

**SCHEDULE 46****INTERFACE AND DESIGN MANAGEMENT****1. DEFINITIONS****1.1 Definitions**

- (a) In this Schedule, unless the context indicates a contrary intention, capitalized terms used herein which are defined in this Schedule and/or the MOU (and not otherwise defined in this Schedule) shall have meanings given to them in this Schedule and/or the MOU. The MOU shall survive this Schedule. The following terms shall have the following meanings:
- (i) **“City Confirmation Request”** means a request in writing delivered by the City to Project Co requesting Project Co to: (A) confirm whether the matter or thing identified in the request is Divergent; and/or (B) in circumstances in which the City considers that a Divergence should result in a reduction to the Fixed Price, review a proposal by the City contained in the request for a Fixed Price Adjustment with respect to that Divergence; and/or (C) to confirm whether a proposed course of action to be taken by the City as identified in the request will eliminate a matter or thing that has been accepted by the City as Divergent or that has been determined to be Divergent by the Dispute Resolution Procedure.
- (ii) **“City Objectives”** means in connection with the delivery of the Stage 2 LRT Project:
- (A) to derive optimum value for the public sector dollars contributed to the Stage 2 LRT Project in line with the risk profile associated with the Stage 2 LRT Project Variations;
- (B) to realise a single point of accountability for service availability and lifecycle maintenance for the Expanded System;
- (C) to benefit from the efficiencies of this Project Agreement and associated infrastructure by negotiating one or more Variations to that contract for those project elements that demonstrate value for money, including by reference to the original competitive pricing for the Stage 1 Project;
- (D) that the result of any negotiations in respect of the Stage 2 LRT Project must maintain the carefully negotiated risk transfer and commercial arrangements from this Project Agreement (as certain elements may be enhanced and modified in the context of the recent light rail projects in the Province of Ontario) provided that the parties will be left with no proportionately greater risk in the aggregate (additional risk in some areas will be priced and/or

offset by lower risk in other areas); and the result of any such negotiations shall be in accordance with the Agreed Parameters; and

- (E) that the result of the negotiation and the overall plan to implement the Stage 2 LRT Project shall be satisfactory to and approved by the City's federal and provincial funding partners.
- (iii) **“Confirmation Response”** means a response in writing to be provided by Project Co to the City in response to a City Confirmation Request (including, for greater certainty, any City Confirmation Request that is deemed to be made by the City with respect to any IDM Submittal pursuant to Section 2.2(a) of this Schedule) which response shall include, at a minimum: (A) with respect to a City Confirmation Request which contains a proposal by the City for Fixed Price Adjustment whether Project Co accepts or rejects that proposal; and, (B) with respect to any matter or thing identified in the City Confirmation Request which Project Co considers to be Divergent: (i) a Variation Notice with respect to that matter or thing which shall, for greater certainty, include an explanation of the manner in which the Divergence is anticipated to influence the maintenance and lifecycle of the Expanded System and a proposal for any Fixed Price Adjustment resulting therefrom; and (ii) a recommendation for a course of action to be undertaken by the City to eliminate any Divergence that would result in an increase in the level of incremental effort to carry out the Maintenance Services, which recommendation shall have regard to DB Co's obligations under the DB Co Works Agreement and shall be consistent with the City Objectives; and (C) with respect to any proposed course of action by the City identified in a City Confirmation Request to eliminate any matter or thing accepted by the City as Divergent, or determined to be Divergent by the Dispute Resolution Procedure, either (i) confirmation that the proposed course of action will eliminate the Divergence; or (ii) a detailed explanation as to why it will not, and further recommendations for the elimination of the Divergence. For greater certainty, a Confirmation Response may also include Project Co Review Suggestions.
- (iv) **“Consultants”** means those professional firms and consultants providing professional architectural, engineering, planning, consulting, Light Rail Vehicle procurement, maintenance, repair and specialty procurement IDM Services which may be retained by Project Co in respect of the delivery of the IDM Services.
- (v) **“DB Co”** means a third party who is the successful proponent in connection with the DB Co Works RFP.
- (vi) **“DB Co Commissioning”** has the meaning given to it in the DB Co Works Agreement.
- (vii) **“DB Co Commissioning Submittal”** means DB Co Commissioning Tests, DB Co Final Commissioning Program, and any submittals relating to DB Co Commissioning required to be submitted by DB Co to the City pursuant to

Schedule 14 – Commissioning to the DB Co Works Agreement and “**DB Co Commissioning Submittals**” shall have a corresponding meaning.

- (viii) “**DB Co Commissioning Tests**” means Commissioning Tests as defined in the DB Co Works Agreement.
- (ix) “**DB Co Final Commissioning Program**” means the Final Commissioning Program as defined in the DB Co Works Agreement.
- (x) “**DB Co Report Card**” means a Report Card (as defined in the DB Works Agreement) required to be submitted by DB Co to the City pursuant to Schedule 20 – Lands to the DB Co Works Agreement and “**DB Co Report Cards**” shall have a corresponding meaning.
- (xi) “**DB Co Variation**” has the meaning ascribed to the term “Variation” under the DB Co Works Agreement.
- (xii) “**DB Co Variation Confirmation**” has the meaning ascribed to the term “Variation Confirmation” under the DB Co Works Agreement.
- (xiii) “**DB Co Variation Directive**” has the meaning ascribed to the term “Variation Directive” under the DB Co Works Agreement.
- (xiv) “**DB Co Variation Inquiry**” has the meaning ascribed to the term “Variation Inquiry” under the DB Co Works Agreement.
- (xv) “**DB Co Works**” has the meaning given to such term in Appendix 3, Part C, Section 1.1 to the MOU.
- (xvi) “**DB Co Works Agreement**” means the design, build and finance project agreement to be entered into between the City and DB Co, including the schedules thereto.
- (xvii) “**DB Co Works Agreement Documents**” means the DB Co Works Agreement and any agreements to be entered into by or at the behest of DB Co in connection of the DB Co Works, but not including the Stage 2 Interface Agreement.
- (xviii) “**DB Co Works RFP**” means the request for proposals issued by the City to selected Persons in connection with the carrying out of the DB Co Works.
- (xix) “**DB Co Works Submittal**” means a works submittal required to be submitted by DB Co to the City pursuant to Schedule 10 – Review Procedure to the DB Co Works Agreement and “**DB Co Works Submittals**” shall have a corresponding meaning.

- (xx) **“Dispute Resolution Procedure”** means the dispute resolution procedure (specifically by an Expert) under Section 5 of Schedule 27 – Dispute Resolution Procedure to this Project Agreement.
- (xxi) **“Divergence”** occurs where any matter or thing to be reviewed or observed by Project Co in the performance of the IDM Services including:
- (A) any IDM Submittal or any matter or thing required or specified by the DB Co Works Agreement to be subject to the review, commissioning or variation procedures set out in Schedules 10, 14 or 22 of the DB Co Works Agreement;
- or
- (B) any other matter or thing: (i) in any specific information and material provided and/or made available to Project Co by the City with respect to the DB Co Works; or (ii) observed by Project Co in any inspection, attendance or review in which Project Co participates,

would result in: (i) any of the Agreed Parameters (including Stage 2 Assumptions) including in terms of Project Co’s pricing or assumption of risk contemplated thereunder, whether by way of increase or decrease, not being complied with; or (ii) in a gross (non-industry standard) inefficiency in the Stage 2 Maintenance Services which Project Co could not reasonably have considered in its pricing assumptions given the level of design detail available to it as of the date of the MOU. **“Divergent”** shall have a corresponding meaning. Divergence shall not, however, include any Excluded Divergence and Excluded Divergence is expressly excluded from this definition of Divergence.

For the purposes of this definition, paragraphs (A) and/or (B) above may include an observation by Project Co, based on the design of the DB Co Works as presented in an IDM Submittal, that:

- (A) suitable Additional Property Interests (as defined in Schedule 20 – Lands of the DB Co Works Agreement) should be requested by DB Co pursuant to Section 8 of Schedule 20 of the DB Co Works Agreement; or
- (B) suitable property interests should otherwise be reserved by the City from any of the Lands (as defined in Schedule 20 – Lands of the DB Co Works Agreement) that are not designated as “System Infrastructure Lands” therein,

in each case for the benefit of Project Co for the duration of the Maintenance Period in respect of the Stage 2 System,

in order to facilitate the efficient maintenance of the Stage 2 System by Project Co in accordance with this Project Agreement as envisaged by the MOU, the Agreed Parameters and the Stage 2 Assumptions.

- (xxii) “**East Final Completion Date**” has the meaning given to it in the DB Co Works Agreement.
- (xxiii) “**Excluded Divergence**” means any Schedule 43 Divergence and any other matter or thing that has been accepted or determined, or should have been identified as being Divergent pursuant to any prior requirement to identify any Divergence as provided for in this Schedule.
- (xxiv) “**Expanded System**” means the System (as it is defined in this Project Agreement as of March 16, 2017) as expanded by the Stage 2 System.
- (xxv) “**Expanded System Revenue Service Availability**” means substantial completion of the Stage 2 System and the overall systems integration has been completed such that the Expanded System operates as a single coherent system.
- (xxvi) “**Expanded System Revenue Service Availability Date**” means the date upon which Expanded System Revenue Service Availability has been achieved. The anticipated target date for Expanded System Revenue Service Availability is December 31, 2023.
- (xxvii) “**Final Notice of Divergence**” has the meaning given to it in Section 4(a).
- (xxviii) “**Fixed Price**” has the meaning ascribed to it in the MOU.
- (xxix) “**Fixed Price Adjustment**” means any increase or decrease to the annual maintenance costs and the annual lifecycle costs portions of the Fixed Price to address the level of incremental or reduced effort to carry out the Maintenance Services resulting from a Divergence.
- (xxx) “**Highway Works**” has the meaning given to it in the DB Co Works Agreement.
- (xxxi) “**IDM Event of Default**” means any material failure of Project Co to perform the IDM Services in accordance with this Schedule which is not rectified within 30 days of notification by the City.
- (xxxii) “**IDM Services**” means the design review, construction and commissioning oversight to be provided by Project Co pursuant to this Schedule to identify any Divergence that relates to, or which may influence, the maintenance and lifecycle of the Expanded System, and includes, for greater certainty, the duties of Project Co set out in Section 2 of this Schedule.

- (xxxiii) “**IDM Services Commencement Date**” means financial close of the DB Co Works Agreement.
- (xxxiv) [INTENTIONALLY DELETED]
- (xxxv) “**IDM Submittal**” means the DB Co Works Submittals, DB Co Commissioning Submittals, DB Co Report Cards and any subsequent updates of any such documents excluding, however any DB Co Works Submittals DB Co Commissioning Submittals or DB Co Report Cards applicable to the Highway Works, and includes any DB Co Variation Confirmation, DB Co Variation Directive or DB Co Variation Inquiry.
- (xxxvi) “**IDM Term**” has the meaning given to it in Section 11.1(a).
- (xxxvii) “**Maintenance Services**” means the scope of work to be performed by Project Co pursuant to the Maintenance Service Variation Confirmation.
- (xxxviii) “**Maintenance Service Variation Confirmation**” means the Stage 2 Maintenance Services Variation Confirmation dated as of the Escrow Release Date (as defined in the Scope 5 Escrow Agreement) between Project Co and the City.
- (xxxix) “**MOU**” means the memorandum of understanding dated March 16, 2017 between Project Co and the City governing the Parties’ approach to the integration of the Stage 2 LRT Project into this Project Agreement.
- (xl) “**Notice of Complaint**” has the meaning given to it in Section 11.2(a)(i).
- (xli) “**Notice of IDM Termination**” means a notice of termination of the IDM Services as defined in Section 11.2(a)(iii).
- (xlii) “**Preliminary Notice of Divergence**” has the meaning given to it in Section 4(a).
- (xliii) “**Project Agreement**” means the Project Agreement dated February 12, 2013 entered into between Project Co and the City, as amended from time to time.
- (xliv) “**Project Co Assumption Verification**” means RTG Assumption Verification as defined in the MOU.
- (xlv) “**Project Co Review Suggestions**” means, in connection with the performance of IDM Services, comments from Project Co which, while not resulting in a Divergence, would result in reduced construction cost and/or more efficient maintenance over the asset life (it being acknowledged and agreed that Project Co may propose changes to either its scope or to DB Co’s design or construction means and/or methodology as long as the overall impact over the life of this Project Agreement would be cost-effective for the City).

- (xlvi) “**Project Manager**” means the individual identified as such in Section 2.1(b).
- (xlvii) “**Scope 5 Escrow Agreement**” means the escrow agreement entered into as of April 23, 2019 by and between the City, Project Co and Norton Rose Fulbright Canada LLP, as escrow agent.
- (xlviii) “**Schedule 43 Divergence**” means any matter or thing that has been determined, or could have been determined, to be Divergent (as that term is defined in Schedule 43 to this Project Agreement) pursuant to the provisions of that schedule.
- (xlix) “**Stage 2 Assumptions**” means the following assumptions in respect of the DB Co Works and Project Co’s assumption of risk in respect of the Expanded System as contemplated by the MOU:
- (A) following achievement of the Expanded System Revenue Service Availability Date, Project Co shall assume full responsibility for maintaining availability of the Expanded System in accordance with the Stage 2 Maintenance PSOS (including the obligation to deliver the Stage 2 Maintenance Services for the fixed price outlined in Appendix 3 Part E - Financial Parameters of the MOU);
  - (B) unless otherwise agreed, as a general matter the Output Specifications (in respect of the System as it is defined in this Project Agreement as at March 16, 2017) will provide an appropriate starting point and standard for maintaining availability of the Expanded System in accordance with Stage 2 Maintenance PSOS, together with any relevant items set out in the maintenance and rehabilitation pricing assumptions provided as part of the Price Form set out as Attachment 1 to Part E of Appendix 3 of the MOU;
- (except to the extent the City otherwise retains responsibility for any matter under either this Project Agreement or the Stage 2 LRT Project Variations (for example, such as the role of the City as operator in the commissioning process)),
- (C) the terms of the DB Co Works Agreement and the Stage 2 Interface Agreement shall follow the assumptions set out in Appendix 3, Part C, Section 1.2 of the MOU and Appendix 3, Part F, Section 1.5 of the MOU, respectively; and
  - (D) the overall goal of the Stage 2 LRT Project procurement process is to achieve the City Objectives (including value for money for the City), provided that priority shall be given to ensuring that the assumptions in respect of the DB Co Works Agreement and the Stage 2 Interface Agreement are complied with, subject to any deviations to this approach which the Parties may agree (for example, higher risk profile for DB Co in return for reduced maintenance cost risk margin).

- (l) “**Stage 2 East Extension**” means the east extension of the Confederation Line from Blair station to Trim as generally illustrated by the darker blue lines to the east of the Confederation Line in Figure 1: Summary of Stage 2 Project Components of the MOU including all related DB Co Works.
- (li) “**Stage 2 Interface Agreement**” means the agreement to be entered into among Project Co, DB Co and the City in respect of certain interface issues between the stakeholders of the Expanded System, as envisaged by Section 1.5 of Part F of Appendix 3 of the MOU.
- (lii) “**Stage 2 LRT Project**” means the Stage 2 East Extension and the Stage 2 West Extension and includes both the Stage 2 Project Co Expanded Scope and the DB Co Works.
- (liii) “**Stage 2 LRT Project Variations**” means one or more Variations executed or to be initiated by the City in accordance with the terms of Schedule 22 to the Project Agreement (subject to the terms of the MOU) to implement the Stage 2 Project Co Expanded Scope, which were referred to under the MOU as the “Stage 1 PA Variations” and which include this Schedule.
- (liv) “**Stage 2 Maintenance Services**” means the services described in Section 1.5 of Appendix 2 of the MOU.
- (lv) “**Stage 2 Maintenance PSOS**” means the output specifications being developed for the Stage 2 Project Co Expanded Scope, which was referred to under the MOU as the “Stage 2 RTG PSOS”.
- (lvi) “**Stage 2 Project Co Expanded Scope**” means the additional works and services described in Appendix 2 of the MOU intended to be delivered by Project Co as part of the Stage 2 LRT Project, which was referred to under the MOU as the “RTG Expanded Scope” and which includes the IDM Services.
- (lvii) “**Stage 2 West Extension**” means the west extension of the Confederation Line from Tunney’s Pasture to Moodie Drive as generally illustrated by the darker blue lines to the west of the Confederation Line in Figure 1: Summary of Stage 2 Project Components of the MOU including all related DB Co Works.
- (lviii) “**Unavoidable Delay**” means any condition or cause beyond the reasonable control of Project Co that prevents or delays Project Co in fulfilling its obligations under this Schedule, provided that Project Co has acted in a reasonable manner consistent with its obligations hereunder with respect to such condition or cause.
- (lix) “**Variation**” has the meaning ascribed to it in the Maintenance Service Variation Confirmation.

- (lx) “**Variation Enquiry**” has the meaning ascribed to it in Schedule 22 – Variation Procedure of the Maintenance Service Variation Confirmation
- (lxi) “**Variation Notice**” has the meaning ascribed to it in Schedule 22 – Variation Procedure of the Maintenance Service Variation Confirmation.
- (lxii) “**West Final Completion Date**” has the meaning given to it in the DB Co Works Agreement.

## 2. INTERFACE AND DESIGN MANAGEMENT SERVICES

### 2.1 Duties

- (a) Project Co shall provide the IDM Services all in accordance with and in the manner more particularly set out in this Schedule.
- (b) Project Co shall provide the resources and staff necessary for the delivery of the IDM Services. As at the date hereof, the Project Manager for the IDM Services is James Messel. Project Co shall treat such Project Manager as if such person were a Key Individual performing IDM Services and the provisions of Section 10.4(c) of the Project Agreement shall apply to such Project Manager, *mutatis mutandis*, during the period that Project Co is providing the IDM Services.
- (c) Project Co shall provide design review and construction and commissioning oversight for DB Co Works which have influence on maintenance and lifecycle of the Expanded System and shall identify all occurrences of Divergence relating thereto and proposals for all Fixed Price Adjustments resulting therefrom. Without limitation, Project Co shall issue Confirmation Responses or Notices of Divergence as required by Sections 2, 3 and 4 of this Schedule. In this regard and without limitation, Project Co shall be sufficiently knowledgeable about the terms and conditions of the DB Co Works Agreement, including review processes applicable to IDM Submittals, to provide Confirmation Responses and Notices of Divergence within the time periods and as otherwise required by the terms of this Schedule.
- (d) Project Co shall be responsible for assisting in the design procurement and commissioning from a maintenance and lifecycle perspective during construction relating to those elements of the DB Co Works that will impact on maintenance and rehabilitation of the Expanded System and shall identify all occurrences of Divergence relating thereto.
- (e) Project Co and any relevant Project Co Parties shall have the right to:
  - (i) receive notice from the City of any “punchlist” inspections of the DB Co Works, to participate in any such inspections and to review with the owner’s engineer;

- (ii) receive copies from the City, in a timely manner, of all relevant tests, inspection reports, and other related materials relating to construction materials and methods of construction, and to receive notice from the City of all related tests, inspections and other reviews sufficiently in advance (acting reasonably) so as to permit Project Co to prepare for the attendance at such tests, inspections and other reviews. Without limitation, Project Co and, if applicable, the Project Co Parties have the right to be present at the DB Co Start-Up Meeting, Design Workshops, and Works Committee Meetings. The Project Co Parties will only actively participate in such tests, inspections, meetings and other reviews at the request of the City and otherwise shall only be observers in such tests, inspections, meetings and other reviews; and
- (iii) receive copies from the City, in a timely manner, of final as-built drawings.
- (f) Following attendance at an inspection or review referred to in Section 2.1(e)(i), or receipt of documentation in Sections 2.1(e)(ii) and 2.1(e)(iii), Project Co will provide comments and timely feedback as to the impact of the DB Co Works on the Project from a maintenance and lifecycle perspective and from the perspective of mitigating latent defect risks to be assumed by Project Co, and any anticipated impact on maintenance and rehabilitation of the Expanded System and shall provide any Confirmation Response, Preliminary Notice of Divergence or Final Notice of Divergence as required by the terms of this Schedule as a result of such participation in inspections and reviews and receipt of documentation.
- (g) Other than as specified herein, neither Project Co nor any of its Affiliates, acting in its capacity as the provider of IDM Services, shall enter, directly or indirectly, into any ancillary agreement, side letter or similar additional agreement with DB Co with respect to the IDM Services, without the prior written consent of the City.
- (h) For the avoidance of doubt and without limitation, the IDM Services shall not:
  - (i) form part of the Approved Purposes, the Civic Works, the Design and Construction Works, the Highway Work, the Maintenance, the Maintenance Services, the Procurement Support Services, Work or Works; or
  - (ii) form part of the definition of, or be required for, 2017 Readiness, Substantial Completion, Final Completion or Revenue Service Availability.
- (i) The City acknowledges and agrees that Project Co's attendance and/or participation at the tests, inspections, reviews, meetings and workshops identified in Section 2.1(e)(ii), or any observations made by Project Co thereat, shall not exclude or limit Project Co's rights in respect of DBF Defects (as defined in the DB Co Works Agreement) under the Stage 2 Interface Agreement.

## 2.2 Design Review, Construction and Commissioning Oversight

- (a) Project Co and any relevant Project Co Parties shall have the right to access and receive copies in a timely manner of all IDM Submittals. Upon receipt of any IDM Submittal the City shall as soon as reasonably practicable, and in any event not later than two (2) Business Days of such receipt, provide a copy or otherwise make the IDM Submittal available to Project Co for review and comment. Each IDM Submittal provided or made available to Project Co shall be deemed to include a City Confirmation Request with respect to all matters contained in the IDM Submittal. Prior to the commencement of the provision of IDM Services by Project Co pursuant to this Schedule, the City shall use commercially reasonable efforts to provide Project Co with access to the Electronic Data Management System for the purpose of enabling Project Co to receive IDM Submittals from DB Co concurrently with the City.
- (b) Project Co shall conduct its review of each City Confirmation Request (including each IDM Submittal) and provide its Confirmation Response with respect to each City Confirmation Request (including each IDM Submittal) as soon as reasonably practicable and in any event in connection with any Confirmation Response with respect to an IDM Submittal, not later than three (3) Business Days prior to the date upon which the City is required to respond to DB Co with respect to the applicable IDM Submittal pursuant to the DB Co Works Agreement. Within three (3) Business Days of the City providing comments to DB Co in respect of any IDM Submittal, the City shall provide copies of such comments to Project Co (whether or not such comments from the City include comments from Project Co), provided that the City may remove any comments which it deems, acting reasonably, to be either (i) confidential in nature or (ii) items which do not have any influence on maintenance and lifecycle of the Expanded System, prior to providing such copies to Project Co. Notwithstanding the provisions Schedule 22- Variation Procedure of the Maintenance Service Variation Confirmation, the Variation Notice included in the Confirmation Response shall not indicate the latest date by which a Variation Enquiry must be issued.
- (c) If the City rejects Project Co's determination that the matter or thing identified in the Confirmation Response is Divergent or if there is a dispute as to whether or not a proposed course of action will eliminate a Divergence, the City shall notify Project Co of such rejection or dispute in writing providing reasons for such rejection or dispute within three (3) Business Days of receipt of the Confirmation Response. Within two (2) Business Days of receipt of the City's notice of rejection or dispute, Project Co may refer the issue of Divergence or elimination of Divergence for resolution pursuant to the Dispute Resolution Procedure and if Project Co does not refer the issue of Divergence or elimination of Divergence for resolution pursuant to the Dispute Resolution Procedure within that time period, Project Co shall not be entitled to claim or otherwise assert that the matter or thing identified in the Confirmation Response is Divergent or claim any resulting Fixed Price Adjustment with respect thereto and shall

be deemed to accept that the proposed course of action in question will eliminate the Divergence.

- (d) If Project Co rejects a City proposal for a Fixed Price Adjustment contained in a City Confirmation Request, the City may at any time thereafter refer the issue of whether or not there should be a Fixed Price Adjustment as proposed by the City for resolution pursuant to the Dispute Resolution Procedure.
- (e) If the issue of a Divergence or a dispute as to whether a proposed course of action to eliminate a Divergence will result in its elimination has been referred to the Dispute Resolution Procedure, then the question of any Fixed Price Adjustment resulting from a determination of Divergence shall also be determined in that Dispute Resolution Procedure; provided, however, that Project Co's rights of objection with respect to the determination of any Fixed Price Adjustment will continue to be restricted in the manner contemplated by Section 1.1 of Appendix 3 – Agreed Parameters of the MOU in any Dispute Resolution Procedure.
- (f) If the City accepts Project Co's determination in a Confirmation Response that there is a Divergence, or if any matter or thing is determined to be Divergent pursuant to the Dispute Resolution Procedure the City may at its election:
  - (i) propose to Project Co a course of action to eliminate the Divergence which may include taking any available steps the City may have pursuant to the DB Co Works Agreement to eliminate such Divergence, including but not limited to:
    - (A) requiring DB Co to comply with its obligations under the DB Co Works Agreement to the extent required to eliminate the Divergence, if such option is available; or
    - (B) initiating a DB Co Variation requiring DB Co to undertake the DB Co Works in manner that will eliminate the Divergence.

and shall, as soon as reasonably practicable, notify Project Co in writing as to City's proposed course of action to eliminate the Divergence, and the timeframe and process by which the City intends to eliminate the Divergence (and in this regard the City may issue a further City Confirmation Request with respect to the City's proposed course of action to eliminate the Divergence); and/or

- (ii) elect to treat the Divergence as a Variation and issue a Variation Enquiry pursuant to Schedule 22 – Variation Procedure of the Maintenance Service Variation Confirmation, in which case all references to the term “Estimate” in that Schedule shall be deemed to be references to the Fixed Price Adjustment hereunder; provided, for greater certainty, Project Co's rights of objection under Section 1.5 of Schedule 22 of the Maintenance Service Variation Confirmation will continue to be restricted in the manner contemplated by Section 1.1 of Appendix 3 – Agreed Parameters of the MOU.

- (g) If the City elects to proceed under both subparagraphs 2.2(f)(i) and 2.2(f)(ii) above, then the City shall be entitled to defer the issuance of a Variation Confirmation under Schedule 22 – Variation Procedure of the Maintenance Service Variation Confirmation until such time as the City has elected whether or not to eliminate the Divergence pursuant to subparagraph 2.2(f)(i) above.
- (h) The City acknowledges and agrees that, pursuant to Section 9.12(a)(iii) of the Maintenance Service Variation Confirmation, the City shall not make or agree to make any amendment to or variation of the DB Co Works Agreement without complying with the provisions of Schedule 43 to this Project Agreement, *mutatis mutandis*.

### 3. CITY CONFIRMATION REQUESTS GENERAL

- (a) In addition to the provisions of Section 2 of this Schedule, the City may from time to time and at any time during the IDM Term deliver a City Confirmation Request to Project Co with respect to any specific matter or thing identified and/or provided by the City to Project Co that has not previously been the subject of a City Confirmation Request, Preliminary Notice of Divergence or Final Notice of Divergence. Unless some other time period has been specified in this Schedule for the delivery of Confirmation Response, Project Co shall deliver a Confirmation Response as soon as reasonably practicable to each City Confirmation Request and in any event, not later than ten (10) Business Days from receipt of the City Confirmation Request.
- (b) The provisions of Sections 2.2 (c) to 2.2(g) shall apply *mutatis mutandis* to any City Confirmation Request issued pursuant to this Section 3.
- (c) In the event Project Co does not provide a Confirmation Response to any City Confirmation Request provided or deemed to be provided pursuant this Schedule within the time specified, and otherwise in compliance with the requirements of this Schedule, Project Co shall: (i) not be entitled to claim or otherwise assert that the matter or thing identified in the City Confirmation Request is Divergent or claim any resulting Fixed Price Adjustment with respect thereto; and (ii) be deemed to have accepted any proposal for a Fixed Price Adjustment contained in the City Confirmation Request.
- (d) The Parties agree that Project Co shall not be responsible under this Schedule for ensuring that DB Co or the DB Co Works are in compliance with the DB Co Works Agreement. The City acknowledges and agrees that neither Project Co nor any Project Co Party will have any liability (A) if a document submitted by DB Co and reviewed by Project Co pursuant to this Schedule results in a non-compliance with the DB Co Works Agreement by DB Co or a breach by DB Co of Applicable Law or (B) for any loss of claim arising due to some defect in any documents, drawings, specifications or certificates submitted by DB Co.
- (e) The City acknowledges and agrees that any review and comment by Project Co of any IDM Submittals shall not relieve DB Co of the risk and responsibility for the Project

Operations (as defined in the DB Co Works Agreement) and for meeting all of DB Co's obligations under and requirements of the DB Co Works Agreement. Without limiting the generality of the foregoing, any and all errors or omissions in IDM Submittals or of any review and comment shall not exclude or limit DB Co's obligations or liabilities in respect of the Works under the DB Co Works Agreement or exclude or limit Project Co's rights in respect of DBF Defects (as defined in the DB Co Works Agreement) under the Stage 2 Interface Agreement.

#### 4. NOTICES OF DIVERGENCE

- (a) In addition to issuing Confirmation Responses pursuant to Sections 2 and 3 of this Schedule, Project Co shall as part of the IDM Services review all information and material made available to it by the City with respect to the DB Co Works, or observed by Project Co in the performance of the IDM Services including in any inspection, attendance or review in which Project Co participates, and which has not otherwise been the subject of a City Confirmation Request, to identify any matter or thing that Project Co considers to be Divergent and any Fixed Price Adjustment resulting therefrom. Within two (2) Business Days upon Project Co determining that a matter or thing is Divergent under this Section 4(a), Project Co shall deliver to the City a notice in writing (the "**Preliminary Notice of Divergence**") with respect to the matter or thing which Project Co has determined to be Divergent, and within four (4) Business Days of delivery of any Preliminary Notice of Divergence, Project Co shall deliver to the City an additional notice in writing (the "**Final Notice of Divergence**") which shall contain all the information, including any proposal for a Fixed Price Adjustment, and recommendations with respect to the Divergence that is required to be provided by Project Co in a Confirmation Response.
- (b) The provisions of Sections 2.2(c) to 2.2 (g) shall apply *mutatis mutandis* to any Final Notice of Divergence delivered by Project Co as if, and to the same extent as though the Final Notice of Divergence was a Confirmation Response.
- (c) In the event Project Co does not provide a Preliminary Notice of Divergence or a Final Notice of Divergence as required under Section 4(a) within the time specified and otherwise in compliance with the requirements of this Schedule, Project Co shall not be entitled to claim or otherwise assert that any matter or thing that could otherwise have been identified by Project Co as being Divergent at that time is Divergent or claim any resulting Fixed Price Adjustment with respect thereto.

#### 5. NO CLAIMS OR ASSERTIONS OF DIVERGENCE

- (a) For greater certainty, Project Co shall not be entitled to claim or otherwise assert that any matter or thing is Divergent or claim any resulting Fixed Price Adjustment with respect thereto, if the matter or thing is an Excluded Divergence.
- (b) Without limitation, Project Co shall not be entitled to claim or otherwise assert that any matter or thing is Divergent or claim any resulting Fixed Price Adjustment with respect

thereto, if the matter or thing has or should been identified by Project Co as being Divergent and Project Co has or should have made a proposal for Fixed Price Adjustment with respect thereto in the relevant Confirmation Response, or in the first Final Notice of Divergence required to be issued by Project Co after the matter or thing has been identified by Project Co as being Divergent and in the case of any identified matter or thing, that matter or thing has been accepted by the City as being Divergent, or has been determined to be Divergent pursuant to the Dispute Resolution Procedure.

- (c) In addition to the foregoing, Project Co shall not in any event be entitled to claim or otherwise assert that any matter or thing is Divergent or claim any resulting Fixed Price Adjustment with respect thereto after the expiration of the IDM Term except for matters or things identified or that should have been identified as being Divergent and with respect to which a proposal for a Fixed Price Adjustment has or should have been made pursuant to a Confirmation Response or Final Notice of Divergence issued in accordance with the requirements of this Schedule within the IDM Term, and in the case of identified matter or thing: (i) that matter or thing has been accepted by the City as being Divergent or; (ii) that matter or thing has been determined to be Divergent pursuant to the Dispute Resolution Procedure; or (iii) the status of that matter or thing remains subject to the Dispute Resolution Procedure initiated within the IDM Term.

## **6. AUDIT RIGHTS**

- (a) Project Co shall have audit rights on quality information provided during the performance of IDM Services. Any such audits are at the sole cost and expense of Project Co.

## **7. CONSULTANTS**

- (a) Project Co shall provide to the City and maintain a list of Consultants and sub-Consultants engaged in the provision of the IDM Services, organized by discipline.

## **8. STANDARD OF CARE AND UNAVOIDABLE DELAY**

- (a) Project Co shall perform the IDM Services with the reasonable skill and care as would normally be exercised by licensed or registered professionals having knowledge and experience in providing services of a similar nature, scope and complexity to the IDM Services.
- (b) The IDM Services will be provided in a manner that is consistent with the Stage 2 Assumptions and Project Co's assumption of risk contemplated thereunder. Project Co shall also have due regard to the City Objectives in the performance of the IDM Services and assist the City to achieve the City Objectives, in so far as they do not conflict with Project Co's legitimate expectations outlined in the Stage 2 Assumptions. In carrying out the IDM Services, Project Co will be expected to consider the combined best interests of both Parties, and shall promptly inform the City of any potential conflicts of interests that arise.

- (c) The City shall act in good faith in cooperating with Project Co in the performance of the IDM Services in accordance with this Schedule, including when considering any Confirmation Response or Final Notice of Divergence issued by Project Co as part of the IDM Services.
- (d) If Project Co is prevented from, or delayed in, the performance of its duties by an event of Unavoidable Delay, the date for performance shall be delayed by a period of time equal to the period of Unavoidable Delay. Project Co will notify the City as soon as practicable after becoming aware of an event of Unavoidable Delay and will, from time to time, notify the City of the expected duration of the period of Unavoidable Delay.
- (e) If, during the course of any review by Project Co contemplated hereunder, Project Co requests further information or clarification, in writing, from the City in connection with such review, the City shall use all reasonable efforts to provide such information and/or clarification to Project Co within a reasonable period of time following receipt of such written request from Project Co.
- (f) Any timeline for comment, confirmation and/or review by Project Co contemplated in this Schedule may be extended as set out herein, or if not set out herein, may be extended as permitted by the City (acting reasonably).
- (g) Project Co: (i) confirms that it is generally familiar with the general requirements, design and performance criteria of the City in connection with the IDM Services and the City Objectives; and (ii) subject to Section 8(b), covenants that it will apply this familiarity in the delivery of the IDM Services with respect to the Stage 2 LRT Project.

## 9. INSURANCE

- (a) Project Co shall, at the City's expense, effect and maintain (i) Project Specific Professional Liability insurance and (ii) Commercial General Liability insurance, each in an aggregate amount of \$5,000,000, to protect itself and its employees from claims, losses or damages arising out of the performance of IDM Services rendered by Project Co and its employees, agents and subcontractors under this Schedule and caused by any error, omission or negligent act for which it is legally liable. Project Co shall maintain this insurance in force throughout the IDM Term. [INTENTIONALLY DELETED]
- (b) Project Co shall, at its own expense, also effect and maintain insurance to protect itself from claims under workers' compensation acts; from claims for damages because of bodily injury, including personal injury, sickness, disease, or death of any employees.
- (c) Certificates of insurance shall be delivered to the City prior to commencement of IDM Services. The certificates shall contain a provision that the coverage afforded under the policies shall not be cancelled or reduced in limits by endorsement until at least thirty (30) days' prior written notice has been given to the City.

**10. [INTENTIONALLY DELETED]****11. TERM****11.1 Duration**

- (a) The IDM Services to be provided under this Schedule shall commence on the IDM Services Commencement Date and shall continue in full force and effect until the earlier of (A) the date upon which the later of the East Final Completion Date or the West Final Completion Date is achieved under the DB Co Works Agreement, and (B) such other date, if any, on which termination of the IDM Services takes effect in accordance with the terms of this Schedule (the “**IDM Term**”).

**11.2 Termination by the City**

- (a) The City may terminate the IDM Services for cause if at any time there occurs a IDM Event of Default which is continuing. Such termination is to be conducted on the following basis:
  - (i) the City shall give written notice (“**Notice of Complaint**”) to Project Co specifying in reasonable detail the IDM Event of Default;
  - (ii) if the IDM Event of Default in question is one that is capable of being cured, then within fifteen (15) days of receipt of such Notice of Complaint, Project Co shall commence to cure such default and proceed diligently thereafter to cure such default until such default is cured;
  - (iii) if the IDM Event of Default in question is one that is capable of being cured and, if within the fifteen (15) day period referred to in Section 11.2(a)(ii), Project Co fails to commence to cure such default or if at any time after the expiry of such fifteen (15) day period Project Co fails to proceed diligently to cure such default, the City may terminate the IDM Services by written notice (“**Notice of IDM Termination**”) to Project Co stating that the IDM Services are terminated and the reasons therefor. Such termination shall be effective as of and from the last day of the month in which the Notice of IDM Termination is given to Project Co;
  - (iv) if the IDM Event of Default in question is one that is not capable of being cured, then within fifteen (15) days of receipt of such Notice of Complaint, Project Co shall deliver in writing to the City a reasonable plan to prevent the reoccurrence of such IDM Event of Default, which plan is satisfactory to the City (acting reasonably) and Project Co shall proceed diligently thereafter to implement such plan; and
  - (v) if the IDM Event of Default in question is one that is not capable of being cured, and, if within the fifteen (15) day period referred to in Section 11.2(a)(iv), Project Co fails to deliver the plan referred to in that Section or if at any time after the

expiry of such fifteen (15) day period Project Co fails to proceed diligently to implement such plan to the satisfaction of the City (acting reasonably), the City may terminate the IDM Services by giving Project Co a Notice of IDM Termination (and shall include the reasons for the termination). Such termination shall be effective as of and from the last day of the month in which the Notice of IDM Termination is given to Project Co.

- (vi) in the event the City terminates the IDM Services for cause pursuant to this Section 11.2(a), Project Co shall not thereafter be entitled to claim or otherwise assert that any matter or thing is Divergent or claim any resulting Fixed Price Adjustment with respect thereto.
- (b) Upon written notice to Project Co, the City may terminate the IDM Services for its convenience, without obligation or liability of any nature except as set out in Section 11.4.
- (c) The City agrees that nothing in or arising out of this Schedule and no performance or delay or failure in the performance of this Schedule (including any delay or failure relating to the performance of the IDM Services) shall give rise to or be capable of giving rise to a Project Co Event of Default. To the extent that any claim by the City under this Schedule would cause Project Co to be unable to meet its obligations under the Lending Agreements, payment of such claim shall be deferred until such time Project Co is able to meet make such payment without breaching its obligations under the Lending Agreements.

### 11.3 Termination by Project Co

- (a) If the City defaults [INTENTIONALLY DELETED] or in any material respect of any other obligation under this Schedule and such default shall continue for more than thirty (30) days after notice thereof is given to the City, Project Co may suspend performance of IDM Services, but only until [INTENTIONALLY DELETED] or the default is otherwise cured. If such default continues for sixty (60) days from the date such notice of default has been given to the City, Project Co may terminate the IDM Services by notice to the City with immediate effect. The election to terminate shall not be construed to be an election of remedies and a waiver of other potential remedies available to it at law and/or in equity.

### 11.4 Consequences of Termination

- (a) The IDM Services are being provided alongside the continued operation of the MOU with a view to finalizing all of the Stage 2 LRT Project Variations. If the City validly terminates the IDM Services on the grounds of a IDM Event of Default, the City shall be entitled to consider this as a material breach of the MOU for the purposes of Section 3 of the MOU and take the actions described thereunder (such as recovery of additional costs incurred to replace the IDM Services).

- (b) In addition, but subject to Section 11.2(a)(vi) if the IDM Services hereunder are terminated for a IDM Event of Default and Project Co remains the intended provider of the Stage 2 Maintenance Services, the City will act in good faith to ensure that the DB Co Works and DB Co Works Agreement Documents shall reflect the Stage 2 Assumptions, but, subject to the foregoing and to the Parties' respective rights and obligations under Section 1.5 of Part F of Appendix 3 to the MOU, Project Co shall not be entitled to claim that any decision made by the City in such circumstances has impacted Project Co's pricing assumptions in the Price Form.
- (c) If the IDM Services are terminated early for any reason other than IDM Event of Default, and Project Co remains the intended provider of the Stage 2 Maintenance Services, then the waivers in 11.4(b) shall not apply, and the City acknowledges that if the DB Co Works or any of the DB Co Works Agreement Documents are Divergent, this shall entitle Project Co to an adjustment (which, for clarity, may be an adjustment in respect of Project Co's scope of work, assumption of risk and/or pricing) under the terms of the MOU and any relevant Stage 2 LRT Project Variation which incorporates the relevant Stage 2 Assumptions.
- (d) [INTENTIONALLY DELETED]
- (e) If the IDM Services are terminated early, Project Co shall promptly deliver to the City copies of all records and documents (with the exception of Sensitive Information) maintained under the terms of this Schedule, which are in the possession or control of Project Co, relating directly or indirectly to the IDM Services, in accordance with the terms of Section 4.4 of Schedule 26 – Records Provisions to this Project Agreement.

## 12. GENERAL

### 12.1 Dispute Resolution Procedure

- (a) For the purposes of this Schedule, Section 5.1 of Schedule 27 – Dispute Resolution Procedure shall be amended as follows:
  - (i) the word “or” at the end of Section 5.1(c) shall be deleted;
  - (ii) the “,” at the end of Section 5.1(d) shall be deleted and replaced “; or”;
  - (iii) following Section 5.1(e), a new Section 5.1(f) shall be added as follows:
    - “(e) the determination of any matter submitted to the Dispute Resolution Procedure pursuant to Schedule 46 - Interface and Design Management to the Project Agreement,”
- (a) For the avoidance of doubt, “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”.

**12.2 [INTENTIONALLY DELETED]**

