$(REDACTED) Contractors Rework</li> <li>• \$(REDACTED) Legal Liability for Damages To hired Automobiles (SEF 94)</li> <li>• \$(REDACTED/REDACTED) Medical Payments</li> </ul> <p>Major Extensions:</p> <ul style="list-style-type: none"> <li>• Owner’s and Contractor’s Protective</li> <li>• Blanket Contractual (written and oral)</li> <li>• Direct and Contingent Employers Liability</li> <li>• Employee Benefits Administrative Errors and Omissions</li> <li>• Personal Injury (nil participation)</li> <li>• Cross Liability and Severability of Interest with respect to each insured party</li> <li>• Blasting/demolition/excavating/underpinning/pile driving/shoring/caisson work/work below ground surface/tunnelling/grading, and similar operations associated with the Works, as applicable</li> <li>• Elevator and Hoist Collision Liability</li> <li>• Liberalized Notice of Claim Requirement, i.e., requirement to report will commence when knowledge is held by a designated project person(s) – to be identified</li> </ul>	<p>Commencement Date to date of Completion plus 36 months Completed Operations</p>	<p>For all Work, except as noted below:</p> <p>\$(REDACTED) per occurrence</p> <p>\$(REDACTED) per claim with respect to Contractors Rework</p> <p>\$(REDACTED) per claim with respect to each SEF 94, Tenants’ Legal Liability, Employee Benefits Administrative Errors and Omissions and Prairie or Forest Fire Fighting Expenses</p>	<p>“Wrap-Up” Commercial General Liability and Non-Owned Automobile Liability insurance covering all construction operations on an occurrence basis against claims for Bodily Injury (including Death), Personal Injury, Property Damage (including Loss of Use), and including Products and Completed Operations Liability extension for a period of not less than 36 months, effective from the date of Completion.</p> <p>Sudden and Accidental Pollution and Hostile Fire Pollution coverage to be not less than IBC 2313 form (240 hours detection/240 hours’ notice coverage structure).</p>

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Type (Occurrence)	Amount	Period of Insurance	Maximum Deductible(s)	Principal Cover
	<ul style="list-style-type: none"> <li>• Non-Owned Automobile Liability</li> <li>• Tenants' Legal Liability (All Risks) – subject to sub-limit</li> <li>• Medical Expenses – subject to sub-limit</li> <li>• Non-Owned Automobile Liability Policy (SPF#6)</li> <li>• Contractual Liability (SPF#96)</li> <li>• Prairie or Forest Fire Fighting Expenses – subject to sub-limit</li> <li>• Sudden and Accidental Pollution and Hostile Fire Pollution – subject to sub-limit</li> <li>• Permission for Unlicensed Vehicles (partial road use)</li> <li>• Unlicensed Equipment</li> <li>• Loss of Use Without Property Damage</li> <li>• Loading and Unloading of Automobiles</li> <li>• Intentional Injury, committed to Protect Persons or Property</li> <li>• Accident Benefits</li> <li>• Worldwide Territory, subject to suits being brought in Canada or the US</li> <li>• Breach of Conditions</li> </ul> <p>Major Exclusions:</p> <ul style="list-style-type: none"> <li>• Injury to employees, where WSIB provides valid coverage</li> <li>• Property in the care, custody or control of the insured, except as provided under Broad Form Products and Completed Operations</li> <li>• Operation of licensed motor vehicles, other than attached machinery while used for its purpose, at the Lands and any Additional Lands</li> <li>• Physical damage to the Project, except during Broad Form Products and Completed Operations extension period</li> <li>• Cyber risk</li> <li>• Mould, fungi and fungal derivatives</li> <li>• Professional liability of engineers, architects, and other professional consultants</li> <li>• Nuclear or radioactive contamination, except release radioactive isotopes intended for scientific, medical, industrial or commercial use</li> <li>• Asbestos</li> <li>• Sanctions Clause</li> </ul>			

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Type (Occurrence)	Amount	Period of Insurance	Maximum Deductible(s)	Principal Cover
<i>Comments</i>				<ul style="list-style-type: none"> <li>• Named Insured includes NOPs, Owner, IO, and all other parties engaged in the Works or with an insurable interest or required to be noted as a Named, Additional Named or Additional insured by contract or agreement including but not limited to subcontractors, sub-subcontractors, suppliers while working on the Lands or any Additional Lands, tradesmen while working on the Lands or any Additional Lands, engineers, architects, consultants and sub-consultants, (other than for professional liability),</li> <li>• Others as Additional Insureds, as may be required from time to time, arising from all operations and activities pertaining to the Works and the control and use of the Lands or any Additional Lands</li> <li>• Railway Companies as Additional Insured as required</li> <li>• Directors, officers, shareholders, employees of the insured parties involved in the Works covered as Additional Insureds</li> <li>• Insurance shall be primary without right of contribution of any other insurance carried by any Named Insured</li> <li>• Aggregate limits will be permitted for Products and Completed Operations, Prairie and Forest Fire Fighting Expenses, Sudden and Accidental Pollution and Hostile Fire Pollution and Employee Benefits Administrative Errors &amp; Omissions Liability; no policy general aggregate will be permitted</li> <li>• Professional service activities integral to the project, but not covering engineers, architects or other professional consultants, i.e., incidental professional liability risk of a Named Insured and their employed professionals is to be covered, but not the professional liability of independent fee-for-service professional consultants, architects or engineers</li> <li>• Waiver of subrogation of insurers' rights of recovery, against all Named, Additional Named and/or Additional Insureds, as well as officers, directors, employees, servants and agents of the foregoing where required by contract or agreement</li> <li>• Policy to be non-cancellable except for premium non-payment, , material change to the risk ,abandonment ,material misrepresentation or concealment of facts, or a material breach of any condition of the policy. Policy cancellable at anytime by the Owner subject to minimum retained premium</li> </ul>

**Works Insurance – Union Station Enhancement Project**

Insurances to be provided, or caused to be provided, by the Owner through the Metrolinx Construction Insurance Program (“OCIP”)

Type (Claims Made)	Amount	Period of Insurance	Maximum SIR	Principal Cover
<b>Appendix A - Insurance 3 (A3)</b>				
<b>Project Specific Pollution Liability (combined Contractors’ Pollution Liability and Pollution Legal Liability):</b>	<p>[\$[REDACTED]] per claim and in the aggregate for all claims, inclusive of defense and all costs and expenses</p> <p>Major Extensions:</p> <ul style="list-style-type: none"> <li>• Hazardous Substances occurring at or emanating from the Works or the Lands or any Additional Lands during the Policy Period</li> <li>• Microbial Matter (including Fungus/Mould)</li> <li>• Underground / above ground storage tanks</li> <li>• First Party Restoration and Clean-up Costs</li> <li>• Disposal Site Extension, including Transportation (reporting required)</li> <li>• Duty to Defend</li> <li>• Canada and US Territory</li> <li>• Contractual Liability</li> <li>• Emergency Response Costs</li> <li>• Breach of Conditions</li> </ul> <p>Major Exclusions:</p> <ul style="list-style-type: none"> <li>• Terrorism</li> <li>• War</li> <li>• Intentional Non-compliance</li> <li>• Prior Knowledge / Known Condition / Pre-Existing Condition (exception for exacerbation, aggravation, worsening)</li> <li>• WSIB</li> <li>• Employers’ Liability</li> <li>• Professional Liability</li> <li>• Nuclear Liability</li> <li>• Property Damage to Motor Vehicles during Transportation</li> </ul>	Commencement Date to the date of Completion plus 36 month Extended Reporting Period	[\$[REDACTED]] per claim inclusive of defense and all costs and expenses	Pollution Liability insurance covering third party bodily injury, property damage consequential loss or damage, including clean-up and restoration costs, both at the Lands, any Additional Lands, and off-Site, as required.

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Type (Claims Made)	Amount	Period of Insurance	Maximum SIR	Principal Cover
<i>Comments</i>				<ul style="list-style-type: none"> <li>Named Insured will include NOPs, Owner, and all other parties engaged in the Works or with an insurable interest or required to be noted as a Named, Additional Named or Additional insured by contract or agreement including but not limited to, including the subcontractors, sub-subcontractors, consultants and sub-consultants. IO will be identified as Additional Insured.</li> <li>Waiver of subrogation in favour of Named, Additional Named and/or Additional Insureds where required by contract or agreement</li> <li>This coverage shall be primary with respect to the Works without right of contribution of any insurance carried by the Named Insured.</li> <li>The directors, officers, shareholders and employees of the foregoing shall be Additional Insureds</li> <li>Policy to be non-cancellable except for premium non-payment, material change to the risk abandonment material misrepresentation or concealment of facts, or a material breach of any condition of the policy. Policy cancellable at anytime by the Owner subject to minimum retained premium</li> </ul>

**Works Insurance – Union Station Enhancement Project**

Insurances to be provided, or caused to be provided, by the Owner through the Metrolinx Construction Insurance Program (“OCIP”)

Type (Claims Made)	Amount	Period of Insurance	Maximum Deductible	Principal Cover
<b>Appendix A – Insurance 4 (A4) Project Specific Professional Insurance</b>	<p>\$(REDACTED) minimum per claim / \$(REDACTED) in the aggregate (inclusive of defence and related costs and supplementary payments).</p> <p>Major Extensions:</p> <ul style="list-style-type: none"> <li>• Mitigation and Rectification</li> <li>• Metrolinx as Administrative Party</li> <li>• Breach of Conditions</li> <li>• Broad definition of Professional Services</li> <li>▪ Contractual liability amendment</li> <li>▪ Primary insurance extension</li> <li>• Automatic addition of firms for 60 days, subject to Notice after 60 days, and subject to definition of professional services</li> <li>• Present, former partner, executive officer, director or shareholder of Named Insureds while acting within their scope of duties for the Named Insured</li> <li>• Any individuals or personal corporations retained by the Named Insured under a personal services contract</li> <li>• Lawyer fees and associated expenses incurred in the investigation, defence, settlement, arbitration or litigation of claims</li> <li>• Duty to defend, even if the allegations are groundless, false or fraudulent</li> <li>• Worldwide Territory, subject to suits brought in Canada</li> </ul> <p>Major Exclusions:</p> <ul style="list-style-type: none"> <li>• Express warranties or guarantees</li> <li>• Estimates on profit, return</li> <li>• Faulty workmanship, construction or work which is alleged or in fact not constructed in</li> </ul>	Commencement Date to date of Completion plus 36 months Extended Reporting Period	<p>\$(REDACTED) mitigation and rectification</p> <p>\$(REDACTED) all other</p>	Project Specific Professional Insurance in connection with the design and construction of the Works from beginning of first design, through the entire construction period, to date of Completion plus coverage for an extended reporting period of not less than 36 months.

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Type (Claims Made)	Amount	Period of Insurance	Maximum Deductible	Principal Cover
	<p>accordance with the design of the Project or the construction documents</p> <ul style="list-style-type: none"> <li>• Design or manufacture of any good or products sold or supplied by the Named Insured</li> <li>• Terrorism</li> <li>• Nuclear Liability</li> <li>• Judgments and awards deemed uninsurable by law</li> <li>• Liability assumed under design contract, unless such liability would have attached to the Named Insured by law in the absence of such agreement</li> <li>• Punitive or exemplary damages, fines, penalties or interest or liquidated punitive or exemplary damages or fees except where allowable by law</li> <li>• Refusal to employ, termination of employment, humiliation or discrimination on any basis or other employment related practices or policies</li> <li>• Fraudulent or dishonest conduct</li> <li>• Increase in Painshare/Reduction in Gainshare (unless caused by a breach of professional duty)</li> <li>• Betterments</li> <li>• Sanctions Clause</li> </ul>			
<i>Comments</i>	<ul style="list-style-type: none"> <li>• Named Insured NOPs, Owner, all engineers, architects, and other professional consultants that provide professional design services in connection with the Project</li> <li>• This coverage shall be primary with respect to the Project without right of contribution of any insurance carried by Named Insured</li> <li>• Professional Services covered: All architectural, engineering, land surveying, environmental, landscape architectural, interior design/space planning, soil and material testing services, geotechnical services, and procurement services, including their replacements and/or sub-consultants of any tier, construction management, and temporary design</li> <li>• Retroactive Date: Full retroactive coverage from date of first design activity</li> </ul> <ul style="list-style-type: none"> <li>• Policy to be non-cancellable except for premium non-payment, material change to the risk abandonment, material misrepresentation or concealment of facts, or a material breach of any condition of the policy. Policy cancellable at anytime by the Owner subject to minimum retained premium</li> </ul>			

**APPENDIX B TO SCHEDULE 13  
NOP INSURANCE REQUIREMENTS**

**Works Insurance – Union Station Enhancement Project**

**Insurances to be provided, or caused to be provided by each NOP**

Type	Amount	Period of Insurance	Principal Cover
<b>Appendix B – Insurance 1 (B1)</b>  <b>Automobile Liability</b>	\$[REDACTED] (Minimum) for NOP vehicles  \$[REDACTED] (Minimum) for vehicles of any other subcontractors, sub-subcontractors, consultants, and sub-consultants, and workmen, tradesmen or other persons working on or at the Lands or any Additional Lands	Commencement Date to the Final Completion Date	Standard Ontario Owners Form for all vehicles operated by NOP, NOP Parties all subcontractors, sub-subcontractors, consultants and sub-consultants in connection with the Project.  Business Automobile Liability insurance covering third party property damage and bodily injury liability (including accident benefits) arising out of any licensed vehicle.
<i>Comments</i>	<ul style="list-style-type: none"> <li>• Policies shall be endorsed to preclude cancellation, except upon 90 days prior written notice provided to Participants or 15 days for non payment of premium</li> <li>• Policy to be non-cancellable except for premium non-payment, material misrepresentation or concealment of facts, or a material breach of any condition of the policy.</li> </ul>		
<b>Appendix B – Insurance 2 (B2)</b>  <b>Commercial General Liability and Non-Owned Automobile Liability</b>	\$ [REDACTED] each occurrence, and in the annual general aggregate and aggregate with respect to Broad Form Products and Completed Operations for NOP and NOP Parties  \$ [REDACTED] each occurrence and in the annual general aggregate and aggregate with respect to Broad Form Completed Operations for any other contractor, subcontractors, sub-subcontractors, consultants and sub-consultants, workmen, tradesmen, or other persons involved in the Works  In both instances, limits of liability may be structured as any combination of primary	Commencement Date to the Final Completion Date	Commercial General Liability insurance covering all operations on an occurrence basis against claims for Bodily Injury (including Death), Broad Form Property Damage (including Loss of Use), Broad Form Products and Completed Operations Liability.  This Commercial General Liability insurance will cover off-site activities connected to the Project and Products and Completed Operations Liability beyond the “Wrap-Up” Commercial General Liability Insurance policy’s Products and Completed Operations extension period.

Type	Amount	Period of Insurance	Principal Cover
and Completed Operations Liability, and Owner's and Contractor's Protective extensions	plus supplementary layers and Umbrella and/or Excess, or primary plus Umbrella and/or Excess  Sub-limits:  <ul style="list-style-type: none"> <li>• Full policy limits with respect to Non-Owned Automobile Liability</li> <li>• \$[REDACTED] Prairie or Forest Fire Fighting Expenses</li> </ul> Principal Extensions required to be provided by each NOP and shall be endeavoured to be provided by any other contractor, subcontractors, sub-subcontractors, consultants, sub-consultants, workmen, tradesmen or other persons involved in the Works:  <ul style="list-style-type: none"> <li>• Owner's and Contractor's Protective</li> <li>• Blanket Contractual (written)</li> <li>• Direct and Contingent Employers Liability</li> <li>• Personal Injury (nil participation)</li> <li>• Cross Liability and Severability of Interest with respect to each insured party</li> <li>• Blasting/demolition/excavating/ underpinning/pile driving/ shoring/ caisson work/work below ground surface/tunnelling/grading, and similar operations associated with the Works as applicable</li> <li>• Elevator and Hoist Collision Liability</li> <li>• Non-Owned Automobile Liability (SPF #6)</li> <li>• Contractual Liability Endorsement SPF#96</li> <li>• Prairie or Forest Fire Fighting Expenses – subject to sub-limit</li> <li>• Permission for Unlicensed Vehicles' (partial road use)</li> <li>• Unlicensed Equipment</li> <li>• Loss of Use Without Property Damage</li> <li>• Loading and Unloading of Automobiles</li> </ul>		

Type	Amount	Period of Insurance	Principal Cover
	<ul style="list-style-type: none"> <li>• Broad Form Property Damage</li> <li>• Broad Form Completed Operations</li> <li>• Intentional Injury, committed to Protect Persons or Property</li> <li>• Worldwide Territory, subject to suits being brought in Canada or the US</li> <li>• Breach of Conditions</li> </ul> <p>Permitted Exclusions:</p> <ul style="list-style-type: none"> <li>• Injury to employees, where WSIB provides valid coverage</li> <li>• Property in the care, custody or control of the insured, except as provided under Broad Form Products and Completed Operations</li> <li>• Operation of licensed motor vehicles, other than attached machinery while used for its purpose, or at the Lands or any Additional Lands</li> <li>• Cyber risk</li> <li>• Mould, fungi and fungal derivatives</li> <li>• Professional liability of engineers, architects, and other professional consultants</li> <li>• Nuclear or radioactive contamination, except release of radioactive isotopes intended for scientific, medical, industrial or commercial use</li> <li>• Sanctions Clause</li> <li>• Asbestos</li> </ul>		
<i>Comments</i>			<ul style="list-style-type: none"> <li>• The NOP Party will be identified as Named Insured, Owner, other NOP Parties, IO, and the City of Toronto will be identified as Additional Insureds, and any other party required to be included by contract or agreement as an Additional Insured. All policies where permitted will include a waiver of subrogation in favour of all Named, Additional Named and Additional Insureds</li> <li>• Policies shall be endorsed to preclude cancellation, except upon 90 days prior written notice provided to Participants or 15 days for non payment of premium</li> <li>• Policy to be non-cancellable except for premium non-payment, material misrepresentation or concealment of facts, or a material breach of any condition of the policy.</li> </ul>

Type	Amount	Period of Insurance	Principal Cover
<b>Appendix B – Insurance 3 (B3)</b> <b>“All Risks” Ocean Marine Cargo</b> <b>(If any exposure)</b>	[REDACTED]% Replacement Cost Valuation basis	Date of Commencement of Early Works to the Final Completion Date or termination of the Insured’s involvement Date in the Works	Property of Every description destined for incorporation into the Works during marine transit, on a full replacement value basis, with no co-insurance provision.
<i>Comments</i>		<ul style="list-style-type: none"> <li>NOP Party will be identified as Named Insured, Owner, other NOP Parties, IO, and the City of Toronto will be identified as Additional Insureds, and any other party required to be included by contract or agreement as an Additional Insured. All policies where permitted will include a waiver of subrogation in favour of all Named, Additional Named and Additional Insureds</li> <li>Include a Breach of Conditions clause</li> <li>This coverage shall be primary with respect to the Works without right of contribution of any insurance carried by Owner</li> <li>Policy to be non-cancellable except for premium non-payment, material misrepresentation or concealment of facts, or a material breach of any condition of the policy.</li> </ul>	
<b>Appendix B – Insurance 4 (B4)</b> <b>“All Risks” Contractors’ Equipment</b> To cover NOP’s subcontractors, sub-subcontractors consultants and sub-consultants	If Site equipment is three years old or less the sum insured shall be equal to [REDACTED]% of the replacement value of all contractors’ equipment used at the project. If Site equipment is more than three years old, actual cash value basis of loss settlement is acceptable.	Date of Commencement of Early Works to the Final Completion Date or termination of the Insured’s involvement in the Works	“All Risks” coverage on all owned, rented, leased or borrowed contractors’ equipment used at the Lands or any Additional Lands
<i>Comments</i>		<ul style="list-style-type: none"> <li>NOP Party will be identified as Named Insured, Owner, other NOP Parties, IO, and the City of Toronto will be identified as Additional Insureds, and any other party required to be included by contract or agreement as an Additional Insured. All policies where permitted will include a waiver of subrogation in favour of all Named, Additional Named and Additional Insureds</li> <li>Policy to be non-cancellable except for premium non-payment, material misrepresentation or concealment of facts, or a material breach of any condition of the policy.</li> <li>Include a Breach of Conditions clause</li> <li>This coverage shall be primary with respect to the Works without right of contribution of any insurance carried by Owner</li> </ul>	

Type	Amount	Period of Insurance	Principal Cover
<u>Appendix B</u> - <u>Insurance 5 (B5)</u>	In accordance with Ontario Act's established benefits and schedules	Not Applicable	<p>(i) NOP, and its Affiliates shall obtain and maintain WSIB Insurance, in accordance with the Province of Ontario requirements.</p> <p>(ii) NOP, ensure that satisfactory evidence of WSIB Insurance is provided by all NOPs, including all other consultants, sub consultants, contractors, subcontractors, suppliers and tradesmen working at the Lands and any Additional Lands</p> <p>Prior to commencement of the work, each of the foregoing shall provide satisfactory written confirmation of compliance, from the appropriate authority, including confirmation that all required assessments have been paid to date.</p> <p>Within 60 days of all NOPs having complied with their obligation relating to the whole of the Works, including all obligations arising during the Defects Correction Period, the NOP shall provide the Owner with satisfactory written confirmation that all required assessments have been paid to date.</p> <p>On request, within 30 days after such request, NOP shall deliver to Owner evidence of the WSIB coverage maintained by any person involved in the Works, or confirmation of that person's exemption from WSIB coverage.</p>
<b>WSIB</b>			

**APPENDIX C TO SCHEDULE 13**  
**PROJECT INSURANCE MANUAL**

**[REDACTED]**

**SCHEDULE 14**  
**GUARANTORS**

<b><i>NOP</i></b>	<b><i>Name of Guarantor(s)</i></b>	<b><i>Address of Registered Office</i></b>
<b>Kiewit-Alberici Union General Partnership</b>	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]
<b>Mass. Electric Construction Canada Co.</b>	[REDACTED]	[REDACTED]
<b>WSP Canada Inc.</b>	[REDACTED]	[REDACTED]



## SCHEDULE 15

### PARENT COMPANY GUARANTEE

This Guarantee is dated as of the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

#### BETWEEN:

●, a [corporation] formed under the laws of ● having its head office and principal headquarters located in the [City of Toronto],

(the “Guarantor”);

– and –

**METROLINX**, a non-share capital corporation continued under the *Metrolinx Act*, 2006, S.O. 2006, c.16 and a Crown agency within the meaning of the *Crown Agency Act*, R.S.O. 1990, c.48, as amended in accordance with Section 3 of the *Metrolinx Act*, 2006 (Ontario).

**WHEREAS** Metrolinx (the “Owner”) have entered into a project alliance agreement (the “Project Alliance Agreement”) with, *inter alia*, [list Non-Owner Participants] (collectively, the “NOPs”) in relation to the design and construction of certain infrastructure, as more particularly described in the Project Alliance Agreement (the “Project”);

**AND WHEREAS** it is a condition of the Project Alliance Agreement that [describe specific NOP whose obligations are being guaranteed] (the “Guaranteed Party”) provide a parent company guarantee from the Guarantor and that the Guarantor makes available its guarantee in consideration, *inter alia*, of the benefit the Guarantor will realize from the ownership of its subsidiary comprising one of NOPs;

**AND WHEREAS** the Guarantor hereby agrees to guarantee to the Owner the performance of the obligations of the Guaranteed Party under the Project Alliance Agreement, on the terms and subject to the conditions set forth in this Guarantee;

**NOW THEREFORE**, for and in consideration of the foregoing premises and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Guarantor hereby covenants and agrees as follows:

1. **Interpretation.** In this Guarantee (including the Recitals), words and expressions not defined hereunder shall have the same meanings as are respectively assigned to them in the Project Alliance Agreement.
2. **Guarantee of Obligations under the Project Alliance Agreement.** In consideration of the Owner entering into the Project Alliance Agreement with the Guaranteed Party:
  - (a) the Guarantor irrevocably, absolutely and unconditionally guarantees to the Owner, as a direct obligation, the due and punctual performance by the Guaranteed Party of each and all of its obligations (including any indemnity obligations), warranties, duties, covenants and undertakings under and pursuant to the Project Alliance Agreement when and to the extent performance of such obligations (including any indemnity obligations), duties and undertakings shall become due according to the terms of the Project Alliance Agreement and the due and punctual payment and discharge of all such sums of money and liabilities due, owing or payable and unpaid by the Guaranteed Party to the Owner pursuant to the Project Alliance Agreement or as a result of any breach of the terms of the Project Alliance

Agreement by the Guaranteed Party (such obligations hereinafter collectively referred to as the “**Guaranteed Obligations**”);

- (b) the Guarantor agrees with the Owner that if and whenever at any time and from time to time, and to the extent the Guaranteed Party fails to perform any of the Guaranteed Obligations, the Guarantor shall, immediately on receipt of a written demand from the Owner notifying the Guarantor of such failure, pay, perform or discharge such obligations and liabilities, as the case may be, as if the Guarantor was a party to the Project Alliance Agreement in the place and stead of the Guaranteed Party but without regard to any defences to such performance or discharge that the Guarantor has waived, and without any obligation on the part of the Owner to marshal particular collateral or any claim or to initiate any prior action or proceeding against the Guaranteed Party or any other person;
  - (c) if and to the extent that the Guarantor, for any reason, after receiving demand pursuant to Section 2(b), does not perform, pay or discharge any of the Guaranteed Obligations in accordance with this Guarantee, the Guarantor shall indemnify the Owner in respect of any claim, demand, proceedings, liability, loss, damage, costs, charges or expenses (and any taxes arising thereon) arising out of any failure by the Guaranteed Party to perform each and all of the Guaranteed Obligations, in each case pursuant to the Project Alliance Agreement when and if such Guaranteed Obligations become due and payable or performable according to the terms of the Project Alliance Agreement, provided that the Guarantor’s liability shall be no greater than the Guaranteed Party’s liability under the Project Alliance Agreement; and
  - (d) the Guarantor shall indemnify the Owner against any loss or liability suffered by the Owner as a result of any Guaranteed Obligation being or becoming unenforceable, invalid or illegal as if the Guaranteed Obligation had not become unenforceable, invalid or illegal, provided that the Guarantor’s liability shall be no greater than the Guaranteed Party’s liability under the Project Alliance Agreement would have been if the Guaranteed Obligation had not become unenforceable, invalid or illegal.
3. **Unconditional Obligations.** The Guarantor shall not be exonerated by time being given to the Guaranteed Party by the Owner nor by any concession or arrangement or waiver or forbearance granted or made by the Owner to or with the Guaranteed Party or by anything that the Owner, the Guaranteed Party or any other party to the Project Alliance Agreement may do or omit or neglect to do (including, but without limitation, the assertion or failure or delay to assert any right or remedy of the Owner or the pursuit of any rights or remedies by the Owner or the giving by the Guaranteed Party of any security or the release, modification or exchange of any such security) which, but for this provision, might exonerate the Guarantor.
4. **Amendment of Project Alliance Agreement.** The Guarantor hereby authorizes (without need for further consent) the Owner to make any amendment, addendum or variation to the Project Alliance Agreement, the due and punctual performance of which amendment, addendum or variation shall be likewise guaranteed by the Guarantor in accordance with the terms of this Guarantee, and no such amendment shall discharge, release, reduce or impair the liability of the Guarantor hereunder nor the rights of the Owner in relation to this Guarantee.
5. **Continuing Guarantee.** This Guarantee is a continuing guarantee and shall apply to all Guaranteed Obligations whenever arising, and shall continue in full force and effect until the payment, observance and performance in full of the Guaranteed Obligations. This Guarantee is not revocable and is in addition to and not in substitution for any other security which the Owner may at any time hold for the performance of such obligations and may be enforced against the Guarantor without first having recourse to any such security and without taking any steps or proceedings against the Guaranteed Party, any other party to the Project Alliance Agreement, any other guarantor of obligations under the Project Alliance Agreement or any other person. A separate action may be brought and prosecuted against the Guarantor whether or not any action is brought

against the Guaranteed Party or any other guarantor or person and whether or not the Guaranteed Party is joined in any such action or actions. In the event that the Owner brings formal legal proceedings against the Guaranteed Party related to the Project Alliance Agreement, the Guarantor and the Owner will be bound by any final judgment made by the court including any determination of the courts in respect of the obligations of the Guaranteed Party under the Project Alliance Agreement. The obligations of the Guarantor hereunder shall not be diminished or relieved in any way as a result of any amalgamation, merger, reorganization, restructuring, sale, lease or transfer of all or substantially all assets, or similar event with respect to the Guaranteed Party or the Guarantor or any change in the ownership of any shares or other interests in the capital of the Guaranteed Party or the Guarantor and this Guarantee shall continue irrespective of: (A) any non-perfection, manner of application or disposition of any collateral or any proceeds thereof; (B) any release of any security (including any other guarantee, letter of credit or bond), waiver, renewal, extension, indulgence, compromise, amendment, addition, deletion, change, discharge (including by operation of law) or modification of or with respect to any of the Guaranteed Obligations; (C) the actual or purported assignment of any obligation or agreement arising hereunder; (D) the recovery of any judgment against the Guaranteed Party, the Guarantor or any other person, or the failure, neglect or omission on the part of the Owner or any other person to realize upon any obligations or liabilities of the Guaranteed Party; (E) any failure of the Owner to mitigate its damages; or (F) any lack of validity or enforceability of the Project Alliance Agreement, any of the Guaranteed Obligations, this Guarantee or any other guarantee except to the extent that such unenforceability or invalidity results from the default of the Owner in the performance of any of its obligations under the Project Alliance Agreement, and the liability of the Guarantor to the Owner under this Guarantee shall not be discharged except by the indefeasible payment and performance of all of the obligations of the Guarantor hereunder. The Owner may, in its sole and absolute discretion, without notice to or further assent of the Guarantor and without in any way releasing, altering, reducing, impairing, discharging or invalidating the obligations and liabilities of the Guarantor hereunder: (a) waive compliance with, performance or payment of, or default under the Project Alliance Agreement, or any Guaranteed Obligations deriving therefrom, or take or fail to take any action of any kind whether pursuant to the Project Alliance Agreement, at law or otherwise, or exercise or refrain from exercising any right or take or refrain from taking any action, against the Guaranteed Party, any other guarantor or any other person; (b) effect any release, compromise, subordination or settlement of any of the Guaranteed Obligations; (c) assign, sell, sublease or otherwise transfer any or all of its interest in the Project Alliance Agreement or in any premises to which the Project Alliance Agreement relates, subject to the terms of the Project Alliance Agreement applicable to such assignment, sale or other transfer; (d) accept, release or discharge the Guaranteed Party, any other guarantor or a permitted successor or assign of any of the foregoing or any other person; or (e) from time to time, apply any sums at any time received from the Guaranteed Party, any other guarantor or any other person in such manner, in such amounts and in satisfaction of such part of the Guaranteed Obligations as it considers best.

6. **Insolvency and other Defences.** Neither the liability of the Guarantor hereunder nor the rights of the Owner in relation to this Guarantee shall be discharged, released, reduced, impaired or affected by reason of (a) any stay of proceedings against the Guaranteed Party, any other guarantor, or any other person liable as guarantor pursuant to any law relating to bankruptcy, insolvency, restructuring or affecting creditors' rights, or (b) the winding up, dissolution, administration, incapacity, lack of power or re-organization of the Guaranteed Party or any change in its status, function, control or ownership or any lack or deficiency in the authority of any person acting on behalf of the Guaranteed Party in connection with the Guaranteed Party's obligations under the Project Alliance Agreement.
7. **Right to Payment.** In the case of the receivership, interim receivership, sequestration, administration, liquidation, winding-up, dissolution or bankruptcy of the Guaranteed Party (whether voluntary or involuntary) or any similar proceeding in respect of the Guaranteed Party for the relief from or otherwise affecting creditors of the Guaranteed Party, or in the event that the Guaranteed Party shall make any assignment for the general benefit of creditors, an arrangement, a compromise, or composition with its creditors (each an "**Insolvency Proceeding**"), the Owner

shall have the right to rank, in priority to any claim by the Guarantor in such Insolvency Proceeding, for their full claims in connection with the Guaranteed Obligations and to receive all payments in respect thereof until their claims have been paid in full and the Guarantor shall continue to be liable to the Owner for the performance of the Guaranteed Obligations. If any amount shall be paid with respect to the Guaranteed Obligations to the Guarantor in connection with an Insolvency Proceeding at any time when all Guaranteed Obligations shall not have been fully satisfied, then such amount shall be used by the Guarantor solely towards performance of the unperformed Guaranteed Obligations until the Guaranteed Obligations are satisfied in full. The Guarantor shall, if called upon to perform any of the Guaranteed Obligations, have the benefit of all rights, including the right to be paid, that would be available to the Guaranteed Party had such Guaranteed Obligations been performed by the Guaranteed Party.

8. **Reinstatement.** If any payment by the Guaranteed Party in respect of the Guaranteed Obligations is avoided or annulled or must be repaid as a result of insolvency, bankruptcy or otherwise, the liability of the Guarantor will continue as if such payment had not occurred (and to the extent necessary, the guarantee of the Guarantor will automatically be reinstated). For greater certainty, the Guarantor agrees that it will remain liable for the performance in full of such obligations even if the Guaranteed Party is discharged therefrom by applicable legislation relating to bankruptcy, insolvency or reorganization.
9. **Information regarding Project Alliance Agreement.** The Guarantor assumes responsibility for being and keeping informed of the financial condition of the Guaranteed Party and of all other circumstances bearing upon the risk of non performance of the Guaranteed Obligations which diligent inquiry would reveal, and agree that the Owner shall have no duty to advise the Guarantor of information known to it now or hereafter regarding such condition or any such circumstances except as may be required in any legal proceeding.
10. **Interest.** To the extent that interest is payable in accordance with the Project Alliance Agreement, the Guarantor must pay on demand, on all sums payable under this Guarantee, interest at the Default Interest Rate (as such term is defined in the Project Alliance Agreement), provided that such interest will not be in duplication of any interest payable pursuant to the Project Alliance Agreement and claimed hereunder.
11. **No Withholding.** All sums payable under this Guarantee shall be paid in full free and clear of and without deduction of or withholding for or on account of any present or future taxes, duties and/or other charges.
12. **Representations and Warranties.** The Guarantor represents and warrants to the Owner as follows:
  - (a) the Guarantor is duly **[incorporated]** and validly existing and in good standing under the laws of [●];
  - (b) the execution, delivery and performance of this Guarantee do not and will not (i) violate any provision of the constating documents or by-laws of the Guarantor or (ii) violate or constitute any default under any indenture, mortgage, chattel mortgage, security agreement, deed of trust, conditional sales contract, lease, loan or other material agreement, instrument or document to which the Guarantor is a party or by which the Guarantor or any of its assets is bound, or (iii) constitute a default under any law, governmental rule, regulation, judgment or order binding on the Guarantor;
  - (c) this Guarantee has been duly authorized, executed and delivered by the Guarantor and constitutes the Guarantor's legal, valid, binding and enforceable obligations except to the extent enforceability may be limited by bankruptcy and insolvency laws;

- (d) no event has occurred which constitutes, or which with the giving of notice and/or the lapse of time and/or a relevant determination would constitute, a contravention of, or default under, any agreement or instrument by which the Guarantor or any of its assets is bound or affected;
- (e) the claims of the Owner against it under this Guarantee will rank at least *pari passu* with the claims of all the Guarantor's other unsecured creditors, save those whose claims are mandatorily preferred solely by Applicable Law;
- (f) there are no actions, suits or proceedings pending (nor to the best knowledge of the Guarantor, after due inquiry, is there any pending investigation) against or involving the Guarantor at law or in equity or before or by any federal, provincial, municipal or other governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign, or before or by any arbitrator of any kind, which could reasonably be expected to materially and adversely affect or impair the ability of the Guarantor to perform its obligations under this Guarantee and the Guarantor is not in default with respect to any judgment, order, writ, injunction, decree, rule or regulation of any court, arbitrator or federal, provincial, municipal or other governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign, which could reasonably be expected to materially and adversely affect or impair the ability of the Guarantor to perform its obligations under this Guarantee;
- (g) no action or approval, authorization, consent or other order of, and no designation, filing, further registration, qualification or recording with, any governmental or public body or authority is legally required to authorize or is otherwise required in connection with or for the execution, delivery or performance by the Guarantor of this Guarantee except as has already been obtained;
- (h) after giving effect to the transactions contemplated in this Guarantee, it is not nor would be deemed insolvent, nor does its incurrence of contingent obligations under this Guarantee render it insolvent; and
- (i) it has not taken any mortgage, pledge, charge, lien, debenture, deed of trust, hypothec, assignment by way of security, security interest, conditional sales contract, option, pre-emptive right or other title retention agreement or similar interest or instrument charging, or creating a security interest in property or assets, or any other part thereof or interest therein, from the Guaranteed Party for or in consideration of assuming any of its obligations under this Guarantee.

The Guarantor acknowledges that the Owner has executed this Guarantee and agreed to take part in the transactions that this Guarantee contemplates in reliance on the representations and warranties made by the Guarantor in Section 12 of this Guarantee.

The representations made by the Guarantor in this Section 12 will survive the execution of this Guarantee.

**13. Subrogation.** At any time while any payment is payable or obligation is owed by the Guaranteed Party under the Project Alliance Agreement or by the Guarantor under this Guarantee, the Guarantor shall not:

- (a) be subrogated to any rights, security or moneys held, received or receivable by the Owner or be entitled to any right against the Guaranteed Party of contribution or indemnity that would be in competition with the Owner in respect of any payment made by the Guarantor or moneys received by the Owner under this Guarantee; or

- (b) claim, rank, prove, vote or exercise any other rights as a surety or creditor of the Guaranteed Party or its estate in competition with the Owner; or
- (c) take any steps to enforce a right or claim against the Guaranteed Party relating to any money paid by the Guarantor to the Owner under this Guarantee; or
- (d) claim to be entitled by way of contribution, indemnity, subrogation, marshalling or otherwise to the benefit of any right of the Guaranteed Party under any agreement or document to which the Owner is a party (except as set out herein in relation to the Project Alliance Agreement).

**14. Communications.** Any notice or demand hereunder shall be duly signed by or on behalf of a duly authorized officer of the person giving the Communication and delivered by hand or by facsimile transmission, in each case with a copy by electronic transmission, to the following addresses:

**To the Guarantor:**

Address: ●  
 Fax No: ●  
 Phone No: ●  
 Email: ●  
 Attention: ●

**To Metrolinx:**

Address: ●  
 Fax No: ●  
 Phone No: ●  
 Email: ●  
 Attention: ●

Any party may change its address for Communication to another address by prior Communication in writing to the other party.

Any Communication shall be deemed to have been received:

- (a) if hand delivered, when delivered;
- (b) if sent by facsimile, upon sending, subject to confirmation of uninterrupted transmission by a transmission report.

**15. Currency.**

- (a) If, for the purposes of obtaining judgment in any court, it is necessary to convert a sum due hereunder to the Owner in one currency (the “**Original Currency**”) into another currency (the “**Judgment Currency**”), the Guarantor agrees, to the fullest extent that it may effectively do so under Applicable Law, that the rate of exchange used shall be that at which in accordance with normal banking procedures the Owner could purchase the Original Currency with the Judgment Currency on the Business Day preceding that on which final judgment is paid or satisfied.
- (b) The obligations of the Guarantor in respect of any sum due in the Original Currency from it to the Owner under this Guarantee shall, notwithstanding any judgment in any Judgment Currency, be discharged only to the extent that, on the Business Day following receipt by the Owner of any sum adjudged to be so due in such Judgment Currency, it may in

accordance with normal banking procedures purchase the Original currency with such Judgment Currency. If the amount of the Original Currency so purchased is less than the sum originally due to the Owner in the Original Currency, the Guarantor agrees, as a separate obligation and notwithstanding any such judgment, to indemnify the Owner against such loss and, if the amount of the Original Currency so purchased exceeds the sum originally due to the Owner in the Original Currency, it shall remit such excess to the Guarantor.

**16. Tax Gross-Up.**

- (a) All payments required to be made by the Guarantor hereunder shall be made to the Owner, free and clear of, and without deduction or withholding for, any and all present and future Taxes (other than any Taxes the Guaranteed Party would have been required to deduct or withhold had the payment been made by the Guaranteed Party). If as a result of this Guarantee the Guarantor shall be required by law to deduct any Taxes from or in respect of any sum payable hereunder (other than any Taxes the Guaranteed Party would have been required to deduct or withhold had the payment been made by the Guaranteed Party), (i) the sum payable shall be increased as much as shall be necessary so that after making all required withholdings and deductions (including withholdings and deductions applicable to additional sums payable under this Section 16) the Owner receives an amount equal to the sum they would have received had no such withholdings or deductions been made, (ii) Guarantor shall make such withholdings and deductions, (iii) Guarantor shall pay the full amount withheld or deducted to the relevant taxing or other governmental authority in accordance with Applicable Law and (iv) the Owner will use commercially reasonable efforts to obtain any refunds or credits obtainable in respect of any amount paid under (iii) above by the Guarantor to be obtained and reimbursed to the Guarantor.
- (b) In addition, the Guarantor hereby agrees to indemnify and, within five (5) Business Days of demand therefor, pay the Owner for the full amount of Taxes (excluding Excluded Taxes (as such term is defined below) except for Excluded Taxes imposed on any amount paid pursuant to this Section 16) paid by the Owner, other than any Taxes the Owner would have been required to pay had the payment been received from the Guaranteed Party.
- (c) For the purposes hereof, “**Taxes**” means any and all present or future taxes, levies, imposts, duties, deductions, charges or withholdings imposed by any governmental authority, including any and all present or future stamp or documentary taxes or any other excise or property taxes, charges or similar levies arising from any payment made under this Guarantee or from the execution, delivery or enforcement of, or otherwise with respect to, this Guarantee and interest thereon or penalty with respect thereto and “**Excluded Taxes**” means any taxes based on the net income of the Owner (including franchise taxes imposed in lieu of net income taxes) imposed by (i) the Canadian federal government, or (ii) the jurisdiction where such party is organized or has its principal office.

**17. Amendments and Waivers.** No term or provision of this Guarantee may be changed, modified, amended, waived, discharged or terminated, except by an instrument in writing signed by each party hereto.

**18. Further Assurances.** The Guarantor covenants that, upon demand from the Owner, it will perform all acts and execute all deeds and documents reasonably necessary to give full effect to the provisions hereof and to ensure that this Guarantee will be at all times enforceable against the Guarantor in accordance with its terms.

**19. Severability.** The invalidity, illegality or unenforceability in whole or in part of any of the provisions of this Guarantee shall not affect the validity, legality and enforceability of the remaining part or provisions of this Guarantee.

- 20. Governing Law.** This Guarantee shall be governed by the laws of the Province of Ontario and the laws of Canada applicable therein and all actions or proceedings in respect of any claim arising out of or related to this Guarantee, whether in contract, at law or in equity, shall be brought in the courts of the Province of Ontario.
- 21. Counterparts.** This Guarantee may be executed in any number of counterparts, each of which when executed and delivered is an original but all of which taken together constitute one and the same instrument; any party may execute this Guarantee by signing any counterpart of it and may communicate such signing by telecopier or otherwise.
- 22. Successors and Assigns.** This Guarantee shall be binding upon the Guarantor and its successors and permitted assigns and shall ensure to the benefit of the Owner and their respective successors and assigns.

*[signature page to follow]*



**IN WITNESS WHEREOF** this Guarantee has been executed and delivered by the Guarantor as of the date first written above.

●, as Guarantor

Per: \_\_\_\_\_

Name:

Title:

I have the authority to bind the corporation

Acknowledged and accepted:

**METROLINX**

Per: \_\_\_\_\_

Name:

Title:

## SCHEDULE 16

### EXCLUSION AND TERMINATION

#### 1. EXCLUSION OF A DEFAULTING PARTICIPANT

##### 1.1 Exclusion Notice

1.1.1 Where the Owner has served a Default Notice in respect of any Default by a NOP and either:

1.1.1.1 that Default has not been rectified in accordance with Section 33.2.1 of the Agreement; or

1.1.1.2 Section 33.2.2 of the Agreement applies,

without prejudice to its rights under this Agreement or otherwise, the Owner may by notice to the Defaulting Participant and the other NOPs exclude the Defaulting Participant from further participation in the performance of the Works ("**Excluded NOP**").

1.1.2 Any notice given under Section 1.1.1 must specify that it is an Exclusion Notice.

##### 1.2 Rights and obligations of the Excluded NOP

1.2.1 An Excluded NOP will no longer be subject to any obligation under this Agreement the time for performance of which has not accrued prior to the date of the relevant Exclusion Notice except for any obligations under this Section 1.2 and Section 36 of the Agreement, which applies to an Excluded NOP as if this Agreement had been terminated (such that references to "Participants", "Defaulting Participant" and "NOP" in that section are read as "Excluded NOP").

1.2.2 Upon the date of the relevant Exclusion Notice an Excluded NOP will lose all rights of representation, participation and attendance at any meeting of the AMT or ALT and any right for a representative of it to remain as the Alliance Director and any such body may elect to conduct all or part of its business on the basis that it is not disclosable to that Excluded NOP save to the extent otherwise required by law.

1.2.3 An Excluded NOP will continue to be and will remain liable in respect of its acts or omissions under this Agreement prior the date of the relevant Exclusion Notice.

1.2.4 An Excluded NOP will continue to be subject to the requirements of this Agreement in relation to Actual Costs already incurred and (subject to any applicable set off or deduction) will be entitled to be paid by the Owner its Actual Costs (and any corresponding Fee) incurred prior to the date of the relevant Exclusion Notice.

1.2.5 If and to the extent required by the non-defaulting Participants, an Excluded NOP will promptly assign or novate to the non-defaulting Participants, without payment, the benefit of any agreements for the delivery of the whole or any part of the Works at the date of the relevant Exclusion Notice.

1.2.6 If and to the extent required by the non-defaulting Participants (and not before), an Excluded NOP will remove from the Site any Construction Plant and other property provided by that Excluded NOP. If that Excluded NOP fails to do so not less than 15 Business Days after notice to it of the non-defaulting Participants' intention to do so (but

without being responsible for any loss or damage), then, without derogating from the Owner's ownership of such Construction Plant pursuant to Section 16.2.5 of the Agreement, the non-defaulting Participants may remove and/or sell any such Construction Plant or other property which is not owned by the Owner.

- 1.2.7 An Excluded NOP must execute all documents and do all things necessary to give effect to this Section 1.2 and Section 1.3.1.
- 1.2.8 Notwithstanding Sections 6.2 and 6.3 of the Agreement, but subject to Section 40 of the Agreement, each other Party may recover from an Excluded NOP following service of the relevant Exclusion Notice any and all losses, damages, costs and expenses suffered by it arising out of:
  - 1.2.8.1 the relevant Default;
  - 1.2.8.2 the exclusion of the Excluded NOP;
  - 1.2.8.3 any neglect, default or non-performance by the Excluded NOP under this Agreement prior to the date of the relevant Exclusion Notice;
  - 1.2.8.4 any breach of this Section 1.2 or Section 1.3 by that Excluded NOP after the date of the relevant Exclusion Notice;
  - 1.2.8.5 any increased Painshare and/or reduced Gainshare caused by the matters referred to in Sections 1.2.8.1 to 1.2.8.4 or Section 1.2.8.6; or
  - 1.2.8.6 any failure to appoint or delay in appointing a Replacement NOP (and it is the ALT's and Owner's sole and absolute discretion as to whether a Replacement NOP should be sought following an exclusion), providing the Parties have acted in accordance with this Agreement in seeking to appoint such a replacement.

### **1.3 Rights and obligations of the non-defaulting Participants following an exclusion**

- 1.3.1 Save for any rights or obligations under this Section 1, following an Exclusion Notice the obligations of the non-defaulting Participants under this Agreement are not affected or discharged by that Exclusion Notice and the non-defaulting NOPs acknowledge and agree that they remain liable under this Agreement notwithstanding the discharge of the relevant Excluded NOP under Section 1.2.1.
- 1.3.2 The non-defaulting Participants may employ and pay other persons to replace the Excluded NOP in the performance of the Works and may use all Materials and Construction Plant provided by the Excluded NOP as necessary to perform the Works.
- 1.3.3 The non-defaulting Participants must execute all documents and do all such things on behalf of an Excluded NOP, including making decisions on behalf of the Excluded NOP's representatives at the ALT, as are necessary to give effect to this Section 1.3.
- 1.3.4 Subject to Section 1.6, if agreed by the ALT a Replacement NOP may be appointed by the Owner to replace an Excluded NOP.
- 1.3.5 Following any exclusion under this Section 1, as soon as the Owner is aware that it is unable to procure a Replacement NOP in accordance with Section 1.6 the Owner may decide:
  - 1.3.5.1 to proceed with the Works without a Replacement NOP; or

1.3.5.2 require that this Agreement is terminated for default under Section 2, and for this purpose the Owner must promptly serve a notice under Section 2.1.1, and the Excluded NOP is deemed to be the Defaulting Participant for the purpose of Section 2.

#### **1.4 No adjustment of the Fee or Target Outturn Cost following an exclusion**

There is no adjustment to the Target Outturn Cost arising from the exclusion of an Excluded NOP or the service of an Exclusion Notice.

#### **1.5 Payment of Actual Cost due to an exclusion**

Additional costs reasonably and actually incurred by the Participants (other than an Excluded NOP) following an Exclusion Notice, including additional amounts:

1.5.1 payable to the Participants;

1.5.2 payable to any Subcontractor;

1.5.3 arising from the appointment of additional Subcontractors; and/or

1.5.4 arising from the appointment of a Replacement NOP,

are payable as Actual Cost in accordance with this Agreement, save to the extent such are amounts which are to be covered by or included as part of the Fee.

#### **1.6 Appointment of replacement NOP following an exclusion**

1.6.1 Following an Exclusion Notice the ALT may seek the Owner's approval to the appointment of one or more additional NOPS to replace the Excluded NOP ("**Replacement NOP**").

1.6.2 The Owner must act reasonably in considering the approval of a proposed Replacement NOP pursuant to Section 1.6.1. One reason for not approving or delaying the approval of any replacement NOP is a requirement for the Owner to comply with procurement law or any regulatory requirement, and any such approval may be immediate or subject to a competitive procurement process. The Owner does not warrant it will be able to procure a Replacement NOP.

1.6.3 All costs incurred by the Participants in connection with the appointment of any Replacement NOP or approval thereof are recoverable as Actual Cost including costs of the Owner Participant.

1.6.4 Any costs reasonably and actually incurred by the Owner in accordance with this Section 1.6.2 are deemed to be recoverable as Actual Cost by the Owner Participant.

1.6.5 A failure or delay in appointing a Replacement NOP for any reason (including any act or omission of the Owner) does not relieve any NOP from its liabilities or obligations under this Agreement.

1.6.6 The ALT may withdraw a request for approval of a proposed Replacement NOP pursuant to Section 1.6.2 at any time by notice to the Owner.

1.6.7 Unless the Owner and the non-defaulting NOPS agree otherwise (and this Agreement, including the Risk or Reward Regime, is amended to reflect such agreement), and subject to approval by the Owner under Section 1.6.2, any Replacement NOP must be appointed

on the same terms as (and as a new party) to this Agreement without adjustment of the Target Outturn Cost.

## **2. TERMINATION FOR DEFAULT**

### **2.1 Termination by the Owner following a Default Notice**

2.1.1 Where the Owner has served a Default Notice in respect of any Default by a NOP and either:

2.1.1.1 that Default has not been rectified in accordance with Section 33.2.1 of the Agreement; or

2.1.1.2 Section 33.2.2 of the Agreement applies,

without prejudice to its rights under this Agreement or otherwise, the Owner may by notice to all Defaulting Participants and the other NOPs (if any) terminate this Agreement.

2.1.2 A notice given under Section 2.1.1 must specify that it is a Termination Notice.

### **2.2 Termination by a NOP following a Default Notice**

2.2.1 Where any NOP has served a Default Notice in respect of a Default by the Owner Participant and either that Default has not been rectified in accordance with Section 33.3.1 or 33.3.2 of the Agreement applies, without prejudice to its rights under this Agreement or otherwise, that NOP may by notice to the Owner and the other NOPs terminate this Agreement.

2.2.2 A notice given under Section 2.2.1 must specify that it is a Termination Notice.

### **2.3 Liability on termination for Default**

Notwithstanding Sections 6.2 and 6.3 of the Agreement, but subject to Sections 37 and 40.1 of the Agreement, if:

2.3.1 the Owner elects to terminate this Agreement under Section 2.1.1; or

2.3.2 a NOP elects to terminate this Agreement under Section 2.2.1,

the terminating Party and any non-defaulting Participants may recover from any Defaulting Participant any and all losses, damages, costs and expenses suffered by it arising out of (without double counting):

2.3.3 the relevant Default;

2.3.4 the termination of the Agreement;

2.3.5 any neglect, default or non-performance by the Defaulting Participant under this Agreement prior to the date of the relevant Termination Notice;

2.3.6 any breach of Section 36 of the Agreement by that Defaulting Participant after the date of the relevant Termination Notice;

2.3.7 the estimated outturn loss of Gainshare and/or increased Painshare of the Owner and any NOP caused by the termination (estimated at the date of termination and based on all the

circumstances existing at the date of termination) less any Interim Gainshare or Interim Painshare paid or payable on or before the date of termination (and Section 40.1 of the Agreement does not limit recovery under this Section 2.3.7); and

- 2.3.8 the estimated additional costs to the Owner of completing the Works caused by the termination (estimated at the date of termination and based on all the circumstances existing at the date of termination), notwithstanding that on or following such termination the Owner may elect not to complete the Works.

and provided that, on any termination (including where the Owner Participant is the Defaulting Participant), the Owner is not liable to any NOP for any loss of profit in relation to the parts of the Project which are not completed at the date of such termination whether or not such parts are never completed by the Owner or are completed by others and Section 40.1 of the Agreement does not limit recovery under Section 2.3.7 or 2.3.8.

### **3. TERMINATION AT WILL**

#### **3.1 Termination payments**

Subject to the Owner's rights under or in connection with this Agreement, including but not limited to a right to withhold or set off payment and recover all amounts for which any of the NOPs may be liable under this Agreement, if this Agreement is terminated in accordance with Section 34 of the Agreement, the Owner must pay the NOPs and the NOPs must pay the Owner (as the case may be):

- 3.1.1 an amount which is to be agreed by the Owner and the NOPs;
- 3.1.2 failing agreement, an amount determined by a Payment Expert,  
in accordance with the provisions of this Schedule.

#### **3.2 Matters to be taken into account in determining the payment due**

In agreeing the amount payable under this Section, the Participants in Good Faith must have regard to the following:

- 3.2.1 any:
- 3.2.1.1 Actual Costs and Fee;
- 3.2.1.2 Interim Gainshare/Interim Painshare (if any and as the case may be);
- 3.2.1.3 Gainshare or Painshare (if any and as the case may be); and
- 3.2.1.4 Performance Reward Amount or Performance Liability Amount (if any and as the case may be),

payable in accordance with Section 29 of the Agreement and Schedule 12 (Payment Procedures) for the Works which were performed prior to the date of termination and which have not been paid at the date of termination. In considering such amounts that may be payable in respect of such period, the Owner and the NOPs must, in Good Faith, estimate the amounts that would have been payable during the course of this Agreement, if this Agreement had not been terminated in accordance with Section 34 of the Agreement, on a pro-rata basis having regard to the Works which were performed prior to the date of termination.

- 3.2.2 the cost of Materials reasonably ordered by the NOPs for the Works, which the NOPs are legally liable to accept, but only if the Materials become the property of the Owner upon payment;
- 3.2.3 costs reasonably and actually incurred by the NOPs in the expectation of completing the whole of the Works, including any costs or damages incurred by reason of any of the NOPs having to terminate contractual arrangements with a Subcontractor that was entered into in accordance with this Agreement for the purposes of the Works, providing those costs and damages have not been accounted for in any payment by the Owner (including any payment to be made by the Owner under a new agreement pursuant to Section 3.2.6);
- 3.2.4 the NOP's reasonable costs of demobilization;
- 3.2.5 the reasonable costs of the NOPs complying with any directions given by the Owner upon, or subsequent to, termination;
- 3.2.6 if any of the NOPs agree to continue with the Works as contemplated by Section 36.3 of this Agreement, the extent to which Materials, orders made and other matters the subject of the costs outlined in this Section 3.2 can be used in any new agreement entered into between those NOPs for the continuation of those Works; and
- 3.2.7 any amounts which the Owner has previously paid to the NOPs.

### **3.3 The Owner's sole liability on termination**

- 3.3.1 Any payment due to a NOP under this Section 3 is the Owner's only liability to that NOP in relation to or in connection with a termination under Section 34 of the Agreement and the Owner is not otherwise liable to the NOPs for any cost, loss (including Consequential Loss), expense or damage incurred by the NOPs as a consequence of, or in connection with, this Agreement, the Works, or the termination.
- 3.3.2 Notwithstanding the undertaking to avoid issues arising between the Participants and litigation, arbitration or adjudication set out in Section 6.1 and 6.2 of the Agreement, the Owner and the NOPs are entitled to recover the amount as determined in accordance with this Section 3 if that amount is not paid within 20 Business Days of the date of agreement between the Participants or the date of determination by a Payment Expert in accordance with Section 4, as the case may be.

## **4. PAYMENT EXPERT**

### **4.1 Referral of certain issues to a Payment Expert**

- 4.1.1 If an issue arises between the Owner and the NOPs in respect of the amount payable under Section 3, then the Owner or any NOP may, by notice in writing to the Owner and the other NOPs (as the case may be), specify the nature of the issue and call for submission of the issue to a Payment Expert to determine it. In the event of a submission of the issue to the Payment Expert, the Payment Expert must determine the amount payable by the Owner to the NOPs or the NOPs to the Owner (as the case may be) by determining the net sum of the amounts set out in Section 3.2.

### **4.2 Nomination of Payment Expert**

The procedure for appointing the Payment Expert is as follows:

- 4.2.1 written notice must be given by the Participant calling for the appointment of the Payment Expert, including details of the matter to be resolved by the Payment Expert, to the Owner and other NOPs (as applicable).
- 4.2.2 If the matter is not resolved within five (5) Business Days from the date of the notice, the Owner and the NOPs must agree on a single Payment Expert to determine the issue.
- 4.2.3 If, within five (5) Business Days of the notice, the Owner and the NOPs fail to agree on a single Payment Expert, then the Owner and the NOPs must, as soon as practicable, apply to the Ontario Superior Court of Justice for appointment of the Payment Expert from a list of potential experts submitted to the court by the Owner and the NOPs or, if no list is submitted, by the court in its sole discretion.
- 4.2.4 Upon agreement of the Owner and the NOPs, or appointment of an Payment Expert under Section 4.2.3, the Owner, the NOPs and the Payment Expert must enter into an agreement that will govern the determination of the issue. That agreement must be consistent with the provisions of this Schedule 16.

#### **4.3 Payment Expert to have appropriate experience**

- 4.3.1 The Payment Expert must have appropriate commercial and practical experience and expertise in the area of the issue.
- 4.3.2 Any person nominated to act as an Payment Expert must fully disclose any interest or duty prior to that person's appointment. If that person has or may have any interest or duty that conflicts with their appointment as Payment Expert, then that person must not be appointed except with the agreement of the Owner and the NOPs.
- 4.3.3 In resolving the issue the Payment Expert must act impartially.

#### **4.4 Confidentiality**

- 4.4.1 It will be a term of the Payment Expert's appointment that the Payment Expert undertakes to keep confidential matters coming to the Payment Expert's knowledge by reason of the Payment Expert's appointment and carrying it out.

#### **4.5 Power of Payment Expert**

The Payment Expert will have the following powers:

- 4.5.1 to determine an issue regarding the amount payable under Section 3;
- 4.5.2 to inform itself independently as to facts to which the issue relates;
- 4.5.3 to obtain evidence from any person in relation to any aspect of the issue;
- 4.5.4 to receive written submissions and sworn and unsworn written statements and to photocopy documents and to act upon the same;
- 4.5.5 to consult with such other professionally qualified persons as the Payment Expert in its absolute discretion thinks fit; and
- 4.5.6 to take such measures as the Payment Expert thinks fit to expedite the completion of the issue resolution,



but the Payment Expert will only have the power to determine an issue regarding the amount payable under Section 3 and no other issue (unless the Owner and the NOPs otherwise agree).

#### **4.6 Timing of issue resolution**

It will be a term of the Payment Expert's appointment that the Payment Expert must be required to make a determination of the issue within 40 Business Days of the Payment Expert's appointment or such further period as the Owner and the NOPs may agree in writing.

#### **4.7 Written determination**

The Payment Expert must deliver a written determination that sets out the reasons for the determination and the findings of fact on which the determination is based.

#### **4.8 Issue resolution to be held in Ontario**

The issue resolution must be held in Ontario, Canada unless the Owner and the NOPs otherwise agree.

#### **4.9 Payment Expert's determination is final**

The Payment Expert must act as an expert and not an arbitrator. The determination is final and binding on the Owner and the NOPs except where the Payment Expert is in breach of the agreement referred to in Section 4.2.4, in the case of Manifest Error on the face of the determination, or if the Payment Expert has acted in bad faith.

#### **4.10 Costs of Payment Expert**

The costs of the Payment Expert must be borne equally by the Owner and the NOPs and are not Actual Costs.

#### **4.11 Referral to Payment Expert does not affect the obligations of the Participants**

The referral of any matter to an Payment Expert does not in any manner relieve any Participant from performing its obligations under this Agreement pending the determination of the issue.

## SCHEDULE 17

### ISSUE RESOLUTION PROCEDURES

#### 1. Issue Resolution Principles

1.1 The principles to underpin how issues will be handled by the Alliance are agreed as follows.

1.1.1 Issues resolved in accordance with the Alliance Principles.

1.1.2 Issues resolved at lowest practical level within the Alliance.

1.1.3 Issues resolved quickly.

1.1.4 Issues resolved via an agreed escalation procedure which covers people, authorities, issues and resolution time.

1.1.5 Final place for resolution of all issues is the ALT.

1.1.6 Issue resolution at the ALT is unanimous.

#### 2. Issue Resolution Process

2.1 The issue resolution process is as follows.

2.1.1 The ALT must use its best efforts to resolve the issue at no less than two separate ALT meetings.

2.1.2 If the issue cannot be resolved by the ALT, then the Owner shall, by notice in writing to the Participants, specify the nature of the issue and call for the submission to an expert (the "**ALT Appointed Expert**") to determine the matter in accordance with Section 3 of this Schedule.

2.1.3 If the ALT does not agree with the determination of the ALT Appointed Expert, as determined pursuant to and in accordance with Section 3 of this Schedule, then, subject to the no litigation, arbitration or adjudication principle set out in Section 6 of the Agreement, the Owner must determine (taking into account the nature of the issue) the manner in which the issue is to be resolved by nominating, by notice in writing to the Participants, one of the following issue resolution mechanisms for resolution of the issue:

2.1.3.1 except in circumstances where the no litigation, arbitration or adjudication principle set out in Section 6 applies, referral of the issue to arbitration in accordance with Section 4 of this Schedule;

2.1.3.2 determination of the issue by an expert ("**Expert**") in accordance with Section 5 of this Schedule. For clarity, the Expert shall not be the same person who performed the role of the ALT Appointed Expert in respect of the relevant issue; or

2.1.3.3 except in circumstances where the no litigation, arbitration or adjudication principle set out in Section 6 applies, commencement of legal proceedings to resolve the issue.

### **3. Referral to ALT Appointed Expert**

- 3.1** If the issue is referred by the Owner for determination by the ALT Appointed Expert, then the ALT Appointed Expert is to be selected by the ALT, which must in Good Faith confer to attempt to agree on an independent industry expert within five (5) Business Days of the Owner notifying the Participants that the issue be determined by an ALT Appointed Expert in accordance with this Section 3.
- 3.2** If the identity of the ALT Appointed Expert cannot be agreed to by the ALT within the five (5) Business Day period referred to in Section 3.1 of this Schedule, a Participant may apply to the Ontario Superior Court of Justice for appointment of the ALT Appointed Expert from a list of potential experts submitted to the court by the ALT or, if no list is submitted, by the court in its sole discretion.
- 3.3** The Participants must enter into an agreement with the appointed or agreed expert on such terms as the ALT Appointed Expert may require which are consistent with Section 3.4 of this Schedule and which do not in any way modify or vary the requirements of Section 3.4 of this Schedule.
- 3.4** The process required for determination of the issue by the ALT Appointed Expert must be administered as follows:
- 3.4.1 the Participants must:
- 3.4.1.1 deliver to the ALT Appointed Expert a notice setting out the parameters of the determination to be made by the ALT Appointed Expert, and if the Participants cannot agree on the parameters of the determination to be made, any Participant may provide to the ALT Appointed Expert a notice outlining the issues in dispute and the ALT Appointed Expert shall, as a threshold matter, determine the parameters of the determination to be made;
  - 3.4.1.2 not communicate with the ALT Appointed Expert without the prior written consent of the other Participants; and
  - 3.4.1.3 provide the ALT Appointed Expert with all of the information, documents and assistance necessary for the ALT Appointed Expert to make a determination in respect of the issue and ensure that such information is made available to all of the other Participants.
- 3.4.2 the ALT Appointed Expert will:
- 3.4.2.1 act as an expert and not as an arbitrator;
  - 3.4.2.2 proceed in any manner he or she thinks appropriate, without being bound by the rules of evidence, but whilst observing the rules of natural justice;
  - 3.4.2.3 take into consideration all of the documents, information and other material which the Participants give the ALT Appointed Expert including all of the documents, information and material relating to the facts in dispute and to arguments and submissions upon the matters in dispute;
  - 3.4.2.4 not be expected or required to obtain or refer to any other documents, information or material, but may do so if he or she thinks appropriate;
  - 3.4.2.5 be permitted to conduct inspections upon the giving of reasonable notice to the Participants;

- 3.4.2.6 use his or her own knowledge and expertise in forming his or her conclusion;
  - 3.4.2.7 make his or her determination concerning the issue within thirty (30) Business Days or such other timeframe as agreed by the ALT, from the acceptance by the ALT Appointed Expert of the appointment, or such extended period as the ALT Appointed Expert and the ALT may agree; and
  - 3.4.2.8 not communicate with one Participant without the knowledge of the other Participants;
  - 3.4.3 the ALT Appointed Expert may, if he or she thinks appropriate, arrange to meet or otherwise have discussions with the Participants, together but not separately, and in connection with any such meetings or discussions:
    - 3.4.3.1 a Participant may be accompanied by legal or other advisers; and
    - 3.4.3.2 the Participants and the ALT agree to be bound by such procedural directions as may be given by the ALT Appointed Expert, both in preparation for and during the course of the meeting or discussions;
  - 3.4.4 the Participants and the ALT agree and undertake to produce such information and documents as the ALT Appointed Expert may from time to time direct in such place and at such time as the ALT Appointed Expert may direct;
  - 3.4.5 the ALT Appointed Expert may commission his or her own advisers or consultants, including lawyers, accountants, bankers, engineers, surveyors or other technical consultants, to provide information to assist the ALT Appointed Expert in reaching his or her determination in respect of the issue;
  - 3.4.6 the Participants must indemnify (in equal shares) the ALT Appointed Expert for the reasonable cost of retaining those advisers or consultants;
  - 3.4.7 the ALT Appointed Expert will disclose to all of the Participants and the ALT any relationship or interest with the Participants or their respective officers, employees, contractors, consultants or agents who were involved in the reaching of the ALT Appointed Expert's determination in respect of the issue and any interest the ALT Appointed Expert has in the matters in dispute; and
  - 3.4.8 if the ALT Appointed Expert becomes aware of any circumstance which might reasonably be considered to adversely affect the ALT Appointed Expert's capacity to act independently or impartially, the ALT Appointed Expert will immediately inform the Participants.
- 3.5** The determination of the ALT Appointed Expert in respect of the issue made in accordance with this Section 3 of this Schedule is not binding on the Participants.

#### **4. Referral to arbitration**

- 4.1** If the Owner determines that the issue will be resolved by referral to arbitration, then any referral of the issue to arbitration must be in accordance with the *Arbitration Act, 1991* (Ontario).
- 4.2** The arbitration will be held in Toronto, Ontario or any other place as agreed by the ALT. The language of the arbitration shall be English.

- 4.3** The arbitrator of the issue is to be selected by the ALT, which must in Good Faith confer to attempt to agree on an arbitrator within five (5) Business Days of the Owner notifying the Participants that the issue be referred to arbitration in accordance with this Section 4 of this Schedule.
- 4.4** If the identity of the arbitrator cannot be agreed by the ALT within the five (5) Business Day period referred to in Section 4.3 of this Schedule, a Participant may apply to the Ontario Superior Court of Justice for appointment of the arbitrator from a list of potential arbitrators submitted to the court by the ALT or, if no list is submitted, by the court in its sole discretion.
- 4.5** The determination of the arbitrator in respect of the issue made in accordance with this Section 4 of this Schedule will be final and binding on the Participants except where there is a Manifest Error or the arbitrator has acted in bad faith and a Participant challenges the determination within five (5) Business Days of the determination being made by the arbitrator.

**5. Determination by Expert**

- 5.1** If the Owner determines that the issue will be determined by an Expert, then the Expert is to be selected by the ALT, which must in Good Faith confer to attempt to agree on an independent industry expert within 5 Business Days of the Owner notifying the Participants that the issue be determined by an Expert in accordance with this Section 5 of this Schedule.
- 5.2** If the identity of the Expert cannot be agreed by the ALT within the five (5) Business Day period referred to in Section 5.1 of this Schedule, a Participant may apply to the Ontario Superior Court of Justice for appointment of the Expert from a list of potential experts submitted to the court by the ALT or, if no list is submitted, by the court in its sole discretion.
- 5.3** The Participants must enter into an agreement with the appointed or agreed expert on such terms as the Expert may require which are consistent with Section 5.4 of this Schedule and which do not in any way modify or vary the requirements of Section 5.4 of this Schedule.
- 5.4** The process required for determination of the issue by the Expert must be administered as follows:
- 5.4.1 the Participants must:
- 5.4.1.1 deliver to the Expert a notice setting out the parameters of the determination to be made by the Expert, and if the Participants cannot agree on the parameters of the determination to be made, any Participant may provide to the Expert a notice outlining the issues in dispute and the Expert shall, as a threshold matter, determine the parameters of the determination to be made;
  - 5.4.1.2 not communicate with the Expert without the prior written consent of the other Participants; and
  - 5.4.1.3 provide the Expert with all of the information, documents and assistance necessary for the Expert to make a determination in respect of the issue and ensure that such information is made available to all of the other Participants; and
  - 5.4.1.4 be afforded the opportunity to make written submissions to the Expert with supporting documents and, with the Expert's permission, make oral submissions to the Expert, based upon a specified timetable set by the Expert.
- 5.4.2 the Expert will:
- 5.4.2.1 act as an expert and not as an arbitrator;

- 5.4.2.2 proceed in any manner he or she thinks appropriate, consistent with Section 5.4.1 above, without being bound by the rules of evidence, but whilst observing the rules of natural justice;
  - 5.4.2.3 take into consideration all of the documents, information and other material which the Participants give the Expert including all of the documents, information and material relating to the facts in dispute and to arguments and submissions upon the matters in dispute;
  - 5.4.2.4 not be expected or required to obtain or refer to any other documents, information or material, but may do so if he or she thinks appropriate;
  - 5.4.2.5 be permitted to conduct inspections upon the giving of reasonable notice to the Participants;
  - 5.4.2.6 use his or her own knowledge and expertise in forming his or her conclusion;
  - 5.4.2.7 make his or her determination concerning the issue within thirty (30) Business Days from the acceptance by the Expert of the appointment, or such extended period as the Expert and the ALT may agree; and
  - 5.4.2.8 not communicate with one Participant without the knowledge of the other Participants;
- 5.4.3 the Expert may, if he or she thinks appropriate, arrange to meet or otherwise have discussions with the Participants, together but not separately, and in connection with any such meetings or discussions:
- 5.4.3.1 a Participant may be accompanied by legal or other advisers; and
  - 5.4.3.2 the Participants and the ALT agree to be bound by such procedural directions as may be given by the Expert, both in preparation for and during the course of the meeting or discussions;
- 5.4.4 the Participants and the ALT agree and undertake to produce such information and documents as the Expert may from time to time direct in such place and at such time as the Expert may direct;
- 5.4.5 the Expert may commission his or her own advisers or consultants, including lawyers, accountants, bankers, engineers, surveyors or other technical consultants, to provide information to assist the Expert in reaching his or her determination in respect of the issue;
- 5.4.6 the Participants must indemnify (in equal shares) the Expert for the reasonable cost of retaining those advisers or consultants;
- 5.4.7 the Expert will disclose to all of the Participants and the ALT any relationship or interest with the Participants or their respective officers, employees, contractors, consultants or agents who were involved in the reaching of the Expert's determination in respect of the issue and any interest the Expert has in the matters in dispute; and
- 5.4.8 if the Expert becomes aware of any circumstance which might reasonably be considered to adversely affect the Expert's capacity to act independently or impartially, the Expert will immediately inform the Participants.

**5.5** The determination of the Expert in respect of the issue made in accordance with this Section 5 of this Schedule will be final and binding on the Participants except where there is a Manifest Error or the Expert has acted in bad faith and a Participant challenges the determination within five (5) Business Days of the determination being made by the Expert.

## SCHEDULE 18

### LANDS

#### 1. DEFINITIONS AND INTERPRETATION

- 1.1 This Schedule 18 (Lands) consists of the main body of this Schedule 18 (Lands), Appendix A – Lands Table and Appendix B – Blockade Zone.
- 1.2 In this Schedule 18 (Lands), unless the context indicates a contrary intention, and subject to Section 1.3, terms which are defined in the Agreement (and not otherwise defined in this Schedule 18 (Lands)) shall have meanings given to them in the Agreement and, subject to Section 1.3, for the purposes of this Schedule 18 – Lands only, the following terms shall have the following meanings:
- 1.2.1 **“Bay Concourse”** means the public and customer concourse within the easternmost part of Union Station with access to Bay Street (to East) and VIA Concourse (to West).
- 1.2.2 **“Bay East Teamway”** means the portion of the covered sidewalk on the east side of Bay Street adjoining the stairs that provide access to track level. For clarity such sidewalks only include the sidewalks that form part of Union Station and not the sidewalks that form part of the adjacent public streets.
- 1.2.3 **“Bay West Teamway”** means the portion of the covered sidewalk on the west side of Bay Street adjoining the stairs that provide access to track level. For clarity, such sidewalks only include the sidewalks that form part of Union Station and not the sidewalks that form part of the adjacent public streets.
- 1.2.4 **“Blue Route”** means the area of Union Station connecting the Scotiabank Galleria to the Bay Concourse arcade.
- 1.2.5 **“BOH”** means the “Back of House” spaces for operations equipment, building and systems maintenance or similar access, and not intended for public or customer access.
- 1.2.6 **[REDACTED]**
- 1.2.7 **[REDACTED]**
- 1.2.8 **“Jarvis Gate Lands”** means the designated project access onto the USRC (Union Station Rail Corridor) providing access to/ from the east side of Union Station. Secure vehicular access to this site will be from the west side of lower Jarvis Street through gate LE14 (located immediately north of the Gardiner Expressway overpass).
- 1.2.9 **“Lands”** means the three-dimensional (3D) physical limits of the project area, whereby each dimension is identified by a horizontal component (length and width) and stratified upper and lower vertical limits, including fee simple and temporary easement areas such as air rights, lands, and building spaces within the project scope of works construction zones at Union Station, and Rail Corridor access gateway spaces east and west of Union Station.
- 1.2.10 **“New South Concourse”** means the proposed new public and customer concourse to be located within the southernmost portion of Union Station with access to York Street (to West) and Bay Street (to East) and directly north into York Concourse, VIA Concourse, and Bay Concourse as well as vertically up to the train platform level.



- 1.2.11 **“New South Platform”** means the new platform to be constructed and located directly at track level, spanning from York Street in the west to Bay Street in the east at the southernmost crash-wall as per the Reference Concept Design.
- 1.2.12 **“Rail Corridor”** refers to the USRC (Union Station Rail Corridor) which is the assembly of rail tracks, signals, platforms, retaining walls, walkways, vehicular paths, and all other infrastructure relating to rail operations and maintenance, bounded approximately by Strachan Avenue (to West) and Don Valley Parkway (to East). It is approximately 6.4km (4.0miles) long and converges to 16 tracks at Union Station, making it the largest passenger rail facility in Canada.
- 1.2.13 **“RCD”** or the **“Reference Concept Design”**, or functional design, is typically used in an AFP (Alternative Financing and Procurement) model as an input to development of the Request for Proposal (RFP). It is considered as a [REDACTED]% level of design development and comes in PDF and CAD format. The project Reference Concept Design consists of drawings for Architectural, Mechanical, Electrical, Structural, Track and Signals designs created by others.
- 1.2.14 [REDACTED]
- 1.2.15 **“Truck Tunnel”** means the below grade truck tunnel which provides (and will continue to provide) vehicular access to owners, occupants and other users of the lands through which such tunnel passes. Vehicular access to this site is from Lakeshore Boulevard west, from westbound lanes on west side of Bay Street.
- 1.2.16 **“Union Station Headhouse”** means the historic Union Station enclosed building bounded by Front Street West (to North), York Street (to West), Bay Street (to East), and attached to the semi-enclosed trainshed to the South.
- 1.2.17 **“Union Station”** means the historic development inclusive of the Union Station Headhouse and all transportation infrastructure (i.e. tracks, platforms, signals bridges, and train-shed) within the Lands bounded by Front Street West (to North), York Street (to West), Bay Street (to East), and the existing crash-wall directly south of the existing train-shed.
- 1.2.18 **“VIA Concourse”** means the public and customer concourse within the central part of Union Station providing access to VIA rail train loading areas.
- 1.2.19 **“York Concourse”** means the public and customer concourse within the westernmost part of Union Station with access to York Street (to West) and VIA Concourse (to East).
- 1.2.20 **“York East Teamway”** means the portion of the covered sidewalk on the east side of York Street adjoining the stairs that provide access to track level. For clarity, such sidewalks only include the sidewalks that form part of Union Station and not the sidewalks that form part of the adjacent public streets).
- 1.2.21 **“York West Teamway”** means the portion of the covered sidewalk on the west side of York Street adjoining the stairs that provide access to track level. For clarity, such sidewalks only include the sidewalks that form part of Union Station and not the sidewalks that form part of the adjacent public streets.

**1.3** Notwithstanding that the term “Lands”, “Rail Corridor” and “Union Station” are defined in the Agreement in a manner differently than set forth in Section 1.2 of this Schedule 18 (Lands), for purposes of Appendix A – Lands Table of this Schedule 18 (Lands) and for purposes of interpreting each of the definitions contained in Section 1.2 of this Schedule 18 (Lands) in which the term “Lands”, “Rail Corridor” and “Union Station” (as applicable) is referenced, each reference to

“Lands”, “Rail Corridor” and “Union Station” in Section 1.2 of this Schedule 18 (Lands) and Appendix A of this Schedule 18 (Lands) shall have the meaning set forth in Section 1.2 of this Schedule 18 (Lands). For all other purposes of the Agreement, including Sections 2.1 to 2.5 of this Schedule 18 (Lands), any reference to “Lands”, “Union Station” or “Rail Corridor” shall have the meanings given to them in the Agreement.

## 2. LANDS – BASIC RULES AND REQUIREMENTS

2.1 Subject to Sections 2.2 and 2.3 of this Schedule 18 (Lands), the Lands will be made available to the Participants in accordance with and subject to Section 15 of the Agreement from the date provided as the “Available Date” in the table in Appendix A of this Schedule 18 (Lands) (and if no date is indicated, the Available Date will be the Commencement Date) until the earlier of:

2.1.1 the end of the period or end date in the column named “Duration or End Date” in the table in Appendix A of this Schedule 18 (Lands); and

2.1.2 the Date of Completion of the whole of the Works.

2.2 To the extent that new Tranches of the Work are created in accordance with Section 27.6.2 of the Agreement after the Commencement Date, the ALT shall work together with the Owner’s Representative to make adjustments to the table in Appendix A of this Schedule 18 (Lands), as necessary as a result of the implementation of new Tranches of Work, including adjustments to the “Available Date” and “Duration or End Date” for all of the Lands, as determined by the Owner in consultation with the ALT.

2.3 To the extent that, the Participants are required to rectify Defects on the Lands or portion(s) thereof or are required to access the Lands or portion(s) thereof in order to undertake their responsibilities for the care and protection of the Works or to complete any outstanding Works under Section 25 of the Agreement, in each case, beyond the end date for access set out in Section 2.1 of this Schedule 18 (Lands), provided that the Participants provide written Notice to the Owner no later than 90 days prior to the commencement date of the performance of rectification of Defects or the Works, as applicable, Owner shall be responsible for acquiring access required to carry out the rectification of Defects or the Works, as applicable.

2.4 Pursuant to this Schedule 18 (Lands), for certain Lands, Metrolinx will enter into easement, licence, or similar agreement(s) after the Commencement Date. Metrolinx intends to enter into such agreement(s) on substantively the same or better terms and conditions providing for access as the existing lease, easement, licence or similar agreements that have been entered into by Metrolinx and that have been provided to the NOPs prior to the Commencement Date or are currently contemplated in the “Restrictions and Requirements” column of Appendix A to this Schedule 18 (Lands) (the “**Standard Agreements**”). If, after the Commencement Date,

2.4.1 Metrolinx enters into one or more lease, easement, licence or similar agreement(s) in respect of the Lands; or

2.4.2 Metrolinx acquires Land that is subject to any lease, easement, licence or similar agreement(s), and such agreement(s) have substantively the same or better terms and conditions providing for access as the Standard Agreements, such agreement(s) shall be treated, for the purposes of Section 16.6.3 and 19.1.2 of the Agreement and for the purpose of Schedule 21 (Encumbrances), as though the Participants had knowledge of such agreements prior to the Commencement Date.

2.5 Subject to the Participants’ obligations with respect to Consents and the terms and conditions of the Agreement, the Participants access to and use of the Lands for the purposes of the Works is

subject to the Encumbrances, and to any rules, restrictions, access protocols, qualifications and requirements contained in:

- 2.5.1 the applicable grant, including the rules, restrictions, qualifications and requirements that are set out in this Section 2.5, and the rules, restrictions, qualifications and requirements that are set out or referred to in the column marked "Restrictions and Requirements" in the table in Appendix A of this Schedule 18 (Lands), including, without limitation, all agreements and easements referenced in such column;
- 2.5.2 the Project Proposal; and
- 2.5.3 Schedule 19 (Rail Corridor Access).

**APPENDIX A TO SCHEDULE 18**  
**LANDS TABLE**

**[REDACTED]**

**APPENDIX B TO SCHEDULE 18**  
**BLOCKADE ZONE**

**[REDACTED]**

## SCHEDULE 19

### RAIL CORRIDOR ACCESS

1. **Definitions.** In this Schedule 19, unless the context indicates a contrary intention, terms that are defined in the Agreement (and not otherwise defined in this Schedule 19 (Rail Corridor Access)) shall have the meaning given to them in the Agreement and the following terms shall have the following meanings:
- (a) **“Additional White Period Possession”** has the meaning given in Section 10(a).
  - (b) **“Additional Disruptive Possession”** has the meaning given in Section 10(b).
  - (c) **“Alternative Transport”** means the use of a bus bridge or the use of alternative transportation.
  - (d) **“Canadian Rail Operating Rules”** or **“CROR”** means the Transport Canada Canadian Rail Operating Rules.
  - (e) **“Cancelled Disruptive Possession”** has the meaning given in Section 9(b).
  - (f) **“Cancelled White Period Possession”** has the meaning given in Section 9(a).
  - (g) **“Disruptive Possession”** has the meaning given in the Metrolinx USRC Access Standard.
  - (h) **“Failure to Vacate – Disruptive Possession”** has the meaning given in Section 6(b).
  - (i) **“Failure to Vacate – White Period Possession”** has the meaning given in Section 6(a).
  - (j) **“GO Transit Track Standards”** means the GO Transit Track Standards dated May 2018, as amended from time to time.
  - (k) **“GO Transit Track Worker Safety Instructions (TWSI)”** means the Track Worker Safety Instructions developed by Metrolinx, as amended from time to time.
  - (l) **“Incident of Delay”** means an incident of delay that causes a Train Delay and may cause a subsequent related Train Delay.
  - (m) **“Metrolinx CSMP”** means the Metrolinx Construction Safety Management Program, as amended from time to time.
  - (n) **“Metrolinx Safety Charter”** means Metrolinx’s safety charter, as in effect from time to time.
  - (o) **“Metrolinx Union Station Parking Management Guidelines”** means the parking management guidelines for Union Station, as amended from time to time.
  - (p) **“Metrolinx USRC Access Standard”** means the Metrolinx USRC Access Standard, as amended from time to time.
  - (q) **“Metrolinx Work Plan Methodology Template (WPM)”** means the work plan methodology template that has been approved by Metrolinx for each specific track access, as amended from time to time.

- (r) **“Possession Pack”** means the information related to all of the possessions occurring within a designated area for a specified period of time, including the date and time period for applicable track possessions; a schedule of the effective time for each piece of protection and all relevant information relating to the work occurring within that protection, key contact information for individuals on site and on-call, schematic of work locations, schematic of protection, gate access schedule, and related materials.
- (s) **“Rules of the Route”** means the rules which details what time each piece of track is available for the calendar year and includes schematics, operating instructions, and track by track time availability, as such rules are updated annually.
- (t) **“Train Cancellation”** means the cancellation of an in-service passenger train or non-passenger train, or the cancellation of a passenger or non-passenger train that is heading into or out of service.
- (u) **“Train Delay”** has the meaning given in Section 7(a).
- (v) **“UP Express”** means UP Express and its successors.
- (w) **“White Period Possession”** has the meaning given in the Metrolinx USRC Access Standard.

2. **Standards.** The Participants shall at all times comply with all rules, restrictions, requirements and conditions (including all steps, processes, procedures, submittal requirements and deliverable requests) set forth in each of the following when, among other things, performing the Works, accessing the USRC and applying to Metrolinx for access to the USRC and property adjacent to the USRC, applying for track possessions, using and accessing the Lands and the Site, and rail corridor access, Land access and Site access will be managed in accordance with the following:

- (a) the Metrolinx USRC Access Standard, including the reference documents and appendices referred to therein;
- (b) the Metrolinx Rules of the Route applicable to the proposed possession;
- (c) the Metrolinx Safety Charter;
- (d) the Canadian Rail Operating Rules;
- (e) the Metrolinx CSMP;
- (f) the GO Transit Track Worker Safety Instructions (TWSI);
- (g) the Metrolinx Union Station Rail Corridor Parking Management Guidelines;
- (h) the Metrolinx Work Plan Methodology Template (WPM);
- (i) the applicable entry, access and transit protocols required by adjacent third party property owners; and
- (j) any other applicable Authority Requirements.

The rules, restrictions, requirements and conditions (including all steps, processes, procedures, submittal requirements and deliverables requests) set forth in or required by the items specified in Sections 2(a) through (j) above are, for all purposes of the Agreement, deemed to be rules, restrictions, requirements and conditions required by the Agreement and set out in the Agreement.

3. **Construction Schedules and Possessions.** In accordance with the Metrolinx USRC Access Standard, possession requests within the USRC must follow the T-8 planning timeline.
4. **Protection of Infrastructure.** When any activities are undertaken on or about the rail infrastructure within the limits of the USRC, the NOPs and the NOP Parties shall protect existing track and signal infrastructure (**including** signal troughs) from damage, and they shall install and maintain track planking in accordance with the GO Transit Track Standards for off track vehicle pathways, except as otherwise specifically approved by Metrolinx in writing.
5. **Owner Participant Actual Costs.** The costs that will be incurred by the Owner as specified in Sections 6,7,8,9 and 10 of this Schedule 19 are deemed to be the Actual Costs that will be incurred by the Owner in the circumstances described in such sections, and, for all purposes of this Agreement, such costs of the Owner are to be treated as Actual Costs incurred by the Owner Participant. For clarity, such costs incurred by the Owner do not give rise to any adjustment to the Target Outturn Cost.
6. **Overrun Track Possessions**
  - (a) For a White Period Possession, if the Participants fail to vacate and reinstate any of the tracks subject to a White Period Possession in accordance with the GO Transit Track Standards by the date and time set out in the Possession Pack for such White Period Possession (each, a **“Failure to Vacate - White Period Possession”**) the Owner will incur a cost of **[\$REDACTED]** for each minute of the Failure to Vacate – White Period, until the Failure to Vacate – White Period triggers a Train Delay.
  - (b) For a Disruptive Possession, if the Participants fail to vacate and reinstate any of the tracks subject to a Disruptive Possession in accordance with the GO Transit Track Standards by the date and time set out in the Possession Pack for such Disruptive Possession (each, a **“Failure to Vacate – Disruptive Possession”**) the Owner will incur a cost of **[\$REDACTED]** for each minute of the Failure to Vacate – Disruptive Possessions, until the Failure to Vacate – Disruptive Possession triggers a Train Delay.
7. **Train Delays**
  - (a) If one or more Participants, contrary to its obligations pursuant to the Project Alliance Agreement,
    - (i) causes a delay to a GO Transit in-service passenger train or a GO Transit train without passengers that is heading into service;
    - (ii) causes a delay to a UP Express in-service passenger train;
    - (iii) causes a delay to a VIA Rail in-service passenger train or a VIA Rail train without passengers that is heading into service; or
    - (iv) causes a delay to a CN freight train,

(each, a **“Train Delay”**), the Owner will incur costs in the following amounts:

    - (v) for each Train Delay that lasts for five minutes or more, **[\$REDACTED]** for each minute of that Train Delay (for clarity, including the first five minutes) up to (and including) minute 14 of such Train Delay; plus
    - (vi) for each Train Delay that lasts for 15 minutes or more, **[\$REDACTED]** for each minute of that Train Delay commencing at minute 15; plus



- (vii) an amount of \$[REDACTED] for each Train Delay to a GO Transit in-service passenger train or a GO Transit train without passengers that is heading into service that last 15 minutes or more; plus
  - (viii) an amount of \$[REDACTED] for each Train Delay to a UP Express in-service passenger train that lasts 15 minutes or more; plus
  - (ix) an amount of \$[REDACTED] for each Train Delay to a VIA Rail in-service passenger train or a VIA Rail train without passengers that is heading into service that lasts for one hour or more, but less than four hours; plus
  - (x) an amount of \$[REDACTED] for each Train Delay to a VIA Rail in-service passenger train or a VIA Rail Train without passengers that is heading into service that lasts for four hours or more.
- (b) The costs incurred by the Owner for a Train Delay to a GO Transit train or a UP Express train set out in this Schedule 19 shall not apply if the Owner or the Owner's Representative has agreed with the Participants, in advance and in writing, that such delay to the GO Transit train or the UP Express train will not result in costs being incurred by the Owner, as set forth in this Schedule 19.
  - (c) For the purpose of calculating the Actual Costs that will be incurred by the Owner in accordance with this Section 7 of this Schedule 19, the timing (including commencement, duration and cessation) of any Train Delay shall be determined based on the train data that is established and maintained by the Network Operations Control Center.

## 8. Train Cancellations

- (a) If, in the sole discretion of Metrolinx, an Incident of Delay requires a Train Cancellation of a GO Transit train, in addition to any costs that the Owner incurs in accordance with Section 7(a)(v) and Section 7(a)(vi) or otherwise, the Owner will also incur costs in the following amounts:
  - (i) an amount of \$[REDACTED] for each Train Cancellation of a GO Transit train; plus
  - (ii) an amount of \$[REDACTED] for each Train Cancellation of a GO Transit train that requires the use of Alternative Transport.
- (b) If, in the sole discretion of Metrolinx, an Incident of Delay requires a Train Cancellation of a UP Express train, in addition to any costs that the Owner incurs in accordance with Section 7(a)(v) and Section 7(a)(vi) or otherwise, the Owner will also incur costs in the following amounts:
  - (i) an amount of \$[REDACTED] for each Train Cancellation of a UP Express in-service passenger train; plus
  - (ii) an amount of \$[REDACTED] for each Train Cancellation of a UP Express in-service passenger train that requires the use of Alternative Transport.
- (c) If, in the sole discretion of Metrolinx, an Incident of Delay requires a Train Cancellation of a VIA Rail train, in addition to any costs that Owner incurs in accordance with Section 7(a)(v) and Section 7(a)(vi) or otherwise, the Owner will also incur costs in the following amounts:

- (i) an amount of \$[REDACTED] for each Train Cancellation of a VIA Rail train; plus
- (ii) an amount of \$[REDACTED] for each Train Cancellation of a VIA Rail train that requires the use of Alternative Transport.

9. **Cancellation of Possessions**

- (a) If a Participant cancels a White Period Possession, without providing both the Owner and the Owner's Representative at least 15 Business Days prior notice of such cancellation, the Owner will incur a cost in the amount of \$[REDACTED].
- (b) If a Participant cancels a Disruptive Possession without providing the Owner and the Owner's Representative at least 40 Business Days prior Notice of such cancellation, the Owner will incur a cost in the amount of \$[REDACTED].
- (c) If a Participant cancels a Disruptive Possession without providing both the Owner and the Owner's Representative at least 20 Business Days prior Notice of such cancellation, the Owner will incur a cost in the amount of \$[REDACTED].
- (d) If the Owner requires the cancelation of a White Period Possession pursuant to Section 22.6 of the Agreement, the Owner will incur a cost in the amount of \$[REDACTED].
- (e) If the Owner requires the cancellation of a Disruptive Possession pursuant to Section 22.6 of the Agreement, the Owner will incur a cost in the amount of \$[REDACTED].

10. **Additional or Adjusted Track Possessions**

- (a) If the Participants require additional or adjusted White Period Possessions (including, for clarity, overrun track possessions) to perform Works outside the boundaries of the Blockade Zone in addition to the White Period Possessions set out in the Project Proposal (each, an "**Additional White Period Possession**"), and the Owner obtains for the Participants any such additional or adjusted track possessions pursuant to Section 22.3.1 of the Agreement, the costs incurred by the Owner in respect of each such additional or adjusted White Period Possession is \$[REDACTED] for each Additional White Period Possession.
- (b) If the Participants require additional or adjusted Disruptive Possessions (including, for clarity, overrun track possessions) to perform Works outside the boundaries of the Blockade Zone in addition to the Disruptive Possessions set out in the Project Proposal (each, an "**Additional Disruptive Possession**"), and the Owner obtains for the Participants any such additional or adjusted Disruptive Possessions pursuant to Section 22.3.1 of the Agreement, the costs incurred by the Owner in respect of each such additional or adjusted Disruptive Possession is \$[REDACTED] for each Additional Disruptive Possession.

## SCHEDULE 20

### FORM OF SUBCONTRACTOR DIRECT AGREEMENT

THIS SUBCONTRACTOR DIRECT AGREEMENT is made as of the [•] day of [•], 20[•].

**BETWEEN:**

**METROLINX**, a non-share capital corporation continued under the *Metrolinx Act*, 2006, S.O. 2006, c.16 and a Crown agency within the meaning of the *Crown Agency Act*, R.S.O. 1990, c.48, as amended in accordance with Section 3 of the *Metrolinx Act*, 2006 (Ontario).

(the “**Owner**”)

– AND –

**[[•], a corporation incorporated under the laws of [Ontario]]**

(the “**NOP**”)

– AND –

**[[•], a corporation incorporated under the laws of [Ontario]]**

(the “**Subcontractor**”)

**WHEREAS:**

- A. The Owner and the NOP have entered into the project alliance agreement dated [•] (“**Agreement**”), which requires the NOP to enter into, and to cause the Subcontractor to enter into, this Subcontractor Direct Agreement with the Owner.
- B. The Owner intends to enter into this Subcontractor Direct Agreement in accordance with Applicable Law.

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

1. **DEFINITIONS**

In this Subcontractor Direct Agreement, unless the context indicates a contrary intention, terms which are defined in the Agreement (and not otherwise defined in this Subcontractor Direct Agreement) shall have meanings given to them in the Agreement and the following terms shall have the following meanings:

- (a) “**Default Notice**” has the meaning given in Section 6(a);
- (b) “**Novation Notice**” has the meaning given in Section 7(b);
- (c) “**Party**” means the Owner, the the NOP or the Subcontractor, and “**Parties**” means, collectively, the Owner, the NOP and the Subcontractor;

- (d) **“Subcontract”** means the subcontract [•] **[Note to NOPs: Describe applicable subcontract.];** and
- (e) **“Substitute”** has the meaning given in Section 7(b).

## 2. INTERPRETATION

This Subcontractor Direct Agreement shall be interpreted according to the following provisions, unless the context requires a different meaning:

- (a) The headings in this Subcontractor Direct Agreement are for convenience of reference only, shall not constitute a part of this Subcontractor Direct Agreement, and shall not be taken into consideration in the interpretation of, or affect the meaning of, this Subcontractor Direct Agreement.
- (b) Unless the context otherwise requires, references to specific Sections, Clauses, Paragraphs, Subparagraphs, and other divisions are references to such Sections, Clauses, Paragraphs, Subparagraphs, or divisions of this Subcontractor Direct Agreement and the terms “Section” and “Clause” are used interchangeably and are synonymous.
- (c) Words importing persons or parties are to be broadly interpreted and include an individual, corporation, limited liability company, joint stock company, firm, partnership, joint venture, trust, unincorporated organization, Governmental Authority, unincorporated body of persons or association and any other entity having legal capacity, and the heirs, beneficiaries, executors, administrators or other legal representatives of a person in such capacity.
- (d) Unless the context otherwise requires, wherever used herein the plural includes the singular, the singular includes the plural, and each of the masculine, feminine and neuter genders include all other genders.
- (e) References to any standard, principle, agreement or document include (subject to all relevant approvals and any other provisions of this Subcontractor Direct Agreement concerning amendments) a reference to that standard, principle, agreement or document as amended, supplemented, restated, substituted, replaced, novated or assigned.
- (f) The words in this Subcontractor Direct Agreement shall bear their natural meaning.
- (g) References containing terms such as:
  - (i) “hereof”, “herein”, “hereto”, “hereinafter”, and other terms of like import are not limited in applicability to the specific provision within which such references are set forth but instead refer to this Subcontractor Direct Agreement taken as a whole; and
  - (ii) “includes” and “including”, whether or not used with the words “without limitation” or “but not limited to”, shall not be deemed limited by the specific enumeration of items but shall, in all cases, be deemed to be without limitation and construed and interpreted to mean “includes without limitation” and “including without limitation”.
- (h) In construing this Subcontractor Direct Agreement, the rule known as the *ejusdem generis rule* shall not apply nor shall any similar rule or approach to the construction of this Subcontractor Direct Agreement and, accordingly, general words introduced or followed by the word “other” or “including” or “in particular” shall not be given a restrictive meaning

because they are followed or preceded (as the case may be) by particular examples intended to fall within the meaning of the general words.

- (i) Where this Subcontractor Direct Agreement states that an obligation shall be performed “no later than” or “within” or “by” a stipulated date or event which is a prescribed number of days after a stipulated date or event, the latest time for performance shall be 5:00 p.m. on the last day for performance of the obligation concerned, or, if that day is not a Business Day, 5:00 p.m. on the next Business Day.
- (j) Where this Subcontractor Direct Agreement states that an obligation shall be performed “on” a stipulated date, the latest time for performance shall be 5:00 p.m. on that day, or, if that day is not a Business Day, 5:00 p.m. on the next Business Day.
- (k) Any reference to time of day or date means the local time or date in Toronto, Ontario.
- (l) Unless otherwise indicated, time periods will be strictly construed.
- (m) Whenever the terms “will” or “shall” are used in this Subcontractor Direct Agreement they shall be construed and interpreted as synonymous and to read “shall”.

### 3. **CONFLICT IN DOCUMENTS**

- (a) In the event of ambiguities, conflicts or inconsistencies between or among this Subcontractor Direct Agreement and the Agreement, this Subcontractor Direct Agreement shall prevail.

### 4. **AGREEMENTS**

- (a) If the Subcontractor gives the NOP any notice of any default(s) under the Subcontract that may give the NOP a right to terminate the Subcontract or to treat it as having been repudiated by the NOP or to discontinue the Subcontractor’s performance thereunder, then the Subcontractor shall concurrently provide the Owner with a copy of such notice, an executed copy of the Subcontract and set out in reasonable detail the default(s).

### 5. **NOTICE OF MATERIAL NON-PAYMENT OR LATE PAYMENT BY NOP**

- (a) The Subcontractor shall promptly notify the Owner in writing of any material non-payment or late payment of any sums properly due to the Subcontractor from the NOP under the Subcontract under a specified valid invoice and not subject to a genuine dispute, such notice to specify in reasonable detail the specific amounts and the applicable invoice.

### 6. **NO TERMINATION BY SUBCONTRACTOR WITHOUT DEFAULT NOTICE**

The Subcontractor shall not exercise any right it may have to terminate the Subcontract or to treat it as having been repudiated by the NOP or to discontinue the Subcontractor’s performance thereunder unless:

- (a) the Subcontractor first delivers an executed copy of the Subcontract and a written notice (a “**Default Notice**”) to the Owner setting out in reasonable detail the default(s) on which the Subcontractor intends to rely in terminating the Subcontract or to treat it as having been repudiated by the NOP or to discontinue the Subcontractor’s performance thereunder; and
- (b) within a period of five Business Days of the Owner receiving the Default Notice the default(s) on which the Subcontractor intends to rely in terminating the Subcontract or to treat it as having been repudiated by the NOP or to discontinue the Subcontractor’s

performance thereunder have not been remedied; and provided that if, within such period of five Business Days, the Owner agrees to pay the Subcontractor's reasonable costs of continued performance, such period of ten Business Days shall be extended to 45 days.

## 7. **NOVATION OF THE SUBCONTRACT**

- (a) The Subcontractor acknowledges and agrees that,
- (i) where the Agreement has been terminated by the NOP or due to the insolvency of the NOP;
  - (ii) where the Owner is entitled to issue an Exclusion Notice to the NOP pursuant to the Agreement;
  - (iii) where the Owner is entitled to terminate the Agreement in accordance with its terms; or
  - (iv) the Subcontractor is entitled to terminate the Subcontract due to a default by the NOP,

the Subcontract shall not terminate unless the Owner shall have failed to request a novation of the Subcontract pursuant to Section 7(b) within 30 days following the date of such termination.

- (b) If a condition in Sections 7(a)(i), 7(a)(ii) or 7(a)(iv) occurs, the Owner may deliver a notice (a "**Novation Notice**") electing to novate the Subcontract either to the Owner or a third party designated by the Owner in the Novation Notice (the "**Substitute**"), provided that the Owner can demonstrate to the Subcontractor, acting reasonably, that the Substitute shall have sufficient financial resources, or shall be supported by a satisfactory guarantee, to carry out the obligations of the Substitute under the Subcontract.
- (c) Subject to Section 7(d), upon receipt by the Subcontractor of a Novation Notice:
- (i) the NOP and the Subcontractor will be deemed to be released from their existing and future obligations under the Subcontract to each other (except with respect to any and all indemnities from the NOP or the Subcontractor to the other in respect of the period prior to the receipt of the Novation Notice), and the Owner or the Substitute, as applicable, and the Subcontractor will be deemed to assume those same existing and future obligations towards each other (except in respect of the aforesaid indemnities);
  - (ii) the existing and future rights of the NOP against the Subcontractor under the Subcontract and vice versa will be deemed to be cancelled (except with respect to any and all indemnities from the NOP or the Subcontractor to the other in respect of the period prior to the receipt of the Novation Notice), and the Owner or the Substitute, as applicable, and the Subcontractor will be deemed to acquire those same existing and future rights against each other (except in respect of the aforesaid indemnities), subject to any applicable credit from the Subcontractor to the Owner if the Owner pays for the Subcontractor's reasonable costs of continued performance pursuant to Section 6;
  - (iii) any guarantee, bond or covenant in favour of the NOP from any third party in respect of any term, provision, condition, obligation, undertaking or agreement on the part of the Subcontractor to be performed, observed or carried out by the Subcontractor as contained in, referred to, or inferred from the Subcontract shall

be assigned, novated or granted, as required by the Owner or the Substitute, as applicable, each acting reasonably, to the Owner or the Substitute, as applicable, and the Subcontractor shall cause such assignment, novation or grant on substantially the same terms and conditions as the original guarantee, bond or covenant, provided, however, that where the NOP shall continue to hold, or shall continue to be entitled to or have rights under, such guarantee, bond or covenant as security for any obligations of the Subcontractor, the assignment, novation or grant of the guarantee, bond or covenant to the extent of any such obligations to the NOP shall be conditional on the satisfaction of those obligations to the NOP; and

- (iv) at the Owner's request, the Subcontractor shall enter into, and shall cause any guarantor, covenantor or surety under any guarantee, bond or covenant referred to in Section 7(c)(iii) to enter into, and the Owner shall or shall cause the Substitute to enter into, as applicable, all such agreements or other documents as reasonably necessary to give effect to the foregoing, including an agreement between the Owner or the Substitute, as applicable, and the Subcontractor, acceptable to the Owner and the Subcontractor, each acting reasonably, on substantially the same terms as the Subcontract.
- (d) The NOP shall, at its own cost, cooperate fully with the Owner and the Substitute in order to achieve a smooth transfer of the Subcontract to the Owner or the Substitute, as applicable, and to avoid or mitigate in so far as reasonably practicable any inconvenience, including the administration of the Subcontract, ongoing supervisory activities and scheduling.
- (e) If the Owner gives a Novation Notice within the time provided hereunder at any time after the Subcontractor has terminated the Subcontract or treated it as having been repudiated by the NOP or discontinued the Subcontractor's performance thereunder in accordance with the terms of this Subcontractor Direct Agreement, the Subcontractor agrees that the Subcontract shall be reinstated and deemed to have continued despite any termination or treatment as having been repudiated, and the Owner shall pay the Subcontractor's reasonable costs for re-commencing the obligations it has under the Subcontract and the Subcontractor shall be entitled to reasonable compensation and/or relief for re-commencing such obligations, having regard to the additional costs and delays incurred as a result of having terminated the Subcontract or having treated it as being repudiated by the NOP or having discontinued its performance thereunder.
- (f) The Subcontractor acknowledges that if the Owner novates the Subcontract to itself pursuant to Section 7(b), the Owner shall have the right to further novate the Subcontract to a Substitute in accordance with and otherwise on, and subject to, the terms and conditions of this Subcontractor Direct Agreement.
- (g) The step-in rights granted to the Owner by novation, assignment or otherwise, shall take priority over those rights of any other third party granted rights under the Subcontract.

## 8. **SUBCONTRACTOR LIABILITY**

- (a) The Subcontractor acknowledges that the liability of the Subcontractor hereunder shall not be modified, released, diminished or in any way affected by:
  - (i) any independent inspection, investigation or enquiry into any matter which may be made or carried out by or for the Owner, or by any failure or omission to carry out any such inspection, investigation or enquiry; or

- (ii) the appointment by the Owner of any other person to review the progress of or otherwise report to the Owner in respect of the Project, or by any action or omission of such person whether or not such action or omission might give rise to any independent liability of such person to the Owner,

provided always that nothing in this Section 8 shall modify or affect any rights which the Subcontractor might have otherwise had to claim contribution from any other person whether under statute or common law.

- (b) In the event the Owner delivers a Novation Notice, the Subcontractor shall have no greater liability to the Owner or any Substitute than it would have had to the NOP under the Subcontract, and the Subcontractor shall be entitled in any proceedings by the Owner or any Substitute to rely on any liability limitations in the Subcontract.

**9. THE NOP AS PARTY**

- (a) The NOP acknowledges and agrees that the Subcontractor shall not be in breach of the Subcontract by complying with its obligations hereunder.

**10. ASSIGNMENT**

- (a) The NOP shall not, without the prior written consent of the Owner, assign, transfer, charge, subcontract, subparticipate or otherwise dispose of any interest in this Subcontractor Direct Agreement.
- (b) The Subcontractor acknowledges and agrees that notwithstanding any provision in the Subcontract to the contrary, following the termination of the Agreement for any reason, the NOP may assign any of its rights under the Subcontract to the Owner without restriction (including any need to obtain any consent or approval of the Subcontractor).
- (c) The Owner may assign or otherwise dispose of the benefit of the whole or part of this Subcontractor Direct Agreement to any person to whom Owner may assign or otherwise dispose of its interest in the Agreement pursuant to the Agreement.
- (d) The Subcontractor shall not, without the prior written consent of the Owner and the NOP, assign, transfer, charge, subcontract, subparticipate or otherwise dispose of any interest in this Subcontractor Direct Agreement except as may be permitted under the Subcontract.

**11. NOTICES**

- (a) All notices, requests, demands, instructions, certificates, consents and other communications required or permitted under this Subcontractor Direct Agreement shall be in writing (whether or not “written notice” or “notice in writing” is specifically required by the applicable provision of this Subcontractor Direct Agreement) and served by sending the same by registered mail, facsimile or by hand (in each case, with a copy by electronic submission), as follows:

If to the Owner:

Metrolinx  
[•]

Fax No.: [•]  
Attn.: [•]



If to the NOP:

**[Address]**

Fax No.: [•]

Attn: [•]

with a copy to:

**[Address]**

Fax No.: [•]

Attn.: [•]

If to the Subcontractor:

**[Address]**

Fax No.: [•]

Attn.: [•]

- (b) Where any notice is provided or submitted to a Party via facsimile, an original of the notice sent via facsimile shall promptly be sent by regular mail or registered mail. For greater certainty, a notice given via facsimile shall not be invalid by reason only of a Party's failure to comply with this Section 11(b).
- (c) Any Party to this Subcontractor Direct Agreement may, from time to time, change any of its contact information set forth in Section 11(a) by prior notice to the other Parties, and such change shall be effective on the Business Day that next follows the recipient Party's receipt of such notice unless a later effective date is given in such notice.
- (d) Subject to Sections 11(e), 11(f) and 11(g):
  - (i) a notice given by registered mail shall be deemed to have been received on the third Business Day after mailing;
  - (ii) a notice given by hand delivery shall be deemed to have been received on the day it is delivered; and
  - (iii) a notice given by facsimile shall be deemed to have been received on the day it is transmitted by facsimile.
- (e) If the Party giving the notice knows or ought reasonably to know of difficulties with the postal system which might affect negatively the delivery of mail, any such notice shall not be mailed but shall be made or given by personal delivery or by facsimile transmission in accordance with this Section 11.
- (f) If any notice delivered by hand or transmitted by facsimile is so delivered or transmitted, as the case may be, either on a day that is not a Business Day or on a Business Day after 4:00 p.m. (recipient's local time), then such notice shall be deemed to have been received by such recipient on the next Business Day.
- (g) A notice given by facsimile shall be deemed to have been received by the recipient on the day it is transmitted only if a facsimile transmission report (maintained by the sender) indicates that the transmission of such notice was successful.

12. **AMENDMENTS**

This Subcontractor Direct Agreement may not be varied, amended or supplemented except by an agreement in writing signed by duly authorized representatives of the Parties and stating on its face that it is intended to be an amendment, restatement or other modification, as the case may be, to this Subcontractor Direct Agreement.

13. **WAIVER**

- (a) No waiver made or given by a Party under or in connection with this Subcontractor Direct Agreement shall be binding or effective unless the waiver is in writing, signed by an authorized representative of the Party giving such waiver, and delivered by such Party to the other Parties. No waiver made with respect to any right, power or remedy in one instance will be deemed to be a waiver with respect to any other instance involving the exercise of such right, power, or remedy or with respect to any other right, power, or remedy.
- (b) Failure by any Party to exercise any of its rights, powers or remedies hereunder or its delay to do so shall not constitute a waiver of those rights, powers or remedies. The single or partial exercise of a right, power or remedy shall not prevent its subsequent exercise or the exercise of any other right, power or remedy.

14. **RELATIONSHIP BETWEEN THE PARTIES**

The Parties are independent contractors. This Subcontractor Direct Agreement is not intended to and does not create or establish between the Parties any relationship as partners, joint venturers, employer and employee, master and servant, or, except as provided in this Subcontractor Direct Agreement, of principal and agent.

15. **RIGHT TO DESIGNATE**

At any time and from time to time, the Crown may designate any ministry, branch, agency, division, department or office of the Government of Ontario to carry out administrative responsibility for the rights and obligations of the Owner under this Subcontractor Direct Agreement and the NOP and the Subcontractor may deal exclusively with the designated person in respect of all such matters and is entitled to rely on the actions, directions, requests, notices, consents, approvals, waivers, comments relating to the review of documentation and other administrative matters and decisions determined by such designated person from time to time, until the Crown has notified the NOP and the Subcontractor in writing that such designated person is no longer the person designated by the Crown hereunder and such notice shall have effect on the later of the date of delivery of such notice and the date specified in the written notice. The Crown shall advise the NOP and the Subcontractor in writing of any designation hereunder. The rights and obligations of the parties to this Subcontractor Direct Agreement shall be in no way affected by reason of any such designation. the NOP and the Subcontractor acknowledge the right of the Crown to delegate administrative responsibilities hereunder as set forth in this Section 15.

16. **ENTIRE AGREEMENT**

Except where provided otherwise in this Subcontractor Direct Agreement, this Subcontractor Direct Agreement constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings, whether oral, written, express or implied, concerning the subject matter of this Subcontractor Direct Agreement.

17. **SEVERABILITY**

Each provision of this Subcontractor Direct Agreement shall be valid and enforceable to the fullest extent permitted by law. If any provision of this Subcontractor Direct Agreement is declared invalid, unenforceable or illegal by the courts of a competent jurisdiction, such provision may be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Subcontractor Direct Agreement. If any such provision of this Subcontractor Direct Agreement is invalid, unenforceable or illegal, the Parties shall, acting in good faith, promptly negotiate new provisions to eliminate such invalidity, unenforceability or illegality and to restore this Subcontractor Direct Agreement as near as possible to its original intent and effect.

18. **ENUREMENT**

This Subcontractor Direct Agreement shall enure to the benefit of, and be binding on, each of the Parties and their respective successors and permitted transferees and assigns.

19. **GOVERNING LAW AND JURISDICTION**

- (a) This Subcontractor Direct Agreement shall be governed by and construed in accordance with the laws of Ontario and the laws of Canada applicable therein and shall be treated in all respects as an Ontario contract, without regard to conflict of laws principles.
- (b) The Parties agree that the courts of the Province of Ontario and all courts competent to hear appeals therefrom shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Subcontractor Direct Agreement and hereby irrevocably attorn to the exclusive jurisdiction of such courts.
- (c) Nothing in this Subcontractor Direct Agreement affects the rights, protections and immunities of the Crown under the *Crown Liability and Proceedings Act*, 2019, S.O. 2019, c. 7, Sched. 17.

20. **FURTHER ASSURANCE**

Each Party shall do all things, from time to time, and execute all further documents necessary to give full effect to this Subcontractor Direct Agreement.

21. **LANGUAGE OF AGREEMENT**

Each Party acknowledges having requested and being satisfied that this Subcontractor Direct Agreement and related documents be drawn in English. Chacune des parties reconnaît avoir demandé que ce document et ses annexes soient rédigés en anglais et s'en déclare satisfaite.

22. **COUNTERPARTS**

This Subcontractor Direct Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the Parties shall constitute a full, original and binding agreement for all purposes. Counterparts may be executed either in original or faxed form provided that any Party providing its signature in faxed form shall promptly forward to such Party an original signed copy of this Subcontractor Direct Agreement which was so faxed.

23. **COPYRIGHT NOTICE**

The Parties acknowledge that the Owner is the exclusive owner of copyright in the Agreement and this Subcontractor Direct Agreement.

*[SIGNATURE PAGES IMMEDIATELY FOLLOW]*

**IN WITNESS WHEREOF** the Parties have executed this Subcontractor Direct Agreement as of the date first above written.

**METROLINX**

Per:

\_\_\_\_\_  
Name:

Title:

Per:

\_\_\_\_\_  
Name:

Title:

I/we have authority to bind the corporation.

**[NOP]**

Per:

\_\_\_\_\_  
Name:

Title:

Per:

\_\_\_\_\_  
Name:

Title:

I/we have authority to bind the corporation.

**[SUBCONTRACTOR]**

Per:

\_\_\_\_\_  
Name:

Title:

Per:

\_\_\_\_\_  
Name:

Title:

I/we have authority to bind the corporation.

## SCHEDULE 21

### ENCUMBRANCES

- (a) For purposes of this Schedule 21, the defined term “Lands” and “Additional Lands” shall include any portion of the Lands and Additional Lands (if any).
- (b) Each of the following, to the extent affecting the interest (whether real property interest or contractual interest) of Metrolinx in the Lands or Additional Lands (if any) or any other person who owns the Lands (or any portion thereof) or the Additional Lands (or any portion thereof), is, in each case, considered to be an encumbrance for the purposes of the Agreement (each, an “**Encumbrance**”):
- (i) All encumbrances, pledges, liens, charges, security agreements, security interests, leases, subleases, title retention agreements, mortgages, easements, encroachments, right-of-ways, restrictive covenants, work orders, options or adverse claims of any kind or character whatsoever relating to the title to the Lands disclosed or noted in Schedule 18 (Lands) or on the land registry office parcel registers or abstract indices for the Lands and Additional Lands (if any) from time to time, including (but not limited to) those referred to in the legal descriptions for the Lands and Additional Lands (if any) available in the applicable land registry office, in each case as assigned, amended, extended, supplemented, substituted and replaced from time to time.
  - (ii) Liens, charges or prior claims for taxes (which term includes charges, rates and assessments) or utilities (including levies or imposts for sewers and other municipal utility services) not yet due or if due, the validity of which is being contested in good faith, and liens or charges for the excess of the amount of any past due taxes or utilities charges for which a final assessment or account has not been received over the amount of such taxes or utilities charges as estimated and paid by the Owner.
  - (iii) Inchoate liens incidental to construction, renovations or current operations, a claim for which shall not at the time have been registered against the Lands or Additional Lands (if any) or of which notice in writing shall not at the time have been given to the Owner pursuant to the Construction Act or otherwise or any lien or charge, a claim for which, although registered, or notice of which, although given, relates to obligations not overdue or delinquent and in respect of any of the foregoing cases, the Owner has, where applicable, complied with the holdback or other similar provisions or requirements of the relevant construction contracts.
  - (iv) The rights reserved to or vested in the public or any municipality or governmental or other public authority by any statutory provision.
  - (v) Any subsisting reservations, limitations, provisions and conditions contained in any grants from the Crown of any land or interests therein, including reservations of under-surface rights to mines and minerals of any kind including rights to enter, prospect and remove the same.
  - (vi) Any encroachments, easements, rights of way, rights to use or similar interests revealed by any survey of the Lands or Additional Lands (if any) or which would be revealed by an up-to-date survey of the Lands or Additional Lands (if any).
  - (vii) Any rights in favour of or accruing to holders of under-surface rights which could be ascertained by a review of registered title or other public records, or, if unregistered, which do not materially interfere with the use of the Lands or Additional Lands (if any) for the purposes of the Works.



- (viii) Unregistered agreements with any municipal, provincial or federal governments or authorities and any public utilities or private suppliers of services, provided such unregistered agreements have been disclosed to the Participants, or which could be ascertained by commercially standard off-title searches, or, if not so disclosed or ascertained, which do not materially interfere with the use of the Lands or Additional Lands (if any) for the purposes of the Works, and further provided such agreements have been complied with, or, if not complied with, that any non-compliance does not materially interfere with the use of the Lands or Additional Lands (if any) for the purposes of the Works.
- (ix) Unregistered agreements, authorizations, consents, postponements, subordinations, licences or instruments entered into provided that they have been disclosed to the Participants, or which could be ascertained by commercially standard off-title searches, or, if not so disclosed or ascertained by commercially standard off-title searches, or, if not so disclosed or ascertained, which do not materially interfere with the use of the Lands or Additional Lands (if any) for the purposes of the Works, and further provided such agreements have been complied with, or, if not complied with, that any non-compliance does not materially interfere with the use of the Lands or Additional Lands (if any) for the purposes of the Works.
- (x) Unregistered easements, rights of way, rights to use, restrictions, restrictive covenants and similar rights in real property or any interest therein provided that they have been disclosed to the Participants, or which could be ascertained by commercially standard off-title searches, or, if not so disclosed or ascertained by commercially standard off-title searches, or, if not so disclosed or ascertained, which do not materially interfere with the use of the Lands or Additional Lands (if any) for the purposes of the Works, and further provided such agreements have been complied with, or, if not complied with, that any non-compliance does not materially interfere with the use of the Lands or Additional Lands (if any) for the purposes of the Works.
- (xi) Minor imperfections of title.
- (xii) Statutory exceptions to title and any rights reserved to or vested in any person by any statutory provision.
- (xiii) The right of any prior owner, occupant or tenant of any portion of the Lands or Additional Lands (if any) to occupy any portion of the Lands or Additional Lands (if any) or to remove buildings, fixed machinery, equipment, fittings or other fixtures located on such portion of the Lands or Additional Lands (if any).
- (xiv) The rights of any person entitled to any portion of the Lands or Additional Lands (if any) through length of adverse possession or prescription.