

**PROJECT AGREEMENT**

**TO DESIGN, BUILD AND FINANCE  
CONFEDERATION LINE EXTENSION**

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## SCHEDULES

<b>Schedule No.</b>	<b>Description</b>
Schedule 1	- Definitions and Interpretation
Schedule 2	- Completion Documents
Schedule 3	- Subcontractor's Direct Agreement
Schedule 4	- Lenders' Direct Agreement
Schedule 5	- Construction Contractor's Direct Agreement
Schedule 6	- Independent Certifier Agreement
Schedule 7	- Letters of Credit
Schedule 8	- DB Co Parties
Schedule 9	- Key Individuals
Schedule 10	- Review Procedure
Schedule 11	- Integrated Management System Requirements
Schedule 12	- Works Scheduling Requirements
Schedule 13	- DB Co Proposal Extracts
Schedule 14	- Testing & Commissioning
Schedule 15	- Output Specifications
Schedule 16	- Encumbrances
Schedule 17	- Environmental Obligations
Schedule 18	- Communication and Stakeholder Engagement Obligations
Schedule 19	- Procurement Monitoring and Implementation Plan
Schedule 20	- Lands
Schedule 21	- Construction Period Payments
Schedule 22	- Variation Procedure
Schedule 23	- Compensation on Termination
Schedule 24	- Intellectual Property
Schedule 25	- Insurance and Performance Security Requirements
Schedule 26	- Record Provisions
Schedule 27	- Dispute Resolution Procedure
Schedule 28	- Refinancing
Schedule 29	- Form of Performance Guarantee of Construction Guarantor
Schedule 30	- Insurance Trust Agreement
Schedule 31	- DB Co Information
Schedule 32	- <b>[REDACTED]</b>
Schedule 33	- Works Report Requirements
Schedule 34	- Mobility Matters
Schedule 35	- Permits, Licenses, Approvals and Agreements
Schedule 36	- Interface Agreement
Schedule 37	- Extension and Additional Phases
Schedule 38	- Utility Baseline Report

THIS PROJECT AGREEMENT is made as of the [•] day of [•], 20[•]

BETWEEN:

THE CITY OF OTTAWA

(the “City”)

AND:

EAST WEST CONNECTORS GP, [REDACTED]

(“DB Co”)

WHEREAS:

- A. A new light rail transit system is currently under construction in Ottawa, Ontario, being an approximately 12.5 kilometer line along the City’s Bus Rapid Transit corridor from Blair station in the east to Tunney’s Pasture station in the west (the “**Existing Confederation Line**”), which is scheduled to be completed in 2018.
- B. Pursuant to the City’s 2013 Transportation Master Plan, the City wishes to procure the design, construction, installation, testing, commissioning and completion of extensions to the Existing Confederation Line, including (i) extensions west from the Tunney’s Pasture station to the Baseline and Moodie stations (the “**Confederation Line West Extension**”), and (ii) an extension east from the Blair station to the Trim station (the “**Confederation Line East Extension**”), together with certain other Works in relation thereto as described herein (collectively, the “**Project**”).
- C. DB Co will carry out and perform all Works necessary to complete the Project.
- D. The City and DB Co wish to enter into this project agreement (the “**Project Agreement**”), which sets out the terms and conditions upon which DB Co shall perform the Works and complete the Project.
- E. The construction and completion of the Project will provide an overall improvement to the quality of life of the citizens of Ottawa and its outlying regions as well as to visitors to the City.
- F. Public ownership and control of the Existing Confederation Line and the Project will be preserved.
- G. With a view to ensuring that both Parties are able to properly and effectively discharge their respective duties, functions and responsibilities under Applicable Law, it is the intent that the City and DB Co work collaboratively, responsibly and cooperatively throughout the Project Term.

**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 AND INTERPRETATION

### 1.1 Definitions and Interpretation

- (a) This Project Agreement shall be interpreted in accordance with Schedule 1 – Definitions and Interpretation.
- (b) This Project Agreement is comprised of this executed agreement and the following documents, all of which are hereby incorporated by reference into and form part of this Project Agreement:

<b>Schedule No.</b>	<b>Description</b>
Schedule 1	- Definitions and Interpretation
Schedule 2	- Completion Documents
Schedule 3	- Subcontractor's Direct Agreement
Schedule 4	- Lenders' Direct Agreement
Schedule 5	- Construction Contractor's Direct Agreement
Schedule 6	- Independent Certifier Agreement
Schedule 7	- Letters of Credit
Schedule 8	- DB Co Parties
Schedule 9	- Key Individuals
Schedule 10	- Review Procedure
Schedule 11	- Integrated Management System Requirements
Schedule 12	- Works Scheduling Requirements
Schedule 13	- DB Co Proposal Extracts
Schedule 14	- Testing & Commissioning
Schedule 15	- Output Specifications
Schedule 16	- Encumbrances
Schedule 17	- Environmental Obligations
Schedule 18	- Communication and Stakeholder Engagement Obligations
Schedule 19	- Procurement Monitoring and Implementation Plan
Schedule 20	- Lands
Schedule 21	- Construction Period Payments
Schedule 22	- Variation Procedure
Schedule 23	- Compensation on Termination
Schedule 24	- Intellectual Property
Schedule 25	- Insurance and Performance Security Requirements
Schedule 26	- Record Provisions
Schedule 27	- Dispute Resolution Procedure
Schedule 28	- Refinancing
Schedule 29	- Form of Performance Guarantee of Construction Guarantor
Schedule 30	- Insurance Trust Agreement
Schedule 31	- DB Co Information
Schedule 32	- <b>[REDACTED]</b>
Schedule 33	- Works Report Requirements
Schedule 34	- Mobility Matters
Schedule 35	- Permits, Licenses, Approvals and Agreements
Schedule 36	- Interface Agreement
Schedule 37	- Extension and Additional Phases
Schedule 38	- Utility Baseline Report

- (c) The documents comprising this Project Agreement are complementary and what is called for by any one of them shall be interpreted as if called for by all, except in the event of ambiguities, conflicts or inconsistencies, in which case Section 1.2 shall apply.
- (d) Except for those parts of DB Co's proposal which are incorporated by explicit reference into this Project Agreement by the DB Co Proposal Extracts, on Financial Close the Request for Proposals and DB Co's proposal shall be superseded entirely by this Project Agreement and rendered null and void, and shall not be relied upon or used by DB Co, the City or anyone else (including anyone pursuant to Schedule 27 – Dispute Resolution Procedure or any arbitral body or any court) in any way to interpret or qualify the scope of the Works, any obligations or liabilities of DB Co, or anything else contained in this Project Agreement.
- (e) Unless it is specifically provided that a consent, approval or satisfaction is in the sole discretion of the City, no consent, approval or satisfaction of the City or the City Representative shall be unreasonably withheld or delayed.
- (f) Unless it is specifically provided that a consent, approval or satisfaction is in the sole discretion of DB Co, no consent, approval or satisfaction of DB Co or the DB Co Representative shall be unreasonably withheld or delayed.
- (g) The organization of the Output Specifications into divisions, sections and parts shall not control DB Co in dividing the Works among the DB Co Parties or in establishing the extent of the Works to be performed by a trade.

## **1.2 Conflict of Terms**

- (a) In the event of ambiguities, conflicts or inconsistencies between or among any of the provisions of this Project Agreement, the provisions shall govern in the following order of precedence with each taking precedence over those listed subsequently:
  - (i) the provisions of amendments in writing to this Project Agreement signed by the Parties and Variation Confirmations shall govern and take precedence only over those specific provisions of this Project Agreement expressly amended thereby;
  - (ii) any provision establishing a higher standard of safety, reliability, durability, performance or service shall take precedence over a provision establishing a lower standard of safety, reliability, durability, performance or service;
  - (iii) the body of this Project Agreement;
  - (iv) Schedule 1 – Definitions and Interpretation;
  - (v) Schedule 35 – Permits, Licences, Approvals and Agreements;
  - (vi) Schedule 20 – Lands;
  - (vii) Schedule 27 – Dispute Resolution Procedure;
  - (viii) Schedule 21 – Construction Period Payments;

- (ix) Schedule 15 – Output Specifications;
  - (x) Schedule 17 – Environmental Obligations;
  - (xi) Schedule 25 – Insurance and Performance Security Requirements;
  - (xii) Schedule 22 – Variation Procedure;
  - (xiii) Schedule 10 – Review Procedure;
  - (xiv) Schedule 14 – Testing & Commissioning;
  - (xv) Schedule 11 – Integrated Management System Requirements;
  - (xvi) Schedule 28 – Refinancing;
  - (xvii) Schedule 23 – Compensation on Termination;
  - (xviii) Schedule 26 – Record Provisions;
  - (xix) the other Schedules in the order in which they are listed in Section 1.1(b);
  - (xx) Schedule 13 – DB Co Proposal Extracts.
- (b) Subject to Section 1.2(a), if the ambiguity, conflict or inconsistency is between a provision of general application and a provision that applies only to a specific part of the Works, the provision that applies to the specific part of the Works shall govern for that specific part of the Works.
- (c) If any ambiguity, conflict or inconsistency is not readily resolved by the foregoing provisions of this Section 1.2, then DB Co or the City, upon discovery of same, shall immediately give Notice to the City Representative. The City Representative shall, within 10 Business Days after such Notice, make a determination of which provision governs and give Notice of such determination, in writing, to DB Co.
- (d) The City and DB Co shall comply with the determination of the City Representative pursuant to this Section 1.2 unless DB Co disputes the decision of the City Representative in which event such Dispute may be referred for resolution in accordance with Schedule 27 – Dispute Resolution Procedure.

### **1.3 Conflict of Documents**

- (a) In the event of any ambiguity, conflict or inconsistency between the provisions of this Project Agreement and the Lenders' Direct Agreement, the provisions of the Lenders' Direct Agreement shall prevail and govern to the extent of such ambiguity, conflict or inconsistency. Notwithstanding the foregoing, if there is any right or remedy in favour of the City set out in the Lenders' Direct Agreement or any part thereof which is not set out or provided for in the Project Agreement, such additional right or remedy shall not constitute an ambiguity, conflict or inconsistency.

#### **1.4 Legal Requirements**

- (a) Whenever standards of Applicable Law differ, the most stringent standards shall govern.

#### **1.5 Interface Agreement and Interface with RTG**

- (a) On the execution and delivery of this Project Agreement, the parties shall, and the City shall cause RTG to, execute and deliver the Interface Agreement, provided that the Interface Agreement shall be held in escrow until released by notice delivered by the City to DB Co.
- (b) DB Co hereby agrees as follows:
- (i) without prejudice to DB Co's right to claim Delay Events and Compensation Events hereunder from the City, including pursuant to Sections 18.5 and 18.7 relating to defects, errors or inaccuracies in the Stage 1 Connection Infrastructure and Stage 1 Systems Infrastructure, neither RTG nor any RTG Party shall be liable to DB Co or any DB Co Party for, and DB Co shall not and shall ensure that no DB Co Party shall seek to recover from RTG or any RTG Party, any damages, losses, costs, liabilities or expenses which may arise or be suffered, sustained or incurred by, or brought against, any of them (whether in contract, tort, for breach of statutory duty or otherwise) arising, directly or indirectly, out of, or in consequence of, or involving or relating to, the performance or any breach of the PS Services or the PS Services Variation by RTG, or the performance or any breach of the RTG Interface and Design Management Works or the variation to the Stage 1 Project Agreement governing the RTG Interface and Design Management Works by RTG, or any act or omission of RTG or any RTG Party in connection therewith;
  - (ii) RTG's obligations and liability to DB Co are limited to those obligations and liabilities of RTG arising under the Interface Agreement, and nothing herein shall be applied or construed so as to modify or limit such obligations and liabilities, or impose additional obligations or liabilities on RTG or any RTG Party;
  - (iii) the rights of DB Co against the City in relation to the agreements, terms, conditions, scope of Works, standards or other obligations to be performed by DB Co under this Project Agreement shall not be limited by anything in the Interface Agreement; and
  - (iv) in the event that any amount is agreed or determined to be due and payable by DB Co to RTG under the Interface Agreement and RTG has exhausted any rights against DB Co under the Interface Agreement, then the City shall be entitled to recover such amount in the same way as any other liability owing from DB Co to the City hereunder, including by way of set-off or through any performance security provided under this Project Agreement, but subject to the same restrictions or limitations set out hereunder, under the Interface Agreement, or in such performance security as if the underlying obligations had formed part of this Project Agreement. Notwithstanding the foregoing, in no event shall a failure to make payment under the Interface Agreement or any other breach by DB Co thereunder constitute a DB Co Event of Default under this Project Agreement or give rise to any right in favour of the City against DB Co under this Project Agreement, at law or in equity other than the set off right or right to draw on performance security as referred to above. The City shall, and shall procure that RTG shall, comply with the prohibition on duplication of claims under Section 1.4(b) of the Interface Agreement. For greater

certainly, any amounts settled by DB Co with RTG whether through cash payment or otherwise with respect to any obligation under the Interface Agreement shall reduce the City's right to recover such amount on behalf of RTG on a dollar-for-dollar basis. DB Co shall be entitled to settle any obligation under the Interface Agreement directly with RTG without any regard for any agreements, liabilities, obligations or any equities which may otherwise exist between RTG and the City. In the event of a dispute in respect of such amounts, such dispute shall be settled in accordance with the dispute resolution procedure under the Interface Agreement.

- (c) DB Co acknowledges and agrees that:
- (i) the City has delegated certain responsibilities to RTG in respect of the construction and maintenance of the Existing Confederation Line and the maintenance of the Confederation Line East Extension and the Confederation Line West Extension under the Stage 1 Project Agreement. Accordingly, and notwithstanding any direct rights of recourse that RTG may have against DB Co under the Interface Agreement, the City shall be entitled, upon the release of the Interface Agreement from escrow as contemplated in Section 1.5(a), to enforce any term of this Project Agreement against DB Co on behalf of RTG or any RTG Party (or any other party to whom the City has delegated any such functions), provided that, for the avoidance of doubt, DB Co shall owe no greater obligations to the City in this regard than if the delegated responsibilities had been performed by the City in its own name;
  - (ii) DB Co's liability to the City under this Project Agreement shall not be affected by the existence of any arrangements between the City and RTG whereby the City's liability to RTG is limited to the liability which the City can establish against DB Co.

## 1.6 Early Works Agreement

- (a) Upon achievement of Financial Close, this Project Agreement shall supersede and replace the early works agreement in respect of the Project executed by the Parties on or about March 15, 2019 (the "**Early Works Agreement**"). Without prejudice to the generality of the foregoing, any part of the Works performed by DB Co under and in accordance with the Early Works Agreement shall be treated as having been performed under and in accordance with this Project Agreement, and the City's payment obligations related to that part of the Early Works will be those under this Project Agreement and not under this Early Works Agreement, and shall be accounted for and paid for as part of the Mobilization Credit in accordance with Schedule 21 – Construction Period Payments of the Project Agreement.

## 2. COMMERCIAL CLOSE AND FINANCIAL CLOSE

### 2.1 Effective Date

- (a) The provisions of Sections 1.1, 1.2, 1.3, 1.4, 2.1, 2.2, 2.3, 2.4, 3.1, 4.11 to 4.17, 5 to 15, 16.5, 17 to 22, 26 to 31, and 41 to 53 and Schedules 1, 2, 7 – 13, 16 – 18, 20 – 22, 24 – 27, 32 and 35 of this Project Agreement will come into effect on the date of this Project Agreement ("**Commercial Close**"). All other provisions and schedules will come into effect only on Financial Close.

## **2.2 Standby Letter of Credit**

- (a) If DB Co has provided the City with multiple standby letters of credit in accordance with Section 9.1(2) of the RFP, for purposes of this Section 2.2 each of the multiple irrevocable standby letters of credit is referred to as a Standby Letter of Credit for purposes of this Project Agreement.
- (b) Unless a Standby Letter of Credit is drawn by the City in accordance with the provisions of this Project Agreement, the City shall release and deliver the Standby Letter(s) of Credit to DB Co on Financial Close.
- (c) DB Co shall ensure that the Standby Letter(s) of Credit (and any replacement therefor) is renewed prior to its expiry date if, as at such date, Financial Close will not, or may reasonably be expected not to, have occurred.
- (d) If there are multiple Standby Letters of Credit, DB Co acknowledges and agrees that:
  - (i) the City may draw upon any Standby Letter of Credit provided by any Letter of Credit Provider in any specified ratable amount;
  - (ii) the City may draw on any Standby Letter of Credit provided by any Letter of Credit Provider in a disproportionate amount to such Letter of Credit Provider's contribution to security;
  - (iii) the City may draw upon any Standby Letter of Credit provided by any Letter of Credit Provider even in the event that such Letter of Credit Provider is no longer a DB Co Party; and
  - (iv) the provision of multiple Standby Letters of Credit shall not in any way prejudice or adversely affect the rights of the City to draw on the Standby Letter(s) of Credit in accordance with this Project Agreement, including in a circumstance where the default giving rise to the City's right to draw on the Standby Letter(s) of Credit is not the result of any act or omission of the Letter of Credit Provider(s) whose Standby Letter of Credit is drawn upon.

## **2.3 Financial Close**

- (a) No later than 30 days prior to the Financial Close Target Date, DB Co will deliver to the City drafts of all documents referred to in Section 1 of Schedule 2 - Completion Documents.
- (b) On or before the Financial Close Target Date:
  - (i) DB Co shall deliver to the City the documents referred to in Section 1 of Schedule 2 - Completion Documents; and
  - (ii) the City shall deliver to DB Co the documents referred to in Section 2 of Schedule 2 - Completion Documents.
- (c) If DB Co fails to deliver to the City any of the documents referred to in Section 1 of Schedule 2 - Completion Documents by the Financial Close Target Date (other than as a direct result of a

breach by the City of its obligations under Section 2.3(b)(ii)) and the City does not waive such requirement, the City will be entitled to:

- (i) draw on the Standby Letter of Credit immediately and to retain the lesser of (A) the full amount of the Standby Letter of Credit, and (B) the difference between the Guaranteed Price and the price that Contracting Authority is able to obtain from another contractor for the Works, together with all costs reasonably incurred by Contracting Authority to enter into binding agreements with such other contractor, and such amount shall be retained as liquidated damages; and
- (ii) terminate this Project Agreement in its entirety by written Notice having immediate effect.

The Parties agree that such liquidated damages are not a penalty but represent a genuine and reasonable pre-estimate of the damages that the City will suffer as a result of the happening of the specified event. Such payment shall constitute full and final settlement of any and all damages that may be claimed by the City as a result of DB Co not achieving Financial Close. The Parties agree that such liquidated damages shall be payable whether or not the City incurs or mitigates its damages, and that the City shall not have any obligation to mitigate any such damages.

- (d) If the City fails to deliver to DB Co any of the documents referred to in Section 2 of Schedule 2 - Completion Documents by the Financial Close Target Date (other than as a direct result of a breach by DB Co of its obligations under Section 2.3(b)(i)) and DB Co does not waive such requirement, DB Co will be entitled to the return of the Standby Letter of Credit and to terminate this Project Agreement in its entirety by written Notice having immediate effect.
- (e) The following documents will be delivered by DB Co to the City no later than forty-five (45) days following the earliest date such documents are available from the Workplace Safety and Insurance Board: in respect of the Construction Contractor, a CAD-7 and a Workplace Injury Summary Report.

#### **2.4 Disruption in Financial Markets**

- (a) If Financial Close cannot be achieved by the Financial Close Target Date by reason solely of a Severe Market Disruption, subject to DB Co's obligation to renew the Standby Letter of Credit pursuant to Section 2.2, the Financial Close Target Date will be extended until the date falling 10 Business Days (or such other period as the Parties agree, acting reasonably) after the date on which such Severe Market Disruption ceases.
- (b) If a Severe Market Disruption exists, then, at any time before such Severe Market Disruption ceases and prior to Financial Close, the City may in its sole discretion either:
  - (i) terminate this Project Agreement in its entirety by written Notice having immediate effect; or
  - (ii) direct DB Co to assign to a designee of the City which has agreed to assume:
    - (A) the Project Agreement, and all of DB Co's right, title and interest in the Project Data, the Intellectual Property Rights and the DB Co Permits, Licences, Approvals and Agreements; and

- (B) those contracts between DB Co and any DB Co Party which the City elects to be assigned.
- (c) If the City exercises its rights pursuant to Section 2.4(b), and, provided DB Co has, if directed, delivered the assignments provided for in Section 2.4(b)(ii)(A) and (B) above, DB Co will be entitled to the return of its Standby Letter of Credit and to payment of an amount equal to the Design and Bid Fee pursuant to Section 10.3.2 of the Request for Proposals plus **[REDACTED]**% of such fee. The City's obligation to return the Standby Letter of Credit and to pay such fee shall be contingent on the receipt of a waiver, in form and substance satisfactory to the City, that such fee represents full and final satisfaction of any obligation or liability of the City and any other Government Entity to DB Co and any DB Co Parties in connection with the Project Agreement and the Request for Proposals process.

### **3. GUARANTEED PRICE**

#### **3.1 Guaranteed Price and Adjustments**

- (a) The Guaranteed Price, exclusive of HST, is **[\$REDACTED]**, and is equal to the sum of the Cost of the Works and the Cost of the Financing. The Cost of the Works and the expected Cost of the Financing as of the date hereof are as set out in the Financial Model.
- (b) DB Co represents and warrants that the Project Debt Interest Cost is based upon the Interest Reference Rate. The Project Debt Interest Cost will be adjusted once on, or within the 2 Business Days immediately prior to, Financial Close on the basis of the actual increase or decrease in the Project Debt Interest Cost resulting directly from any change upward or downward in the Interest Reference Rate as compared to the Interest Reference Rate as at the RFP Financial Submission Deadline.
- (c) The Parties:
  - (i) acknowledge that the Project Debt Interest Cost is a component of the Cost of the Financing and that the Project Debt Interest Cost is subject to adjustment under Section 3.1(b) as at the date set out in Section 3.1(b); and
  - (ii) acknowledge and agree that subject to adjustments made in accordance with the provisions of this Project Agreement, the final Guaranteed Price shall be determined on the basis of such final adjusted Cost of the Financing and the final adjusted Cost of the Works as of the date set out in Section 3.1(b).
- (d) Subject to the provisions of Section 3.1(c) and without prejudice to express provisions in this Project Agreement requiring, or entitling DB Co to, an adjustment to monetary compensation, the Parties agree that the Guaranteed Price will not be subject to adjustment despite changes in the Works, unless such changes in the Works arise pursuant to a Variation Confirmation. The Parties further agree that the Guaranteed Price will only be adjusted where the Project Agreement specifically and expressly refers to an adjustment to the Guaranteed Price, and no claim for an adjustment to the Guaranteed Price on any legal or equitable basis outside of the specific and express rights to an adjustment of the Guaranteed Price set out in the Project Agreement will be allowed. In order to be effective, any permitted adjustment to the Guaranteed Price must be provided for in a Variation Confirmation under Schedule 22 – Variation Procedure, but without

prejudice to express provisions in this Project Agreement requiring or entitling DB Co to an adjustment to monetary compensation.

- (e) DB Co acknowledges and agrees that, subject to the provisions of Section 3.1(c) and without prejudice to express provisions in this Project Agreement requiring, or entitling DB Co to, an adjustment to monetary compensation,
  - (i) DB Co has satisfied itself as to the correctness and sufficiency of the Guaranteed Price, and has based the Guaranteed Price on the data, interpretations, necessary information, examinations and satisfaction as to all relevant matters and any further data relevant to the design;
  - (ii) the Guaranteed Price covers all of DB Co's obligations under the Project Agreement; and
  - (iii) the Guaranteed Price includes all premium time and overtime that may be required to perform the Works in accordance with this Project Agreement and Good Industry Practice.

#### **4. PAYMENT**

##### **4.1 General**

- (a) Subject to the provisions of the Project Agreement (including, for clarity Section 3.1(d)) and in accordance with and subject to Applicable Law respecting holdbacks, the City shall make the payments set out in this Section 4.
- (b) For the purpose of this Project 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 transfer number and the other details of the transfer.

##### **4.2 Construction Period Payments**

- (a) The City shall pay to DB Co the Construction Period Payments, plus, for clarity, applicable HST in accordance with Schedule 21 – Construction Period Payments and this Project Agreement.
- (b) The City shall pay to DB Co:
  - (i) the East Substantial Completion Payment, plus, for clarity, applicable HST, on the East Substantial Completion Payment Date; and
  - (ii) the West Substantial Completion Payment together with any Unpaid Construction Period Payments as of the West Substantial Completion Payment Date, plus, for clarity, applicable HST, on the West Substantial Completion Payment Date,

each in accordance with Schedule 21 – Construction Period Payments and this Project Agreement.

- (c) Notwithstanding Section 4.2(b),

- (i) if the East Warranty Letter of Credit has not been delivered to the City by the East Substantial Completion Payment Date, the City may withhold from the East Substantial Completion Payment a holdback amount of \$[REDACTED] (the “**East Warranty Cash Amount**”); and
  - (ii) if the West Warranty Letter of Credit has not been delivered to the City by the West Substantial Completion Payment Date, the City may withhold from the West Substantial Completion Payment a holdback amount of \$[REDACTED] (the “**West Warranty Cash Amount**”).
- (d) In the event of Section 4.2(c)(i) above, the East Warranty Cash Amount may be withheld by the City, subject to reduction in value in accordance with Section 11.18(a), until the earlier of (i) the date that is two Business Days following the date that the East Warranty Letter of Credit has been delivered to the City, or (ii) the date that is two Business Days following the expiry of the East Warranty Period, and, in either case, the East Warranty Cash Amount shall be paid by the City to DB Co upon such second Business Day, less any amounts as would otherwise have been drawn down against the East Warranty Letter of Credit in accordance with Sections 11.17 and 11.17A. Until receipt of the East Warranty Letter of Credit, the City may use the East Warranty Cash Amount in the place of, in the same manner as and for the same purpose as the East Warranty Letter of Credit. The withholding of the East Warranty Cash Amount in accordance with this Section 4.2(d) until DB Co’s delivery of the East Warranty Letter of Credit to the City shall be the City’s sole remedy for failure on the part of DB Co to deliver the East Warranty Letter of Credit by the East Substantial Completion Payment Date and, for greater certainty, the City shall not be entitled to withhold payment of the balance of the East Substantial Completion Payment as a result of any such failure on the part of DB Co.
- (e) In the event of Section 4.2(c)(ii) above, the West Warranty Cash Amount may be withheld by the City, subject to reduction in value in accordance with Section 11.18(a), until the earlier of (i) the date that is two Business Days following the date that the West Warranty Letter of Credit has been delivered to the City, or (ii) the date that is two Business Days following the expiry of the West Warranty Period, and, in either case, the West Warranty Cash Amount shall be paid by the City to DB Co upon such second Business Day, less any amounts as would otherwise have been drawn down against the West Warranty Letter of Credit in accordance with Sections 11.17 and 11.17A. Until receipt of the West Warranty Letter of Credit, the City may use the West Warranty Cash Amount in the place of, in the same manner as and for the same purpose as the West Warranty Letter of Credit. The withholding of the West Warranty Cash Amount in accordance with this Section 4.2(e) until DB Co’s delivery of the West Warranty Letter of Credit to the City shall be the City’s sole remedy for failure on the part of DB Co to deliver the West Warranty Letter of Credit by the West Substantial Completion Payment Date and, for greater certainty, the City shall not be entitled to withhold payment of the balance of the West Substantial Completion Payment as a result of any such failure on the part of DB Co.
- (f) [Not used]
- (g) Notwithstanding Section 4.2(b), if the Remaining Works Letter of Credit has not been delivered to the City by the West Substantial Completion Payment Date, the City may withhold from the West Substantial Completion Payment a holdback amount of \$[REDACTED] (the “**Remaining Works Cash Amount**”);

- (h) In the event of Section 4.2(g) above, the Remaining Works Cash Amount may be withheld by the City until the earlier of (i) the date that is two Business Days following the date that the Remaining Works Letter of Credit has been delivered to the City, or (ii) the date when the Remaining Works Letter of Credit would have been returned to DB Co if it had been provided in accordance with Section 11.18A, and, in either case, upon such date, the Remaining Works Cash Amount shall be paid by the City to DB Co, less any amounts as would otherwise have been drawn down against the Remaining Works Letter of Credit in accordance with Section 11.18A. Until receipt of the Remaining Works Letter of Credit, the City may use the Remaining Works Cash Amount in the place of, in the same manner as and for the same purpose as the Remaining Works Letter of Credit. The withholding of the Remaining Works Cash Amount in accordance with this Section 4.2(h) until DB Co's delivery of the Remaining Works Letter of Credit to the City shall be the City's sole remedy for failure on the part of DB Co to deliver the Remaining Works Letter of Credit by the West Substantial Completion Payment Date and, for greater certainty, the City shall not be entitled to withhold payment of the balance of the West Substantial Completion Payment as a result of any such failure on the part of DB Co.

**4.3 [Not Used]**

**4.4 [Not Used]**

**4.5 Compensation on Termination**

- (a) If this Project Agreement is terminated pursuant to Sections 36.3(a), 37.2(a)(ii), 38.1, 38.2 or 38.3, then:
- (i) Schedule 23 – Compensation on Termination shall apply and the City shall pay DB Co any applicable compensation on termination; and
  - (ii) the provisions of Section 4.2 shall no longer apply.
- (b) DB Co hereby irrevocably directs the City to make any Compensation Payment to the Lenders' Agent, or as the Lenders' Agent may direct. The City shall pay the Compensation Payment as directed by the Lenders' Agent and shall not accept any redirection without the consent of Lenders' Agent. The City will pay the Compensation Payment in accordance with the provisions of Schedule 23 – Compensation on Termination. DB Co acknowledges and agrees that payment by the City of the Compensation Payment to the Lenders' Agent in accordance with this Section 4.5(b) constitutes payment by the City to DB Co in satisfaction of the City's obligation to pay the Compensation Payment to DB Co under this Project Agreement and in satisfaction of any trust obligation of the City with respect to such payments under section 7 of the CA pursuant to section 10 of the CA.

**4.6 Payment Due under Insurance Policies**

- (a) In the event of loss or damage occurring where payment becomes due under the property and boiler insurance policies, payments shall be made in accordance with the provisions of the Insurance Trust Agreement.

#### **4.7 HST**

- (a) The City covenants and agrees to pay to DB Co the HST that may be exigible with respect to any payments made by the City to DB Co hereunder.

#### **4.8 Set-Off**

- (a) The Parties agree that their rights of set-off at law or in equity are limited to the right of:
  - (i) the City, to set off against any amounts otherwise due to DB Co pursuant to the terms of this Project Agreement, any amounts (including, without limitation, any amounts payable in accordance with Section 46, or any amounts payable as liquidated damages) that are due and owed to the City from or by DB Co pursuant to the terms of this Project Agreement; and
  - (ii) DB Co to set off against any amounts otherwise due to the City pursuant to the terms of this Project Agreement, any amounts (including, without limitation, any amounts payable in accordance with Section 46) that are due and owed to DB Co from or by the City pursuant to the terms of this Project Agreement.
- (b) For clarity, the City is entitled to exercise its rights in accordance with Section 4.8(a)(i) immediately upon an amount becoming due and owed to the City by DB Co pursuant to the terms of this Project Agreement.

#### **4.9 Effect of Payment**

- (a) Subject to Section 40.2, no payment hereunder shall be construed as an acceptance or approval of incomplete, defective or improper performance by DB Co of any of its obligations under this Project Agreement, nor shall it operate to relieve DB Co from the performance of any of its obligations under this Project Agreement which have not been performed.

#### **4.10 No Other Entitlement**

- (a) DB Co shall not be entitled to any payments, compensation, rights, remedies, benefits or entitlements under or in connection with this Project Agreement, except as specifically and expressly set out in this Project Agreement.

#### **4.11 Taxes**

- (a) All amounts specified in this Project Agreement, including, for clarity, any compensation payable on termination, are expressed exclusive of HST, but inclusive of all other Taxes payable pursuant to Applicable Law. For clarity, the City shall not be required to pay any interest and/or penalties that are imposed on or assessed against DB Co or any DB Co Party for non-compliance with Applicable Law. If DB Co is required by Applicable Law to collect any such HST from the City, the City shall pay such HST to DB Co simultaneously with the amount to which such applicable HST relates or applies.
- (b) The City shall pay when due and payable, all property taxes or payments in lieu of property taxes that are assessed in respect of ownership or use of the Lands, the New City Infrastructure, the Existing Infrastructure and the New MTO Infrastructure.

- (c) The City shall pay all applicable HST properly payable in accordance with the *Excise Tax Act* (Canada) by the City upon and in connection with payments by the City to DB Co under this Project Agreement.

#### 4.12 Changes in Scope of Taxation

- (a) If, as a result of a Change in Law, the application of Taxes under Part IX of the *Excise Tax Act* (Canada) or any provincial sales tax legislation changes with respect to the provision of any goods or services by DB Co in connection with the performance of the Works, the City and DB Co agree to co-operate to determine how such change affects their respective obligations under this Project Agreement to the extent not already addressed in this Project Agreement.

#### 4.13 Changes in Recoverability of Tax Credits

- (a) The City will pay to DB Co from time to time, as the same is incurred by DB Co, amounts equal to any Irrecoverable Tax to the extent such Irrecoverable Tax results from a Change in Law. DB Co will pay to the City from time to time, as the same is incurred by DB Co, amounts equal to any Recoverable Tax to the extent such Recoverable Tax results from a Change in Law.
- (b) For the purposes of this Section 4.13, the term “**Irrecoverable Tax**” means HST or an irrecoverable sales tax levied by the Province in lieu of all or a portion of HST incurred by DB Co in respect of the supply of any good or service to the City which is consumed, used or supplied, or to be consumed, used or supplied, exclusively by DB Co in the course of carrying out the Works to the extent that DB Co is unable to recover or be credited with input tax credits, refunds, rebates or exemptions for such HST.
- (c) For the purposes of this Section 4.13, the term “**Recoverable Tax**” means HST incurred by DB Co in respect of the supply of any good or service to the City which is consumed, used or supplied, or to be consumed, used or supplied, exclusively by DB Co in the course of carrying out the Works to the extent that DB Co is able to recover or be credited with input tax credits, refunds, rebates or exemptions for such HST.

#### 4.14 Information and Assistance Provided by DB Co

- (a) DB Co shall, at the City’s request and cost, assist the City in applying for and obtaining all remissions and credits of Taxes to which the City is entitled.
- (b) The City 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 Project Agreement. DB Co shall, at the City’s cost, assist the City in making any applications for such global or general exemption, waiver, remission or refund and shall provide the City with such documentation as the City may reasonably require to support such application and, in any event, shall provide such consent as the City may require. Any exemption, waiver, remission, refund or other recovery of Taxes obtained by the City through such application shall accrue to the sole benefit of the City.
- (c) DB Co will provide the City with any information reasonably requested by the City from time to time in relation to any Taxes chargeable in accordance with this Project Agreement and payable by the City to DB Co from time to time.

#### 4.15 Residency – Income Tax Act (Canada)

- (a) DB Co shall not undertake any action or transaction that, if undertaken, would cause or result in DB Co becoming a Non-Resident without the City’s prior written consent, which consent may be withheld in the City’s sole discretion.

#### 4.16 Taxes – General

- (a) DB Co shall not, without the prior written consent of the City (which consent may be withheld in its sole discretion), undertake any action or transaction that, if undertaken, would cause the City to have (or result in the City 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 DB Co or any DB Co Party under this Project Agreement or under any other Ancillary Document.

#### 4.17 Taxes – Indemnity

- (a) If (i) DB Co becomes a Non-Resident, or (ii) the City 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 DB Co or a DB Co Party by the City under the Project Agreement or under any of the Project Documents, then the City shall be entitled to make any applicable deductions or withholdings required by Applicable Law from any amount paid or credited or to be paid or credited to DB Co or a DB Co Party on or after the date on which (A) DB Co or the DB Co Party becomes a Non-Resident and at all times while it remains a Non-Resident; or (B) the City is required by Applicable Law to deduct or withhold amounts in respect of any such amounts, in each case, in respect of all Taxes that are required by Applicable Law to be deducted or withheld from amounts paid or credited to a Non-Resident or otherwise as required by Applicable Law; and all amounts paid or credited by the City under this Project Agreement or under any other Ancillary Document to DB Co or a DB Co Party shall be paid or credited net of such deductions or withholdings.
- (b) If (i) DB Co becomes a Non-Resident, or (ii) the City is or becomes required by Applicable Law to deduct and withhold any amount in respect of Taxes on or in respect of any amounts paid or credited to DB Co or a DB Co Party by the City under the Project Agreement or under any of the Project Documents, DB Co shall, in each case, indemnify and hold harmless the City for (A) the full amount of all Taxes (“**Indemnifiable Taxes**”) that arise, are imposed on or are required to be paid by the City in respect of any amounts paid or credited by the City to DB Co or any DB Co Party under this Project Agreement or under any other Ancillary Document as a result of either of the foregoing items less any amount withheld or deducted by the City in respect of such Taxes, and (B) 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 City makes written demand for it. A certificate containing reasonable detail as to the amount of Indemnifiable Taxes and Associated Liabilities submitted to DB Co by the City shall be conclusive evidence, absent manifest error, of the amount due from DB Co to the City. The City shall be entitled to exercise its rights of set off under Section 4.8 against any amounts owing under this indemnification. In the event that it is finally determined that such Indemnifiable Taxes were not correctly or legally

asserted or remitted, then such Indemnifiable Taxes shall be reimbursed to DB Co following such final determination.

## **5. SCOPE OF AGREEMENT**

### **5.1 Scope of Agreement**

- (a) DB Co shall undertake the Project and perform the Works in accordance with and subject to the provisions of this Project Agreement.
- (b) DB Co shall exercise its rights and perform its obligations at its own cost and risk without recourse to the City, except as otherwise provided in this Project Agreement. Except as provided in the Interface Agreement, DB Co's sole recourse with respect to the subject matter of this Project Agreement shall be to the City.

## **6. REPRESENTATIONS AND WARRANTIES**

### **6.1 DB Co Representations and Warranties**

- (a) DB Co represents and warrants to the City that as of Commercial Close:
  - (i) DB Co is [REDACTED] and is formed and validly existing under the laws of the Province of Ontario, 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 Project Agreement and to perform its obligations hereunder;
  - (ii) [REDACTED] under the laws of the Province of British Columbia, is in good standing with the Registrar of Companies in the Province of British Columbia 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 Project Agreement and to perform its obligations hereunder in its capacity as a partner of DB Co;
  - (iii) [REDACTED] under the laws of the Province of Ontario, is in good standing with the Ministry of Government Services of Ontario 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 Project Agreement and to perform its obligations hereunder in its capacity as a partner of DB Co;
  - (iv) [REDACTED] under the laws of the Province of Ontario, is in good standing with the Ministry of Government Services of Ontario 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 Project Agreement and to perform its obligations hereunder in its capacity as a partner of DB Co;
  - (v) [REDACTED] under the laws of the Province of Ontario, is in good standing with the Ministry of Government Services of Ontario 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 Project Agreement and to perform its obligations hereunder in its capacity as a partner of DB Co;

- (vi) all partnership interests in DB Co as of Commercial Close have been disclosed to the City;
- (vii) DB Co and the DB Co Parties, collectively, have extensive experience and are knowledgeable in the design and construction of infrastructure and facilities similar to the those included in the scope of the Project in scale, scope, type and complexity, and have the required ability, experience, skill and capacity to perform the Works in a timely and professional manner as set out in this Project Agreement;
- (viii) DB Co, and [REDACTED] have the requisite power, authority and capacity to execute, deliver and perform this Project 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 Project Agreement to be done, executed, delivered or performed by DB Co or by [REDACTED] in its capacity as a partner of DB Co;
- (ix) no steps or proceedings have been taken or are pending to supersede or amend:
  - (A) the constating or formation documents of DB Co, including the partnership agreement governing DB Co; or
  - (B) the constating or formation documents, articles or by-laws of [REDACTED]

in each case, in a manner that would impair or limit its ability to perform the obligations of DB Co under this Project Agreement;

- (x) this Project Agreement has been duly authorized, executed, and delivered by DB Co, and constitutes a legal, valid, and binding obligation of DB Co, [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;
- (xi) the execution delivery, and performance by DB Co, and performance by [REDACTED] in its capacity as a partner of DB Co, of this Project Agreement does not and will not violate or conflict with, or constitute a default under:
  - (A) its constating, formation or organizational documents, including any by-laws;
  - (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;

- (xii) no DB Co Event of Default has occurred and is continuing;
- (xiii) all of the information regarding DB Co, **[REDACTED]** set out in Schedule 31 – DB Co Information is true and correct in all material respects;
- (xiv) there are no actions, suits, proceedings, or investigations pending or threatened against DB Co, **[REDACTED]** or, to DB Co’s knowledge, any DB Co 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 DB Co or in any impairment of its ability to perform its obligations under this Project Agreement, and DB Co has no 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;
- (xv) DB Co has conducted its own documentary investigations and has carefully reviewed the whole of this Project Agreement, and all other documents made available to DB Co by or on behalf of the City, and, to DB Co’s knowledge, nothing contained herein or therein inhibits or prevents DB Co from completing the Works or performing the Works in accordance with this Project Agreement in a good and safe manner so as to achieve and satisfy the requirements of this Project Agreement;
- (xvi) DB Co, and **[REDACTED]** in its capacity as a partner of DB Co, is able to meet its obligations as they generally become due;
- (xvii) DB Co is registered under Division V of Part IX of the *Excise Tax Act* (Canada) and its HST registration number is **[REDACTED]**;
- (xviii) **[Intentionally Deleted]**;
- (xix) each Scheduled Substantial Completion Date is a realistic date and is achievable by DB Co performing the Works in accordance with this Project Agreement;
- (xx) DB Co, and **[REDACTED]** is not a Non-Resident;
- (xxi) DB Co has obtained all necessary DB Co Permits, Licences, Approvals and Agreements required to commence the Works;
- (xxii) the manager or supervisory personnel DB Co has assigned to the Project are highly experienced;
- (xxiii) DB Co has a sufficient staff of qualified and competent personnel to replace its designated supervisors, subject to the City’s approval, in the event of death, incapacity or resignation;
- (xxiv) DB Co and the Construction Contractor have conducted inspections of the Lands prior to Commercial Close and an investigation and examination of the Project Agreement, the Background Information and any other documents made available to DB Co by the City so as to ascertain the nature or location of the Works and the Lands, the physical conditions of the Lands and the Existing Infrastructure on which Works will be

performed, and protocols, rules and regulations if any, possible delays in commencing the Works, conditions relating to the transportation, handling and storage of materials and availability of labour and the character and availability of equipment, materials and facilities needed to perform the Works;

- (xxv) DB Co has secured the Financing and is in a position to complete the Financing on or before the Financial Close Target Date, subject to the satisfaction of reasonable conditions that are customary in closing financing for projects similar to the Project;
- (xxvi) no Restricted Person has Direct or Indirect Power or Control over any member of the DB Co Group in relation to the decisions, management, actions or policies of DB Co or in relation to the operation, management and ownership of the Project;
- (xxvii) to the knowledge of DB Co, no Restricted Person has directly or indirectly, an Economic Interest in DB Co or the Project;
- (xxviii) either:
  - (A) the COR-Certified Construction DB Co Party is in possession of its COR Certification in good standing as required under this Project Agreement and has the ability to maintain such COR Certification at all times during the performance of the Works in accordance with its terms, provisions and conditions; or
  - (B) the COR-Qualified Construction DB Co Party:
    - (I) is in possession of its OHSAS 18001 Accreditation which remains in good standing and has the ability to maintain such OHSAS 18001 Accreditation in good standing at all times during the performance of the Works until such COR-Qualified Construction DB Co Party receives its COR Certification as required under this Project Agreement, and
    - (II) has made an application to the IHSA for its COR Certification as required under this Project Agreement; and
- (xxix) Prior to or concurrently with execution of this Project Agreement, DB Co has executed the Nominated Signalling Subcontract with the Nominated Signalling Subcontractor or has caused the Construction Contractor to execute the Nominated Signalling Subcontract with the Nominated Signalling Subcontractor.

## **6.2 City Representations and Warranties**

- (a) The City represents and warrants to DB Co that as of Commercial Close:
  - (i) the City is a municipal corporation duly and validly constituted and subsisting under the laws of the Province of Ontario and has the requisite power, authority and capacity to execute and deliver this Project Agreement and perform its obligations under this Project 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 Project Agreement to be done, executed, delivered or performed;

- (ii) this Project Agreement has been duly authorized, executed, and delivered by the City and constitutes a legal, valid, and binding obligation of the City, enforceable against the City 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 are in the discretion of a court;
  - (C) the special jurisdiction and power of the Ontario Municipal Board over defaulting municipalities under the *Municipal Affairs Act* (Ontario);
- (iii) the execution, delivery, and performance by the City of this Project Agreement does not and will not violate or conflict with, or constitute a default under:
  - (A) any Applicable Law (including, for greater certainty, the *City of Ottawa Act 1999* (Ontario) and any by-laws issued in accordance therewith); or
  - (B) 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;
- (iv) the City has obtained all necessary consents and approvals required for the execution by the City of, and performance of its obligations under, this Project Agreement;
- (v) other than any proceeding under the *Expropriations Act* (Ontario) which could delay the acquisition by the City of the Lands, there are, to the knowledge of the City, no actions, suits, proceedings, or investigations pending or threatened (in writing) against the City, MTO or, to the City's knowledge, any City Party at law or in equity before any Governmental Authority or arbitral body (whether or not covered by insurance) of which the City or MTO has received written notice, and that individually or in the aggregate could result in any material adverse effect on the Project, or in any impairment of the City's, MTO's or DB Co's ability to perform their respective obligations under this Project Agreement, and the City has no 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;
- (vi) the City is able to meet its obligations as they generally become due;
- (vii) the City has rights of use and access to, on and over the Lands, or has the requisite power to obtain such rights, that are sufficient to enable the City to grant or to cause to be granted to DB Co the licence rights contemplated in Section 16.1;
- (viii) the Project is permitted by the existing official plan, zoning and other land use restrictions applicable to the City and the Project.

- (b) The City represents and warrants to DB Co that as of Commercial Close, no City Event of Default has occurred and is continuing.

## **7. BACKGROUND INFORMATION**

### **7.1 No Liability**

- (a) Except as expressly provided in Sections 1.5(b)7.4, 18.1(b), 18.2, 18.3, 18.4, 18.5, 18.6, 18.7 and 18.8 none of the City, any City Party, RTG or any RTG Party, or any Government Entity shall be liable to DB Co or any DB Co Party for, and DB Co or any DB Co Party shall not seek to recover from the City, any City Party, RTG or any RTG Party, or any Government Entity, any damages, losses, costs, liabilities or expenses which may arise (whether in contract, tort or otherwise) from the adoption, use or application of the Background Information by, or on behalf of, DB Co or any DB Co Party.

### **7.2 No Warranty**

- (a) Except as expressly provided in Sections 7.4, 18.1(b), 18.2, 18.3, 18.4, 18.5, 18.6, 18.7 and 18.8:
  - (i) neither the City nor any City Party, nor RTG nor any RTG Party, nor any Government Entity gives any warranty or undertaking of whatever nature in respect of the Background Information and, specifically (but without limitation), neither the City nor any City Party, nor RTG nor any RTG Party, or Government Entity warrants that the Background Information represents all of the information in its possession or power (either during the conduct of the procurement process for the Project or at the time of execution and delivery of this Project Agreement) relevant or material to or in connection with the Project or the obligations of DB Co under this Project Agreement or under any of the Project Documents; and
  - (ii) neither the City nor any City Party, nor RTG nor any RTG Party, nor any Government Entity shall be liable to DB Co or any DB Co Party in respect of any failure, whether before, on or after the execution and delivery of this Project Agreement:
    - (A) to disclose or make available to DB Co or any DB Co Party any information, documents or data;
    - (B) to review or update the Background Information; or
    - (C) to inform DB Co or any DB Co Party of any inaccuracy, error, omission, defect or inadequacy in the Background Information.

### **7.3 No Claims**

- (a) DB Co acknowledges and confirms that:
  - (i) it has conducted its own analysis and review of the Background Information and has, before the execution and delivery of this Project Agreement, satisfied itself as to the accuracy, completeness and fitness for purpose of any such Background Information upon which it places reliance; and

- (ii) except as expressly provided in Sections 7.4, 18.1(b), 18.2, 18.3, 18.4, 18.5, 18.6, 18.7 and 18.8, it shall not be entitled to and shall not, and shall ensure that no DB Co Party shall, make any claim against the City, or any City Party, RTG or any RTG Party, or Government Entity (whether in contract, tort or otherwise), including, without limitation, any claim in damages, for extensions of time or for additional payments under this Project Agreement on the grounds:

- (A) of any misunderstanding or misapprehension in respect of the Background Information; or

- (B) that the Background Information was incorrect or insufficient,

nor shall DB Co be relieved from any of its obligations under this Project Agreement on any such ground.

#### **7.4 Technical Reports**

- (a) The City agrees that, if at the date of this Project Agreement, except as disclosed in any Background Information (other than Technical Reports) or as otherwise disclosed by the City or any City Party or known by DB Co or any DB Co Party, in each case prior to the date that is 30 days prior to the RFP Technical Submission Deadline, any of the information in:

- (i) the Technical Reports (other than the Geotechnical Reliant Reports) is, to the actual knowledge of the City, incorrect, or there is relevant information in the possession or control of the City that would make any of the information in such Technical Reports incorrect, or

- (ii) the Geotechnical Reliant Reports is incorrect,

then, to the extent that such incorrect information materially adversely interferes with DB Co's ability to perform the Works or materially adversely affects DB Co's cost of, or schedule for, performing the Works, such incorrect information shall, subject to and in accordance with Schedule 22 – Variation Procedure, result in a Variation.

### **8. PROJECT DOCUMENTS**

#### **8.1 Project Documents**

- (a) DB Co shall perform its obligations under, and observe all of the provisions of, each of the Project Documents to which it is a party, and shall ensure that each DB Co Party shall perform its obligations under, and observe all of the provisions of, each of the Project Documents to which such DB Co Party is a party, so as to ensure that other parties to such Project Documents shall not be entitled to terminate same. In the event that DB Co receives a Notice of default under any of the Project Documents, it shall promptly, and, in any event, no later than 2 Business Days after receipt thereof, deliver a copy of such Notice of default to the City.

#### **8.2 Ancillary Documents**

- (a) DB Co shall not:

- (i) terminate or agree to the termination of all or part of any Ancillary Document, except pursuant to Sections 27.3, 49.3 and 50.2 or otherwise to prevent or cure a DB Co Event of Default (provided that commercially reasonable alternative measures would not prevent or cure such DB Co Event of Default);
- (ii) subject to Section 8.2(a)(i) above, make or agree to any amendment, restatement or other modification or exercise any of its rights under any Ancillary Document that materially adversely affects DB Co's ability to perform its obligations under this Project Agreement or that has the effect of increasing any liability of the City, whether actual or potential;
- (iii) breach its obligations (or waive or allow to lapse any rights it may have) or permit others to breach their obligations (or waive or allow to lapse any rights they may have) under any Ancillary Document, if any such breach (or waiver or lapse) would materially adversely affect DB Co's ability to perform its obligations under this Project Agreement or that have the effect of increasing any liability of the City, whether actual or potential; or
- (iv) enter into, or permit the entry into by any other person of, any agreement replacing all or part of any Ancillary Document, except in the circumstances referenced in Section 8.2(a)(i),

without the prior written consent of the City, provided that, where consent is requested pursuant to Section 8.2(a)(i) or 8.2(a)(iv), such consent shall not be withheld, and shall be provided within a reasonable time, where the relevant matter referred to in Section 8.2(a)(i) or 8.2(a)(iv) will not materially adversely affect DB Co's ability to perform its obligations under this Project Agreement or have the effect of increasing any liability of the City, whether actual or potential. In the event of termination or agreement to the termination of all or part of any Ancillary Document as described in Section 8.2(a)(i), or the entering into of any agreement replacing all or part of any Ancillary Document as described in Section 8.2(a)(iv), DB Co shall, to the extent applicable, comply with all provisions herein relating to changes in Subcontractors, including Section 49.3.

- (b) Upon the written request of the City or the City Representative, DB Co will deliver or cause to be delivered to the City or the City Representative a copy of any notices delivered or received by DB Co under any of the Ancillary Documents.

### **8.3 Changes to Lending Agreements and Refinancing**

- (a) Subject to the terms of the Lenders' Direct Agreement, DB Co shall not terminate, amend or otherwise modify the Lending Agreements, or waive or exercise any of its rights under the Lending Agreements, if at the time such action is contemplated and effected, it would materially adversely affect DB Co's ability to perform its obligations under this Project Agreement or the Project Documents or have the effect of increasing the liability of the City whether actual or potential, unless such action is a Permitted Borrowing or a Refinancing effected in accordance with the provisions of Schedule 28 – Refinancing.

### **8.4 Compliance with Lending Agreements**

- (a) DB Co shall keep the Lending Agreements in good standing to the extent necessary to perform its obligations under this Project Agreement and the Project Documents, and shall ensure that none

of the terms and conditions of the Lending Agreements shall prevent DB Co from performing its obligations under this Project Agreement or the Project Documents.

## **9. THE CITY RESPONSIBILITIES**

### **9.1 General**

- (a) The City shall, at its own cost and risk:
- (i) perform all of its obligations under, and observe all provisions of, this Project Agreement in compliance with Applicable Law;
  - (ii) obtain, maintain, and, as applicable, renew the City Permits, Licences, Approvals and Agreements which may be required for the performance of the Works;
  - (iii) comply with all City Permits, Licences, Approvals and Agreements, in accordance with their terms, and other Permits, Licences, Approvals and Authorizations to the extent obligations thereunder attributable to the City are within the actual knowledge of the City, and are not otherwise required be undertaken or assumed by DB Co hereunder; and
  - (iv) cooperate with DB Co in the fulfillment of the purposes and intent of this Project Agreement, provided, however, that the City shall not be under any obligation to perform any of DB Co's obligations under this Project Agreement.
- (b) The City shall, and shall cause all City Parties and MTO to, take reasonable steps to minimize undue interference with the provision of the Works by DB Co or any DB Co Party.
- (c) Nothing in this Project Agreement shall in any way fetter the right, authority and discretion of the City or any City Party or Government Entity in fulfilling its statutory or other functions under Applicable Law, and DB Co understands and agrees that nothing in this Project Agreement shall preclude the City from performing, discharging or exercising its duties, responsibilities, and powers under Applicable Law. DB Co further agrees that it shall comply, and shall cause all relevant DB Co Parties to comply, with all written directions issued by or on behalf of the City (or any respective designate appointed) from time to time, subject to Section 31.1(b).
- (d) The City may, acting in its sole discretion, without legal obligation to do so and at the expense of DB Co, take such commercially reasonable steps as DB Co may request to facilitate access for DB Co to Highway Corridor Lands to the extent DB Co may reasonably require to perform the Construction Activities provided that DB Co has demonstrated to the reasonable satisfaction of the City, that it has not been able to gain such access through the use of its own commercially reasonable efforts.
- (e) Notwithstanding the provisions of Section 11.8(a)(i), the City shall be responsible for all designations, assumptions, road closures, transfers and any other applicable requirements relating to any DB Co Permits, Licences, Approvals and Agreements which can only be effected by the City pursuant to the *Municipal Act, 2001* (Ontario), subject to receipt by the City of any required consent(s) from the Crown in right of Canada and subject to DB Co having, at its own cost, provided or caused to be provided such information, documentation, and technical or administrative assistance, as the City may request and as DB Co may reasonably be able to provide to enable the City to effect such requirements.

## **10. DB CO RESPONSIBILITIES – GENERAL**

### **10.1 Other Business**

- (a) DB Co shall not engage in any activities which are not specifically related to, required by and conducted for the purpose of the Project without the prior written consent of the City, in its sole discretion.

### **10.2 Complete and Operational New City Infrastructure and New MTO Infrastructure**

- (a) DB Co shall design, engineer, construct and commission the New City Infrastructure and the New MTO Infrastructure so as to provide the City with complete and operational New City Infrastructure and New MTO Infrastructure in accordance with the Output Specifications, and the DB Co Proposal Extracts, all in accordance with and subject to the terms of this Project Agreement.

### **10.3 General Responsibilities and Standards**

- (a) DB Co shall, at its own cost and risk, perform and complete the Works:
  - (i) in accordance with the Works Schedules and, in this regard, shall commence the Works no later than the day following Financial Close and, subject to adjustment as provided for in the Project Agreement, achieve:
    - (A) East Substantial Completion by the East Scheduled Substantial Completion Date;
    - (B) East Final Completion by the East Scheduled Final Completion Date;
    - (C) West Substantial Completion by the West Scheduled Substantial Completion Date; and
    - (D) West Final Completion by the West Scheduled Final Completion Date;
  - (ii) in compliance with Applicable Law;
  - (iii) so as to satisfy the Output Specifications;
  - (iv) in compliance with all Permits, Licences, Approvals and Agreements and so as to preserve the existence and continued effectiveness of any such Permits, Licences, Approvals and Agreements;
  - (v) in accordance with Good Industry Practice and to meet the standards followed by professionals, manufacturers, contractors and trades who are experienced in work on infrastructure that is comparable to the New City Infrastructure and the New MTO Infrastructure;
  - (vi) in a manner consistent with the Integrated Management System and Integrated Management Plans, and the DB Co Proposal Extracts;

- (vii) in a timely and professional manner;
  - (viii) with due regard to the health and safety of persons and property;
  - (ix) subject to the other provisions of this Project Agreement, in a manner which will not impair the ability of the City, any City Party or any Government Entity to comply with Applicable Law; and
  - (x) subject to the other provisions of this Project Agreement, in a manner which will not impair the performance of the Governmental Activities; and
  - (xi) in accordance with all other terms of this Project Agreement.
- (b) DB Co shall cooperate with the City in the fulfillment of the purposes and intent of this Project Agreement, provided however that DB Co shall not be under any obligation to perform any of the City's obligations under this Project Agreement.
- (c) DB Co shall, at its own cost and risk:
- (i) without prejudice to the City's obligations under Sections 9 and 16.1, coordinate with the City all Construction Activities relating to Existing Infrastructure and Stage 1 Connection Infrastructure owned by the City or MTO and the New MTO Infrastructure, including the provision of the Works Schedules, and any updates to the Works Schedules relating to such infrastructure, so as to minimize the impact of Construction Activities on City or MTO operations and services provided by the City or MTO to the public; and
  - (ii) subject to Section 11.29, enter into any Utility Agreements that may be required by Utility Companies to complete the Works;
- (d) [Not used]
- (e) DB Co shall, at its own cost and risk, as soon as possible, and in any event within twenty-four (24) hours of its receipt or notice, notify the City of receipt or notice of (and provide the City with copies of any correspondence received in relation to) any incident report, investigation report or similar correspondence (in each case, whether in draft or final form) issued by the MOL or any other Governmental Authority in respect of the Works.
- (f) If the City has executed an agreement with MTO in relation to this Project (a "**Stakeholder Agreement**"), then the following shall apply:
- (i) the City shall provide a copy of the Stakeholder Agreement to DB Co, and DB Co shall not, and shall ensure that the DB Co Parties do not, in any way whatsoever, contravene or cause the City to contravene the Stakeholder Agreement; and
  - (ii) to the extent that DB Co's performance of its obligations set out in Section 10.3(f)(i) would result in a material change to the Works, or materially adversely affects DB Co's cost of, or schedule for, performing the Works, and would not otherwise be required of DB Co under the Project Agreement, then such change shall, subject and in accordance with Schedule 22 – Variation Procedure, result in a Variation.

## 11. DB CO RESPONSIBILITIES – DESIGN AND CONSTRUCTION

### 11.1 Development of Design

- (a) DB Co shall, at its own cost, develop and complete the design of the New City Infrastructure and the New MTO Infrastructure and all Design Data in accordance with the requirements of this Project Agreement, including Schedule 10 – Review Procedure and this Section 11.1.
- (b) In order to develop the detailed design of the New City Infrastructure and New MTO Infrastructure, DB Co shall consult with the Stakeholders (which consultation requirements pursuant to the Environmental Assessments are further described in Schedule 17 – Environmental Obligations), the City Representative and the City Design Team in an interactive process. If the result of any consultation with Stakeholders is a change to the scope, configuration or size of any New City Infrastructure or New MTO Infrastructure or a change in the Works, then such change shall, subject to and in accordance with Schedule 22 – Variation Procedure, result in a Variation.
- (c) The further development of the design of the New City Infrastructure and New MTO Infrastructure and the process by which it is progressed must fully comply with the requirements of this Project Agreement.
- (d) The Parties agree that Appendix A to Schedule 10 – Review Procedure is an initial list of Design Data and other items that will require design review, which Design Data and other items shall include design and construction documentation (to a scale required by the City Design Team) for each of the following:
  - (i) design development drawings, reports, schedules and specifications progressed from the date of this Project Agreement with extensive user group input, showing all architectural, engineering and landscape design information sufficient to allow for the development of working drawings, submitted at,
    - (A) Pre-Final Design Development (PFDD); and
    - (B) Final Design Development (FDD);(collectively, the “**Design Development Submittals**”);
  - (ii) working drawing documentation, being construction drawings, reports, schedules and specifications progressed from the Design Development Submittals, showing all architectural, engineering and landscape design information in accordance with the requirements of this Project Agreement, submitted upon completion thereof and as required in accordance with Schedule 10 – Review Procedure (the “**Construction Document Submittals**”);
  - (iii) Permit, Licence, Approval and Agreement drawings (phased, if applicable); and
  - (iv) all other reports, studies, plans and documentation required pursuant to Schedule 10 – Review Procedure or otherwise identified in the Project Agreement.
- (e) DB Co shall submit to the City Representative for review in accordance with Schedule 10 – Review Procedure all Design Data and other items listed in Section 11.1(d).

- (f) The Design Data and other items listed in Section 11.1(d) must contain, at a minimum, the information required pursuant to Article 3 of Schedule 10 – Review Procedure.
- (g) The Design Data and other items listed in Section 11.1(d) must contain, at a minimum, the following additional information:
  - (i) identification of the stage of design or construction to which the documentation relates;
  - (ii) all design or construction drawings and specifications necessary to enable the City Representative to make an informed decision as to whether DB Co is permitted to proceed pursuant to Schedule 10 – Review Procedure;
  - (iii) for each stage of the design or construction documentation, a schedule identifying all changes to the relevant documentation that has occurred from the previous stage of design or construction documentation; and
  - (iv) where changes have been submitted, an indication of how the changes meet the requirements of this Project Agreement.
- (h) All design review meetings held by DB Co pursuant to the Review Procedure which the City wishes to attend shall be held in Ottawa, Ontario unless the City otherwise agrees in writing.
- (i) If DB Co commences or permits the commencement of the next level of design or construction of any part or parts of the New City Infrastructure prior to being entitled to proceed in accordance with Schedule 10 – Review Procedure and it is subsequently determined in accordance with Schedule 10 – Review Procedure or Schedule 27 – Dispute Resolution Procedure that the design or construction does not comply with this Project Agreement, then DB Co shall forthwith, at its own cost and risk, undo, remove from the New City Infrastructure and/or Lands, replace and restore, as applicable, any parts of the design or construction that do not comply with this Project Agreement.
- (j) Subject to Sections 18.5 and 18.7, neither the City nor any City Party will have any liability:
  - (i) if a document submitted by DB Co and reviewed by the City, the City Representative or the City Design Team results in non-compliance with this Project Agreement by DB Co or a breach by DB Co of Applicable Law; or
  - (ii) for any loss or claim arising due to some defect in any documents, drawings, specifications or certificates submitted by DB Co.
- (k) DB Co and the City will cooperate with each other in the design review process. Notwithstanding such cooperation by the City, such review shall not constitute acceptance of the Works, and DB Co shall remain solely responsible for compliance in full with all requirements of this Project Agreement.
- (l) DB Co shall allow the City Design Team, at any time, a reasonable opportunity to view any items of Design Data, which shall be made available to the City Representative as soon as practicable following receipt of a written request from the City Representative.

- (m) DB Co shall cause the Construction Contractor to establish and maintain a computerized design database and a web based Review Procedure Activities Register, which DB Co and the City may access remotely by computer to:
  - (i) view drawings comprised within the Design Data;
  - (ii) electronically store and print copies of such Design Data; and
  - (iii) track the status of each Works Submittal, pursuant to Article 3 of Schedule 10 – Review Procedure.

## **11.2 Start-Up Meeting**

- (a) Within 10 Business Days after the date of this Project Agreement, DB Co and the Design Team shall attend a start-up meeting (the “**Start-Up Meeting**”) with the City to set out the design development process in greater detail.
- (b) The agenda for the Start-Up Meeting shall include the following:
  - (i) DB Co’s plan to develop a successful partnership with the City for the purpose of supporting the City in achieving its vision, mission and core values;
  - (ii) DB Co’s plan to ensure that the Works are completed in accordance with the requirements set forth in this Project Agreement;
  - (iii) DB Co’s process to ensure optimum design quality;
  - (iv) DB Co’s approach to ensure that all DB Co Parties perform the Works, as applicable, as a fully integrated team;
  - (v) DB Co’s approach to a fully integrated interior design process that includes every element of interior finishes, furniture, fixtures, equipment, occupant signage and wayfinding;
  - (vi) a proposed schedule of Works Submittals which is consistent with the Proposed Works Schedule and which provides for a progressive and orderly flow of Works Submittals from DB Co to the City Representative to allow sufficient time for review of each Works Submittal by the City Design Team, taking into account both the resources available to the City Design Team to conduct such review and whether delay in the review of the subject matter of the Works Submittal will have a material impact on DB Co’s ability to progress future anticipated Works Submittals and the Works in accordance with the Works Schedule;
  - (vii) DB Co’s plan to successfully integrate feedback from consultations with Stakeholders and the City Design Team, in accordance with, and subject to, the Review Procedure;
  - (viii) any issues related to Schedule 34 – Mobility Matters;
  - (ix) DB Co’s approach to timing, construction, adjustment and user feedback on required mock-ups; and

- (x) a communication process that includes an electronic data room and the use of a computerized document tracking system that has the capacity to report, on request, the status of all design and construction documentation.

### **11.3 [Not Used]**

### **11.4 Performance of Design Obligations**

- (a) In the design and engineering of the Project, DB Co, its consultants and the DB Co Parties shall, at a minimum, 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.
- (b) DB Co shall ensure that all parts of the Works shall, as required by Applicable Law, be performed or reviewed by licensed or registered professional engineers and architects registered to practice in the Province of Ontario. Such architects and engineers shall certify and, if required by Applicable Law, sign and seal, all designs, drawings and technical reports confirming that they comply with all prevailing design standards and design practices for such work in the Province of Ontario, all other applicable standards, Output Specifications and codes, and as otherwise required by Applicable Law.

### **11.5 Works Submittals**

- (a) Any and all items, documents and anything else required or specified by this Project Agreement in respect of the,
  - (i) East Works to be submitted to, reviewed or otherwise processed by the City prior to East Substantial Completion; and
  - (ii) West Works to be submitted to, reviewed or otherwise processed by the City prior to West Substantial Completion,

including any and all subsequent revisions, amendments and changes thereto, shall be subject to review by the City pursuant to Schedule 10 – Review Procedure. The first document to be submitted by DB Co for review by the City pursuant to Schedule 10 – Review Procedure shall be the draft document control and security protocol described in Section 42.5(f).

### **11.6 Documents**

- (a) DB Co shall keep one copy of the current digital files of the Project Agreement, Project Documents, Works Schedule, submittals, reports, Variation Confirmations, DB Co Variation Notices, Variation Directives, partnering documents, records of meetings and all other documents necessary for the administration of the Project, all in good order and readily accessible and available to the City, Lenders' Consultant and the City Representative.
- (b) DB Co shall, where practical, keep one copy of current standards and manufacturers' literature specified in the Project Documents in good order and readily accessible and available to the City Representative and Lenders' Consultant and their representatives for the duration of the Works.

## 11.7 General Construction Obligations

- (a) Without limiting Section 10.3:
- (i) DB Co is solely responsible for all construction means, methods and techniques used to undertake the Works and must provide everything (including labour, plant, equipment and materials) necessary for the construction and commissioning of the New City Infrastructure and the New MTO Infrastructure, and all other performance of the Works, save to the extent such equipment and materials are to be provided by the City or RTG as specified in Schedule 15-2 Part 3, Appendix A.
  - (ii) DB Co shall in a timely and professional manner and in accordance with the requirements of this Project Agreement:
    - (A) construct the Works diligently, expeditiously and in a thorough and workman-like manner consistent with Schedule 11 – Integrated Management System Requirements;
    - (B) ensure that
      - (I) no works other than the Works under this Project Agreement are constructed on the Lands, the New City Infrastructure, the New MTO Infrastructure, the Existing Infrastructure or the Stage 1 Connection Infrastructure by DB Co, any DB Co Party or any person for whom DB Co is responsible at law; and
      - (II) the New City Infrastructure is constructed only on the Lands in accordance with Schedule 15 – Output Specifications;
    - (C) protect the Works from all of the elements, casualty and damage;
    - (D) in respect of plant, equipment, Products and materials incorporated in the Works, use plant, equipment, Products and materials that:
      - (I) are of a kind that are consistent with the Output Specifications;
      - (II) are new, of good quality and are used, handled, stored and installed in accordance with Applicable Law and Good Industry Practice, including, with respect to health and safety, so as not to be hazardous or dangerous; and
      - (III) where they differ from the Output Specifications, have been substituted with the City’s prior written consent in accordance with Section 11.20.
  - (iii) Without limiting DB Co’s obligations pursuant to Section 11.11 or DB Co’s indemnity pursuant to Section 46.1, DB Co shall, from commencement of the Works until East Substantial Completion in respect of the System Infrastructure comprising the East Works, West Substantial Completion in respect of the System Infrastructure comprising the West Works, the applicable Handover in respect of the New MTO Infrastructure, and the applicable New Municipal Infrastructure Component Acceptance Date in respect of

the New Municipal Infrastructure, be responsible for maintaining and securing the Site to prevent access onto the Site, the New City Infrastructure, the New MTO Infrastructure and the elements of the Existing Infrastructure on which Works will be performed (during such times as it has care and custody of such Existing Infrastructure) of any persons not entitled to be there, and the licence granted to DB Co pursuant to Section 16.1 shall include rights for DB Co to do so.

- (iv) DB Co shall not, and DB Co shall ensure that the DB Co Parties do not, in any way whatsoever, contravene or cause a contravention of any labour-related contractual obligation or agreement, to the extent that DB Co has been notified of the same, or any provision of any disclosed collective agreement to which the City or MTO is a party that is applicable to the New MTO Infrastructure or New City Infrastructure and constructed pursuant to the Project Agreement, as such disclosed collective agreements or labour-related agreements may be amended from time to time. To the extent that compliance with any amendments made to any such disclosed collective agreements or labour-related agreements, or to the extent any such disclosed collective agreements or labour-related agreements entered into or disclosed to DB Co after Financial Close, adversely interferes with DB Co's ability to perform the Works or materially adversely affects DB Co's cost of, or schedule for, performing the Works, the same shall, subject to and in accordance with Section 32, be treated as a Delay Event and, subject to and in accordance with Section 33, be treated as a Compensation Event.
- (b) DB Co shall provide a new construction site office for use by the City at each location specified in Schedule 15 – Output Specifications, upon DB Co's mobilization to the Site at such location, and in accordance with the requirements set out in Schedule 15 – Output Specifications.

### **11.8 Permits, Licences, Approvals and Agreements**

- (a) DB Co shall, at its own cost and risk:
  - (i) obtain, maintain, and, as applicable, renew all DB Co Permits, Licences, Approvals and Agreements which may be required for the performance of the Works;
  - (ii) except for those obligations which are identified as the City obligations in Schedule 35 – Permits, Licences, Approvals and Agreements, assume all of the obligations of the City under the City Permits, Licences, Approvals and Agreements (and for greater certainty, the Development Approvals);
  - (iii) comply with all Permits, Licences, Approvals and Agreements in accordance with their terms; and
  - (iv) provide all security, including all letters of credit, that may be required in connection with any DB Co Permits, Licences, Approvals and Agreements, provided that, if the City is able to obtain an exemption from such security on behalf of DB Co and with respect to the Project,
    - (A) DB Co shall provide to the City an accurate accounting of the costs and expenses avoided by DB Co as a result of any such exemption; and

- (B) the City shall be permitted to deduct an amount equal to all costs and expenses that were avoided by DB Co as a result of any such exemption from a Substantial Completion Payment.
- (b) Where any DB Co Permits, Licences, Approvals and Agreements have requirements that may impose any conditions, liabilities or obligations on the City or any City Party or RTG or any RTG Party, DB Co shall not obtain, amend or renew (other than upon the same terms and conditions) such DB Co Permits, Licences, Approvals and Agreements without the prior written consent of the City, such consent not to be unreasonably withheld or delayed, provided that none of the City, any City Party, RTG or any RTG Party shall be responsible for obtaining or for the failure of DB Co to obtain any DB Co Permit, Licence, Approval and Agreement. The City shall comply, or shall require compliance, with any conditions, liabilities or obligations as are imposed on the City or any City Party or RTG or any RTG Party by the requirements of any DB Co Permit, Licence, Approval and Agreement obtained with the City's consent under this Section 11.8(b).
- (c) The City shall provide DB Co with such information and administrative assistance as DB Co may reasonably require in relation to the Permits, Licences, Approvals and Agreements. In respect of Section 11.8(a)(ii), the City shall,
- (i) provide DB Co with relevant information and copies of notices received under the applicable City Permits, Licences, Approvals and Agreements; and
- (ii) execute any documents under the applicable City Permits, Licences, Approvals and Agreements which Applicable Law dictates that only the City can execute.
- (d) DB Co shall, at its own cost, provide or cause to be provided such information, documentation, and administrative assistance as the City may request and as DB Co may reasonably be able to provide, and shall execute such applications as are required to be in its name, to enable the City to obtain, maintain or renew any of the City Permits, Licences, Approvals and Agreements or to demonstrate compliance with any Permits, Licences, Approvals and Agreements, provided that DB Co shall not be responsible for obtaining or for any delay in obtaining or for the failure of the City to obtain any of the City Permits, Licences, Approvals and Agreements, unless such delay or failure is caused by any act or omission of DB Co, any DB Co Party or any other person for whom DB Co is responsible at law.
- (e) If, prior to the applicable Scheduled Substantial Completion Date, the City fails to issue to DB Co a final determination (a granting, conditional granting, or refusal) in respect of a Listed DB Co PLAA prior to the expiration of [REDACTED] per cent of the number of Business Days (rounding up to Business Days if such calculation results in a certain number of Business Days plus a fraction of a Business Day) designated for a final determination by the City in Appendix A to Schedule 35 – Permits, Licences, Approvals and Agreements for the applicable Listed DB Co PLAA (the “**City PLAA Deadline**”), then any delay in the Works or additional costs in respect of the Works caused by the failure to make a final determination by the City PLAA Deadline shall, subject to and in accordance with Section 32, be treated as a Delay Event and, subject to and in accordance with Section 33, be treated as a Compensation Event, provided that:
- (i) the applicable DB Co Permit, Licence, Approval or Agreement is a Listed DB Co PLAA;
- (ii) DB Co has fulfilled all obligations pursuant to the Applicable Law, in accordance with any deadline applicable to the Listed DB Co PLAA imposed by this Project Agreement

- or the City, including providing timely and thorough responses to questions or concerns posed by the City in respect of the Listed DB Co PLAA;
- (iii) DB Co submitted the applicable Listed DB Co PLAA in accordance with the timing for such submission in the Works Schedule or Recovery Schedule, as applicable (in each case, as such submission date may be extended on account of any Delay Event); and
  - (iv) DB Co's application for the Listed DB Co PLAA and DB Co's responses to all questions or concerns posed by the City were in accordance with Good Industry Practice.
- (f) For clarity, Section 11.8(e) does not entitle DB Co to a Delay Event or a Compensation Event,
- (i) in the event that the City's final determination on a Listed DB Co PLAA is made in a timely way, pursuant to the applicable City PLAA Deadline, but is not favourable to DB Co or DB Co disagrees with the substance of the final determination;
  - (ii) in the event that the City fails to issue to DB Co a final determination in respect of a Permit, Licence, Approval or Agreement that is not explicitly listed as a Listed DB Co PLAA; or
  - (iii) with respect to,
    - (A) Permits, Licences, Approvals or Agreements that are related to, but not explicitly included on, the Listed DB Co PLAAs; or
    - (B) the Traffic and Transit Management Plan.
- (g) DB Co shall, at its own cost and risk, provide to the City a system to track the status of each Listed DB Co PLAA through every stage of preparation, submission and approval. More specifically, such system shall:
- (i) be kept updated on a daily basis and be available to the City in real time during normal business hours through a web-based interface which would include functionality to provide automated email alerts to a customizable frequency and set of email addresses;
  - (ii) be operational no later than the date upon which the first Listed DB Co PLAA application is submitted; and
  - (iii) include a feature that highlights to the City each outstanding applicable Listed DB Co PLAA when it reaches the following milestone triggers:
    - (A) **[REDACTED]**% of the number of Business Days designated for a final determination by the City in Appendix A to Schedule 35 – Permits, Licences, Approvals and Agreements for the applicable Listed DB Co PLAA;
    - (B) **[REDACTED]**% of the number of Business Days designated for a final determination by the City in Appendix A to Schedule 35 – Permits, Licences, Approvals and Agreements for the applicable Listed DB Co PLAA; and

- (C) 5 Business Days prior to the expiration of the City PLAA Deadline.
- (h) DB Co shall submit documentation on the proposed design, functionality, and usage of the system to the City Representative in accordance with Schedule 10 – Review Procedure no later than 60 days after Financial Close.
- (i) In addition, DB Co shall provide written notice to the City Representative with respect to any outstanding Listed DB Co PLAA when it reaches the milestone triggers outlined in Section 11.8(g)(iii) above.
- (j) With respect to any failure to issue to DB Co a final determination in respect of a Listed DB Co PLAA prior to the expiration of the relevant City PLAA Deadline, DB Co shall not be entitled to the Delay Event or Compensation Event pursuant to Section 32.1(a)(xv) unless the tracking system as described in Section 11.8(g) is functional and available to the City, provides notice to the City of the milestone described in Section 11.8(g)(iii), and contains accurate information as to the status of the applicable Listed DB Co PLAA at all material times.
- (k) With respect to the NCC FLUDTA:
  - (i) the City shall obtain the NCC FLUDTA, but can only do so with DB Co’s performance of the obligations set out in Section 11.8(k)(ii);
  - (ii) DB Co shall use commercially reasonable efforts to assist the City in obtaining the NCC FLUDTA as required from time to time including, without limitation:
    - (A) the preparation and delivery of all Design Data in respect of the NCC FLUDTA pursuant to Schedule 10 – Review Procedure;
    - (B) the preparation and delivery of Design Development Submittals and/or Construction Document Submittals pursuant to Section 11.1 that are reasonably necessary to obtain the NCC FLUDTA;
    - (C) the preparation and delivery of such other plans, specifications, agreements, documents and instruments in respect of Works and amendments thereto that are reasonably necessary to obtain the NCC FLUDTA; and
    - (D) DB Co shall make changes to the Design Data as required by NCC to further assist the City in obtaining the NCC FLUDTA and DB Co shall take such other actions as may be reasonably directed by the City from time to time with respect thereto; and
  - (iii) if, following Commercial Close:
    - (A) NCC requires a change to the Design Data or any other additional obligation to be assumed in respect of the NCC FLUDTA pursuant to Section 11.8(a); and
    - (B) the City, in a timely manner, requires DB Co to make such change or to assume such additional obligation,

provided the change or other obligation is not otherwise a responsibility or obligation of DB Co under this Project Agreement, then such change or obligation shall result in a Variation subject to and in accordance with Schedule 22 – Variation Procedure.

### 11.9 Protection of Work and Property

- (a) DB Co shall protect (i) the Works and the property of the City on the Site, the New City Infrastructure, the New MTO Infrastructure, and (ii) the Existing Infrastructure and Stage 1 Connection Infrastructure (while the same is in DB Co's possession or at any time such Existing Infrastructure or Stage 1 Connection Infrastructure is the subject of ongoing Works), from damage or destruction caused by DB Co's operations under this Project Agreement, and DB Co shall, in accordance with Section 11.9(b), be responsible for such damage or destruction, except for any damage or destruction which occurs as a result of acts or omissions by the City or any City Party.
- (b) Unless this Project Agreement is terminated in accordance with its terms, and except to the extent a Relief Event or Force Majeure Event occurs in respect of which the policies required to be procured pursuant to Section 1 of Schedule 25 do not respond, if all or any part of the Works is damaged or destroyed prior to the applicable Substantial Completion Date in respect of the System Infrastructure, or prior to the applicable New Municipal Infrastructure Component Acceptance Date in respect of the New Municipal Infrastructure, or prior to the applicable Handover in respect of the New MTO Infrastructure, DB Co shall, at its own cost and expense, Make Good the Works, or any part thereof, as applicable, (the "**Reinstatement Work**") promptly and in any event as soon as practicable in the circumstances. Except as otherwise expressly provided in this Project Agreement, damage to or destruction of all or any part of the Works shall not terminate this Project Agreement or relieve DB Co of any of its obligations hereunder or entitle DB Co to any compensation from the City.
- (c) DB Co shall not undertake to repair and/or replace any damage or destruction whatsoever to adjacent property or any Existing Infrastructure owned by third parties other than MTO without first consulting the City, and in the case of Existing Infrastructure owned by MTO, without first consulting MTO and, in each case, receiving written instructions as to the course of action to be followed.
- (d) Without derogating from any obligations which DB Co may have under any Encroachment Permit, DB Co acknowledges and agrees that the timely performance of Reinstatement Work relating to damage or destruction to Existing Infrastructure owned by MTO or New MTO Infrastructure (but in all cases subject to the time period limitations provided in Sections 11.9(b)) is critical to the ability of MTO to maintain effective operations of such infrastructure. DB Co will respond to any requirement by MTO to perform Reinstatement Work within the time periods required by MTO, acting reasonably having regard to the nature of the Reinstatement Work. DB Co acknowledges and agrees that if MTO is unable to contact DB Co and/or obtain the Reinstatement Work within the time specified by MTO, MTO may take such emergency steps as are reasonable and appropriate to correct any damage or destruction or failures to comply with the Project Agreement, at DB Co's sole risk, cost and expense. Except in the case of damage caused by MTO's own forces, such emergency steps taken by MTO shall not invalidate any DB Co warranties in respect of the Works.

- (e) Notwithstanding Sections 11.9(b) and 11.9(f), Reinstatement Work carried out by DB Co in respect of New MTO Infrastructure that is not owned by MTO shall be planned and implemented by DB Co in consultation with the applicable third party.
- (f) If the Reinstatement Work is reasonably estimated to cost more than \$[REDACTED] (index linked) or in any other case where the City Representative, having regard to the nature of the damage or destruction, notifies DB Co that a Reinstatement Plan is required (excluding where the damage or destruction occurs before the applicable time periods provided in Section 11.9(b) and the City Representative acting reasonably considers that the continued application of the Design and Construction Certification Procedure would be able to adequately address the Reinstatement Work without the need for a separate Reinstatement Plan), DB Co shall, as soon as practicable and in any event within 20 Business Days after the occurrence of the damage or destruction or receipt of notification from the City Representative, as the case may be, or, if such Reinstatement Work is in respect of Highway Works, such period of time as may be required to comply with directions of MTO, (or if, with the exercise of all due diligence more than 20 Business Days is reasonably required for such purposes, then within such longer period of time after the occurrence of such damage or destruction or receipt of notification from the City Representative, as the case may be, as may be reasonably required with the exercise of all due diligence, provided DB Co exercises and continues to exercise all such due diligence) submit to the City Representative pursuant to Schedule 10 - Review Procedure a plan (a “**Reinstatement Plan**”) prepared by DB Co for carrying out the Reinstatement Work setting out, in reasonable detail, *inter alia*:
- (i) a description of the Reinstatement Work required to restore, replace and reinstate the damage or destruction;
  - (ii) DB Co’s proposed schedule for the execution of the Reinstatement Work; and
  - (iii) the information required pursuant to Schedule 22 – Variation Procedure as if such plan were an Estimate,

and the Reinstatement Work must not be commenced until the City Representative consents thereto in accordance with Schedule 10 - Review Procedure except (A) where such Reinstatement Work relates to Existing Infrastructure owned by MTO or New MTO Infrastructure and MTO requires performance of such Reinstatement Work on an expedited basis, or (B) to the extent necessary to address any Emergency, public safety needs. Notwithstanding Sections 11.9(c), (e) and (f), where there is danger to life or property which arises out of or in connection with the performance of the Works, either Party may, but DB Co shall, immediately take such emergency action as is necessary to remove the danger.

- (g) DB Co shall cause the Reinstatement Work to be carried out in accordance with the Output Specifications and all other applicable requirements under this Project Agreement and, where applicable, in accordance with the Reinstatement Plan consented to by the City Representative in accordance with Schedule 10 - Review Procedure. All designs, plans and specifications in respect of the Reinstatement Work shall be subject to the Design and Construction Certification Procedure. If requested by the City Representative, the persons (and if applicable, a suitable parent entity thereof acceptable to the City) retained by DB Co to design and carry out any Reinstatement Work shall, as a condition to their retainer and prior to commencing any Reinstatement Work or design work in connection therewith, enter into a construction contract with DB Co and a direct agreement with the City in substantially the same forms as the Design and Construction Contract and the Construction Contractor’s Direct Agreement.

(h) In the event any Insurance Proceeds under Insurance Policies as referred to in Schedule 30 - Insurance Trust Agreement are available to carry out the Reinstatement Work, such Insurance Proceeds shall be paid into the Insurance Trust Account and shall be dispensed in accordance with the provisions of the Insurance Trust Agreement to carry out the Reinstatement Work.

(i) [Not used]

#### **11.10 Liability Unaffected**

(a) DB Co shall not be relieved of any liability or obligation under this Project Agreement by the retainer or appointment of any DB Co Party, and DB Co shall cause each DB Co Party, to the extent such DB Co Party performs, or is specified hereunder to perform, the Works, to comply with the obligations of DB Co to the City in the same manner and to the same extent as DB Co.

(b) No inspection, review, comment, approval, verification, confirmation, certification, acknowledgement or audit pursuant to the provisions of this Project Agreement by the City, the City Representative, Lenders' Consultant, MTO, RTG, or anyone on their behalf, nor any failure of any of them to do so, shall relieve DB Co from performing or fulfilling any of its obligations under this Project Agreement or be construed as an acceptance of the Works or any part thereof.

#### **11.11 Safety**

(a) DB Co shall, from Financial Close until the East Substantial Completion in respect of the System Infrastructure comprising the East Works, West Substantial Completion in respect of the System Infrastructure comprising the West Works, the applicable New Municipal Infrastructure Component Acceptance Date in respect of the New Municipal Infrastructure, the applicable Handover in respect of the New MTO Infrastructure, and West Final Completion in respect of the Remaining Works:

(i) comply with the health and safety requirements in Schedule 11 – Integrated Management System Requirements of the Project Agreement, its Integrated Management System, and the Construction Safety Management Plan;

(ii) keep the Site (including Existing Infrastructure on the Site), the Works, the New City Infrastructure and the New MTO Infrastructure in a safe and orderly state, as appropriate in accordance with Good Industry Practice, to avoid danger to persons on the Site (including Existing Infrastructure on the Site), the New City Infrastructure and the New MTO Infrastructure and in the immediate vicinity of the Site (including Existing Infrastructure on the Site), the New City Infrastructure and the New MTO Infrastructure;

(iii) take such measures as are reasonable in accordance with Good Industry Practice to prevent access to the Site (including Existing Infrastructure on the Site), the New City Infrastructure and the New MTO Infrastructure of any persons or creatures not entitled to be there;

(iv) comply, and cause each DB Co Party to comply,

(A) with Applicable Law relating to health and safety, including without limitation the *Occupational Health and Safety Act* (Ontario) and all regulations thereto;

- (B) with the Construction Access Management Plan, the Traffic and Transit Management Plan and all rules, requirements and restrictions relating to access, rail safety and operations and track protection, and road safety and operations, as set out in Schedule 15 – Output Specifications; and
    - (C) with any direction or instruction from Transport Canada pursuant to any contractual arrangement or board order involving Transport Canada and MTO with respect to the System Infrastructure corridor and facilitate and provide cooperation with respect to any inspections by Transport Canada on the Lands.
  - (v) register the Project with the MOL by way of a Notice of Project, pursuant to the Applicable Law, with the purpose of designating DB Co as the “constructor” for all Works on the Site;
  - (vi) with respect to the Works, cause a COR-Certified Construction DB Co Party or, prior to receipt of COR Certification, a COR-Qualified Construction DB Co Party, to perform, all of the obligations of the “constructor”, and indemnify the City, each City Party and each Government Entity against any and all of the liabilities of the “constructor”, under the *Occupational Health and Safety Act* (Ontario) and all regulations thereto;
  - (vii) provide the City with a certificate of good standing from WSIB or any successor thereto once every 90 days; and
  - (viii) facilitate and provide cooperation with respect to any inquiry or investigation of the MOL with respect to the Project.
- (b) New MTO Infrastructure and New City Infrastructure shall, for the all purposes of this Project Agreement, become Existing Infrastructure upon the earlier of, in the case of,
- (A) New MTO Infrastructure, the applicable Handover; and
  - (B) System Infrastructure comprising the East Works, East Substantial Completion;
  - (C) System Infrastructure comprising the West Works, West Substantial Completion; and
  - (D) New Municipal Infrastructure, the applicable New Municipal Infrastructure Component Acceptance Date.
- (c) At any time that the Works are being carried out in or around the Existing Infrastructure or Stage 1 Connection Infrastructure, DB Co shall at all times:
- (i) ensure that it complies with all safety requirements set out in the Project Agreement, including those set out in Section 11.11(a) above; and
  - (ii) keep the Existing Infrastructure or Stage 1 Connection Infrastructure in a safe and orderly state, as appropriate and in accordance with Good Industry Practice, to avoid any danger

to the System Users, employees, visitors and other persons attending the Existing Infrastructure or Stage 1 Connection Infrastructure.

- (d) If the MOL determines pursuant to the *Occupational Health and Safety Act* (Ontario) that DB Co is not the “constructor” for the Site or any portion thereof, then the following shall apply:
- (i) DB Co shall comply with the instructions of the “constructor” relating to matters of health and safety on the Site, or such portion thereof, methods and manner of construction, and coordination and scheduling of the “constructor’s” works with the Works.
  - (ii) If DB Co’s activity or presence on the Site causes the City to be named “constructor” by MOL, DB Co will immediately take any necessary remedial action, including vacating the Site, to ensure that the MOL determines that DB Co is the “constructor”.
  - (iii) If a third party is named “constructor” by MOL, DB Co shall not interfere with or delay the third party’s work, and shall not do anything whatsoever that causes the third party to be in contravention of its obligations under the *Occupational Health and Safety Act* (Ontario). DB Co shall 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.
  - (iv) DB Co shall indemnify the City, each City Party and each Government Entity against any and all of the liabilities arising from a determination by the MOL that the City, or both the City and a third party contractor has been designated as the “constructor”, under the *Occupational Health and Safety Act* (Ontario).
- (e) In the event that an act or omission of DB Co causes or contributes to an MOL determination that DB Co is not the “constructor” for its work, or if DB Co is denied access to the Site pursuant to Section 11.11(d)(iii), DB Co will not be eligible for a Delay Event or a Compensation Event.

#### **11.12 Additional Works, Third Party Works and RTG Works**

- (a) DB Co shall, having regard to DB Co’s obligations set out in Section 17, arrange and carry out all coordination of the Works with the Third Party Works directly with the applicable Third Party Contractor.
- (b) The City may, in its sole discretion, carry out Additional Works.
- (c) From Financial Close until the Substantial Completion Date for the Works affected by such Additional Works, the City may assign the responsibility for directing methods and manner of construction (where applicable) of the Additional Works, the coordination and scheduling of the Additional Works and the safety training in respect of the Additional Works to DB Co. For clarity, the City may, in its sole discretion, assign such responsibilities to DB Co, subject to Section 11.12(h).
- (d) In connection with the Additional Works, the City shall,
  - (i) cause Additional Contractors to comply with the instructions of DB Co relating to matters of health and safety on the Site, methods and manner of construction (where applicable), and coordination and scheduling of the Additional Works with the Works;

- (ii) enter into separate contracts with Additional Contractors,
  - (A) under conditions of contract which are compatible with the conditions of this Project Agreement;
  - (B) that require Additional Contractors to comply with Section 11.12(e) and all directions of DB Co in respect of any matter regarding health and safety on the Site, and methods and manner of construction (where applicable); and
  - (C) that require Additional Contractors to comply with DB Co's coordination and scheduling of the Additional Works; and
- (iii) ensure that insurance coverage is provided by each Additional Contractor as would be required by a prudent owner similarly situated and coordinate such insurance with the insurance coverage of DB Co and in any event, such insurance shall provide for liability insurance of not less than \$[REDACTED].
- (e) In connection with the Additional Works, if the City has assigned responsibilities to DB Co pursuant to Section 11.12(c), DB Co shall,
  - (i) provide for the methods and manner of construction (where applicable) of the Additional Works and the coordination and scheduling of the Additional Works with the Works to be performed under this Project Agreement;
  - (ii) for each of the East Works, West Works and Highway Works, assume overall responsibility for compliance with all aspects of Applicable Law relating to health and safety at the Site, including all the responsibilities of the "constructor" under the Occupational Health and Safety Act (Ontario), prior to the applicable Substantial Completion Date and, exercised in a manner consistent with the *Occupational Health and Safety Act* (Ontario), at any time that DB Co is acting as a "constructor" on the Site, or the applicable portion thereof, following the applicable Substantial Completion Date;
  - (iii) provide Additional Contractors reasonable opportunity to introduce and store their products and use their construction machinery and equipment to execute the Additional Works, as applicable;
  - (iv) participate with the City and Additional Contractors in reviewing the construction schedules of Additional Contractors, when directed to do so by the City; and
  - (v) if part of the Works is affected by or depends upon, for its proper execution, the Additional Works, promptly report to the City in writing and prior to proceeding with that part of the Works any readily apparent deficiencies in the Additional Works. Failure by DB Co to so report shall invalidate any claims against the City by reason of such readily apparent deficiencies.
- (f) In the case of Additional Works carried out prior to the last Substantial Completion, if:
  - (i) any Additional Contractors cause any damage to the Works;

- (ii) DB Co incurs any additional costs or there is any delay in the Works Schedule as a result of any Additional Contractors not complying with the coordination, scheduling and safety instructions of DB Co; or
- (iii) subject to the performance by DB Co of its obligations under this Section 11.12, if DB Co incurs any additional costs or there is any delay in the Works Schedule as a result of any such Additional Works,

then any such delay in the Works Schedule or additional costs in respect of the Works shall, subject to and in accordance with Section 32 be treated as a Delay Event and, subject to and in accordance with Section 33, be treated as a Compensation Event.

- (g) Claims, disputes, and other matters in question between DB Co and Additional Contractors shall be dealt with in substantially the same manner as contemplated in Schedule 27 – Dispute Resolution Procedure provided the Additional Contractors are subject to reciprocal dispute resolution obligations in the contracts between the City and the Additional Contractors. DB Co shall be deemed to have consented to arbitration of any dispute with any Additional Contractor whose contract with the City contains a reciprocal agreement to arbitrate.
- (h) In connection with the Additional Works, DB Co may request a Variation as follows:
  - (i) DB Co shall have a period of 10 Business Days following Notice from the City of the City’s intention to carry out such Additional Works, including a reasonable description of such Additional Works, to request a Variation if such Additional Works are
    - (A) reasonably expected to make void a warranty made in favour of DB Co from a DB Co Party or equipment supplier and given in accordance with Good Industry Practice; or
    - (B) reasonably expected to have a material negative consequence on DB Co’s ability to perform any of the Works, including a material delay in performance of the Works, or material additional costs in respect of the Works;
  - (ii) If DB Co has made a request for a Variation in accordance with Section 11.12(h)(i), the City shall, within 10 Business Days after such request, either issue a Variation Enquiry or give Notice to DB Co that it does not agree that a Variation is required;
  - (iii) Either Party may refer the question of whether a Variation is required for resolution in accordance with Schedule 27 – Dispute Resolution Procedure; and
  - (iv) If the City has, under Section 11.12(h)(ii), given Notice to DB Co that it does not agree that a Variation is required, the City shall, within 10 Business Days after a subsequent agreement or of a determination that a Variation is required, issue a Variation Enquiry and the relevant provisions of Schedule 22 – Variation Procedure shall apply except that:
    - (A) the City shall not be entitled to withdraw any such Variation Enquiry unless the City determines not to proceed with the Additional Works or to proceed only in a manner that the Additional Works will not result in a warranty becoming void or will not result in any material negative consequence on

DB Co's ability to perform any of the Works and DB Co has agreed with such conclusion, or the Parties otherwise agree; and

- (B) the Parties shall, without prejudice to their respective general obligations to comply with the terms of this Project Agreement, use commercially reasonable efforts to mitigate the adverse effects with respect to any void or voidable warranty and take commercially reasonable steps to minimize any increase in costs arising from any void warranty.
- (i) Placing, installing, applying or connecting the Additional Works performed by Additional Contractors on and to the Works performed by DB Co shall not relieve DB Co from its obligations under the Project Agreement with respect to the Works, except to the extent expressly described in any Variation Confirmation.
- (j) In connection with the RTG Stage 1 PA Works and RTG City Party Works, the City shall enter into and/or maintain contractual terms with RTG, including the Stage 1 Project Agreement and variations thereto,
- (i) which are compatible with the conditions of this Project Agreement;
- (ii) that require RTG and RTG Parties to comply with directions of DB Co in respect of any matter regarding health and safety on the Site;
- (iii) that require RTG and RTG Parties to take reasonable steps to minimize undue interference with the provision of the Works by DB Co or any DB Co Party; and
- (iv) in respect of the RTG Systems Integration Works, that require RTG and RTG Parties to comply with the Systems Integration Management Plan.
- (k) In the case of RTG Stage 1 PA Works and RTG City Party Works, if:
- (i) RTG or any RTG Party causes any damage to the Works; or
- (ii) DB Co incurs any additional costs or there is any delay in the Works Schedule as a result of any act or omission of RTG or any RTG Party, including due to non-compliance with the Systems Integration Management Plan by RTG or any RTG Party in the performance of the RTG Systems Integration Works or RTG Stage 1 PA Works,
- then any such delay in the Works Schedule or additional costs in respect of the Works shall, subject to and in accordance with Section 32 be treated as a Delay Event and, subject to and in accordance with Section 33, be treated as a Compensation Event.
- (l) To the extent that any City Party or Additional Contractor (other than RTG or an RTG Party) undertakes Remaining System Integration Work or any of the activities outlined in Section 5.2(m) of Schedule 15-2 Part 1, then the City shall be subject to the same obligations in respect of such City Party or Additional Contractor as set out in Section 11.12(j) and (k) as if such City Party or Additional Contractor were RTG or an RTG Party, *mutatis mutandis*.
- (m) Claims, disputes, and other matters in question between DB Co and RTG shall be dealt with (i) in respect of matters governed by the Interface Agreement, in accordance with the dispute resolution

procedure in the Interface Agreement, and (ii) in respect of all other matters involving the City, in substantially the same manner as contemplated in Schedule 27 – Dispute Resolution Procedure and the City shall ensure RTG is subject to reciprocal dispute resolution obligations in the Stage 1 Project Agreement and variations thereto, including in respect of Systems Integration Disputes which shall be referred at first instance to the Systems Integration Verifier in accordance with Schedule 27 – Dispute Resolution Procedure. DB Co shall be deemed to have consented to arbitration of any dispute with RTG.

### 11.13 Protest and Trespass

- (a) Except as otherwise provided in this Project Agreement, the City shall not be responsible for the presence of any persons participating in civil disobedience, demonstration or protest action (“**Protesters**”) or any other persons otherwise not entitled to be on or around the Lands (“**Trespassers**”). For greater certainty, the presence of, or interference by, any Protesters or Trespassers on or around the Lands shall not be a breach of the obligation of the City to grant licence rights of use and access to DB Co on and over the Lands pursuant to Section 16 nor a breach of any other obligation, representation or warranty under this Project Agreement.
- (b) Prior to the applicable Substantial Completion Date, the management of any Protesters or Trespassers shall be the responsibility of DB Co in respect of the Site (including Existing Infrastructure on the Site), to the extent such management is not otherwise the responsibility of the Police Service.
- (c) If, prior to the applicable Substantial Completion Date, Protesters or Trespassers occupy the Site, facilities or infrastructure referred to in Section 11.13(b), or access to such Site, facilities, or infrastructure is prevented or interfered with by Protesters or Trespassers, DB Co shall use all appropriate measures reasonable in the circumstances to manage such Protesters or Trespassers and promptly notify the City Representative of such occurrence and of the action which DB Co proposes to take in respect thereof. DB Co may exercise any legal remedy available to it to remove Protesters or Trespassers from the Site, facilities or infrastructure referred to in Section 11.13(b), provided that if DB Co does elect to exercise any such legal remedy, DB Co shall give the City Representative at least 24 hours’ Notice prior to commencing any such legal proceeding (except in a case of Emergency, danger to persons or material destruction or material damage to property where, in such circumstances, such Notice may be given to the City less than 24 hours prior to the commencement of such legal proceeding) and shall continually update the City Representative as to the status of any such legal proceeding in reasonable detail and at reasonable intervals, and provided further that:
  - (i) DB Co shall not give directly or indirectly to any Protester or Trespasser any inducement, monetary or otherwise, with a view to avoiding, limiting or influencing the manner of protest activities by that Protester or Trespasser or by other Protesters or Trespassers; and
  - (ii) DB Co shall not by virtue of this Section 11.13(c) be prevented from entering into *bona fide* settlements of claims brought against it by Protesters or Trespassers which provide for reasonable payments in satisfaction of such claims or agreeing to any reasonable cost orders in any proceedings.
- (d) DB Co may request the assistance of the City (at the cost of DB Co) to remove Protesters or Trespassers from the Site, Lands, facilities or infrastructure set out in Section 11.13(b), if DB Co demonstrates to the City’s reasonable satisfaction that:

- (i) DB Co is pursuing legal remedies available to it to remove the Protesters or Trespassers (provided that for this purpose DB Co may, but shall not be obligated to, prosecute injunctive or other judicial remedies beyond the court of first instance); and
- (ii) the continued presence of the Protesters or Trespassers is having a material adverse effect on the conduct of the Works that DB Co is unable to mitigate.

Following such request, the City shall notify DB Co whether the City can lawfully provide any assistance in relation to the removal of the Protesters or Trespassers that is not independently available to DB Co and, to the extent that such assistance can be lawfully provided, the City shall provide such assistance (at the cost of DB Co) to the extent it is, in the discretion of the City, reasonable and appropriate in the circumstances to do so.

#### **11.14 Adjacent Developments**

- (a) DB Co shall,
  - (i) having regard to this Section 11.14, review all planning and development applications received from the City in connection with proposed Adjacent Developments;
  - (ii) as required by the City, provide all commercially reasonable assistance to,
    - (A) facilitate the discussion, agreement and any implementation of proposals with respect to Adjacent Developments; and
    - (B) avoid or mitigate any adverse impact of an Adjacent Development on the Works and the New City Infrastructure;
  - (iii) subject to DB Co's reasonable operational and health and safety requirements, permit the developer of the Adjacent Development to post or affix signage in respect of the Adjacent Development, which signage may identify the Adjacent Development project architect, engineer and lender, and other members of the developer's project team;
  - (iv) subject to DB Co's reasonable operational and health and safety requirements, permit the developer of the Adjacent Development to post or affix, at one location on the Lands, signage, as required in connection with a development application; and
  - (v) at the City's request, provide to the developer of an Adjacent Development, all Project documentation in respect of the design and construction of elements of the New City Infrastructure that are relevant to the Adjacent Development, subject to the developer of the Adjacent Development, executing a confidentiality agreement and a waiver of liability, each in a form and substance satisfactory to the City and DB Co, each acting reasonably.
- (b) The City shall ensure that any contract entered into by the City with the developer of an Adjacent Development, in respect of which Section 11.14(a) is reasonably expected to apply, will contain a reciprocal provision to Section 11.14(a) for the benefit of DB Co.
- (c) All work and activities undertaken by DB Co or any DB Co Party pursuant to this Section 11.14 shall be at DB Co's own cost, provided that in the event that more than [REDACTED] Adjacent

Development applications are referred to DB Co by the City in a calendar year, then DB Co shall be entitled to a Variation in respect of the review of such development applications in excess of [REDACTED] applications per calendar year referred to them.

#### 11.15 Defective Works

- (a) Prior to East Substantial Completion and save with respect to possible East Minor Deficiencies identified in accordance with Section 25.10(a), DB Co shall promptly Make Good any Construction Defects in respect of the East Works (an “**East Construction Defect**”) whether or not such East Construction Defect has been incorporated into the New City Infrastructure and whether or not the East Construction Defect is the result of poor workmanship, use of defective Products or equipment or damage through carelessness or other act or omission of DB Co. The correction of East Construction Defects shall be at DB Co’s sole cost and expense. DB Co shall Make Good, in a manner acceptable to the Independent Certifier, or, in the case of New Municipal Infrastructure, the City Engineer, all East Construction Defects, whether or not they are specifically identified by the Independent Certifier or the City Engineer, as the case may be, and DB Co shall prioritize the correction of any East Construction Defects so as not to interfere with or derogate from the Works Schedule, provided that DB Co shall prioritize the correction of any East Construction Defects that in the sole discretion of the City is determined to adversely affect the day to day operation of the City.
- (b) Prior to West Substantial Completion and save with respect to possible West Minor Deficiencies identified in accordance with Section 25.10(b), DB Co shall promptly Make Good any Construction Defect (other than Highway Construction Defects which shall be addressed in accordance with Section 11.15(c)) in respect of the West Works (a “**West Construction Defect**”) whether or not such West Construction Defect has been incorporated into the New City Infrastructure and whether or not the West Construction Defect is the result of poor workmanship, use of defective Products or equipment or damage through carelessness or other act or omission of DB Co. The correction of West Construction Defects shall be at DB Co’s sole cost and expense. DB Co shall Make Good, in a manner acceptable to the Independent Certifier, or, in the case of New Municipal Infrastructure, the City Engineer, all West Construction Defects, whether or not they are specifically identified by the Independent Certifier or the City Engineer, as the case may be, and DB Co shall prioritize the correction of any West Construction Defects so as not to interfere with or derogate from the Works Schedule, provided that DB Co shall prioritize the correction of any West Construction Defects that in the sole discretion of the City is determined to adversely affect the day to day operation of the City.
- (c) Prior to the applicable Handover, DB Co shall promptly Make Good any Construction Defect in respect of the Highway Works (a “**Highway Construction Defect**”) whether or not such Highway Construction Defect has been incorporated into the New MTO Infrastructure and whether or not the Highway Construction Defect is the result of poor workmanship, use of defective Products or equipment or damage through carelessness or other act or omission of DB Co. The correction of Highway Construction Defects shall be at DB Co’s sole cost and expense. DB Co shall Make Good, in a manner acceptable to the Independent Certifier, all Highway Construction Defects, whether or not they are specifically identified by the Independent Certifier, and DB Co shall prioritize the correction of any Highway Construction Defects so as not to interfere with or derogate from the Works Schedule, provided that DB Co shall prioritize the correction of any Highway Construction Defects that in the sole discretion of the City is determined to adversely affect the day to day operation of the City.

- (d) Prior to West Final Completion and save with respect to possible Remaining Works Minor Deficiencies identified in accordance with Section 25.12A(a), DB Co shall promptly Make Good any Construction Defect in respect of the Remaining Works (a “**Remaining Works Construction Defect**”) whether or not such Remaining Works Construction Defect has been incorporated into the New City Infrastructure or the New MTO Infrastructure and whether or not the Remaining Works Construction Defect is the result of poor workmanship, use of defective Products or equipment or damage through carelessness or other act or omission of DB Co. The correction of Remaining Works Construction Defects shall be at DB Co’s sole cost and expense. DB Co shall Make Good, in a manner acceptable to the Independent Certifier, all Remaining Works Construction Defects, whether or not they are specifically identified by the Independent Certifier, and DB Co shall prioritize the correction of any Remaining Works Construction Defects so as not to interfere with or derogate from the Works Schedule, provided that DB Co shall prioritize the correction of any Remaining Works Construction Defects that in the sole discretion of the City is determined to adversely affect the day to day operation of the City.
- (e) In the event DB Co is required to correct a Construction Defect pursuant to this Section 11.15, DB Co shall promptly Make Good other contractors’ work destroyed or damaged by such rectifications at DB Co’s expense.

#### 11.16 Warranty Obligations

- (a) DB Co represents, warrants and covenants that:
- (i) the East Works, including the New City Infrastructure and all Products, parts and workmanship provided by DB Co and DB Co Parties, including those replaced during the East Warranty Period;
  - (ii) the West Works, including the New City Infrastructure, the New MTO Infrastructure, and all Products, parts and workmanship provided by DB Co and DB Co Parties, including those replaced during the West Warranty Period; and
  - (iii) the Remaining Works, including all Products, parts and workmanship provided by DB Co and DB Co Parties, including those replaced during the Remaining Works Warranty Period,

shall conform to the requirements and specifications set out in this Project Agreement, Good Industry Practice, Applicable Law and all professional engineering principles generally accepted as standards of the industry in the Province of Ontario; be free of defects, including design defects, errors and omissions; be new, of good quality material, of merchantable quality; and all materials and equipment supplied by DB Co and DB Co Parties shall be of good quality, and in compliance with this Project Agreement and fit for their intended purpose as described in the Project Agreement.

- (b) Subject to Section 11.16(l), DB Co shall promptly, at its sole cost and expense,
- (i) during the
    - (A) East Warranty Period correct and Make Good all East Construction Defects arising in respect of the East Works;

- (B) West Warranty Period correct and Make Good all West Construction Defects and Highway Construction Defects arising in respect of the West Works; and
  - (C) Remaining Works Warranty Period correct and Make Good all Remaining Works Construction Defects arising in respect of the Remaining Works,
- (ii) for greater certainty, DB Co is required to correct and Make Good any Construction Defects related to any Product provided by DB Co and DB Co Parties, and any equipment supplied by DB Co and DB Co Parties during the applicable Warranty Period despite DB Co having obtained on the City's behalf industry-standard or other equipment warranties in accordance with Section 11.16(e);
  - (iii) correct and Make Good any Construction Defects that could not reasonably have been ascertained by a competent person in accordance with Good Industry Practice during a visual inspection of the Works ("**Construction Latent Defect**"), provided the City gives DB Co written Notice of the Construction Latent Defect within the time frame applicable to such Construction Latent Defect pursuant to the *Limitations Act*, 2002 (Ontario) and provided further Construction Latent Defects shall exclude:
    - (A) all electrical and mechanical components of the Works still in service beyond the supplier's recommended useful life, with such recommended useful life being consistent with Good Industry Practice; and
    - (B) any Construction Defects resulting from the effects of corrosion, erosion (other than corrosion or erosion due to Construction Defects in design and /or construction) or normal wear and tear upon any portion of the System Infrastructure or failure of the any portion of the System Infrastructure due to faulty maintenance by RTG or RTG Parties;
  - (iv) comply with the Warranty Protocol.
- (c) The warranties set out in Section 11.16(b) shall each cover labour and material, including, the costs of removal and replacement of covering materials. None of the warranties shall limit extended warranties on any Product or any item of equipment called for elsewhere in Schedule 15 - Output Specifications or otherwise provided by any manufacturer of such Product or item of equipment. DB Co shall ensure that all extended warranties specified in the Project Agreement are provided and shall, in the case of the System Infrastructure, assign to the City or such entity as the City may direct, all such extended warranties as the City or its designate may direct, and in the case of the New MTO Infrastructure, assign to the MTO, all such extended warranties the MTO may direct.
  - (d) [Intentionally Deleted]
  - (e) DB Co shall obtain warranties from the manufacturers of each of the Products and items of equipment for the duration(s) and in accordance with the applicable requirements specified in Schedule 15 - Output Specifications in the name of and to the benefit of DB Co, the City in the case of New City Infrastructure, and the MTO in the case of New MTO Infrastructure. Where, in respect of a Product warranty or equipment warranty, the Output Specifications do not specify a specific duration and/or other requirements, DB Co shall obtain industry-standard warranties

from the applicable manufacturers in the name of and to the benefit of DB Co and the City and shall use commercially reasonable efforts to ensure that such Product warranties and equipment warranties extend for as long a period as possible.

- (f) In respect of the East Works, each Product warranty and equipment warranty shall be issued by the applicable manufacturer and delivered to DB Co no later than 30 days prior to the East Substantial Completion Date. DB Co shall ensure that each Product warranty and equipment warranty, including any Product warranty or equipment warranty extended under Section 11.16(e), is fully assigned to the City, at no cost or expense to the City, at the end of the East Warranty Period, as such East Warranty Period may be extended in accordance with Section 11.16(b).
- (g) In respect of the West Works other than Highway Works, each Product warranty and equipment warranty shall be issued by the applicable manufacturer and delivered to DB Co no later than 30 days prior to the West Substantial Completion Date. DB Co shall ensure that each Product warranty and equipment warranty, including any Product warranty or equipment warranty extended under Section 11.16(e), is fully assigned to the City, at no cost or expense to the City, at the end of the West Warranty Period, as such West Warranty Period may be extended in accordance with Section 11.16(b).
- (h) In respect of the Highway Works, each Product warranty and equipment warranty shall be issued by the applicable manufacturer and delivered to DB Co no later than 30 days prior to the applicable Handover. DB Co shall ensure that each Product warranty and equipment warranty, including any Product warranty or equipment warranty extended under Section 11.16(e), is fully assigned to the City or the MTO, as applicable, at no cost or expense to the City or the MTO, at the end of the West Warranty Period, as such West Warranty Period may be extended in accordance with Section 11.16(b).
- (i) In respect of the Remaining Works, each Product warranty and equipment warranty shall be issued by the applicable manufacturer and delivered to DB Co no later than 30 days prior to, the West Final Completion Date. DB Co shall ensure that each Product warranty and equipment warranty, including any Product warranty or equipment warranty extended under Section 11.16(e), is fully assigned to the City, at no cost or expense to the City, at the end of the Remaining Works Warranty Period, as such Remaining Works Warranty Period may be extended in accordance with Section 11.16(b).
- (j) The City may, in its sole discretion, assign the DB Co warranties set out in Section 11.16(b) that relate to the Highway Works to the MTO, and shall provide Notice to DB Co of any such assignment of DB Co warranties. On the commencement of the first Warranty Period for each of the New City Infrastructure and the New MTO Infrastructure or any component thereof, DB Co shall provide at least two copies of each of the compilations of warranty certificates, one compilation for the New City Infrastructure and one compilation for the New MTO Infrastructure. DB Co shall update all copies of each of the compilations from time to time as each Warranty Period commences. Each of the compilations shall indicate the start and completion date of each DB Co warranty.
- (k) Subject to Section 11.12, DB Co acknowledges that,
  - (i) with respect to the New City Infrastructure, the City may, in its sole discretion; and

(ii) with respect to the New MTO Infrastructure, the MTO may, in its sole discretion,

maintain, repair and/or alter any part or parts of the Works during the applicable Warranty Period and DB Co agrees that such work shall not impact any of the warranties provided by DB Co hereunder, provided that such work is carried out in accordance with Good Industry Practice and, if applicable, the Maintenance Instructions and that such work does not materially alter the affected part or parts of the Works.

(l) For greater certainty, DB Co shall have no obligation under this Section 11.16 to procure, assign or enforce any manufacturer's warranties in respect of any Product or equipment which is procured or obtained by the City, any City Party, RTG or any RTG Party or Make Good any defect of deficiency in respect of the same; provided that DB Co shall not knowingly or negligently undertake any course of action that has the effect of nullifying or materially diminishing the enforceability of any such manufacturer's warranty.

### 11.17 Warranty Work and Prompt Repair of Warranty Work

(a) DB Co shall carry out all Warranty Work,

(i) in respect of the East Works (such work, the "**East Warranty Work**");

(ii) in respect of the West Works (such work, the "**West Warranty Work**"); and

(iii) in respect of the Remaining Works (such work, the "**Remaining Works Warranty Work**").

All Warranty Work shall be carried out and completed at DB Co's sole cost and expense and Warranty Work shall not be the basis of a claim for a Delay Event, a Compensation Event, a Variation, additional compensation or damages. The applicable Warranty Period shall be extended for a further one year in respect of Remaining Works Warranty Work, and two years in respect of all other Warranty Work, in each case from the date of such Warranty Work is completed and accepted by the City in respect of the New City Infrastructure or any component thereof, and by the MTO in respect of the New MTO Infrastructure or any component thereof. For clarity, any extension of a Warranty Period for the purposes of a correction shall only apply to the relevant Warranty Work and not the Works as a whole, and in no event shall a Warranty Period be extended for a period in excess of two years following the expiry of the initial Warranty Period.

(b) DB Co acknowledges and agrees that, the timely performance of Warranty Work is critical to the ability of the City to maintain effective operations of the New City Infrastructure, and to the ability of the MTO to maintain effective operations of the New MTO Infrastructure. DB Co shall use commercially reasonable efforts to respond to any requirement by the City or the MTO to perform Warranty Work within the reasonable time periods required by the City or the MTO to perform the Warranty Work for the New City Infrastructure or the New MTO Infrastructure, or, where applicable, within such time periods as required in a Warranty Request under the Warranty Protocol. Except where the Warranty Protocol imposes a specific additional obligation, DB Co shall commence and complete Warranty Work as expeditiously as possible and at times convenient to the City or MTO, as applicable, which may require work outside normal working hours at DB Co's expense. Any extraordinary measures required to complete such Warranty Work, as reasonably directed by the City or the MTO to accommodate the operation of the New

City Infrastructure, the New MTO Infrastructure, the Existing Infrastructure, the Stage 1 Connection Infrastructure or other aspects of the Project as constructed, shall be at DB Co's sole cost and expense. In relation to critical areas required for effective operations, DB Co shall commence, carry out and complete all Warranty Work on an urgent basis, as is reasonable having regard to the nature of the Warranty Work, taking into account the circumstances and any timelines for commencement and completion as may be communicated by the City, with respect to the New City Infrastructure, or the MTO, with respect to the New MTO Infrastructure, to DB Co.

- (c) DB Co acknowledges and agrees that if,
  - (i) subject to the Warranty Protocol, the City with respect to the New City Infrastructure; or
  - (ii) the MTO with respect to the New MTO Infrastructure,

is unable to contact DB Co and/or obtain Warranty Work promptly, or, in the case of urgent Warranty Work within the time period specified in accordance with Section 11.17(b), the City and the MTO, as applicable, may take such emergency steps as are reasonable and appropriate to correct any defects, deficiencies or failures to comply with the Project Agreement, at DB Co's sole cost and expense. Except in the case of damage caused by the City's or the MTO's own forces, or where such emergency steps are not performed in accordance with Good Industry Practice or applicable Maintenance Instructions, such emergency steps taken by the City's or the MTO's own forces, as applicable, shall not invalidate any DB Co warranties in respect of the Works.

- (d) If DB Co fails to carry out Warranty Work in accordance with Section 11.16(b), and in the time specified in Section 11.17(b) or subsequently agreed upon, without prejudice to any other right or remedy the City may have, the City and the MTO, as applicable, may perform such Warranty Work at the sole risk, cost and expense of DB Co and may draw down on the relevant Warranty Letter of Credit to fund or as reimbursement for such costs and expenses.
- (e) DB Co acknowledges and agrees that all rules, requirements and restrictions relating to access, rail safety and operations and track protection, as set out in Schedule 15 – Output Specifications, apply to DB Co's performance of its obligations in accordance with Sections 11.16(b) and 11.17.
- (f) DB Co shall be solely responsible for obtaining access from MTO for the purpose of carrying out Warranty Work. DB Co acknowledges that such access to the New MTO Infrastructure may be subject to such limitations as may be imposed by MTO, and that DB Co may be required to obtain a Permit, Licence, Approval or Agreement to access the New MTO Infrastructure for the purpose of carrying out Warranty Work. If, after making commercially reasonable efforts and otherwise complying with its obligations pursuant to this Project Agreement, DB Co is unable to obtain access to the New MTO Infrastructure, DB Co shall refer the matter to the City, and if City is unable to facilitate access to the New MTO Infrastructure in a timely manner, DB Co shall be excused from its obligations to carry out such Warranty Work.
- (g) The warranties set out in Sections 11.16(b) and 11.17 shall not deprive the City or the MTO of any action, right or remedy otherwise available to the City or the MTO at law or in equity, and the periods referred to in this Section 11.17 shall not be construed as a limitation on the time in which the City or the MTO may pursue such other action, right or remedy.

- (h) Neither test results, nor selection or approval by the City or the City Representative of testing entities, nor any other thing in the Project Agreement shall have the effect of limiting or shortening or otherwise affecting in any way whatsoever the duration, effectiveness or content of any guarantee or warranty set forth in any other document or material forming part of the Project Agreement.
- (i) DB Co's aggregate maximum liability in respect of or relating to Warranty Work (including Remaining Works Warranty Work) shall be limited to the amount of the limitation on liability under the Performance Guarantee of Construction Contractor. This limitation on liability shall include, and be applicable to, (i) all costs incurred by or on behalf of the City or MTO to perform the Warranty Work, (ii) all liquidated damages payable by DB Co to the City pursuant to Section 11.17A, (iii) all Defect Rectification Costs and Direct Losses payable by DB Co to RTG under the Interface Agreement.

#### **11.17A Liquidated Damages for Failure to Perform Warranty Work**

- (a) The City shall provide Notice to DB Co of whether a Construction Defect is anticipated to be a Minor Construction Defect, Medium Construction Defect, Major Construction Defect or Critical Construction Defect, as soon as reasonably practicable after becoming aware of such Construction Defect, and shall thereafter notify DB Co as soon as reasonably practicable after becoming aware of any change in categorization of such Construction Defect.
- (b) Without prejudice to the City's other rights and remedies under Section 11.17, but subject to Section 11.17A(f), if DB Co has been provided with access to the System Infrastructure reasonably required to undertake Warranty Work in accordance with Section 11.17, but fails or refuses to perform Warranty Work required to rectify any Construction Defect in respect of the System Infrastructure within the reasonable time period required by the City in accordance with Section 11.17(b), or such time period set out in a Warranty Request in respect of such Construction Defect, as applicable, then DB Co shall:
  - (i) if the applicable Construction Defect is a Minor Construction Defect, pay to the City the sum of \$[REDACTED] per calendar day after the expiry of such time period until such Warranty Work is completed, as liquidated damages in respect of damages suffered and costs incurred by the City related to DB Co's failure or refusal to perform such Warranty Work within such time period;
  - (ii) if the applicable Construction Defect is a Medium Construction Defect, pay to the City the sum of \$[REDACTED] per calendar day after the expiry of such time period until such Warranty Work is completed, as liquidated damages in respect of damages suffered and costs incurred by the City related to DB Co's failure or refusal to perform such Warranty Work within such time period; or
  - (iii) if the applicable Construction Defect is a Major Construction Defect, pay to the City the sum of \$[REDACTED] per calendar day after the expiry of such time period until such Warranty Work is completed, as liquidated damages in respect of damages suffered and costs incurred by the City related to DB Co's failure or refusal to perform such Warranty Work within such time period;

provided that, except as otherwise set forth in Step 1.8(d) of the Warranty Protocol, in no event shall such liquidated damages commence to accrue until the later of (A) seven (7) calendar days

after DB Co's receipt of either (i) Notice from the City of such Construction Defect or (ii) the applicable Warranty Request under the Warranty Protocol, whichever is earlier or (B) the lapse of the applicable DB Co Response Period.

- (c) Without prejudice to the City's other rights and remedies under Section 11.17, but subject to Section 11.17A(f), if the applicable Construction Defect is a Critical Construction Defect, provided DB Co has been provided with access to the System Infrastructure reasonably required to undertake Warranty Work in accordance with Section 11.17, DB Co shall pay to the City the sum of \$[REDACTED] per calendar day for each day after receipt of Notice of such Critical Construction Defect or receipt of the applicable Warranty Request, as the case may be, until Warranty Work is completed, as liquidated damages in respect of damages suffered and costs incurred by the City related to DB Co's failure or refusal to promptly perform such Warranty Work; provided that, except as otherwise specified in Step 1.8(d) of the Warranty Protocol, in no event shall such liquidated damages commence to accrue until the later of (A) three (3) calendar days after DB Co's receipt of either (i) Notice from the City of such Construction Defect or (ii) the applicable Warranty Request under the Warranty Protocol, whichever is earlier, or (B) the lapse of the applicable DB Co Response Period.
- (d) Notwithstanding Section 11.17A(a), in the event such Warranty Work is undertaken by the City in accordance with 11.17(d), liquidated damages under section 11.17A(b) and (c) shall only accrue for that period of time in excess of the time period required by the City in accordance with Section 11.17(b) or set out in the applicable Warranty Request, as the case may be, until such Warranty Work is completed by the City or RTG. Where such Warranty Work is undertaken by RTG in accordance with the Warranty Protocol, liquidated damages shall only accrue for that period specified in Step 1.8(d) of the Warranty Protocol.
- (e) The Parties agree that the liquidated damages set out in this Section 11.17A are not a penalty but represent a genuine and reasonable pre-estimate of the damages that will be suffered by the City or any City Party related to DB Co's failure to timely perform Warranty Work in accordance with this Project Agreement, including, as applicable, the Warranty Protocol. DB Co further agrees that it is, and shall be, estopped from alleging that any liquidated damages set out in this Section 11.17A are a penalty and not liquidated damages, or are otherwise unenforceable for any reason, including that such damages were not incurred.
- (f) Subject to Section 11.17A(g) and subject to an aggregate maximum liability of DB Co for liquidated damages under this Section 11.17A equal to \$[REDACTED], unless otherwise specified herein, liquidated damages that accrue under this Section 11.17A shall become due and payable from time to time upon the City giving Notice to DB Co. Any such Notice shall specify the amount of liquidated damages that have accrued and are payable by DB Co to the City as of the date of such Notice. If such liquidated damages are not paid by DB Co within 10 Business Days from the date of such Notice, the City may recover any such liquidated damages due by DB Co by setting off such amounts from any amounts due or owing by the City to DB Co hereunder, or by drawing down the corresponding amount from the applicable Warranty Letter of Credit, in each case as required by the City, acting in its discretion. Failure by the City to provide a Notice to DB Co under this Section 11.17A(f) shall not constitute a waiver of the City's right to claim, or otherwise release DB Co from liability for, all liquidated damages under this Section 11.17A at any time.
- (g) In the event that there is a Dispute concerning whether or not a defect constitutes a Construction Defect or the required time period for performance of the required Warranty Work, and such

Dispute is ongoing, the City shall not be entitled to payment of related liquidated damages pursuant to this Section 11.17A unless and until such Dispute is resolved in accordance with either the Dispute Resolution Procedure, or the procedure in Appendix 6 of the Interface Agreement, as applicable, and, if resolved in favour of the City, the provisions respecting liquidated damages contained in this Section 11.17A shall apply with retroactive effect, except that there shall be added to the amount payable by DB Co on account of liquidated damages, interest at the rate of [REDACTED] percent per annum from the date the liquidated damages were required to be paid in the absence of the Dispute to the date of payment.

- (h) Notwithstanding the forgoing provisions of this Section 11.17A, provided DB Co has complied with, and exercised all commercially reasonable efforts to enforce, the warranty provisions in the Nominated Signalling Subcontract, liquidated damages shall not accrue under this Section 11.17A for a period of delay in completion of Warranty Work to the extent such delay is attributable to a delay or failure of the Nominated Signalling Subcontractor in undertaking Warranty Work in respect of the Nominated Signalling Subcontractor Works pursuant to the Nominated Signalling Subcontract.

#### 11.18 Warranty Letter of Credit

- (a) DB Co shall deliver, or cause to be delivered, to the City unconditional and irrevocable letters of credit from any one or more of the Schedule I Canadian chartered banks or any other financial institutions approved by the City in the City's sole and absolute discretion, in each case, whose current long-term issuer rating is at least "A" by Standard & Poor's and "A2" by Moody's Investor Services or an equivalent rating by another party acceptable to the City, in its sole and absolute discretion, in favour and for the direct and exclusive benefit of the City, in the form set out in Schedule 7B – Warranty Letter of Credit (each, a "**Warranty Letter of Credit**"), on or before the following dates:
  - (i) the East Substantial Completion Date, in respect of the East Warranty Work (the "**East Warranty Letter of Credit**"); and
  - (ii) the West Substantial Completion Date, in respect of the West Warranty Work (the "**West Warranty Letter of Credit**").

If no warranty claims are made pursuant to Sections 11.16 and 11.17 within the first year of the any Warranty Period, the value of the applicable Warranty Letter of Credit shall be reduced by [REDACTED]% for the remainder of the initial two year term of such Warranty Period. If a Warranty Period is extended in accordance with Section 11.17(a) in respect of Warranty Work, the value of the applicable Warranty Letter of Credit shall, for the duration of the extension beyond the initial two year term of such Warranty Period, be reduced to an amount equal to [REDACTED]% of the value of such Warranty Work.

- (b) Unless a Warranty Letter of Credit is drawn by the City in accordance with the provisions of this Project Agreement, the City shall release and deliver the,
  - (i) East Warranty Letter of Credit to DB Co on the day following the expiry of the East Warranty Period; and
  - (ii) West Warranty Letter of Credit to DB Co on the day following the expiry of the West Warranty Period,

each Warranty Period as may be extended pursuant to Section 11.17(a).

- (c) If an East Warranty Letter of Credit is drawn by the City, the City shall release and deliver the full amount of the East Warranty Letter of Credit, less,
  - (i) the amount of any warranty claims then outstanding, if any; and
  - (ii) the amount of claims previously satisfied by a draw by the City on the East Warranty Letter of Credit, if any,

on the day following the expiry of the East Warranty Period, and as it may be extended pursuant to Section 11.17(a).

- (d) If a West Warranty Letter of Credit is drawn by the City, the City shall release and deliver the full amount of the West Warranty Letter of Credit, less,
  - (i) the amount of any warranty claims then outstanding, if any; and
  - (ii) the amount of claims previously satisfied by a draw by the City on the West Warranty Letter of Credit, if any,

on the day following the expiry of the West Warranty Period, and as it may be extended pursuant to Section 11.17(a).

- (e) [Not used]

- (f) The City shall be entitled to draw on a Warranty Letter of Credit:

- (i) in accordance with Sections 11.17(d) and 1.5(b)(iv); and/or
- (ii) to satisfy any amounts that are due and have remained outstanding for 30 days by DB Co pursuant to the terms of this Project Agreement or the Interface Agreement.

- (g) The City may make multiple calls on the East Warranty Letter of Credit and West Warranty Letter of Credit.

- (h) DB Co shall continuously maintain, replace or renew a Warranty Letter of Credit (or shall cause the continuous maintenance, replacement or renewal of a Warranty Letter of Credit) until such Warranty Letter of Credit is released and delivered to DB Co pursuant to Section 11.18(b), (c), or (d), as the case may be, provided that for clarity, in the event of any draw on a Warranty Letter of Credit, DB Co shall not be required to replenish the Warranty Letter of Credit to the extent so drawn.

- (i) In the event that DB Co does not renew (or does not cause the renewal of) a Warranty Letter of Credit (a “**Non-Renewed Warranty Letter of Credit**”) and does not provide (or cause the provision of) proof of such renewal to the City before the date that is 20 calendar days before the Warranty Letter of Credit’s expiry date then, at any time during such 20 calendar day period and upon providing prior written Notice to DB Co, the City may draw upon the full amount of the Non-Renewed Warranty Letter of Credit and deposit the cash proceeds thereof in a segregated bank account selected by DB Co (provided that such bank account must be at a bank that meets

the thresholds described in Section 11.18(a)) and if DB Co does not promptly select such bank account then such bank account may be selected by the City in its absolute discretion, and such cash proceeds shall thereupon stand in place of the Non-Renewed Warranty Letter of Credit until DB Co delivers (or causes the delivery of) a replacement Warranty Letter of Credit to the City. All interest earned on such cash proceeds shall be for the benefit of DB Co. The City shall be entitled to withdraw such cash proceeds in the same manner that it is permitted to draw upon a Warranty Letter of Credit under Section 11.18(f). Upon the delivery of a replacement Warranty Letter of Credit by DB Co to the City, all remaining cash proceeds and all accrued interest thereon from such segregated bank account shall be returned to DB Co or as DB Co may direct within five Business Days after the delivery of such replacement Warranty Letter of Credit by DB Co to the City.

### 11.18A Remaining Works Letter of Credit

- (a) On or before the West Substantial Completion Date, DB Co shall deliver, or cause to be delivered, to the City an unconditional and irrevocable letter of credit from any one or more of the Schedule I Canadian chartered banks or any other financial institutions approved by the City in the City's sole and absolute discretion, in each case, whose current long-term issuer rating is at least "A" by Standard & Poor's and "A2" by Moody's Investor Services or an equivalent rating by another party acceptable to the City, in its sole and absolute discretion, in favour and for the direct and exclusive benefit of the City, in the form set out in Schedule 7C – Remaining Works Letter of Credit (the "**Remaining Works Letter of Credit**").
- (b) Unless the Remaining Works Letter of Credit is drawn by the City in accordance with the provisions of this Project Agreement, the City shall release and deliver the Remaining Works Letter of Credit to DB Co within five Business Days following the West Final Completion Date.
- (c) If the Remaining Works Letter of Credit is drawn by the City, the City shall release and deliver the full amount of the Remaining Works Letter of Credit, less, any amounts drawn by the City on the Remaining Works Letter of Credit, to DB Co within five Business Days following the West Final Completion Date.
- (d) In the event that the Remaining Works, other than in respect of any Remaining Works Minor Deficiencies, have not been completed by the West Scheduled Final Completion Date, the City may, upon the delivery of written notice to DB Co at any time following the West Scheduled Final Completion Date, engage others to perform the work necessary to complete the Remaining Works at the risk and cost of DB Co and the City may, at any time and from time to time, fund the cost of completing such work by drawing against the Remaining Works Letter of Credit.
- (e) If, by the time specified in 25.12B(a) DB Co has failed to complete and rectify any of the Remaining Works Minor Deficiencies specified in the Remaining Works Minor Deficiencies List, the City may, upon the delivery of written notice to DB Co at any time following such date, engage others to perform the work necessary to complete and rectify such Remaining Works Minor Deficiencies, at the risk and cost of DB Co and the City may, at any time and from time to time, fund the cost of completing such work by drawing against the Remaining Works Letter of Credit.
- (f) Following the West Substantial Completion Date, in the event that:

- (i) a claim for a lien is registered against the Lands, or against the City or the holdback under the CA relating to the performance of the Remaining Works, or
- (ii) the City receives any written notice of a lien under the CA arising in relation to the performance of the Remaining Works,

and, in each case, unless DB Co makes alternative arrangements to bond or otherwise secure the amount of such lien claim and the costs associated therewith satisfactory to the City, acting reasonably, the City shall be entitled to draw down from the Remaining Works Letter of Credit, an amount the City reasonably determines would be required to satisfy the applicable lien claimant and any costs and expenses incurred by the City in connection therewith, including such amount on account of costs of the lien claimant such that the City may, upon payment of the amount of the lien claim together with such costs into court, obtain an order vacating such lien pursuant to the CA, until such time as such claim has been dealt with in accordance with the applicable provisions of Section 17.3.

- (g) The City may make multiple calls on the Remaining Works Letter of Credit.
- (h) DB Co shall continuously maintain, replace or renew the Remaining Works Letter of Credit (or shall cause the continuous maintenance, replacement or renewal of the Remaining Works Letter of Credit) until the Remaining Works Letter of Credit is released and delivered to DB Co pursuant to Section 11.18A(b), provided that, for clarity, in the event of any draw on the Remaining Works Letter of Credit, DB Co shall not be required to replenish the Remaining Works Letter of Credit to the extent so drawn.
- (i) In the event that DB Co does not renew (or does not cause the renewal of) the Remaining Works Letter of Credit and does not provide (or cause the provision of) proof of such renewal to the City before the date that is 20 calendar days before the Remaining Works Letter of Credit's expiry date, then at any time during such 20 calendar day period and then at any time and upon providing prior written Notice to DB Co, the City may draw upon the full amount of the Remaining Works Letter of Credit and deposit the cash proceeds thereof in a segregated bank account selected by DB Co (provided that such bank account must be at a bank that meets the thresholds described in Section 11.18A(a) and if DB Co does not promptly select such bank account then such bank account may be selected by the City in its sole and absolute discretion) and such cash proceeds shall thereupon stand in place of the Remaining Works Letter of Credit until DB Co delivers (or causes the delivery of) a replacement Remaining Works Letter of Credit to the City. All interest earned on such cash proceeds shall be for the benefit of DB Co. The City shall be entitled to withdraw such cash proceeds in the same manner that it is permitted to draw upon the Remaining Works Letter of Credit under Section 11.18A(d). Upon the delivery of a replacement Remaining Works Letter of Credit by DB Co to the City, all remaining cash proceeds and all accrued interest thereon from such segregated bank account shall be returned to DB Co or as DB Co may direct within five Business Days after the delivery of such replacement Remaining Works Letter of Credit by DB Co to the City.

#### **11.18B Intentionally Deleted**

### 11.18C Intentionally Deleted

### 11.18D Return of Draw Amount

- (a) In the event that the City obtains funds (the "**Draw Amount**") as a result of the City's call on any Warranty Letter of Credit or Remaining Works Letter of Credit and it is subsequently determined pursuant to the Dispute Resolution Procedure that such call was in breach of this Project Agreement or the amount of such call was in excess of the amount that the City was entitled to draw under this Project Agreement, the City shall repay such Draw Amount or excess amount, as applicable, and the Direct Losses of DB Co resulting from such wrongful or excess draw, within five (5) Business Days of such final determination; provided that, such repayment shall be conditional upon (and take place concurrently with) the restoration of such Warranty Letter of Credit or Remaining Works Letter of Credit, as applicable (if and to the extent that the applicable Warranty Letter of Credit or Remaining Works Letter of Credit has not been released by such date in accordance with this Project Agreement) by a face amount equal to the Draw Amount or excess amount, as applicable.
- (b) Notwithstanding anything to the contrary contained in this Project Agreement, the City shall only be permitted to draw on any Letter of Credit to the extent that the City's or MTO's, as applicable, entitlement to perform any Warranty Work or the Construction Defect giving rise thereto is not the subject of ongoing Dispute.

### 11.19 Coordination and Minimization of Disruption and Interference

- (a) DB Co shall perform the Works so as to coordinate with,
  - (i) the operations of, and the performance of any services by, the City, any City Party, any Governmental Authority, any Other Contractor, any Railway Company, any Utility Company, MTO, any Transit System and any railway system, including the performance of the Governmental Activities and the Other Works;
  - (ii) the operations of, and the performance of any RTG Works, by RTG and any RTG Party, including in accordance with the Interface Agreement (and subject to any specific coordination arrangements agreed therein);
  - (iii) the construction of the interface, connection or inter-connection between the New City Infrastructure, the New MTO Infrastructure, and any existing transit systems, highway systems, railway systems, Transit Systems, railway networks and any other Ontario or City of Ottawa road or roadway.
- (b) DB Co acknowledges and agrees that,
  - (i) DB Co has familiarized itself with all operations and activities associated with the Lands, the Existing Infrastructure and the existing transit systems, highway systems and railway systems, including the Existing Confederation Line, to the extent pertinent to or affected by the Works, and will perform the Works in accordance with, and subject to,
    - (A) this Project Agreement, including all rules, requirements and restrictions relating to access, rail safety and operations and track protection, as set out in Schedule 15 – Output Specifications;

- (B) the Traffic and Transit Management Plan and the Construction Access Management Plan; and
    - (C) the requirements of the City and the MTO,
- in order to maintain normal operations and activities associated with the Lands, the Existing Infrastructure and the existing transit systems, highway systems and railway systems, including the Existing Confederation Line;
- (ii) the carrying on of the City Activities during construction is a priority for the City, and DB Co has reviewed the Project Documents with respect to this; and
  - (iii) DB Co shall use all methods required to comply with the instructions set out in this Project Agreement during the performance of the Works, DB Co shall fully cooperate with the City in complying with such instructions during the performance of the Works. Any costs incurred by DB Co in complying with said instructions shall be part of the Guaranteed Price, except in circumstances where DB Co is otherwise entitled to additional compensation in accordance with this Project Agreement.
- (c) Except as explicitly permitted by the City or this Project Agreement, and subject to DB Co's compliance with all applicable Permits, Licences, Approvals and Agreements,
- (i) DB Co shall minimize disturbance to and interference with,
    - (A) the existing transit systems, highway systems, railway systems, and the Existing Infrastructure and Stage 1 Connection Infrastructure in accordance with this Project Agreement, including with respect to noise, dust control, access to the Lands and the particular requirements in respect of those portions of the Works which are to be carried out within the Existing Infrastructure or Stage 1 Connection Infrastructure and in respect of those portions of the Works where connections are being made to the Existing Infrastructure or Stage 1 Connection Infrastructure;
    - (B) the construction, operations or maintenance activities of the City, any Governmental Authority, any Other Contractor, any Railway Company, any Utility Company, MTO, RTG and RTG Parties in accordance with the Interface Agreement (and subject to any specific coordination arrangements agreed therein), any Transit System and any railway system, and with respect to any road or roadway, including the performance of the Governmental Activities, RTG Works and the Other Works;
    - (C) the convenience of the public in respect of, and the access of the public to and use of, any public or private roads or highways or other transportation infrastructure including the Existing Infrastructure (other than the New City Infrastructure and the New MTO Infrastructure), whether under the control or in the possession of the City or any other person, and DB Co shall minimize any lane or ramp closures or diversions, track closures or diversions and traffic diversions or restrictions.

- (d) To the extent that the Project necessitates interference, in any way, with the operation of the existing transit systems, existing highway systems, existing railway systems or Existing Infrastructure, including the imposition of any closures or detours on the existing highway systems, railway systems or Existing Infrastructure, DB Co shall use commercially reasonable efforts to cooperate with the City, Governmental Authorities, Other Contractors, Railway Companies, Utility Companies, MTO, RTG and RTG Parties in accordance with the Interface Agreement (and subject to any specific requirements therein), Transit Systems, railway systems and other relevant third parties to ensure the continued operation of the existing transit systems, highway systems, rail systems and Existing Infrastructure.
- (e) DB Co shall develop and implement protocols in furtherance of its obligations as set out in this Section 11.19 in accordance with the Traffic and Transit Management Plan, the Construction Access Management Plan and the Output Specifications.

#### **11.20 Substitutions**

- (a) Whenever equipment, components, materials, supplies, tools, and other items are specified or otherwise described in this Project Agreement by using the name or catalogue or model number of a particular manufacturer, fabricator, vendor or distributor, or any other material name or description, the naming or identification of the item is intended to establish the type and the minimum function and quality required, and equipment, components, materials, supplies, tools, and other items of other manufacturers, fabricators, vendors or distributors shall not be substituted without the prior written consent of the City, in its sole discretion. Notwithstanding the foregoing, in the case of obsolescence of an item or in any other circumstances where the relevant prescribed item is unavailable through no fault of DB Co or any DB Co Party, to the extent the replacement item is more expensive to purchase or install than the prescribed item, or increases the costs of Works, or causes delay in the Works, such change shall, subject to and in accordance with Section 32 be treated as a Delay Event and, subject to and in accordance with Section 33, be treated as a Compensation Event. To the extent the replacement item is less expensive to purchase or install than the prescribed item, or reduces the costs of Works, such change shall be addressed as a Variation.

#### **11.21 Change in Standards**

- (a) Where this Project Agreement requires DB Co to comply with a technical standard in respect of the design and construction of the Utility Works, New City Infrastructure and the New MTO Infrastructure, and that standard has changed between the date of this Project Agreement and the date that such compliance is required, then DB Co shall give Notice to the City of such change. If, after such Notice, the City requires compliance with the changed standard (rather than the standard applicable as of the date of this Project Agreement), then, to the extent such change impacts the Works and would not have otherwise been taken into account by compliance with Good Industry Practice, such changed standard shall, subject to and in accordance with Schedule 22 – Variation Procedure, result in a Variation. If the City does not require compliance with the changed standard, then DB Co shall continue to comply with the standard applicable as of the date of this Project Agreement, without a Variation therefor. This Section 11.21 shall not apply where a change in a technical standard is also a Change in Law, in which case Article 30 shall govern.

## **11.22 Subcontractors and Suppliers**

- (a) DB Co shall preserve and protect the rights of the Parties under this Project Agreement with respect to the works to be performed under Subcontract, and shall:
- (i) enter into Subcontracts or written agreements with DB Co Parties to require them to perform their work as provided in the Project Agreement;
  - (ii) incorporate the relevant terms and conditions of the Project Agreement into all contracts or written agreements with DB Co Parties; and
  - (iii) be as fully responsible to the City for acts and omissions of the DB Co Parties as for acts and omissions of persons directly employed by DB Co.
- (b) Attached in Part 1 of Schedule 8 – DB Co Parties is a list of all DB Co Parties that DB Co has engaged or caused to be engaged for the performance of the Work as of the date of execution of this Project Agreement. DB Co agrees to update such list (and including, for greater clarity, Part 2 of Schedule 8) from time to time as additional DB Co Parties are engaged. Any of these named DB Co Parties listed by DB Co may be changed by DB Co upon prior Notice to (but without the approval of) the City Representative, provided however, that if the City Representative reasonably objects to any change to a Prequalified Subcontractor (other than the Nominated Signaling Subcontractor) that is a DB Co Party, then DB Co shall select an alternative replacement Prequalified Subcontractor to which the City Representative does not reasonably object.
- (c) DB Co hereby agrees to contractually obligate the Construction Contractor to enter into the Construction Contractor’s Direct Agreement and, subject to Section 11.22(d), to cause the Construction Contractor to cause each of the other DB Co Parties, including Suppliers leasing any construction machinery and equipment, to enter into the Subcontractor’s Direct Agreement, to evidence, among other things, that the City shall have the right to cure any default by the Construction Contractor under the Subcontract.
- (d) With the exception of the Subcontracts specifically listed in item 1 in Part 2 of Schedule 8 – DB Co Parties, none of DB Co, the Construction Contractor or the applicable DB Co Party are obliged to enter into a Subcontractor’s Direct Agreement in respect of Subcontracts having a total estimated cost of \$[REDACTED] or less.
- (e) Subject to Section 11.22(d), DB Co agrees to deliver to the City the Subcontractor’s Direct Agreements by the applicable due dates set out in Part 2 of Schedule 8 – DB Co Parties. If, following the date that [REDACTED]% (and issued for construction) Construction Document Submittals are submitted to the City in accordance with Schedule 10 – Review Procedure, DB Co is required to enter into any additional Subcontractor’s Direct Agreement pursuant to this Section 11.22, DB Co shall deliver such Subcontractor’s Direct Agreements to the City within 30 days after execution.

## **11.23 Apprenticeship Plan and Program**

- (a) No later than six months after Financial Close, DB Co shall provide a plan setting out DB Co’s Project-specific approach to maximizing apprenticeship opportunities on the Project (the

“**Apprenticeship Plan**”) for review and approval by the City. The Apprenticeship Plan shall include,

- (i) specific objectives for apprenticeship opportunities for the Project on a trade-by-trade basis;
  - (ii) apprenticeship opportunities for each trade required on the Project;
  - (iii) a confirmation that apprenticeships will be registered with the Ministry of Advanced Education and Skills Development and the Ontario College of Trades, as applicable;
  - (iv) a program to ensure the required supply of apprentices to meet DB Co’s Apprenticeship Plan targets and requirements; and
  - (v) a program to support apprentices on the Project, to complete their apprenticeships during the Project Term and, for those whose apprenticeships are not complete by the end of the Project Term a program to support apprentices to complete their apprenticeships after the end of the Project Term.
- (b) DB Co shall implement the approved Apprenticeship Plan.
- (c) DB Co shall provide an annual report to the City on the implementation of the Apprenticeship Plan which report shall include,
- (i) statistics on the number of apprentices involved in the Project relative to the number of journeypersons, for each month of the Project; and
  - (ii) detailed information setting out DB Co’s progress toward achieving the objectives set out in the Apprenticeship Plan, including an identification of barriers that prevented DB Co from achieving its objectives.
- (d) The City may require DB Co to amend its Apprenticeship Plan if, in its opinion, acting reasonably, DB Co is failing to maximize apprenticeship opportunities on the Project pursuant to the then current Apprenticeship Plan.
- (e) The City may, in its sole discretion, release DB Co’s Apprenticeship Plan to the public. DB Co’s Apprenticeship Plan shall not be Confidential Information.

#### **11.24 Procurement Monitoring and Implementation Plan**

- (a) DB Co shall implement the procurement monitoring and implementation plan (the “**Procurement Monitoring and Implementation Plan**”) attached as Schedule 19 – Procurement Monitoring and Implementation Plan to this Project Agreement.
- (b) A director of DB Co shall submit, annually, on each anniversary of Commercial Close, a completed and executed declaration in the form attached as Appendix 1 to Schedule 19 – Procurement Monitoring and Implementation Plan that DB Co has made the proper inquiries and has determined that the requirements of the Procurement Monitoring and Implementation Plan have been complied with by DB Co and its Subcontractors in the immediately previous year.

### 11.25 Health and Safety Certification

- (a) DB Co shall, at its own cost and risk, at all times during the performance of the Works cause a COR-Qualified Construction DB Co Party or COR-Certified Construction DB Co Party, as the case may be, to:
- (i) to the extent a COR-Qualified Construction DB Co Party has not obtained its COR Certification prior to Financial Close,
    - (A) use best efforts to obtain its COR Certification no later than 18 months following Financial Close. In the event that the City is satisfied, in its sole discretion, that the COR-Qualified Construction DB Co Party has used best efforts to obtain its COR Certification in accordance with this Section 11.25 and the COR-Qualified Construction DB Co Party has not obtained COR Certification by the end of such 18 month period, then the City shall establish a time period during which the COR-Qualified Construction DB Co 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 ISO 45001 Accreditation or OHSAS 18001 Accreditation until such time as the COR-Qualified Construction DB Co Party has obtained its COR Certification, and
  - (ii) once the COR-Qualified Construction DB Co Party is certified (thereafter referred to as a “**COR-Certified Construction DB Co Party**”), maintain in good standing, and, as applicable, renew its COR Certification; and
  - (iii) comply with all requirements of its ISO 45001 Accreditation or OHSAS 18001 Accreditation (if a COR-Qualified Construction DB Co Party) or COR Certification (if a COR-Certified Construction DB Co Party), in accordance with its terms.
- (b) Without limiting any other provision of this Project Agreement, if at any time during the performance of the Works:
- (i) a COR-Qualified Construction DB Co Party fails to obtain its COR Certification in accordance with this Project Agreement and the City determines that the failure to obtain the COR Certification is as a result of such COR-Qualified Construction DB Co Party not using best efforts to obtain such certification and the City delivers a Notice to DB Co indicating that a COR-Qualified Construction DB Co Party has failed to obtain its COR Certification in accordance with this Project Agreement;
  - (ii) a COR-Qualified Construction DB Co Party fails to maintain its ISO 45001 Accreditation or OHSAS 18001 Accreditation in good standing in accordance with its terms or in accordance with this Project Agreement;
  - (iii) a COR-Certified Construction DB Co Party fails to maintain its COR Certification in good standing in accordance with its terms or in accordance with this Project Agreement,
- (each a “**H&S Certification Default Event**”);

- (iv) the City delivers a Notice to DB Co indicating that the City is of the opinion that a COR-Qualified Construction DB Co Party will fail to maintain its ISO 45001 Accreditation or OHSAS 18001 Accreditation in good standing in accordance with its terms or in accordance with this Project Agreement; or
- (v) the City delivers a Notice to DB Co indicating that the City is of the opinion that a COR-Certified Construction DB Co Party will fail to maintain its COR Certification in good standing in accordance with its terms or in accordance with this Project Agreement,

DB Co shall:

- (vi) immediately upon the occurrence of a H&S Certification Default Event, notify the City that a H&S Certification Default Event has occurred, and:
  - (A) produce and deliver to the City a report identifying the reasons for the failure to obtain or maintain in good standing the COR Certification, ISO 45001 Accreditation or OHSAS 18001 Accreditation, as the case may be;
  - (B) produce and deliver to the City a plan showing the steps that are to be taken to have the COR Certification, ISO 45001 Accreditation or OHSAS 18001 Accreditation, as the case may be, obtained or reinstated in good standing within a period of not more than 30 days (the “**H&S Certification Reinstatement Plan**”), which H&S Certification Reinstatement Plan shall be subject to review and approval by the City and, to the extent the City requires any amendments or revisions to be made to the H&S Certification Reinstatement Plan, DB Co shall take, and shall cause the COR-Qualified Construction DB Co Party or the COR-Certified Construction DB Co Party, as the case may be, to take, all reasonable steps as may be necessary to make all such required amendments and revisions and deliver to the City an amended H&S Certification Reinstatement Plan not more than five Business Days from the date on which such request is made by the City;
  - (C) no later than five Business Days after the H&S Certification Default Event occurs, arrange to have conducted a complete H&S Construction Inspection in accordance with Section 15.2; and
  - (D) arrange to have conducted an H&S Construction Re-Inspection in accordance with Section 15.2(c), if required; or
- (vii) within five Business Days after receipt of the Notice from the City under Section 11.25(b)(iv) or 11.25(b)(v):
  - (A) produce and deliver to the City Representative a report identifying the manner in which the COR Certification, ISO 45001 Accreditation or OHSAS 18001 Accreditation, as the case may be, shall be maintained in good standing or obtained, as applicable;
  - (B) produce and deliver to the City Representative a plan showing the steps that are to be taken to ensure that the COR Certification, ISO 45001 Accreditation or OHSAS 18001 Accreditation, as the case may be, will be

maintained in good standing without interruption (the “**H&S Certification Maintenance Plan**”), which H&S Certification Maintenance Plan shall be subject to review and approval by the City and, to the extent the City requires any amendments or revisions to be made to the H&S Certification Maintenance Plan, DB Co shall take all reasonable steps as may be necessary to make all such required amendments and revisions and deliver to the City an amended and H&S Certification Maintenance Plan not more than five Business Days from the date on which such request is made by the City;

- (C) arrange to have conducted a complete H&S Construction Inspection in accordance with Section 15.2, and
- (D) arrange to have conducted an H&S Construction Re-Inspection in accordance with Section 15.2(c), if required.

### 11.26 Demolition Requirements

- (a) Without limiting DB Co’s obligation to perform the Works at all times in accordance with Applicable Law, in respect of any Demolition, DB Co shall, and shall cause each applicable DB Co Party that is performing any part of the Demolition to, at such person’s own cost and risk and at all times during the performance of the Works:
  - (i) conduct all work in connection with any Demolition at all times in compliance with section 3 of the Performance Standards Regulation and the Building Code;
  - (ii) ensure that all DB Co Parties having responsibility for the supervision of any such Demolition are qualified as either a professional engineer, limited license holder or provisional license holder (as such terms are used in the Performance Standards Regulation) (such person is hereinafter referred to as a “**Demolition Supervisor**”);
  - (iii) observe and perform the Demolition in a manner that is consistent with the recommendations set forth in the Demolition Guidelines in all material respects; and
  - (iv) in respect of any Complex Structure Demolition to be conducted by DB Co or any DB Co Party:
    - (A) prepare detailed specifications relating to such Complex Structure Demolition which specifications will include, without limitation, a detailed risk assessment and risk mitigation plan assessing all apparent or inferable risks that might be associated with the Demolition, colour-coded Load-Path Diagrams (which will include a description of the Demolition Requirements set forth herein) to supplement the Site work plans and blueprints relating to the Demolition and all other technical requirements relating to the Complex Structure Demolition (the “**Demolition Specifications**”);
    - (B) at all times when a Complex Structure Demolition is being performed that the Demolition Specifications, Demolition work plans and Load-Path Diagram, be present and available at the Site at which such Complex Structure Demolition is being performed; and

- (C) ensure at all times when a Complex Structure Demolition is being performed that a Demolition Supervisor will be on the Site at which such Complex Structure Demolition is being performed and actively supervising all activities in respect of the Complex Structure Demolition,  
  
(collectively the “**Demolition Requirements**”).
- (b) If at any time while any Demolition is being performed pursuant to this Project Agreement, DB Co or any DB Co Party that is performing any part of any Demolition receives Notice from the City or any City Party or Governmental Authority that the Demolition is being conducted in a manner that is either not in compliance with the Demolition Requirements or not otherwise in accordance with this Project Agreement (such event referred to as a “**Demolition Default Event**”), DB Co shall and shall cause any applicable DB Co Party to:
  - (i) be required immediately upon the occurrence of a Demolition Default Event, to notify the City that a Demolition Default Event has occurred, unless the City was the person that provided Notice of the Demolition Default Event;
  - (ii) cease all work in respect of such Demolition; and
  - (iii) within five Business Days after receipt of a Notice of a Demolition Default Event produce and deliver to the City Representative:
    - (A) a report identifying the reasons for the occurrence of the Demolition Default Event; and
    - (B) a Demolition Plan showing the steps that are to be taken to rectify the Demolition Default Event within a period of not more than 30 days from the occurrence of the Demolition Default Event, which Demolition Plan shall be subject to review and approval by the City and, to the extent the City requires any amendments or revisions to be made to such Demolition Plan, DB Co and the applicable DB Co Parties shall take all reasonable steps as may be necessary to make all such required amendments and revisions and deliver to the City an amended and revised Demolition Plan not more than five Business Days from the date on which such request is made by the City.
- (c) No Demolition shall be recommenced at the Site that was the subject of the Demolition Default Event until:
  - (i) the City is satisfied that DB Co or the applicable DB Co Party has taken all necessary steps to remediate such Demolition Default Event in accordance with Demolition Plan; and
  - (ii) the City has received a report, in form and substance satisfactory to the City, prepared by a professional engineer that the Demolition Default Event has been remediated and the Site has been properly prepared for the Demolition to proceed in accordance with the Demolition Plan.

- (d) For clarity, DB Co shall not be eligible for a Delay Event or a Compensation Event in connection with a Demolition Default Event or the recommencement of a Demolition pursuant to Section 11.26(c).

#### 11.27 New Municipal Infrastructure Works

- (a) DB Co shall achieve all New Municipal Infrastructure Works Acceptance by the Scheduled West Substantial Completion Date.
- (b) The City Engineer shall (i) receive and monitor all drawings, specifications, plans and documents related to the design and development of the New Municipal Infrastructure Works; (ii) receive and monitor all progress reports as necessary for the City Engineer to be in a position to confirm progress and extent of completion of the New Municipal Infrastructure Works; (iii) review and monitor the tests described in Schedule 15 – Output Specifications in respect of the New Municipal Infrastructure Works; (iv) prior to any certification and/or acceptance of New Municipal Infrastructure Works, consider the views and comments of both DB Co and the City in relation to the satisfaction of the conditions for such certification and/or acceptance; (v) conduct inspections and reviews of the New Municipal Infrastructure Works as necessary for the City Engineer to be satisfied that the New Municipal Infrastructure Works are proceeding in accordance with the requirements of the Project Agreement; (vi) review relevant documentation, including the Design Development Submittals relating to New Municipal Infrastructure Works, certificates and approvals, Permits, Licences, Approvals, and Agreements, certifications, test results, quality assurance audits, letters of assurance from professionals, schedules of equipment and staff profile schedules, in each case, relating to New Municipal Infrastructure Works provided to the City Engineer pursuant to this Project Agreement and within the timeframes contemplated for such review within Schedule 10 – Review Procedure; and (vii) provide all other services set forth in Schedule 15 – Output Specifications as it relates to the New Municipal Infrastructure Works, in each case, for purposes of enabling the City Engineer to confirm satisfaction of the conditions for issuance of the New Municipal Infrastructure Component Acceptance Certificate for each New Municipal Infrastructure Component and the Final New Municipal Infrastructure Works Acceptance Certificate in relation to all of the New Municipal Infrastructure.
- (c) DB Co shall deliver a notice (a “**New Municipal Infrastructure Works Component Countdown Notice**”) to the City and the City Engineer specifying the date on which DB Co anticipates that New Municipal Infrastructure Component Acceptance will be achieved in respect of such New Municipal Infrastructure Component (the “**Anticipated New Municipal Infrastructure Component Acceptance Date**”). The New Municipal Infrastructure Works Component Countdown Notice shall be delivered not less than 90 days prior to the Anticipated New Municipal Infrastructure Component Acceptance Date. DB Co shall give the City Engineer and the City Representative at least 10 Business Days’ notice prior to the date upon which DB Co anticipates all requirements for New Municipal Infrastructure Component Acceptance shall be satisfied.
- (d) DB Co shall give the City Engineer and the City Representative notice (the “**New Municipal Infrastructure Component Acceptance Notice**”) upon the satisfaction of all requirements of the New Municipal Infrastructure Component Acceptance, together with DB Co’s opinion as to whether the conditions for issuance of the New Municipal Infrastructure Component Acceptance Certificate have been satisfied, and each of the following:

- (i) to the extent transferable and without prejudice to the City's rights pursuant to Section 41 and Schedule 24 – Intellectual Property, all copyright licences for computer programs, or licences to use the same, used in connection with the applicable New Municipal Infrastructure Components together with all technical drawings and data, supplier agreements and contracts, utilities consumption information, environmental and technical reports, leases, licence and subletting data and contracts, asset conditions data, standard operating procedures processes and manuals, and all other information related to the New Municipal Infrastructure Works in respect of the applicable New Municipal Infrastructure Component accumulated up until the New Municipal Infrastructure Component Acceptance Date, in each case, in electronic format acceptable to the City, acting reasonably, where it exists in electronic format, and in original format, when not in electronic format;
- (ii) the most recent Record Drawings relating to the New Municipal Infrastructure Works in the format that the City, acting reasonably, considers most appropriate at the time;
- (iii) copies of all test results performed and test reports prepared in accordance with Schedule 15, together with all DB Co Permits, Licences, Approvals and Agreements obtained and/or entered into in connection with the New Municipal Infrastructure Works;
- (iv) all Project Data and Intellectual Property relating to the design, construction and completion of the New Municipal Infrastructure Component; and
- (v) all information, reports, documents, records and the like referred to in the Project Agreement as it relates to New Municipal Infrastructure Works including as referred to in Schedule 26 – Record Provisions, in each case as it relates to New Municipal Infrastructure and New Municipal Infrastructure Works only,

(collectively, the “**New Municipal Infrastructure Component Works Requirements**”).

Within 10 Business Days after receipt of a New Municipal Infrastructure Component Acceptance Notice the City Engineer shall determine whether the conditions for issuance of the New Municipal Infrastructure Component Acceptance Certificate have been satisfied and to issue to the City and DB Co either:

- (A) the New Municipal Infrastructure Component Acceptance Certificate, setting out in such certificate the New Municipal Infrastructure Component Acceptance Date; or
  - (B) a report detailing the matters that the City Engineer considers are required to be performed by DB Co to satisfy the conditions for issuance of the New Municipal Infrastructure Component Acceptance Certificate.
- (e) Where the City Engineer has issued a report in accordance with Section 11.27(d)(v)(B) above, DB Co shall, within 5 Business Days after receipt of such report, provide the City Engineer and the City Representative with:
- (i) a detailed list indicating the rectification actions proposed for all matters raised in such report;

- (ii) the schedule for completion of all such rectification actions; and
- (iii) any additional tests that need to be undertaken in respect of the New Municipal Infrastructure Works as a result of the rectification actions,

and DB Co shall perform all such additional rectification actions and testing in a timely manner. Upon completion thereof, DB Co may give a further New Municipal Infrastructure Component Acceptance Notice and Section 11.27(c) to (e) inclusive shall be repeated until the New Municipal Infrastructure Component Acceptance Certificate has been issued.

- (f) On each New Municipal Infrastructure Component Acceptance Date in respect of each New Municipal Infrastructure Component:
  - (i) DB Co shall cooperate fully with the City and any persons providing services on or at the New Municipal Infrastructure Components in order to avoid or mitigate, insofar as reasonably practicable, any inconvenience or any risk to the health and safety of any person at, on or under the Lands on which the New Municipal Infrastructure Works are or were performed, including those areas where any warranty work is or has been performed;
  - (ii) insofar as title to the New Municipal Infrastructure Components shall not have already passed to the City pursuant to Section 45.1, DB Co shall transfer to, and there shall vest in the City, free from all Encumbrances (other than the Encumbrances caused or consented to by the City), the New Municipal Infrastructure Components;
  - (iii) DB Co shall use commercially reasonable efforts to assign, or otherwise transfer, to the City, free from all Encumbrances (other than any Encumbrances caused or consented to by the City), the benefit of all manufacturers' warranties, including all documentation in respect thereof, in respect of mechanical and electrical plant and equipment used or made available by DB Co under this Project Agreement which is included in the New Municipal Infrastructure Components; and
  - (iv) subject to Section 41 and Schedule 24 - Intellectual Property, all information obtained by DB Co in connection with the New Municipal Infrastructure Works relating to the applicable New Municipal Infrastructure Components, including Record Drawings and other technical drawings and data, supplier agreements and contracts, utilities consumption information, environmental and technical reports, lease, licence and subletting data and contracts, asset conditions data, standard operating procedure, processes and manuals, and all other information directly related to the New Municipal Infrastructure Works relating to the applicable New Municipal Infrastructure Component accumulated over the course of the Project Term shall be the property of the City.
- (g) Subject to the warranty obligations described herein, the issuance by the City Engineer in accordance with Section 11.27(d) of the New Municipal Infrastructure Component Acceptance Certificate in respect of any New Municipal Infrastructure Component shall result in the responsibility for traffic management, maintenance, repair of the New Municipal Infrastructure Component described in such New Municipal Infrastructure Component Acceptance Certificate reverting back to the City.

- (h) After New Municipal Infrastructure Component Acceptance Certificates for all New Municipal Infrastructure Components have been delivered by the City Engineer to DB Co, DB Co shall deliver a notice to the City Engineer requesting delivery of the Final New Municipal Infrastructure Works Acceptance Certificate. Upon satisfaction of all conditions to complete the New Municipal Infrastructure Works and achievement of New Municipal Infrastructure Works Acceptance, the City Engineer shall deliver to DB Co the Final New Municipal Infrastructure Works Acceptance Certificate.
- (i) DB Co shall deliver to the City and the City Engineer the following, in each case, in form and substance satisfactory to the City and the City Engineer, acting reasonably, in order to be eligible to receive the Final New Municipal Infrastructure Works Acceptance Certificate one complete set of the New Municipal Infrastructure Component Works Requirements divided up in separate packages for each New Municipal Infrastructure Component (i) showing all alterations made to the New Municipal Infrastructure Works since the New Municipal Infrastructure Component Acceptance Date in respect of each New Municipal Infrastructure Component and (ii) including updates and additions to any of the New Municipal Infrastructure Works Requirements since the New Municipal Infrastructure Component Acceptance Date (the “**Final New Municipal Infrastructure Works Requirements**”).

#### **11.28 Works, Goods, Equipment, Consumables and Materials**

- (a) Without expanding its obligations under Section 11.16, DB Co shall cause the goods, equipment, consumables and materials used or supplied by it or any contractor or Subcontractor in connection with the Works to be:
  - (i) of good quality, fit for their intended purpose and maintained in a safe, serviceable and clean condition in accordance with the Output Specifications and Good Industry Practice;
  - (ii) of the type specified in the Output Specifications, if applicable; and
  - (iii) in compliance with all Applicable Law,and shall, as soon as practicable after receiving a request from the City Representative, supply to the City Representative evidence to demonstrate its compliance with this Section 11.28(a).
- (b) DB Co shall cause sufficient stocks of goods, equipment, consumables and materials to be held in compliance with its obligations under this Project Agreement.

#### **11.29 Utility Works – Cash Allowance**

- (a) DB Co shall perform and complete, the DB Co Utility Works, and shall procure and coordinate the performance and completion of the Utility Company Self-Performed Works by the applicable Utility Company pursuant to Utility Agreements:
  - (i) so as to satisfy the Output Specifications;
  - (ii) in accordance with the Works Schedule; and
  - (iii) in accordance with the other terms and conditions of this Project Agreement.

- (b) DB Co shall complete or cause the completion of the Utility Works, comprising part of, or required for:
  - (i) the East Works, as a precondition to achieving East Final Completion;
  - (ii) the West Works other than Highway Works, as a precondition to achieving West Final Completion;
  - (iii) the Highway Works, as a precondition to achieving the applicable Handover; and
  - (iv) the Remaining Works, as a precondition to achieving West Final Completion.
- (c) DB Co shall be solely responsible for coordinating the Utility Works with its activities in respect of the Project Operations and shall not be entitled to an extension of time or additional compensation in respect of the remainder of the Works as a result of the Utility Works or any matter relating thereto, except as provided for in this Section 11.29, Section 18.6, Section 32.1(a)(xxiv) and Section 33.6.
- (d) The DB Co Utility Works shall be reviewed, certified, financed and paid for as part of Earned Value in accordance with Schedule 21 – Construction Period Payments. The Utility Company Self-Performed Works shall be reviewed, certified, financed and paid for in accordance with this Section 11.29. DB Co shall not be required to obtain financing for the costs of the Utility Company Self-Performed Works.
- (e) Prior to entering into a Utility Agreement for the performance of Utility Company Self-Performed Work, DB Co shall submit to the City Representative a draft of such agreement setting out the scope and pricing proposed by the Utility Company for the performance of the Utility Company Self-Performed Work for review by the City. The City may, in conjunction with DB Co, for a period not to exceed 10 Business Days from receipt of the draft agreement, engage with the Utility Company to negotiate pricing for inclusion in the Utility Agreement based upon preferential pricing arrangements which the City may have with the applicable Utility Company and may also raise comments on proposed scope which DB Co shall consider acting reasonably and both Parties may seek to negotiate with the Utility Company. The City shall notify DB Co by the end of such 10 Business Day period of the results of such price discussions and the draft Utility Agreement will be updated for (i) any pricing amendments mutually agreed by the Utility Company and the City and (ii) any scope amendments mutually agreed by the Parties and the Utility Company. DB Co shall enter into the updated Utility Agreement. The City will only pay the Utility Company Works Cash Allowance and Utility Works Fee in respect of Utility Agreements which have been approved by the City in accordance with this Section 11.29(e).
- (f) The estimated cost of the Utility Company Self-Performed Works is \$[REDACTED] (the “**Utility Company Works Cash Allowance**”) plus applicable HST, and shall be paid for by the City on a monthly progress basis as the Utility Company Self-Performed Works are progressed and invoiced by the applicable Utility Company to DB Co. In the event that the actual costs of the Utility Company Self-Performed Works as evidenced by invoices rendered by the applicable Utility Company exceeds the estimated Utility Company Works Cash Allowance for any cause other than the negligence, default or willful misconduct of DB Co or any DB Co Party, the City shall pay such additional cost, plus applicable HST and the applicable Utility Works Fee applicable to such additional cost.

- (g) The City shall also pay DB Co a fee of [REDACTED]% of the Utility Works Cost (the “**Utility Works Fee**”), plus applicable HST, for the management, coordination and administration of the completion of the Utility Company Self-Performed Works.
- (h) DB Co may, on a monthly basis, provide to the City Representative and the Independent Certifier a request for payment (each, a “**Request for Utility Works Payment**”) that includes (i) an itemized breakdown of the applicable Utility Company Self-Performed Works invoiced in the previous month by a Utility Company, (ii) the Utility Works Fee applicable to the costs of the Utility Company Self-Performed Works included in such invoice, and (iii) applicable HST in respect of the amounts specified in (i) and (ii) above. Such Request for Utility Works Payment may be delivered concurrently with an application for progress payments on account of Earned Value achieved in respect of DB Co Utility Works in accordance with Schedule 21 – Construction Period Payments, but shall be presented separately for processing and payment by the City.
- (i) DB Co shall include with each Request for Utility Works Payment the certification of the Independent Certifier that the relevant Utility Company Self-Performed Works described in such Request for Utility Works Payment is eligible for payment by the City in accordance with this Section 11.29.
- (j) DB Co shall include with each Request for Utility Works Payment such additional supporting documentation as the City Representative may reasonably require in connection with the claimed base progress payments, the estimated cost to complete the Utility Company Self-Performed Works, any cumulative projected variance from the estimated Utility Company Works Cash Allowance and any discounts, rebates, refunds, chargebacks, credits, price adjustments and other allowances available to DB Co in connection with the Utility Company Self-Performed Works. Each Request for Utility Works Payment submitted to the City shall be in a form stipulated by the City, acting reasonably, and shall support an “open-book” pricing approach for the completion of the Utility Company Self-Performed Works.
- (k) Within 10 Business Days of receipt of a Request for Utility Works Payment, the City shall, in consultation with the Independent Certifier, advise DB Co, in writing, whether or not it agrees with the particulars set out in the Request for Utility Works Payment. The City shall only be permitted to withhold its approval if the Independent Certifier determines that the Request for Utility Works Payment does not contain the information that the Independent Certifier requires, acting reasonably, to discharge their obligations under this Section 11.29. If the Independent Certifier withholds its approval pursuant to this Section 11.29(k) and subsequently receives the information that the Independent Certifier requires, acting reasonably, to discharge its obligations under this Section 11.29, it shall, within 10 Business Days of its receipt of such information, make payment of the amount set out in the aforementioned Request for Utility Works Payment. Any Disputes with respect to determinations made under this Section 11.29 shall be resolved in accordance with Schedule 27 – Dispute Resolution Procedure.
- (l) If the City approves in writing the payment of the amount set out in a Request for Utility Works Payment, it shall make payment of the amount set out in the approved Request for Utility Works Payment within 10 Business Days of receipt of the Request for Utility Works Payment.
- (m) DB Co acknowledges and agrees that:

- (i) all costs and expenses related to the administration and scheduling of the Utility Company Self-Performed Works, including, without limitation, the preparation of Requests for Utility Works Payment and any required reporting, shall be compensated solely by the Utility Works Fee; and,
- (ii) all discounts, rebates, refunds, chargebacks, credits, price adjustments and other allowances available to DB Co or any Subcontractor in connection with the Utility Company Self-Performed Works shall be to the credit of the City.

### **11.30 Art Cash Allowance**

- (a) DB Co shall procure and coordinate the performance and completion of the Art Cash Allowance Items:
  - (i) so as to satisfy the Output Specifications;
  - (ii) in accordance with the Works Schedule; and
  - (iii) in accordance with the other terms and conditions of this Project Agreement.
- (b) DB Co shall complete or cause the completion of the Art Cash Allowance Items, comprising part of, or required for:
  - (i) the East Works, as a precondition to achieving East Substantial Completion;
  - (ii) the West Works, as a precondition to achieving West Substantial Completion; and
  - (iii) the Remaining Works, as a precondition to achieving West Final Completion.
- (c) DB Co shall be solely responsible for coordinating the completion of the Art Cash Allowance Items with its activities in respect of the Project Operations and shall not be entitled to an extension of time or additional compensation in respect of the remainder of the Works as a result of the Art Cash Allowance Items or any matter relating thereto, except as provided for in this Section 11.30.
- (d) The Art Cash Allowance Items shall be reviewed, certified, financed and paid for in accordance with this Section 11.30. DB Co shall not be required to obtain financing for the costs of the Art Cash Allowance Items.
- (e) The City and DB Co shall comply with the processes and requirements set forth in Article 12 of Part 1 of Schedule 15-2 of the Output Specifications in respect of the procurement of Art Cash Allowance Items. The City will only pay the Art Cash Allowance in respect of Art Cash Allowance Items which have been procured in accordance with this Section 11.30 and the processes and requirements set forth in Article 12 of Part 1 of Schedule 15-2 of the Output Specifications.
- (f) The estimated cost of the Art Cash Allowance Items is \$[REDACTED] (the “**Art Cash Allowance**”) plus applicable HST, and shall be paid for by the City on a monthly progress basis as the Art Cash Allowance Items are progressed and invoiced to DB Co. In the event that the actual costs of the Art Cash Allowance Items exceed the estimated Art Cash Allowance for any

cause other than the negligence, default or willful misconduct of DB Co or any DB Co Party, the City shall pay such additional cost, plus applicable HST.

- (g) DB Co may, on a monthly basis, provide to the City Representative and the Independent Certifier a request for payment (each, a “**Request for Art Payment**”) that includes (i) an itemized breakdown of the applicable Art Cash Allowance Items invoiced to DB Co in the previous month, and (ii) applicable HST in respect of the amounts specified in (i) above. Such Request for Art Payment may be delivered concurrently with an application for progress payments on account of Earned Value achieved in accordance with Schedule 21 – Construction Period Payments, but shall be presented separately for processing and payment by the City.
- (h) DB Co shall include with each Request for Art Payment the certification of the Independent Certifier that the relevant Art Cash Allowance Items described in such Request for Art Payment is eligible for payment by the City in accordance with this Section 11.30.
- (i) DB Co shall include with each Request for Art Payment such additional supporting documentation as the City Representative may reasonably require in connection with the claimed base progress payments, the estimated cost to complete the Art Cash Allowance Items, any cumulative projected variance from the estimated Art Cash Allowance and any discounts, rebates, refunds, chargebacks, credits, price adjustments and other allowances available to DB Co in connection with the Art Cash Allowance Items. Each Request for Art Payment submitted to the City shall be in a form stipulated by the City, acting reasonably, and shall support an “open-book” pricing approach for the completion of the Art Cash Allowance Items.
- (j) Within 10 Business Days of receipt of a Request for Art Payment, the City shall, in consultation with the Independent Certifier, advise DB Co, in writing, whether or not it agrees with the particulars set out in the Request for Art Payment. The City shall only be permitted to withhold its approval if either the Independent Certifier determines that the Request for Art Payment does not contain the information that the Independent Certifier requires, acting reasonably, to discharge their obligations under this Section 11.30. If the Independent Certifier withholds its approval pursuant to this Section 11.30(j) and subsequently receives the information that the Independent Certifier requires, acting reasonably, to discharge its obligations under this Section 11.30, it shall, within 10 Business Days of its receipt of such information, make payment of the amount set out in the aforementioned Request for Art Payment. Any Disputes with respect to determinations made under this Section 11.30 shall be resolved in accordance with Schedule 27 – Dispute Resolution Procedure.
- (k) If the City approves in writing the payment of the amount set out in a Request for Art Payment, it shall make payment of the amount set out in the approved Request for Art Payment within 10 Business Days of receipt of the Request for Art Payment.
- (l) DB Co acknowledges and agrees that:
  - (i) all costs and expenses related to the procurement, administration and scheduling of the Art Cash Allowance Items, including, without limitation, the preparation of Requests for Art Payment and any required reporting, shall be financed and paid for as part of Earned Value in accordance with Schedule 21 – Construction Period Payments; and

- (ii) all discounts, rebates, refunds, chargebacks, credits, price adjustments and other allowances available to DB Co or any Subcontractor in connection with the Art Cash Allowance Items shall be to the credit of the City.

### 11.31 Nominated Signalling Subcontractor Cash Allowance

- (a) DB Co shall, in accordance with Nominated Signalling Subcontract, be responsible for the Nominated Signalling Subcontractor Works as part of the Works hereunder.
- (b) The Nominated Signalling Subcontractor Works shall be reviewed, certified, financed and paid for in accordance with this Section 11.31, and not as part of the Earned Value in accordance with Schedule 21 – Construction Period Payments. DB Co shall not be required to obtain financing for the costs of the Nominated Signalling Subcontractor Works.
- (c) The agreed cost of the Nominated Signalling Subcontractor Works to be reimbursed by the City is \$[REDACTED] as of Commercial Close (the “**Nominated Signalling Subcontractor Works Cash Allowance**”), plus applicable HST. The Nominated Signalling Subcontractor Works Cash Allowance shall only be amended pursuant to a Variation Confirmation or Variation Directive issued in accordance with Schedule 22 – Variation Procedure, or, subject to and in accordance with Section 33, upon the occurrence of a Compensation Event.
- (d) The City shall open the Nominated Signalling Subcontract Cash Allowance Account on or before Financial Close and shall manage the Nominated Signalling Subcontract Cash Allowance Account in accordance with this Section 11.31.
- (e) The cash flow process applicable to the Nominated Signalling Subcontract Cash Allowance Account will be as follows:
  - (i) the City will deposit the applicable portion of the Nominated Signalling Subcontractor Works Cash Allowance relating to each particular Nominated Signalling Subcontract Milestone into the Nominated Signalling Subcontract Cash Allowance Account five (5) Business Days prior to the date and in the amount set out in Schedule B of the Nominated Signalling Subcontract in respect of such applicable Nominated Signalling Subcontract Milestone (subject to adjustment in accordance with Section 11.31(c));
  - (ii) the City will hold and manage all monies in the Nominated Signalling Subcontract Cash Allowance Account; and
  - (iii) the Parties, together with the Construction Contractor and the Nominated Signalling Subcontractor shall review the operation of the Nominated Signalling Subcontract Cash Allowance Account on a regular basis and make any appropriate modifications to ensure its efficient operation.
- (f) Upon achievement of any Nominated Signalling Subcontract Milestone, DB Co shall provide to the City Representative and the Independent Certifier a request for payment (each, a “**Request for Nominated Signalling Subcontractor Works Payment**”) that includes (i) an itemized breakdown of the completed Nominated Signalling Subcontractor Works comprising the achieved Nominated Signalling Subcontract Milestone, and the invoice for services and materials rendered by the Nominated Signalling Subcontractor in respect thereof, and (ii) applicable HST. DB Co shall include with each Request for Nominated Signalling Subcontractor Works Payment such

additional supporting documentation as the Independent Certifier may reasonably require to confirm achievement of the applicable Nominated Signalling Subcontract Milestone. Such Request for Nominated Signalling Subcontractor Works Payment may be delivered concurrently with an application for progress payments on account of Earned Value in accordance with Schedule 21 – Construction Period Payments, but shall be presented separately for processing and payment by the City.

- (g) The Independent Certifier shall, within five (5) Business Days of receipt of a Request for Nominated Signalling Subcontractor Works Payment, advise DB Co, in writing, whether or not the applicable Nominated Signalling Subcontract Milestone as described in such Request for Nominated Signalling Subcontractor Works Payment is achieved and eligible for payment in accordance with this Section 11.31 and the payment terms of the Nominated Signalling Subcontract.
- (h) The Independent Certifier shall only be permitted to withhold its approval if the Independent Certifier determines that the Request for Nominated Signalling Subcontractor Works Payment does not contain the information that the Independent Certifier requires, acting reasonably, to discharge their obligations under this Section 11.31. If the Independent Certifier withholds its approval pursuant to this Section 11.31(h) and subsequently receives the information that the Independent Certifier requires, acting reasonably, to discharge its obligations under this Section 11.31, the Independent Certifier shall, within five (5) Business Days of its receipt of such information, provide to DB Co, in writing, the Independent Certifier's approval of the applicable Request for Nominated Signalling Subcontractor Works Payment. Any Disputes with respect to determinations made under this Section 11.31 shall be resolved in accordance with Schedule 27 – Dispute Resolution Procedure.
- (i) If the Independent Certifier approves the payment set out in a Request for Nominated Signalling Subcontractor Works Payment, the City shall release the applicable portion of the Nominated Signalling Subcontractor Works Cash Allowance from the Nominated Signalling Subcontract Cash Allowance Account for payment to the Nominated Signalling Subcontractor in accordance with the Nominated Signalling Subcontract.
- (j) In addition to payment of the Nominated Signalling Subcontractor Works Cash Allowance, the City shall also pay to DB Co:
  - (i) an amount equal to **[REDACTED]**% of the Nominated Signalling Subcontractor Works Gainshare, if any, plus applicable HST, on the East Substantial Completion Payment Date; and
  - (ii) an amount equal to **[REDACTED]**% of the Nominated Signalling Subcontractor Works Gainshare, if any, plus applicable HST, on the West Substantial Completion Payment Date.

### **11.32 Category 1 Utility Company Tracking System**

- (a) DB Co shall, at its own cost and risk, provide to the City a system to track the progress made by the Category 1 Utility Companies in performing the activities described in the Utility Baseline Report. More specifically, such system shall:

- (i) be kept updated on a daily basis and be available to the City in real time during normal business hours through a web-based interface which would include functionality to provide automated email alerts to a customizable frequency and set of email addresses;
  - (ii) be operational no later than the date upon which the first Category 1 Utility Company activity described in the Utility Baseline Report is commenced;
  - (iii) include a feature that highlights to the City and the applicable Category 1 Utility Company each outstanding applicable activity described in the Utility Baseline Report when it reaches the following milestone triggers:
    - (A) **[REDACTED]**% of the number of Business Days designated for completion by the Category 1 Utility Company in the Utility Baseline Report for the applicable activity described in the Utility Baseline Report; and
    - (B) **[REDACTED]**% of the number of Business Days designated for completion by the Category 1 Utility Company in the Utility Baseline Report for the applicable activity described in the Utility Baseline Report.
- (b) DB Co shall provide written notice to the City Representative with respect to any outstanding Category 1 Utility Company activity described in the Utility Baseline Report when it reaches the milestone triggers outlined in Section 11.32(a)(iii)(A) and Section 11.32(a)(iii)(B).
- (c) With respect to any failure by a Category 1 Utility Company to perform the obligations set out in the Utility Baseline Report, DB Co shall not be entitled to the Delay Event or Compensation Amount pursuant to Section 32.1(a)(xxiv) unless the tracking system as described in this Section 11.32(a) is functional and available to the City, provides notice to the City of the milestones described in Section 11.32(a)(iii), and contains accurate information as to the progress made by the Category 1 Utility Companies in performing the activities described in the Utility Baseline Report at all material times.

## **12. REPRESENTATIVES**

### **12.1 The City Representative**

- (a) Subject to the limitations set out in Section 12.1(d), the City Representative shall exercise the functions and powers identified in this Project Agreement as functions or powers to be performed by the City Representative and such other functions and powers of the City under this Project Agreement as the City may notify DB Co from time to time.
- (b) The City may, from time to time by written Notice to DB Co, change the City Representative. Such change shall have effect on the later of the date of delivery of such Notice and the date specified in such Notice.
- (c) During any period when no City Representative has been appointed, or when the City Representative is unable, through illness, incapacity or any other reason whatsoever, to perform the City Representative's functions under this Project Agreement, the City shall perform or may, by written Notice to DB Co, promptly appoint an alternative City Representative to perform the functions which would otherwise be performed by the City Representative. Upon receipt of such written Notice, DB Co and the DB Co Representative shall be entitled to treat any act of such

alternative City Representative which is permitted by this Project Agreement as being authorized by the City, and DB Co and the DB Co Representative shall not be required to determine whether authority has in fact been given.

- (d) The City Representative shall not, except as otherwise provided in this Project Agreement, be entitled to modify or waive any provision of this Project Agreement or to authorize a Variation.
- (e) Subject to the limitations set out in Sections 12.1(d), unless otherwise notified in writing, DB Co and the DB Co Representative shall be entitled to treat any act of the City Representative which is explicitly authorized by this Project Agreement as being authorized by the City, and DB Co and the DB Co Representative shall not be required to determine whether authority has in fact been given.

## **12.2 The DB Co Representative**

- (a) Subject to the limitations set out in Section 12.2(d), the DB Co Representative shall have full authority to act on behalf of DB Co for all purposes of this Project Agreement.
- (b) DB Co may change the DB Co Representative with the prior written consent of the City.
- (c) During any period when the DB Co Representative is unable, through illness, incapacity or any other reason whatsoever, to perform the DB Co Representative's functions under this Project Agreement, DB Co shall perform or may, by written Notice to the City, promptly appoint an alternative DB Co Representative to perform the functions which would otherwise be performed by the DB Co Representative, provided that, DB Co must seek the City's consent in accordance with Section 12.2(b) if such alternative DB Co Representative is in place for more than 180 days. Upon receipt of such written Notice, the City and the City Representative shall be entitled to treat any act of such alternative DB Co Representative which is permitted by this Project Agreement as being authorized by DB Co, and the City and the City Representative shall not be required to determine whether authority has in fact been given.
- (d) The DB Co Representative shall not, except as otherwise provided in this Project Agreement, be entitled to modify or waive any provision of this Project Agreement.
- (e) Subject to the limitations set out in Section 12.2(d), unless otherwise notified in writing, the City and the City Representative shall be entitled to treat any act of the DB Co Representative which is explicitly authorized by this Project Agreement as being authorized by DB Co, and the City and the City Representative shall not be required to determine whether authority has in fact been given.

## **12.3 Communications to Representatives**

- (a) At the time that a Party appoints or changes the appointment of the City Representative or the DB Co Representative, as applicable, that Party shall also provide the other Party with contact information for delivery of communications to such representative. Communications to such representative shall not constitute Notices to the Party appointing such representative.

## **12.4 Key Individuals**

- (a) The individuals who are critical to the performance of the Works are identified in Schedule 9 – Key Individuals. DB Co shall use commercially reasonable efforts to ensure that such persons remain involved in the Works in the capacity set out in Schedule 9 – Key Individuals (unless such Key Individuals are not available for reasons beyond the control of DB Co or a DB Co Party). DB Co or a DB Co Party shall not, for the duration of the Works, require or request any such person to be involved in any other project, if, in the reasonable opinion of the City such involvement would have a material adverse effect on the Works. If DB Co fails to comply with this Section 12.4(a), DB Co shall pay to the City the liquidated damages amount, if any, ascribed for such Key Individual in Schedule 9 – Key Individuals. For clarity, DB Co and the DB Co Parties' reasonable commercial efforts, in accordance with this Section 12.4(a), shall include the denial of promotions or relocations of a Key Individual, to the extent such denial is permitted by the Applicable Law. For the purposes of this Section 12.4(a), only the following reasons will be considered beyond the control of DB Co or a DB Co Party: death, short term disability, long term disability or any other reason in the opinion of the City, acting reasonably (DB Co shall provide to the City any further documentation as may be reasonably requested by the City to assess any reason beyond the control of DB Co).
- (b) Subject to DB Co's obligations to ensure that Key Individuals remain involved in the Works as set out in Section 12.4(a), if it becomes necessary for DB Co to replace any individual identified in Schedule 9 - Key Individuals, DB Co shall nominate a competent suitably qualified and experienced permanent replacement or replacements as soon as practicable and provide the City with relevant information on the proposed replacement and shall consult with the City before finalizing the appointment of such replacement. DB Co shall not replace any of the individuals identified in Schedule 9 - Key Individuals without the prior written consent of the City, which consent shall not be withheld or delayed where DB Co is compliant with Sections 12.4(a) and 12.4(c) and the proposed replacement is suitably qualified and experienced. For those Key Individual's in respect of whom liquidated damages amounts are ascribed in Schedule 9 – Key Individuals, in the event DB Co fails to nominate a competent suitably qualified and experienced permanent replacement or replacements for a period of greater than 60 days from the date it became necessary for DB Co to replace any such Key Individual, DB Co shall pay to the City the liquidated damages ascribed in Schedule 9 – Key Individuals. The Parties agree that the liquidated damages set out in this Section 12.4(b) are not a penalty but represent a genuine and reasonable pre-estimate of the damages that the City will suffer as a result of DB Co's failure to provide the applicable Key Individual.
- (c) If the City determines, acting reasonably, that it is in the best interests of the City that any individual identified in Schedule 9 - Key Individuals be replaced, the City shall notify DB Co (including a detailed explanation of the reasons for such determination), and, within 60 days after receipt by DB Co of such Notice, DB Co shall provide the City with relevant information on the proposed replacement and shall consult with the City before finalizing the appointment of such replacement.

## **13. WORKS SCHEDULE AND WORKS REPORT**

### **13.1 Completion of the Works**

- (a) DB Co shall complete the Works in accordance with this Project Agreement and achieve:

- (i) East Substantial Completion by the East Scheduled Substantial Completion Date;
- (ii) East Final Completion by the East Scheduled Final Completion Date;
- (iii) West Substantial Completion by the West Scheduled Substantial Completion Date; and
- (iv) West Final Completion, including all Remaining Works, by the West Scheduled Final Completion Date.

### **13.2 The Works Schedule**

- (a) From Financial Close until PBS-2 becomes the Current PBS, PBS-1 shall be deemed to be the Current PBS and, until such time, the following provisions of the Project Agreement applicable to the Current PBS shall be applicable to PBS-1: Sections 10.3(a)(i), 11.12(f)(ii), 11.12(f)(iii), 14.2(b), 14.2(d), and 26.2(a)(i) of the Project Agreement; Section 1.8(c) of Schedule 10 – Review Procedure; and Section 1.6(b)(vii) of Schedule 22 – Variation Procedure;
- (b) DB Co shall, in accordance with Schedule 12 – Works Scheduling Requirements, prepare and submit to the City and the Independent Certifier:
  - (i) within 180 days after Financial Close, PBS-2 and a schedule narrative in accordance with Section 2.2 of Schedule 12 - Works Scheduling Requirements indicating the differences between PBS-1 and PBS-2;
  - (ii) every month, within 10 Business Days after the end of each calendar month from Financial Close, the Monthly Progress Report and PBS Update in accordance with Schedule 33 – Works Reports;
  - (iii) after receipt of written request from the City, acting reasonably, a Micro-Schedule for any specific area in accordance with Schedule 12 – Works Scheduling Requirements, to be provided no later than the end of subsequent reporting period; and
  - (iv) Recovery Schedules, PBS Re-baselines, Short Duration Schedules, As-built Schedules and Informal Implementation Schedules in accordance with Schedule 12 – Works Scheduling Requirements,

each meeting the requirements of Schedule 12 – Works Scheduling Requirements to the reasonable satisfaction of the City that support the completion of the Works in accordance with Section 13.1.

- (c) The City shall review all submissions in accordance with Schedule 12 – Works Scheduling Requirements and, as applicable, Schedule 10 – Review Procedure.
- (d) At the request of the City Representative, the DB Co Representative shall review the Works Schedules with the City Representative to explain to the City Representative’s reasonable satisfaction:
  - (i) the activity logic and planning assumptions contained in the Works Schedule;
  - (ii) any proposed changes to the Critical Path of the Works; and

- (iii) any other matter raised by the City Representative concerning the Works Schedules.
- (e) DB Co and the City shall comply with the provisions of Schedule 12 – Works Scheduling Requirements.
- (f) Any comment or lack of comment by the City in regard to any Works Schedule indicating potential Delay Events pursuant to Section 32.2(a) of the Project Agreement shall not constitute any acknowledgement or acceptance of the potential delay.

## **14. WORKS COMMITTEE**

### **14.1 Establishment**

- (a) The Parties shall, within 30 days after Financial Close, establish a committee (the “**Works Committee**”) consisting of:
  - (i) six representatives appointed by the City from time to time, one of whom shall be the City Representative; and
  - (ii) five representatives appointed by DB Co, including the DB Co Representative, the Design Build Director, the Testing and Commissioning Coordinator, the Director of Communications and Stakeholder Engagement, and a representative of the Construction Contractor.
- (b) The Independent Certifier shall be entitled, but not required, to attend meetings as non-voting members of the Works Committee. Members of the Works Committee may invite, on prior Notice to all members, such advisors and consultants as they require from time to time to attend meetings and to provide briefings to the Works Committee members.
- (c) The City Representative shall be the chairperson of the Works Committee.

### **14.2 Function and Role**

- (a) The Works Committee shall assist the Parties by promoting cooperative and effective communication with respect to matters related to the Works.
- (b) The Works Committee shall be responsible for receiving and reviewing all matters related to the Works, including:
  - (i) any design, construction and commissioning issues;
  - (ii) the Works Schedules;
  - (iii) any issues arising from reports or documents provided by DB Co or the Independent Certifier;
  - (iv) any quality assurance and safety and security issues, including any design, configuration control, interfacing, training, testing, operational impact and other matters creating or giving rise to a safety or security issue or otherwise requiring attention and oversight;

- (v) the Works Reports;
  - (vi) any special matters referred to the Works Committee by the City or DB Co;
  - (vii) any Proceeding At Risk Matters referred to the Works Committee in accordance with Section 14.6;
  - (viii) any community and media relations issues in accordance with Schedule 18 – Communication and Stakeholder Engagement Obligations;
  - (ix) any issues related to the Construction Access Management Plan and the Traffic and Transit Management Plan and any issues related to the rules, requirements and restrictions relating to access, rail safety and operations and track protection, as set out in Schedule 15 – Output Specifications;
  - (x) monitoring the Testing & Commissioning Program; and
  - (xi) any other issues pertaining to the Works.
- (c) Subject to Section 14.2(d), any unanimous decision of the Works Committee shall be final and binding on the Parties. If the Works Committee is unable to reach a unanimous decision, either Party may refer the matter for resolution in accordance with Schedule 27 – Dispute Resolution Procedure.
- (d) The Works Committee shall not have authority to make decisions with respect to or approve:
- (i) any amendment to or waiver of any provision of this Project Agreement;
  - (ii) any change to a Key Work Milestones set out in the Works Schedules, any Scheduled Substantial Completion Date or any Scheduled Final Completion Date;
  - (iii) any Variation;
  - (iv) any change that may materially adversely affect DB Co’s ability to achieve the East Substantial Completion by the East Scheduled Substantial Completion Date or East Final Completion by the East Scheduled Final Completion Date;
  - (v) any change that may materially adversely affect DB Co’s ability to achieve the West Substantial Completion by the West Scheduled Substantial Completion Date or West Final Completion by the West Scheduled Final Completion Date; or
  - (vi) any matter with respect to which the City has a right of consent or in respect of which the City may exercise discretion pursuant to this Project Agreement.

### 14.3 Term of Works Committee

- (a) Unless otherwise agreed by the Parties, the Works Committee shall operate only until the later of the East Final Completion Date and West Final Completion Date (the “**Works Committee End Date**”).

#### **14.4 Replacement of Committee Members**

- (a) The City shall be entitled to replace any of its respective representatives on the Works Committee by written Notice to DB Co. The City will use commercially reasonable efforts to deliver prior written Notice of any such replacement to DB Co. DB Co may replace any of its representatives on the Works Committee with the prior written consent of the City.

#### **14.5 Procedures and Practices**

- (a) The members of the Works Committee may:
  - (i) adopt such procedures and practices for the conduct of the activities of the Works Committee as they consider appropriate from time to time;
  - (ii) invite to any meeting of the Works Committee such other persons as the members of the Works Committee may agree;
  - (iii) exclude from any meeting of the Works Committee such persons as the members of the Works Committee may agree; and
  - (iv) receive and review reports from any person or organization agreed to by the members of the Works Committee.
- (b) Once established, the Works Committee shall meet at least once each month from Financial Close until the Works Committee End Date, unless otherwise agreed by the members of the Works Committee or the Parties.
- (c) Any one of the DB Co Representatives or the City Representatives on the Works Committee may convene a special meeting of the Works Committee at any time. Special meetings of the Works Committee may be convened on not less than 5 Business Days' Notice to all members of the Works Committee identifying the agenda items to be discussed at the special meeting, provided that, in an Emergency, a meeting may be called at any time on such Notice as may be reasonable in the circumstances.
- (d) Unless otherwise agreed by the members of the Works Committee, the Works Committee shall meet in the City of Ottawa, Ontario. Meetings of the Works Committee may be held by means of such telephonic, electronic or other communication facilities as permit all persons participating in the meeting to communicate with each other simultaneously and instantaneously. A person participating in a meeting by such means will be deemed to be present at such meeting, provided that each member of the Works Committee must attend in person at least once each calendar quarter.
- (e) Four representatives appointed by the City (one of whom shall be the City Representative) and three representatives appointed by DB Co (one of whom shall be the DB Co Representative) shall constitute a quorum at any meeting of the Works Committee. A quorum of members may exercise all the powers of the Works Committee. The members shall not transact business at a meeting of the Works Committee unless a quorum is present.
- (f) Minutes of all meetings, recommendations and decisions of the Works Committee, including those made by telephone or other form of communication, shall be recorded and maintained by

DB Co. DB Co shall circulate copies of such minutes within 5 Business Days after the holding of the meeting or the making of the recommendation or decision. Unless the City notifies DB Co within 5 Business Days after receipt of the minutes that the City disagrees with the contents of the minutes, DB Co and the City shall be deemed to have approved such minutes. DB Co shall maintain a complete set of all minutes of the meetings of the Works Committee and shall make such minutes available for inspection by the City during regular business hours.

#### 14.6 Proceeding At Risk

- (a) If at any time the City Representative has noted a Works Submittal as “CRITICAL COMMENT” in accordance with Schedule 10 – Review Procedure (a “**Proceeding At Risk Matter**”), then the City may issue to DB Co (with a copy to the Independent Certifier) a Notice (the “**Proceeding At Risk Notice**”) identifying the City’s reasons for issuing the Proceeding At Risk Notice and requesting DB Co to deliver any relevant Design Data and any other information reasonably required by the City from DB Co to review the Proceeding At Risk Matter.
- (b) Following the issuance of a Proceeding At Risk Notice, the City Representative and the DB Co Representative, together with the other members of the Works Committee, shall each promptly and diligently make a reasonable *bona fide* effort to resolve the Proceeding At Risk Matter. The Independent Certifier shall be required to attend all meetings and deliberations of the Works Committee at which the Proceeding At Risk Matter is considered, but shall not be entitled to participate in any decisions of the Works Committee.
- (c) Within 10 Business Days after receipt by DB Co of a Proceeding At Risk Notice, DB Co shall deliver a response to the City, each member of the Works Committee and the Independent Certifier, which shall include:
  - (i) the Design Data and any other information requested by the City in the Proceeding At Risk Notice;
  - (ii) DB Co’s opinion confirming agreement with, or disputing the opinion of, the City regarding the Proceeding At Risk Matter;
  - (iii) any additional Design Data and other information in support of DB Co’s opinion regarding the Proceeding At Risk Matter; and
  - (iv) DB Co’s proposal to rectify the Proceeding at Risk Matter.
- (d) Within five Business Days after receipt by the City of the response from DB Co pursuant to Section 14.6(c), the City shall notify DB Co if the City requires any additional information from DB Co. DB Co shall provide such additional information to the City and each member of the Works Committee and the Independent Certifier within 5 Business Days after receipt of such Notice.
- (e) The Independent Certifier shall within 30 Business Days after the Proceeding At Risk Notice, deliver to each of the City and DB Co its written opinion as to whether the City acted reasonably in delivering the Proceeding At Risk Notice.
- (f) Within 15 Business Days after receipt by the City of all deliverables contemplated by Section 14.6(c) and, if applicable, Section 14.6(d), and in any event, no later than 35 Business Days after

receipt by DB Co of the Proceeding At Risk Notice, the Works Committee shall meet in person (the “**PAR Meeting**”) to attempt to resolve the Proceeding At Risk Matter.

- (g) Within five Business Days after the PAR Meeting and, in any event, no later than 40 Business Days after receipt by DB Co of the Proceeding At Risk Notice (“**PAR Meeting Expiry Date**”), the Works Committee shall attempt to reach a final decision with respect to the Proceeding At Risk Matter. If the Works Committee is unable to reach a final decision, and the Independent Certifier’s opinion delivered pursuant to Section 14.6(e) confirms that the City acted reasonably in delivering the Proceeding At Risk Notice, DB Co shall be deemed to be “**Proceeding At Risk**” and the City may, in its sole discretion, give notice to the Lenders’ Agent pursuant to Section 15 of the Lenders’ Direct Agreement, that DB Co is Proceeding At Risk, together with the relevant information supporting the City’s opinion that DB Co is Proceeding at Risk.
- (h) Regardless of the Independent Certifier’s opinion, if the Works Committee fails to reach a final decision with respect to the Proceeding At Risk Matter by the PAR Meeting Expiry Date, either Party may refer the Proceeding At Risk Matter for resolution in accordance with Schedule 27 – Dispute Resolution Procedure.
- (i) The Proceeding At Risk Notice, review, and comments made during the process set out in this Section 14.6 are for general conformity to the obligations and requirements of this Project Agreement, and any such Notice, review and comment shall not relieve DB Co of the risk and responsibility for the Works and for meeting all of its obligations under and satisfying all requirements of this Project Agreement, and shall not create any new or additional obligations or liabilities for the City.
- (j) If it is determined in accordance with Schedule 27 – Dispute Resolution Procedure that DB Co should not have been deemed to be Proceeding at Risk under Section 14.6(g), the City shall (i) promptly notify the Lender’s Agent that it is withdrawing its notice given pursuant to Section 14.6(g), if applicable, and (ii) reimburse DB Co for its reasonable costs incurred in connection with responding to a Proceeding at Risk Notice and for its participation in the Proceeding at Risk Matter.

## 15. INTEGRATED MANAGEMENT SYSTEM

### 15.1 Integrated Management System

- (a) DB Co shall comply with the provisions of Schedule 11 – Integrated Management System Requirements.

### 15.2 Safety Management

- (a) DB Co shall cause the Construction Contractor, at its sole cost and expense, to conduct an inspection of its facilities and of its health and safety management systems on an annual basis until Final Completion or as otherwise required in accordance with Sections 11.25(b)(vi)(C) or 11.25(b)(vii)(C) (each, an “**H&S Construction Inspection**”), which H&S Construction Inspections shall:
  - (i) be conducted by a Certified H&S Inspector, and
  - (ii) during the performance of the Works, include, at a minimum,

- (A) a review of general compliance with all applicable Occupational Health and Safety Act (Ontario) requirements, compliance with all safety manuals applicable to the Site at which the Works are being conducted; and
  - (B) a review of the Construction Contractor's job hazard analysis documentation on any portion of the Lands which could endanger or put at risk the safety of any person working on any portion of the Lands;
- (b) DB Co shall cause the results of each H&S Construction Inspection (such results referred to as the “**H&S Construction Inspection Report**”) to be delivered to the City and the Works Committee not more than five Business Days from the date on which a H&S Construction Inspection is completed. An H&S Construction Inspection Report arising from an H&S Construction Inspection shall be tabled and presented by DB Co for discussion by the Works Committee at the next meeting of the Works Committee that follows the date on which such H&S Construction Inspection Report was issued.
- (c) To the extent an H&S Construction Inspection Report discloses any non-compliance by the COR-Qualified Construction DB Co Party or the COR-Certified Construction DB Co Party, as the case may be, with the terms of the COR Certification or OHSAS 18001 Accreditation, as the case may be, the City shall have the right to require DB Co to cause the COR-Qualified Construction DB Co Party or the COR-Certified Construction DB Co Party, as the case may be, at its sole cost and expense:
  - (i) to take any corrective and remedial action required by the H&S Construction Inspection Report to correct any such non-compliance and DB Co shall cause the COR-Qualified Construction DB Co Party or the COR-Certified Construction DB Co Party, as the case may be, to comply with all instructions given by the Certified H&S Inspector in respect of actions required to be taken to correct any such non-compliance;
  - (ii) to arrange to have conducted by a Certified H&S Inspector such follow-up H&S Construction Inspections of those facilities and health management systems associated with the non-compliances identified in the relevant H&S Construction Inspection Report (each, an “**H&S Construction Re-Inspection**”) within three Business Days from the date on which any such request is made by the City, until any and all corrective and remedial actions required by the Certified H&S Inspector with respect to the correction of each identified non-compliance is completed to the satisfaction of the Certified H&S Inspector; and
  - (iii) to cause the results of each H&S Construction Re-Inspection (such results referred to as the “**H&S Construction Re-Inspection Report**”) to be delivered to the City and the Works Committee not more than three Business Days from the date on which a H&S Construction Re-Inspection is completed. An H&S Construction Re-Inspection Report arising from an H&S Construction Re-Inspection shall be tabled and presented by DB Co for discussion by the Works Committee at the next meeting of the Works Committee that follows the date on which such H&S Construction Re-Inspection Report was issued.

## **16. ACCESS TO THE LANDS**

### **16.1 Access to Lands**

- (a) Subject to this Section 16 and the provisions of Schedule 20 – Lands, including any restrictions on the use and access to the Lands set out Schedule 20 – Lands, the City shall grant or have caused to be granted, and shall continuously grant or cause to be granted, to DB Co and all DB Co Parties non-exclusive licence rights of use and access to, on and over the Lands, except such rights set out as a DB Co responsibility to obtain under the Permits, Licences, Approvals and Agreements tables attached as Schedule 35 – Permits, Licences, Approvals and Agreements, as are required by DB Co and such DB Co Parties and sufficient (subject to DB Co performing its obligations described in the Permits, Licences, Approvals and Agreements tables attached as Schedule 35 – Permits, Licences, Approvals and Agreements and subject to the timing and extent of the grant of use and access to the Lands set out in Schedule 20 – Lands) to allow DB Co and such DB Co Parties to perform that part of the Works to be performed on Lands. The rights granted to DB Co pursuant to this Section 16.1(a) shall be effective on the later of,
- (i) the date of Financial Close; and
  - (ii) the commencement date for access to individual parcels of lands that comprise the Lands as set out in Schedule 20 – Lands.
- (b) Subject to DB Co's obligation to comply with the other terms and conditions set forth in this Project Agreement and the other Project Documents, DB Co shall ensure that each DB Co Party shall at all times, when entering the Lands, act in a manner consistent with the obligations of DB Co under the Project Agreement.
- (c) In consideration for the use and access rights granted pursuant to Section 16.1(a), DB Co shall provide the Works subject to and in accordance with this Project Agreement.
- (d) Without derogating from any of the City's rights hereunder, in particular, and subject to any restrictions set out in Schedule 20 – Lands, the City acknowledges that, in respect of the Works, DB Co and the DB Co Parties require, and the City shall provide, access to the Lands in accordance with Section 16.1(a) without material interference by the City, any City Party, MTO, RTG or any RTG Party (except as provided in the Interface Agreement). DB Co further acknowledges that following Substantial Completion, DB Co's access to the applicable Lands shall be subject to the City Activities.
- (e) Subject to Section 16.1(a), none of the rights granted pursuant to this Section 16.1 shall grant access to,
- (i) any lands beyond the boundaries of the Lands, or to any lands other than the Lands, other than easements and similar interests of the City which benefit the Lands, obtained after the date of this Project Agreement, to the extent the same are necessary for the Works or exceed any restrictions set out in Schedule 20 – Lands; or
  - (ii) any facilities or infrastructure of the City, Utility Companies, Railway Companies, MTO or any other third parties, except as set out in Schedule 20 – Lands (which access, if any, is subject to Section 16.1(b)).

- (f) The use and access rights provided in this Section 16.1 shall automatically terminate as of the Termination Date, save and except for any earlier termination of the use and access rights specified in Schedule 20 – Lands.
- (g) For greater certainty, the use and access rights provided in this Section 16.1 shall not entitle DB Co or any DB Co Party to extract any mineral from the Lands for use in the Works.
- (h) The City shall acquire use of and access to the Lands described in Schedule 20 – Lands on or prior to the applicable commencement date for access set out in Schedule 20 – Lands. The City shall provide Notice to DB Co of the commencement of access rights to the Lands as such access is obtained by the City.

## **16.2 Non-Exclusive Rights to Lands and Development of Lands**

- (a) Without prejudice to Section 11.12, DB Co acknowledges and agrees that the rights granted to DB Co and the DB Co Parties hereunder to the Lands shall be non-exclusive and that the City and any person authorized by the City may occupy and possess the Lands, the New City Infrastructure, the New MTO Infrastructure and the Existing Infrastructure (in each case, on the Lands) without the prior consent of DB Co, including for the purposes of carrying out the Governmental Activities, the Other Works or RTG Works. In exercising its rights DB Co shall not, and shall require that the DB Co Parties shall not, except as permitted under this Project Agreement, disrupt the performance of the Governmental Activities, the Other Works or RTG City Party Works.
- (b) Without limiting Section 16.2(a), DB Co acknowledges that the City may from time to time use or develop (including by way of subdivision or expansion), or permit the use or development of, or dispose of, portions of the Lands, other than those portions of the Lands (or interests in the Lands) necessary for the performance of the Works. To the extent that such use, development or disposition materially adversely interferes with DB Co's licence rights hereunder or materially adversely interferes with DB Co's ability to perform the Works, such use, development or disposition shall, subject to and in accordance with Schedule 22 – Variation Procedure, result in a Variation. For greater certainty, but without limiting the generality of the foregoing, DB Co acknowledges and agrees that certain of the Lands shall be subject to the restrictions set out in Schedule 20 – Lands and Schedule 15 – Output Specifications.
- (c) Access to Existing Infrastructure shall be provided for in accordance with Schedule 20 – Lands and any Permits, Licences, Approvals and Agreements.
- (d) Except as otherwise specified in the Output Specifications or elsewhere in this Project Agreement, DB Co acknowledges and agrees with the City that the City has no authority to grant use and access to the Third Party Lands, which use and access must be sought from MTO in accordance with the Applicable Law and any Permit, License, Approval or Agreement or other requirements imposed by MTO. DB Co shall be solely responsible to obtain permission from applicable third parties access to the Existing Infrastructure or any component thereof owned by third parties.

**16.3 [Not Used]**

**16.4 Naming and Signage**

- (a) DB Co acknowledges that the City and the applicable owners of the New MTO Infrastructure and the Existing Infrastructure reserve and retain,
- (i) all rights to designate the name for the New City Infrastructure, the New MTO Infrastructure and the Existing Infrastructure, and any part thereof and to retain all revenues derived from the sponsorship of such names;
  - (ii) all rights to signage in relation to the Lands and any part of the New City Infrastructure, the New MTO Infrastructure and the Existing Infrastructure; and
  - (iii) all rights, Trade-Marks, naming or branding regarding any part of the New City Infrastructure, the New MTO Infrastructure and the Existing Infrastructure.
- (b) Without limiting the City's rights pursuant to Section 16.4(a), with the prior written consent of the City, which may take into consideration,
- (i) any applicable governmental or other guidelines, including the guidelines set out in Schedule 15 – Output Specifications or Schedule 18 – Communication and Stakeholder Engagement Obligations; and
  - (ii) any provision or restriction set out in Schedule 20 – Lands,

DB Co, the DB Co Parties and the Lenders may, for the period prior to Substantial Completion, erect and maintain signage (which may include such parties' logos and trade names) at or on the Lands identifying their respective roles in connection with the development and construction of the Project, provided that such signage is erected and maintained in accordance with the requirements and restrictions set out in this Project Agreement, including Schedule 15 – Output Specifications and Schedule 18 – Communication and Stakeholder Engagement Obligations.

**16.5 No Interest in Land, Facilities or Infrastructure**

- (a) DB Co acknowledges and agrees that neither DB Co nor the Lenders shall acquire any estate, right, title or ownership interest in the Lands or any part of the New City Infrastructure, the New MTO Infrastructure or the Existing Infrastructure, or any other interest in land, facilities or infrastructure pursuant to this Project Agreement, the Project Documents or otherwise. Notwithstanding any provision herein or in any of the Project Documents to the contrary, all fee simple interest in and freehold title to the Lands, or any part thereof, and the Project, shall at all times remain unencumbered by any interest of DB Co or the Lenders. DB Co and the Lenders shall have access to the Lands and the New City Infrastructure under and subject to the licences and access rights granted under this Section 16 and the Lenders' Direct Agreement, respectively.

**16.6 Non-Disturbance Agreement**

- (a) If the City mortgages, charges or otherwise encumbers the Lands, the City shall notify DB Co and, at the request of DB Co, provide DB Co with an agreement, in form satisfactory to DB Co, acting reasonably, executed by the mortgagee of the Lands permitting DB Co and the Lenders'

Agent to access and use the Lands under the use and access granted pursuant to this Section 16 and the Lenders' Direct Agreement, respectively, free from interference from the mortgagee or any person claiming by or through the mortgagee. This Section 16.6 shall not apply in respect of any portion of the Lands used or developed pursuant to Section 16.2(b) if neither the licence granted pursuant to this Section 16 nor the Works pertain to such portion of the Lands.

**16.7 Adjustments to Lands Available to DB Co**

- (a) [REDACTED]
- (b) [REDACTED]
- (c) DB Co shall be entitled to obtain any properties (or obtain temporary access to any properties) at its own cost and expense, however, such properties shall not, for the purposes of this Project Agreement, be Lands and no New City Infrastructure shall be located on, or rely in any way upon, any properties which DB Co acquires pursuant to this Section 16.7(b).

**17. ENCUMBRANCES**

**17.1 DB Co Shall Perform Obligations Under Encumbrances**

- (a) DB Co's access to and use of the Lands or any part thereof granted in Section 16 shall be subject to the Encumbrances.
- (b) Subject to Section 17.2, DB Co shall perform all obligations of the City under all Encumbrances for or on behalf of the City, other than:
  - (i) obligations which DB Co is not legally capable of performing for or on behalf of the City; and
  - (ii) obligations which the applicable counterparty to such Encumbrance formally relieves or waives DB Co from performing, with the consent of the City, in its sole discretion (and if such relief or waiver is not consented to by the City, and subject to Section 17.1(b)(i), DB Co shall perform such obligations in accordance with this Section 17).
- (c) DB Co, whether before, during or after the completion of the Works, shall not in any manner breach the Encumbrances.

**17.2 No Encumbrances**

- (a) DB Co shall not create, incur, permit or suffer to exist any Encumbrance to be created, filed, issued or registered upon or against the Lands or any part of them or any interest therein (i) due to an act or omission of DB Co or any DB Co Party, or (ii) arising in relation to the Works.
- (b) DB Co does not have title to the Lands or any interest therein, and no act or omission by DB Co or any DB Co Party shall give rise to a right for any person to obtain title to or any interest in the Lands or any part thereof, except:
  - (i) as may be expressly agreed to in writing by the City or the applicable third party owner of the Lands;

- (ii) as may be expressly permitted by the terms of this Project Agreement; or
  - (iii) as may be permitted under Applicable Law, but without limiting DB Co's obligations under Sections 17.2(c)(i) and 17.3(a).
- (c) In the event that the Lands or any part thereof or any interest therein becomes subject to any Encumbrance following Financial Close,
- (i) due to an act or omission of DB Co or any DB Co Party (which has not been consented to in writing by the City), or arising in relation to the Works, DB Co shall immediately take all steps necessary to terminate, remove, vacate or discharge such Encumbrance. If such Encumbrance is not terminated, removed, vacated or discharged within 10 Business Days after DB Co becoming aware of the creation, filing, issuance or registration of such Encumbrance, then, without prejudice to any other rights or remedies it may have, the City may take whatever steps it deems necessary and appropriate, in its sole discretion, to terminate, remove, vacate or discharge the Encumbrance, including payment of any amount owing or claimed thereunder, and seek immediate recovery from DB Co of the amount of any such payment and any associated costs, including legal costs (on a full indemnity basis), all of which shall be payable on demand, and DB Co hereby appoints the City as DB Co's attorney to execute any termination or discharge of an Encumbrance referred to in this Section 17.2(c)(i) which appointment is coupled with an interest and shall be irrevocable for the Project Term and thereafter so long as any of DB Co's obligations under this Section 17.2(c)(i) are outstanding;
  - (ii) due to an act or omission of DB Co or any DB Co Party (which has been consented to in writing by the City), or arising in relation to the Works, DB Co shall perform all obligations under such Encumbrance in accordance with Sections 17.1 and 17.3 (as is applicable) and at its sole cost and expense; or
  - (iii) which is not due to an act or omission of DB Co or any DB Co Party, or which has not arisen in relation to the Works, prior to performing obligations under any such Encumbrance, DB Co shall promptly notify the City of any such Encumbrance and the City may elect, in its sole discretion, to:
    - (A) have such Encumbrance be removed, vacated or discharged at the City's sole cost and expense;
    - (B) perform the required obligations thereunder; or
    - (C) instruct DB Co to perform the required obligations thereunder.
- (d) For the purposes of this Section 17, if,
- (i) an encumbrance otherwise identified in Sections (b)(viii), (ix) or (x) of Schedule 16 – Encumbrances has not been complied with (excluding non-compliance by DB Co and DB Co Parties) and such non-compliance materially interferes with the use of the Lands for the purposes of the Works; or
  - (ii) an encumbrance otherwise identified in Sections (b)(vii), (viii), (ix) or (x) of Schedule 16 – Encumbrances was not disclosed to DB Co and was not ascertainable through

commercially standard off-title searches, and such encumbrance materially interferes with the use of the Lands for the purposes of the Works,

the City shall be entitled to the same election as set out in Section 17.2(c)(iii), subject to Section 17.2(e). DB Co shall promptly notify the City of any such encumbrance upon DB Co becoming aware of such encumbrance.

- (e) If DB Co is instructed to perform obligations under an Encumbrance pursuant to Section 17.2(c)(iii) or Section 17.2(d), which performance imposes costs or delays in the performance of Works, such performance shall, subject to and in accordance with Section 32, be treated as a Delay Event and, subject to and in accordance with Section 33, be treated as a Compensation Event.

### **17.3 Construction Act (Ontario)**

- (a) The Parties acknowledge that Section 17.2 shall apply to claims for liens made against the Lands pursuant to the CA and shall also apply to claims made against the City or the holdback under the CA as though such a claim were an Encumbrance against the Lands as referred to therein. For clarity, Section 17.2 shall not apply to claims for lien that do not relate to the Work provided or performed by or on behalf of DB Co and DB Co Parties.
- (b) DB Co shall withhold from each Subcontractor the holdbacks required under the CA and shall deal with such holdbacks in accordance with the CA.
- (c) DB Co shall, as a condition of final payment under any Subcontract for which lien rights or rights in respect of the holdback may be claimed under the CA, require that a certificate of completion under section 33(1) of the CA for such Subcontract be issued and the relevant Subcontractor provide statutory declarations or other assurances confirming that all those engaged by the Subcontractor have been paid in accordance with Applicable Law.
- (d) DB Co shall follow the requirements of the CA and Good Industry Practice for posting and advertising certificates of completion when issued.
- (e) DB Co shall promptly provide the City with a copy of any materials which are provided to the Lenders to evidence compliance with the CA.
- (f) Upon request by the City, DB Co shall perform and deliver to the City a sub-search of title on the Lands or any part thereof. The City shall pay the reasonable costs of any such search except (i) a search that reveals Encumbrances that are not permitted by this Project Agreement, (ii) a search requested based on a reasonable suspicion that an Encumbrance that is not permitted by this Project Agreement has been registered on title to the Lands, and (iii) a search requested for the purpose of confirming that an Encumbrance that is not permitted by this Project Agreement has been discharged from title to the Lands.
- (g) DB Co shall cause a Payment Certifier to be appointed under the Design and Construction Contract and shall cause such Payment Certifier to certify the substantial performance of the Design and Construction Contract in accordance with the CA.

- (h) The City shall, and shall cause MTO to, provide DB Co with any notice of lien that is delivered to the City or MTO in connection with the Works promptly (and in any event within 5 Business Days) following receipt thereof.

## **18. SITE CONDITIONS AND RELIANT INFORMATION**

### **18.1 Acceptance of Site Conditions**

- (a) Subject to Sections 7.4, 18.1(b), 18.2, 18.3, 18.4, 18.5, 18.6, 18.7 and 18.8 DB Co acknowledges and agrees that it has inspected or investigated the Lands, the Existing Infrastructure (including the surroundings thereof) on which Works will be performed, and the Site Conditions in accordance with Good Industry Practice taking into account all matters relating to the Lands (including the buildings, structures and works, on, over and under the Lands existing on the date hereof and the Background Information), the Existing Infrastructure on which Works will be performed, and the Site Conditions prior to executing this Project Agreement and agrees to accept the Lands, the Existing Infrastructure on which Works will be performed, and the Site Conditions on an “as is, where is” basis. Without limiting the generality of the foregoing, but subject to Sections 7.4, 18.1(b), 18.2, 18.3, 18.4, 18.5, 18.6, 18.7 and 18.8, DB Co shall not be entitled to make any claim of any nature whatsoever against the City or any City Party, or RTG or any RTG Party, on any grounds relating to the Lands, the Existing Infrastructure on which Works will be performed, or the Site Conditions, including the fact that incorrect or insufficient information on any matter relating to the Lands, the Existing Infrastructure on which Works will be performed, or the Site Conditions was given to it by any person, whether or not the City or a City Party, RTG or any RTG Party.
- (b) Section 18.1(a) is not intended to prohibit DB Co from relying upon information that has been provided by a person who has given DB Co an express written entitlement to rely on that information, provided however, subject to Sections 7.4, 18.2, 18.3, 18.4, 18.5, 18.6, 18.7 and 18.8, DB Co shall not be entitled to make any claim of any nature whatsoever against the City or any City Party, RTG or any RTG Party, on any grounds relating to the information provided by that person. For clarity, subject to Sections 7.4, 18.2, 18.3, 18.4, 18.5, 18.6, 18.7 and 18.8, DB Co’s legal recourse shall be against the person who provided the express written entitlement to rely on the information and not the City or any City Party, or RTG or any RTG Party.
- (c) Subject to Sections 7.4, 18.1(b), 18.2, 18.3, 18.4, 18.5, 18.6, 18.7 and 18.8, DB Co acknowledges and agrees that it has and shall be deemed to have:
  - (i) performed all necessary due diligence and investigations or inspections on the Lands, and examined the Lands and its surroundings and any existing works on, over or under the Lands in accordance with Good Industry Practice, taking into account all matters relating to the Lands, including any Existing Infrastructure, and any other buildings, structures and works, on, over and under the Lands existing on the date hereof;
  - (ii) performed all necessary due diligence and investigation or inspection on the Existing Infrastructure in accordance with Good Industry Practice on which Works will be performed and satisfied itself prior to executing this Project Agreement as to the structural, environmental and general condition of such Existing Infrastructure;
  - (iii) in accordance with Good Industry Practice, taking into account all matters relating to the Lands, including any Existing Infrastructure, and any other buildings, structures and

works, on, over and under the Lands existing on the date hereof, satisfied itself as to the nature of the Site Conditions, the ground and the subsoil, the level and quantity of groundwater, the form and nature of the Lands, the loadbearing and other relevant properties of the Lands, the risk of injury or damage to property affecting the Lands, the nature of the materials (whether natural or otherwise) to be excavated and the nature of the design, work and materials necessary for the execution and delivery of the Works;

- (iv) satisfied itself as to the presence of any Contamination on, in or under the Lands, in accordance with Good Industry Practice, taking into account all matters relating to the Lands, including any Existing Infrastructure, and any other buildings, structures and works, on, over and under the Lands existing on the date hereof;
  - (v) satisfied itself as to the adequacy of the Lands, rights of access to, from and through the Lands and any accommodation it may require for the purposes of fulfilling its obligations under this Project Agreement;
  - (vi) satisfied itself as to the possibility of interference by persons of any description whatsoever with access to or use of, or rights in respect of, the Lands; and
  - (vii) satisfied itself as to the precautions, times and methods of working necessary to prevent any nuisance or interference, whether public or private, being caused to any third parties.
- (d) DB Co further acknowledges and agrees that, other than as referred to or contained in this Project Agreement, no representations or warranties have been made, nor documentation delivered to DB Co or any DB Co Party, which would indicate that DB Co would be unable to perform the Works in a lawful manner.

## 18.2 Contamination

- (a) At all times prior to the applicable Substantial Completion Date, DB Co shall be responsible for managing, remediating and/or removing, in accordance with Section 4.5 of Schedule 17 – Environmental Obligations, any Contamination located on, in or under the Site which was described in, or was properly inferable, readily apparent or readily discoverable from, the Environmental Reports or the Geotechnical Reports made available to DB Co at least 30 days prior to the RFP Technical Submission Deadline (“**Existing Contamination**”). Notwithstanding the forgoing or anything else to the contrary contained in this Agreement, DB Co shall have no responsibility for any Contamination that is migrating to or from the Lands, except (I) to the extent that DB Co or any DB Co Party Released such Contamination in a manner which does not comply with Applicable Law or (II) DB Co or any DB Co party is causing the migration of Existing Contamination.
- (b) DB Co shall be responsible for managing, removing or remediating, in accordance with Section 4.5 of Schedule 17 – Environmental Obligations:
  - (i) any Contamination on, in or under the Lands which DB Co or any DB Co Party has brought onto the Lands or lands adjacent to the Lands and caused to be Released in a manner which does not comply with Applicable Law; and

- (ii) any Existing Contamination which was harmless or stored, contained or otherwise dealt with in accordance with Applicable Law which DB Co or any DB Co Party causes to be Released in a manner which does not comply with Applicable Law.

In addition, and without limiting any other obligation of DB Co under the Project Agreement, DB Co shall be responsible for all Direct Losses associated with the Releases of Contamination or Existing Contamination described in Sections 18.2(b)(i) and 18.2(b)(ii) above and, to the extent of DB Co's responsibility for Contamination that is migrating to or from the Site, Section 18.2(a).

- (c) Contamination which is not the responsibility of DB Co pursuant to Sections 18.2(a) and 18.2(b) shall be the responsibility of the City.
- (d) Upon the discovery of any Contamination, DB Co shall immediately inform the City Representative and shall comply, and ensure compliance by all DB Co Parties, with all Applicable Law and Schedule 17 - Environmental Obligations in respect thereof:
  - (i) at the City's cost pursuant to Section 18.2(g), in respect of Contamination for which the City is responsible pursuant to Section 18.2(c); and
  - (ii) at its own cost in respect of Contamination for which it is responsible pursuant to Section 18.2(a) or 18.2(b).
- (e) Except to the extent required to prevent or mitigate an Emergency or to comply with Applicable Law, DB Co shall not undertake any significant work pursuant to Section 18.2(d) in respect of Contamination for which the City is responsible pursuant to Section 18.2(c) until the City Representative has been given a reasonable opportunity to review the nature and extent of the Contamination and has instructed DB Co to proceed with such work.
- (f) In the event that the City wishes DB Co to perform actions in respect of any Contamination which are in addition to any required pursuant to Section 18.2(d), then the City shall issue an instruction to DB Co specifying what action the City requires DB Co to take and DB Co shall promptly and diligently comply with all such instructions at the City's cost pursuant to Section 18.2(g).
- (g) If Sections 18.2(d)(i), 18.2(e) or 18.2(f) require DB Co to perform any alteration, addition, Demolition, extension or variation in the Works as a result of Contamination for which the City is responsible pursuant to Section 18.2(c) or as a result of any instructions given by the City pursuant to Section 18.2(f) and which would not otherwise be required under this Project Agreement, then any such alteration, addition, Demolition, extension or variation in the Works shall, subject to and in accordance with Section 32, be treated as a Delay Event and, subject to and in accordance with Section 33, be treated as a Compensation Event.
- (h) In the event that the City and DB Co do not agree as to the nature or extent of Contamination, or in the event of a disagreement as to whether DB Co is responsible for Contamination pursuant to either Sections 18.2(a) or 18.2(b), or the actions to be performed by DB Co pursuant to Section 18.2(d) or Schedule 17 – Environmental Obligations, such disagreement shall be referred for determination to a panel of 3 independent and suitably qualified and experienced persons, 1 appointed by the City, 1 appointed by DB Co, and a third appointed jointly by the appointees of the City and DB Co. If either Party fails to appoint such appointee within 10 Business Days of delivery Notice of such disagreement, or if the appointees of the City and DB Co fail to appoint

the third appointee within 10 Business Days of the later of their respective appointments, then the Superior Court of Justice of Ontario shall appoint such appointee. The costs and expenses of retaining such appointees shall be borne by the unsuccessful Party. Such panel shall endeavour to deliver a decision within 15 Business Days of any such disagreement being referred to such panel. Such panel's decision shall be determined by majority and shall be final and binding on the Parties only in respect of the nature of the Contamination and any action to be performed by DB Co pursuant to Section 18.2(d), except to the extent that either Party alleges that such decision would result in non-compliance with Applicable Law or this Project Agreement, in which event either Party may refer the disagreement for resolution in accordance with Schedule 27 - Dispute Resolution Procedure.

### 18.3 Items of Geological, Historical or Archaeological Interest or Value

- (a) As between the Parties, all fossils, artifacts and other objects having artistic, historic, archaeological or monetary value, including human remains and burial sites, which may be found on or at the Lands are or shall be the sole and absolute property of the City or the owner of the relevant property, as applicable.
- (b) The City shall be responsible for items referred to in Section 18.3(a) except for any such items that were described in, or were properly inferable, readily apparent or readily discoverable from any Archaeological Reports or any Cultural Heritage Reports.
- (c) Upon the discovery of any item referred to in Section 18.3(a), DB Co shall:
  - (i) immediately inform the City Representative of such discovery; and
  - (ii) take all steps not to disturb the item and, if necessary, cease any Works in so far as performing such Works would endanger the item or prevent or impede its excavation, take all necessary steps to preserve and ensure the preservation of the item in the same position and condition in which it was found, and comply, and ensure that all DB Co Parties comply, with Applicable Law and all requirements of Governmental Authorities with respect to such discovery, including the *Funeral, Burial and Cremations Services Act, 2002* (Ontario) and the *Standards & Guidelines for Conservation of Provincial Heritage Properties issued under the Ontario Heritage Act* (Ontario):
    - (A) subject to and in accordance with Section 18.3(e), at the City's cost, in respect of any such discovery for which the City is responsible pursuant to Section 18.3(b); and
    - (B) at its own cost in respect of any such discovery for which it is responsible pursuant to Section 18.3(b).
- (d) In the event that the City wishes DB Co to perform actions in respect of any discovery of any item referred to in Section 18.3(a) which are in addition to any required pursuant to Section 18.3(c), then the City shall issue an instruction to DB Co specifying what action the City requires DB Co to take and DB Co shall promptly and diligently comply with all such instructions at the City's cost subject to and in accordance with Section 18.3(e).
- (e) If Section 18.3(c) or Section 18.3(d) require DB Co to perform any alteration, addition, Demolition, extension or variation in the Works as a result of any such discovery for which the

City is responsible pursuant to Section 18.3(b) or as a result of any instructions given by the City pursuant to Section 18.3(d) and which would not otherwise be required under this Project Agreement, then any such alteration, addition, Demolition, extension or variation shall, subject to and in accordance with Section 32, be treated as a Delay Event and, subject to and in accordance with Section 33, be treated as a Compensation Event.

- (f) In the event that the City and DB Co do not agree as to the nature or extent of the actions required to be performed by DB Co pursuant to Section 18.3(c)(ii), such disagreement shall be referred for determination to an independent and suitably qualified and experienced person, acceptable to DB Co and the City, each acting reasonably (and the costs and expenses of retaining such person shall be borne by the unsuccessful Party). Such person's decision shall be final and binding on the Parties except to the extent that either Party alleges that such decision would result in non-compliance with Applicable Law or this Project Agreement, in which event either Party may refer the disagreement for resolution in accordance with Schedule 27 – Dispute Resolution Procedure.

#### **18.4 Species-at-Risk**

- (a) DB Co shall be responsible for any Species-at-Risk which may be found on, in or at the Site, the occurrence of which, in the location in which it is found, was described in the Environmental Assessments. The City shall be responsible for any Species-at-Risk which may be found on, in or at the Site, except for any Species-at-Risk the occurrence of which, in the location in which it is found, was described in the Environmental Assessments.
- (b) In respect of Species-at-Risk for which DB Co is responsible pursuant to Section 18.4(a), DB Co shall, at its own cost, comply, and ensure compliance by all DB Co Parties, with all Applicable Law and the provisions of Schedule 17 – Environmental Obligations. Upon the discovery of any Species-at-Risk for which the City are responsible pursuant to Section 18.4(a), DB Co shall:
  - (i) immediately inform the City Representative of such discovery; and
  - (ii) comply, and ensure compliance by all DB Co Parties, with all Applicable Law and the provisions of Schedule 17 - Environmental Obligations in respect thereof, including taking all necessary steps to preserve the respective habitat and relocate the Species-at-Risk at the City's cost pursuant to Section 18.4(d).
- (c) In the event that the City wishes DB Co to perform actions which are in addition to any required pursuant to Section 18.4(b), then the City shall issue an instruction to DB Co specifying what action the City requires DB Co to take and DB Co shall promptly and diligently comply with all such instructions at the City's cost pursuant to Section 18.4(d).
- (d) If Sections 18.4(b) or 18.4(c) require DB Co to perform any alteration, addition, demolition, extension or variation in the Works as a result of the discovery of any Species-at-Risk for which the City is responsible pursuant to Section 18.4(a) or as a result of any instructions given by the City pursuant to Section 18.4(c) and which would not otherwise be required under this Project Agreement, then any such alteration, addition, demolition, extension or variation:
  - (i) prior to Substantial Completion shall, subject to and in accordance with Section 32, be treated as a Delay Event and, subject to and in accordance with Section 33, be treated as a Compensation Event; and

- (ii) following Substantial Completion shall, subject to and in accordance with Schedule 22 - Variation Procedure, result in a Variation.

### **18.5 Stage 1 Connection Infrastructure**

- (a) DB Co has reviewed the Stage 1 Connection Infrastructure Preliminary Report, and shall, subject to terms of this Section 18.5, undertake the design and Construction Activities related to the interface and interconnection of the Confederation Line East Extension and Confederation Line West Extension with the Existing Confederation Line in accordance with this Project Agreement. DB Co shall be entitled to assume and rely on the fact that the actual specifications and conditions of the Stage 1 Connection Infrastructure, upon completion of construction and commissioning such Stage 1 Connection Infrastructure, will be as described in the Stage 1 Connection Infrastructure Preliminary Report.
- (b) After Financial Close, and no later than June 25, 2019 the City will provide updated information, to the extent available, relating to the Stage 1 Connection Infrastructure Preliminary Report. No later than December 31, 2019, the City shall provide to DB Co a Stage 1 Connection Infrastructure Final Report.
- (c) If the Stage 1 Connection Infrastructure, or the Stage 1 Connection Infrastructure Final Report, demonstrates a deviation from the Stage 1 Connection Infrastructure Preliminary Report or the requirements in the Output Specifications, unless such deviation:
  - (i) was within the actual knowledge of DB Co or a DB Co Party, as of the date which is 30 days prior to the RFP Technical Submission Deadline;
  - (ii) was disclosed as such by the City to DB Co at least 30 days prior to the RFP Technical Submission Date (either in the Stage 1 Connection Infrastructure Preliminary Report or otherwise); or
  - (iii) has been, or is reasonably capable of being fully mitigated by DB Co without (A) incurring additional expenses which, when aggregated with all such other expenses incurred by DB Co and DB Co Parties in mitigating other such deviations from the Stage 1 Connection Infrastructure Preliminary Report or requirements in the Output Specifications, exceed \$[REDACTED], or (B) delaying the Critical Path,

to the extent that such deviation requires DB Co to perform any alteration, addition, demolition, extension, re-performance or variation in the Works, which would not otherwise be required under this Project Agreement, or otherwise delays DB Co's performance of the Works, any such alteration, addition, demolition, extension, variation or delay shall, subject to and in accordance with Section 32, be treated as a Delay Event and, subject to and in accordance with Section 33, be treated as a Compensation Event.

- (d) For the purposes of Section 18.5(c)(i), "actual knowledge of DB Co" shall mean knowledge that is actually held by the person who was identified as the project manager (or analogous position) for the Project in DB Co's proposal in response to the Request for Proposals.

## 18.6 Mislocated or Unknown Utilities

- (a) DB Co shall be responsible for Utility Infrastructure on the Site pursuant to Schedule 15 – Output Specifications, except for any Utility Infrastructure that is:
- (i) Mislocated Utility Infrastructure; or
  - (ii) is Utility Infrastructure that:
    - (A) was not within the actual knowledge of DB Co or a DB Co Party, as of the date which is 30 days prior to the RFP Technical Submission Deadline; and
    - (B) was not referenced or described in, or was not inferable, readily apparent or readily discoverable, from the Background Information.
- (b) For the purposes of Section 18.6(a)(ii)(A), “actual knowledge of DB Co” shall mean knowledge that is actually held by the person who was identified as the project manager (or analogous position) for the Project in DB Co’s proposal in response to the Request for Proposals.
- (c) If Utility Infrastructure on the Site that is not the responsibility of DB Co pursuant to Section 18.6(a) delays DB Co’s performance of the Works then any such delay or additional costs in respect of the Works shall, subject to and in accordance with Section 32 be treated as a Delay Event and, subject to and in accordance with Section 33, be treated as a Compensation Event.
- (d) DB Co shall not be eligible for the Delay Event or Compensation Event set out in this Section 18.6 in respect of:
- (i) any Utility Infrastructure that is a service connection;
  - (ii) any Utility Infrastructure that is above-ground, aerial, or at-grade;
  - (iii) any of the following Utility Infrastructure that is owned by the City or MTO:
    - (A) watermains of nominal diameter less than 150mm;
    - (B) combined sewers or storm sewers of nominal diameter less than 300mm;
    - (C) sanitary sewers of nominal diameter less than 225mm; and
    - (D) street lighting and traffic signal cables;
  - (iv) any Utility Infrastructure relocations carried out at the Site within the study area limits represented by the Subsurface Utility Engineering (SUE) Reports subsequent to Commercial Close, or within the study area limits represented by the Roll Plans subsequent to the City obtaining such subsurface utility engineering information, in either case including with respect to,
    - (A) the Works; and
    - (B) Third Party Works and Additional Works.

- (e) Any Dispute as to whether Utilities encountered by DB Co are or not Mislocated Utility Infrastructure or Utility Infrastructure described in clause (i) or (ii) of Section 18.6(a) shall initially be submitted to the Independent Certifier for independent determination in accordance with Section 4 of Schedule 27 – Dispute Resolution Procedure.

### **18.7 Stage 1 Systems Information**

- (a) DB Co shall be entitled to rely upon the accuracy of the Stage 1 Systems Information for purposes of the Works and shall be entitled to rely on the fact that the Existing Confederation Line systems have been built in accordance with the Stage 1 Systems Information and Stage 1 Project Agreement.
- (b) In the event of any defect, omission, error or inaccuracy in the Stage 1 Systems Information (including if the Stage 1 System Information is not compliant with the Stage 1 Project Agreement or demonstrates a deviation from the requirements in the Output Specifications), unless such defect, omission, error or inaccuracy:
  - (i) was within the actual knowledge of DB Co or a DB Co Party, as of the as of the date which is 30 days prior to the RFP Technical Submission Deadline; or
  - (ii) was disclosed as such by the City to DB Co at least 30 days prior to the RFP Technical Submission Date (either in the Stage 1 Systems Information or otherwise),

and provided compliance with the requirements of this Project Agreement reasonably requires DB Co to perform any alteration, addition, demolition, extension or variation in the Works which would not otherwise be required under this Project Agreement, or if such defect, error or inaccuracy otherwise delays DB Co’s performance of the Works, any such alteration, addition, demolition, extension, variation or delay shall, subject to and in accordance with Section 32, be treated as a Delay Event and, subject to and in accordance with Section 33, be treated as a Compensation Event.

- (c) For the purposes of Section 18.7(b)(i), “actual knowledge of DB Co” shall mean knowledge that is actually held by the person who was identified as the project manager (or analogous position) for the Project in DB Co’s proposal in response to the Request for Proposals.

### **18.8 Defects – Major Existing Third Party Infrastructure**

- (a) The City shall be responsible for defects in Major Existing Third Party Infrastructure provided that the defect,
  - (i) was not within the actual knowledge of DB Co or a DB Co Party, as of the date which is 30 days prior to the RFP Technical Submission Deadline;
  - (ii) was not referenced or described in, or was not properly inferable, readily apparent or readily discoverable from, the Background Information;
  - (iii) was not properly attributable to the result of the aging of the Major Existing Third Party Infrastructure; or
  - (iv) was not caused or contributed to by DB Co or a DB Co Party.

- (b) For the purposes of Section 18.8(a)(i), “actual knowledge of DB Co” shall mean knowledge that is actually held by the person who was identified as the project manager (or analogous position) for the Project in DB Co’s proposal in response to the Request for Proposals.
- (c) If a defect in Major Existing Third Party Infrastructure that is the responsibility of the City pursuant to Section 18.8(a), delays DB Co’s performance of the Works, then any such delay in the Works Schedule or additional costs in respect of the Works shall, subject to and in accordance with Section 32, be treated as a Delay Event and, subject to and in accordance with Section 33, be treated as a Compensation Event.

## **19. GOVERNMENTAL AND THIRD PARTY FINANCIAL OBLIGATIONS**

### **19.1 Governmental and Third Party Financial Obligations**

- (a) DB Co shall be responsible for,
  - (i) all Financial Obligations under or in respect of all DB Co Permits, Licences, Approvals and Agreements, including,
    - (A) any engineering, administration and inspection fees required in respect of works or services to be performed;
    - (B) any security deposits required under any DB Co Permits, Licences, Approvals and Agreements; and
    - (C) any other amounts payable under any DB Co Permits, Licences, Approvals and Agreements; and
  - (ii) all Financial Obligations in respect of the City Permits, Licences, Approvals and Agreements that are set out as being DB Co’s responsibility in Schedule 15 – Output Specifications, Schedule 17 – Environmental Obligations or Schedule 35 – Permits, Licences, Approvals and Agreements, including any engineering, administration and inspection fees required in respect of works or services to be performed.
- (b) For clarity, and notwithstanding Section 19.1(a), DB Co shall not be responsible for payment of any development charges relating to the Works, the New City Infrastructure, the New MTO Infrastructure or the Lands.
- (c) Subject to Section 19.1(a)(ii), the City shall be responsible for all Financial Obligations under or in respect of all the City Permits, Licences, Approvals and Agreements including such Financial Obligations, as applicable in either case, to the City of Ottawa, any Utility Company, any Railway Company, any Governmental Authority or any other third party in respect of the Works, including:
  - (i) any engineering administration and inspection fees required in respect of works or services required to be performed;
  - (ii) any security deposits required under any City Permits, Licences, Approvals and Agreements; and

- (iii) any other amounts payable under any City Permits, Licences, Approvals and Agreements.
- (d) The Parties agree that any refund, partial rebate or credit granted by the City, any applicable Utility Company, any applicable Railway Company, or any applicable Governmental Authority or any other third party relating to the Financial Obligations referred to in Sections 19.1(a), 19.1(b) and 19.1(c) shall be for the benefit of the City to the extent such Financial Obligations were paid by the City (including pursuant to Section 11.29) and shall be for the benefit of DB Co to the extent such Financial Obligations were paid by DB Co. Without limiting the generality of the foregoing, to the extent that the City enters into any cost sharing arrangements with any Utility Company, any Railway Company, any Governmental Authority or any third party, DB Co acknowledges and agrees that the City shall be the sole beneficiary of any such cost sharing arrangements and DB Co shall have no entitlement whatsoever to any benefit arising from any such cost sharing arrangements.

## **20. CITY ACCESS AND MONITORING**

### **20.1 City Access During the Works**

- (a) Subject to Section 20.1(b) but without limiting any of the City's rights in respect of the Lands, the New City Infrastructure, the New MTO Infrastructure or the right of any third party in relation to that third party's portion of the Lands or New MTO Infrastructure, DB Co acknowledges and agrees that DB Co shall not restrict the access of the City, and the Government Entities and their respective representatives, to,
  - (i) the Lands, the New City Infrastructure, the New MTO Infrastructure or any workshop where materials, plant or equipment are being manufactured, prepared or stored at all reasonable times during normal working hours, including for the purposes of general inspection or audit, or of attending any test or study being carried out in respect of the Works, or to fulfill any statutory, public or other duties or functions; or
  - (ii) the Lands, the New City Infrastructure, the Existing Infrastructure for the purpose of operating the Existing Confederation Line.

For clarity, nothing in this Section 20.1 shall restrict or impede the City's or any other third party owner's right to use and access the Existing Infrastructure or any part of the Lands not required at that time for DB Co's performance of the Works in accordance with the terms hereof.

- (b) In exercising their access rights under Section 20.1(a) in respect of the Lands, the City shall, and shall cause the Government Entities, and their respective representatives, to:
  - (i) provide reasonable prior Notice appropriate to the circumstances (other than for any offices or other facilities provided for the use of the City and/or Government Entities);
  - (ii) comply with all relevant safety procedures and any reasonable directions with regard to site safety that may be issued by or on behalf of the DB Co Representative from time to time; and
  - (iii) if required by DB Co, be accompanied by a representative of DB Co or a DB Co Party.

## **20.2 Increased Monitoring**

- (a) If, at any stage, the City is of the opinion, acting reasonably, that there are defects in the Works or that DB Co has failed to comply, in any material respect, with the requirements of this Project Agreement, the City may, without prejudice to any other right or remedy available to it, by Notice to DB Co, increase the level of monitoring of DB Co from that set out in this Project Agreement to such level as the City considers reasonable taking into account the nature of the relevant defect or failure until such time as DB Co shall have demonstrated, to the City's satisfaction, that it is capable of performing and will perform, in all material respects, its obligations related to the Works under this Project Agreement. DB Co will compensate the City for any reasonable costs incurred as a result of such increased monitoring.

## **20.3 Right to Uncover**

- (a) DB Co shall ensure that the City is afforded advance Notice of, and that the City is afforded a full opportunity to witness, all inspection and test activity in accordance with the Inspection and Test Plan. If DB Co does not provide such Notice and opportunity, DB Co shall at the request of the City uncover any relevant part of the Works which have been covered up or otherwise put out of view or remove any relevant part of the Works that have been proceeded with in order to permit the City to witness the relevant inspection or test activity. DB Co shall bear all costs of any such uncovering or removal, regardless of whether or not any defect is discovered in the relevant Works.
- (b) The City shall have the right, at any time prior to the East Final Completion Date, to request DB Co to uncover or open up and inspect (or allow the City to inspect) any part or parts of the East Works, or to require testing of any part or parts of the East Works, where the City reasonably believes that such part or parts of the East Works is or are defective or that DB Co has failed to comply with the requirements of this Project Agreement (including the Design Data) relevant to such part or parts of the East Works, and DB Co shall comply with such request. When the City makes such a request, the City shall include reasonably detailed reasons with such request.
- (c) The City shall have the right, at any time prior to the West Final Completion Date, to request DB Co to uncover or open up and inspect (or allow the City to inspect) any part or parts of the West Works, or to require testing of any part or parts of the West Works (other than Highway Works in respect of which Section 20.3(d) shall apply), where the City reasonably believes that such part or parts of the West Works is or are defective or that DB Co has failed to comply with the requirements of this Project Agreement (including the Design Data) relevant to such part or parts of the West Works, and DB Co shall comply with such request. When the City makes such a request, the City shall include reasonably detailed reasons with such request.
- (d) The City shall have the right, at any time prior to the applicable Handover, to request DB Co to uncover or open up and inspect (or allow the City to inspect) any part or parts of the Highway Works, or to require testing of any part or parts of the Highway Works, where the City reasonably believes that such part or parts of the Highway Works is or are defective or that DB Co has failed to comply with the requirements of this Project Agreement (including the Design Data) relevant to such part or parts of the Highway Works, and DB Co shall comply with such request. When the City makes such a request, the City shall include reasonably detailed reasons with such request.

- (e) If an inspection shows that the relevant part or parts of the Works is or are defective or that DB Co has failed to comply with the requirements of this Project Agreement (including the Design Data) relevant to such part or parts of the Works, DB Co shall rectify all such defects and non-compliance diligently and at no cost to the City and DB Co shall not be entitled to any additional compensation or extension of time in relation thereto.
- (f) If an inspection shows that the relevant part or parts of the Works is not or are not defective and that DB Co has complied with the requirements of this Project Agreement (including the Design Data) relevant to such part or parts of the Works, the exercise by the City of its rights pursuant to this Section 20.3 shall, subject to and in accordance with Section 32, be treated as a Delay Event and, subject to and in accordance with Section 33, be treated as a Compensation Event.

#### **20.4 No Relief from Obligations**

- (a) The Parties acknowledge that the exercise by the City or the City Representative of the rights under this Section 20 shall in no way affect the obligations of DB Co under this Project Agreement except as set out in this Section 20.

#### **20.5 Access by Others**

- (a) Subject to Section 20.5(b) and subject to and in accordance with Section 11.12 (to the extent applicable), DB Co shall ensure that throughout the Project Term, 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 Lands, New City Infrastructure, Existing Infrastructure, Stage 1 Connection Infrastructure or New MTO Infrastructure for:
  - (i) the Independent Certifier to the extent required to perform its obligations pursuant to Schedule 6 - Independent Certifier Agreement;
  - (ii) inspectors and other persons authorized to act on behalf of the City and owners of New MTO Infrastructure and Existing Infrastructure, for inspection and/or acceptance purposes;
  - (iii) all Other Contractors, including the owners or operators of any Third Party Facilities and their agents at all reasonable times to exercise any right or power or perform any duty or obligation under any Applicable Law or the Utility Agreements, Railway Orders or Encroachment Permits, provided that, wherever consistent with the requirements of Applicable Law and the requirements of this Project Agreement, DB Co may limit such access so as to not unnecessarily impede or restrict traffic flows, the operation of the Existing Infrastructure or any Works;
  - (iv) all Governmental Authorities and Emergency Service Providers in order to carry out any work (including surveys and inspections) in accordance with or to exercise any right or power or perform any duty or obligation under any Applicable Law and provided that, whenever consistent with the applicable requirements of such Governmental Authority, Emergency Service Providers or Applicable Law and the requirements of this Project Agreement (as the case may be), DB Co may limit such access so as to not unnecessarily impede or restrict traffic flows, the operation of the Existing Infrastructure or any Works;

- (v) any Other Contractors, owners or operators of Third Party Facilities, Governmental Authorities, MTO, Emergency Service Providers, Utility Companies, Railway Companies, Transit Systems and railway systems for the purposes of access to and from any other lands and/or facilities adjacent to or in proximity to the Lands, the New City Infrastructure, the New MTO Infrastructure and Existing Infrastructure owned or operated by such person or in which such person has any interest, provided that, whenever consistent with the requirements of Applicable Law and the requirements of this Project Agreement, DB Co may limit such access so as to not unnecessarily impede or restrict traffic flows, the operation of the Existing Infrastructure or any Works;
  - (vi) any City Party to undertake emergency training in relation to the New City Infrastructure;
  - (vii) any City Party to undertake and perform Systems Integration Works in accordance with the Systems Integration Management Plan, or RTG or RTG Parties in accordance with the provisions of the Interface Agreement.
- (b) Subject to Section 20.5(c), the City shall require persons accessing Site(s) on the Lands in accordance with access rights under Section 20.5(a) to:
- (i) provide reasonable prior Notice to DB Co appropriate to the circumstances;
  - (ii) comply with all relevant health and safety procedures and any reasonable directions with regard to health and safety that may be issued by or on behalf of the DB Co Representative from time to time; and
  - (iii) if reasonably required by DB Co, be accompanied by a representative of DB Co or a DB Co Party.
- (c) Section 20.5(b) shall not apply,
- (i) to Additional Contractors, who shall instead comply with any instructions or procedures made by DB Co pursuant to Section 11.12;
  - (ii) in the case of access rights described in Section 20.5(a) for the purpose of responding to an Emergency ;
  - (iii) for the purposes of responding to an emergency declared by the City or by a Governmental Authority; and
  - (iv) in circumstance where the requirements of Section 20.5(b) are inconsistent with the requirements of the applicable Governmental Authority or Emergency Service Provider.

## **20.6 Public Use**

- (a) DB Co shall have no right to grant to the general public the right to use either the New City Infrastructure or the New MTO Infrastructure. It shall be the right of the City to grant the right of use to the general public to the New City Infrastructure. It shall be the right of the MTO to grant the right of use to the general public to the New MTO Infrastructure.

- (b) Except as otherwise expressly provided in this Project Agreement, DB Co shall not have any claim whatsoever against the City, any City Party, any Emergency Service Providers or any other Governmental Authority for, or in respect of any lane or ramp closure or diversion or any track closure or diversion, including any such closure or diversion as a result of the exercise of any other rights or powers or the discharge of any other duties or functions by any such authority, affecting all or any part of the Lands, the New City Infrastructure or the New MTO Infrastructure, at any time.

## **21. ENVIRONMENTAL REQUIREMENTS**

### **21.1 [Intentionally Deleted]**

### **21.2 Environmental Requirements**

- (a) DB Co and the City shall comply with the provisions of Schedule 17 – Environmental Obligations.

### **21.3 [Intentionally Deleted]**

## **22. INDEPENDENT CERTIFIER**

### **22.1 Appointment**

- (a) On or prior to Financial Close, the Parties shall appoint an independent and suitably qualified and experienced consultant to act as the Independent Certifier for the purposes of this Project Agreement and shall enter into an agreement with the Independent Certifier substantially in the form of Schedule 6 – Independent Certifier Agreement. If the Parties are unable to agree upon the Independent Certifier within such period of time, then the determination of the Independent Certifier shall be made in the same manner as the identification of a replacement Independent Certifier under Section 22.7(b).
- (b) Neither Party shall, without the prior written consent of the other Party, enter into any agreement with the Independent Certifier in connection with the Project other than the Independent Certifier Agreement, and DB Co shall ensure that no DB Co Party enters into any separate agreement with the Independent Certifier in connection with the Project.

### **22.2 Role of Independent Certifier**

- (a) The general role, obligations and functions of the Independent Certifier are described in Schedule 6 – Independent Certifier Agreement.

### **22.3 Changes to Terms of Appointment**

- (a) Neither the City nor DB Co shall without the other's prior written approval:
  - (i) waive, settle, compromise or otherwise prejudice any rights or claims which the other may from time to time have against the Independent Certifier; or
  - (ii) vary the terms of the Independent Certifier Agreement or the services performed or to be performed by the Independent Certifier.

- (b) The Parties shall perform their respective obligations arising under or in connection with the Independent Certifier Agreement.

#### **22.4 Right to Change Appointment**

- (a) The Parties agree that the Independent Certifier shall not provide any services or reports or other information to DB Co, the Lenders, the DB Co Parties or any other person other than pursuant to the performance of the functions of the Independent Certifier under this Project Agreement unless agreed to in writing by the Parties. The Parties may agree to terminate the Independent Certifier Agreement upon 30 days' Notice to the Independent Certifier. If such Notice is given, then, pursuant to Section 22.7, a new Independent Certifier will be appointed. The Parties agree that, notwithstanding the 30 days' Notice of termination, the Independent Certifier shall continue on a day-to-day basis thereafter until a new Independent Certifier is appointed.

#### **22.5 Cooperation**

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

#### **22.6 Payment of Independent Certifier and Systems Integration Verifier**

- (a) DB Co and the City shall share equally the responsibility for the payment of all fees and costs of the Independent Certifier.
- (b) DB Co and the City shall share equally the responsibility for the payment of all fees and costs of the Systems Integration Verifier.

#### **22.7 Replacement**

- (a) In the event of the Independent Certifier's engagement being terminated otherwise than for full performance, the Parties shall liaise and cooperate with each other in order to appoint a replacement consultant to act as the Independent Certifier as soon as reasonably practicable. The identity of any such replacement shall be as agreed by the Parties and the terms of his/her appointment shall, unless otherwise agreed by the Parties, be as set out in the Independent Certifier Agreement.
- (b) In the event the Parties fail to agree upon the identity of a replacement Independent Certifier within five Business Days after the termination of the original Independent Certifier's appointment, then a replacement Independent Certifier shall be chosen as follows:
  - (i) each Party shall, within five Business Days thereafter, select three suitably qualified and experienced replacements that would be acceptable to that Party, and shall provide Notice thereof to the other Party, with a ranking of preference for replacements;
  - (ii) if the Parties have both selected a common replacement, then such common replacement shall be the Independent Certifier, and if there is more than one common replacement, then the common replacement with the highest overall ranking (calculated by adding

together the ordinal rank assigned by the Parties) shall be selected, and in the event of a tie, the lowest-cost of such tied replacements shall be selected; and

- (iii) if the Parties have not selected a common replacement, then the determination of the new replacement may be referred for resolution in accordance with Schedule 27 – Dispute Resolution Procedure.

**23. INTENTIONALLY DELETED**

**24. INTENTIONALLY DELETED**

**25. COMMISSIONING AND COMPLETION**

**25.1 Commissioning Activities**

- (a) DB Co shall perform all,
  - (i) East DB Co Commissioning pursuant to the East Testing & Commissioning Plan;
  - (ii) West DB Co Commissioning pursuant to the West Testing & Commissioning Plan;
  - (iii) Highway DB Co Commissioning pursuant to the Highway Testing & Commissioning Plan; and
  - (iv) Remaining Works DB Co Commissioning pursuant to the Remaining Works Testing & Commissioning Plan.

**25.2 Testing & Commissioning Program**

- (a) [Not used]
- (b) The Testing & Commissioning Program shall, at a minimum:
  - (i) describe the requirements, and the timing and sequence of such requirements, necessary for, as applicable:
    - (A) the East DB Co Commissioning to achieve East Substantial Completion on or before the East Scheduled Substantial Completion Date, and East Final Completion on or before the East Scheduled Final Completion Date;
    - (B) the West DB Co Commissioning to achieve West Substantial Completion on or before the West Scheduled Substantial Completion Date, and West Final Completion on or before the West Scheduled Final Completion Date;
    - (C) the Highway DB Co Commissioning to achieve each Handover on or before the West Scheduled Substantial Completion Date; and
    - (D) the Remaining Works DB Co Commissioning to achieve completion of the Remaining Works on or before the West Final Completion Date,

as the case may be;

- (ii) comply with all requirements of the Schedule 14 – Testing & Commissioning;
  - (iii) include the names of the individuals or companies proposed to perform the applicable DB Co Commissioning;
  - (iv) include a schedule of each of the applicable DB Co Commissioning Tests proposed to be performed and the timeframe for completion, with start and end dates;
  - (v) include a schedule of meetings to be held between the Parties to coordinate the performance of the applicable DB Co Commissioning; and
  - (vi) list the approvals required from any Governmental Authority, manufacturer or other person that are necessary to meet the requirements of the Testing & Commissioning Program or Applicable Law.
- (c) The City shall provide DB Co with comments on each draft Testing & Commissioning Program in accordance with the procedures contemplated by Schedule 10 – Review Procedure, and DB Co shall revise each draft Testing & Commissioning Program to the extent contemplated by Schedule 10 – Review Procedure within 30 days after receipt of any comments from the City.

### 25.3 DB Co Commissioning

- (a) DB Co shall, in accordance with Schedule 14 – Testing & Commissioning, invite the Independent Certifier and the City Representative to witness, and to comment on, each aspect of each DB Co Commissioning and DB Co shall provide all information that the Independent Certifier and the City Representative may reasonably require in relation thereto, including:
- (i) tests proposed;
  - (ii) test methodology; and
  - (iii) expected test results.

### 25.4 Substantial Completion Certificate

- (a) DB Co shall give the Independent Certifier and the City Representative at least 10 Business Days' Notice prior to the date upon which DB Co anticipates delivering each of the East Substantial Completion Notice and West Substantial Completion Notice.
- (b) DB Co shall give the Independent Certifier and the City Representative Notice upon the satisfaction of all requirements for,
- (i) East Substantial Completion (the “**East Substantial Completion Notice**”), describing, in reasonable detail, the satisfaction of the requirements for East Substantial Completion, together with DB Co’s opinion as to whether the conditions for issuance of the East Substantial Completion Certificate have been satisfied; and

- (ii) West Substantial Completion (the “**West Substantial Completion Notice**”), describing, in reasonable detail, the satisfaction of the requirements for West Substantial Completion, together with DB Co’s opinion as to whether the conditions for issuance of the West Substantial Completion Certificate have been satisfied,

(each a “**Substantial Completion Notice**”).

- (c) For the purposes of determining each applicable Substantial Completion, and for the purposes of determining substantial performance in accordance with Section 2(2) of the CA, the Parties have agreed not to expeditiously complete any Remaining Works until after West Substantial Completion.

The Parties have agreed that the price of the services or materials to be supplied, and required, to complete any Remaining Works shall be deducted from the total Cost of Works in determining substantial performance. For greater certainty, completion of the Remaining Works shall be a requirement for achieving West Final Completion.

- (d) The City shall, within five Business Days after receipt of a,
  - (i) East Substantial Completion Notice, provide the Independent Certifier and DB Co with the City’s opinion as to whether the conditions for issuance of an East Substantial Completion Certificate has been satisfied and, if applicable, any reasons as to why they consider that the East Substantial Completion Certificate should not be issued; and
  - (ii) West Substantial Completion Notice, provide the Independent Certifier and DB Co with the City’s opinion as to whether the conditions for issuance of an West Substantial Completion Certificate has been satisfied and, if applicable, any reasons as to why they consider that the West Substantial Completion Certificate should not be issued.
- (e) Within five Business Days after DB Co’s receipt of the City’s opinion pursuant to Section 25.4(d), the Parties shall cause the Independent Certifier to determine whether the conditions for issuance of each Substantial Completion Certificate have been satisfied, having regard for the opinions of both DB Co and the City, to determine whether any Minor Deficiencies exist, and to issue to the City and to DB Co either:
  - (i) the relevant Substantial Completion Certificate confirming the date of issue as the Substantial Completion Date and setting out the Minor Deficiencies List (if applicable) in accordance with Section 25.10; or
  - (ii) a report detailing the matters that the Independent Certifier considers are required to be performed by DB Co to satisfy the conditions for issuance of a Substantial Completion Certificate.
- (f) Where the Independent Certifier has issued a report in accordance with Section 25.4(e)(ii) and DB Co has not referred a Dispute in relation thereto for resolution in accordance with Schedule 27 – Dispute Resolution Procedure, DB Co shall, within 5 Business Days after receipt of such report, provide the Independent Certifier and the City Representative with:
  - (i) a detailed list indicating the rectification actions proposed for all matters raised in such report;

- (ii) the schedule for completion of all such rectification actions; and
- (iii) any additional DB Co Commissioning that needs to be undertaken as a result of the rectification actions,

and DB Co shall perform all such additional rectification actions and DB Co Commissioning in a timely manner. Upon completion thereof, DB Co may give a further Substantial Completion Notice and Sections 25.4(c) to (f), inclusive, shall be repeated until the relevant Substantial Completion Certificate has been issued.

- (g) The Independent Certifier's decision to issue or not to issue a Substantial Completion Certificate shall be final and binding on the Parties solely in respect of determining the applicable Substantial Completion Payment Date, and a Dispute in relation to such Substantial Completion Payment Date shall not be subject to resolution pursuant to the Dispute Resolution Procedure, provided, however, that any other Dispute in relation to the Independent Certifier's decision to issue or not to issue the Substantial Completion Certificate may be referred for resolution pursuant to the Schedule 27 – Dispute Resolution Procedure.
- (h) In respect of the East Works, DB Co shall provide As-Built Drawings, Record Drawings and specifications, Design Data and Shop Drawings as soon as possible and in any event no later than 60 days after the East Substantial Completion Date.
- (i) In respect of the West Works other than Highway Works, DB Co shall provide As-Built Drawings, Record Drawings and specifications, Design Data and Shop Drawings as soon as possible and in any event no later than 60 days after the West Substantial Completion Date.
- (j) In respect of the Highway Works, DB Co shall provide As-Built Drawings, Record Drawings and specifications, Design Data and Shop Drawings as soon as possible and in any event no later than 60 days after the applicable Handover.

## 25.5 Countdown Notices, Failure to Achieve Substantial Completion and Liquidated Damages

- (a) DB Co shall deliver a Notice (each, a “**Initial Countdown Notice**”) to the City and the Independent Certifier specifying the date on which DB Co anticipates that,
  - (i) East Substantial Completion will be achieved (the “**East Anticipated Substantial Completion Date**”, such Countdown Notice, an “**East Initial Countdown Notice**”); and
  - (ii) West Substantial Completion will be achieved (the “**West Anticipated Substantial Completion Date**”, such Countdown Notice, a “**West Initial Countdown Notice**”).

An Initial Countdown Notice shall be delivered not less than 180 days prior to the applicable Anticipated Substantial Completion Date.

- (b) In accordance with Section 7 of Schedule 12 – Works Schedule Requirements, the:
  - (i) East Anticipated Substantial Completion Date shall not be earlier than the East Scheduled Substantial Completion Date; and

- (ii) West Anticipated Substantial Completion Date shall not be earlier than the West Scheduled Substantial Completion Date,  
  
without the prior written consent of the City, in its sole discretion.
- (c) [Not used]
- (d) In the event that DB Co has not delivered an East Initial Countdown Notice to the City in accordance with the requirements of Section 25.5(a), then DB Co shall,
  - (i) within 3 Business Days after the date that the East Initial Countdown Notice was to have been delivered to the City, pay to the City the sum of \$[REDACTED] as liquidated damages in respect of damages suffered and costs incurred by the City related to DB Co's failure to deliver the East Initial Countdown Notice in a timely manner; and
  - (ii) pay to the City the additional sum of \$[REDACTED] per calendar day as liquidated damages in respect of damages suffered and costs incurred by the City related to DB Co's failure to deliver such Notice for each day after the date that the East Initial Countdown Notice was to have been delivered to the City in accordance with the requirements of Section 25.5(a), until and including the date such Notice is delivered.
- (e) In the event that DB Co has not provided a West Initial Countdown Notice to the City in accordance with the requirements of Section 25.5(a), then DB Co shall,
  - (i) within 3 Business Days after the date that the West Initial Countdown Notice was to have been delivered to the City, pay to the City the sum of \$[REDACTED] as liquidated damages in respect of damages suffered and costs incurred by the City related to DB Co's failure to deliver the West Initial Countdown Notice in a timely manner; and
  - (ii) pay to the City the additional sum of \$[REDACTED] per calendar day as liquidated damages in respect of damages suffered and costs incurred by the City related to DB Co's failure to deliver such Notice for each day after the date that the West Initial Countdown Notice was to have been delivered to the City in accordance with the requirements of Section 25.5(a) until and including the date such Notice is delivered.
- (f) [Not used]
- (g) If an East Initial Countdown Notice has been delivered to the City and DB Co subsequently determines that East Substantial Completion will not be achieved on or before the East Anticipated Substantial Completion Date established by such East Initial Countdown Notice, DB Co shall:
  - (i) forthwith issue a subsequent Notice (an "**East Subsequent Notice**") to the City establishing a revised date by which DB Co expects to achieve East Substantial Completion (the "**East Revised Substantial Completion Date**"), which East Revised Substantial Completion Date shall be no earlier than,
    - (A) the East Anticipated Substantial Completion Date established by the East Initial Countdown Notice, and

- (B) 15 days after the delivery of such East Subsequent Notice;
- (ii) pay to the City, as liquidated damages in respect of damages suffered and costs incurred by the City related to DB Co's failure to achieve East Substantial Completion by the East Anticipated Substantial Completion Date established as aforesaid, the following amount:
  - (A) if the East Subsequent Notice is delivered between 1 and 29 days after the delivery of the East Initial Countdown Notice, the sum of \$[REDACTED];
  - (B) if the East Subsequent Notice is delivered between 30 and 59 days after the delivery of the East Initial Countdown Notice, the sum of \$[REDACTED];
  - (C) if the East Subsequent Notice is delivered between 60 and 89 days after the delivery of the East Initial Countdown Notice, the sum of \$[REDACTED];
  - (D) if the East Subsequent Notice is delivered between 90 and 119 days after the delivery of the East Initial Countdown Notice, the sum of \$[REDACTED];
  - (E) if the East Subsequent Notice is delivered between 120 and 149 days after the delivery of the East Initial Countdown Notice, the sum of \$[REDACTED]; or
  - (F) if the East Subsequent Notice is delivered later than 149 days after the delivery of the East Initial Countdown Notice, the sum of \$[REDACTED].
- (h) If a West Initial Countdown Notice has been delivered to the City and DB Co subsequently determines that West Substantial Completion will not be achieved on or before the West Anticipated Substantial Completion Date established by such West Initial Countdown Notice, DB Co shall:
  - (i) forthwith issue a subsequent Notice (a "**West Subsequent Notice**") to the City establishing a revised date by which DB Co expects to achieve West Substantial Completion (the "**West Revised Substantial Completion Date**"), which West Revised Substantial Completion Date shall be no earlier than,
    - (A) the West Anticipated Substantial Completion Date established by the West Initial Countdown Notice, and
    - (B) 15 days after the delivery of such West Subsequent Notice;
  - (ii) pay to the City, as liquidated damages in respect of damages suffered and costs incurred by the City related to DB Co's failure to achieve West Substantial Completion by the West Anticipated Substantial Completion Date established as aforesaid, the following amount:
    - (A) if the West Subsequent Notice is delivered between 1 and 29 days after the delivery of the West Initial Countdown Notice, the sum of \$[REDACTED];
    - (B) if the West Subsequent Notice is delivered between 30 and 59 days after the delivery of the West Initial Countdown Notice, the sum of \$[REDACTED];

- (C) if the West Subsequent Notice is delivered between 60 and 89 days after the delivery of the West Initial Countdown Notice, the sum of \$[REDACTED];
  - (D) if the West Subsequent Notice is delivered between 90 and 119 days after the delivery of the West Initial Countdown Notice, the sum of \$[REDACTED];
  - (E) if the West Subsequent Notice is delivered between 120 and 149 days after the delivery of the West Initial Countdown Notice, the sum of \$[REDACTED]; or
  - (F) if the West Subsequent Notice is delivered later than 149 days after the delivery of the West Initial Countdown Notice, the sum of \$[REDACTED].
- (i) [Not used]
  - (j) In the event that DB Co fails to achieve East Substantial Completion by the East Anticipated Substantial Completion Date without having delivered to the City an East Subsequent Notice, or in the event that DB Co has delivered to the City an East Subsequent Notice establishing an East Revised Substantial Completion Date and DB Co fails to achieve East Substantial Completion by such East Revised Substantial Completion Date, without having delivered a further East Subsequent Notice, in either case, DB Co shall:
    - (i) forthwith issue an East Subsequent Notice to the City establishing a further revised date by which DB Co expects to achieve East Substantial Completion (the “**East Further Revised Substantial Completion Date**”), which East Further Revised Substantial Completion Date shall be no earlier than 15 days after the delivery of such East Subsequent Notice;
    - (ii) within 3 Business Days after the East Anticipated Substantial Completion Date or the East Revised Substantial Completion Date, as the case may be, pay to the City the amount of \$[REDACTED] as liquidated damages in respect of damages suffered and costs incurred by the City related to DB Co’s failure to achieve East Substantial Completion and deliver notice thereof in a timely manner;
    - (iii) if the East Subsequent Notice in subparagraph 25.5(j)(i) has not been delivered by DB Co, pay to the City the additional sum of \$[REDACTED] per calendar day for each day after the East Anticipated Substantial Completion Date or the East Revised Substantial Completion Date, as the case may be, that such East Subsequent Notice in respect of the East Further Revised Substantial Completion Date has not been delivered to the City, as liquidated damages in respect of damages suffered and costs incurred by the City related to DB Co’s failure to deliver such notice.
  - (k) In the event that DB Co fails to achieve West Substantial Completion by the West Anticipated Substantial Completion Date without having delivered to the City a West Subsequent Notice, or in the event that DB Co has delivered to the City a West Subsequent Notice establishing a West Revised Substantial Completion Date and DB Co fails to achieve West Substantial Completion by such West Revised Substantial Completion Date, without having delivered a further West Subsequent Notice, in either case, DB Co shall:

- (i) forthwith issue a West Subsequent Notice to the City establishing a further revised date by which DB Co expects to achieve West Substantial Completion (the “**West Further Revised Substantial Completion Date**”), which West Further Revised Substantial Completion Date shall be no earlier than 15 days after the delivery of such West Subsequent Notice;
  - (ii) within 3 Business Days after the West Anticipated Substantial Completion Date or the West Revised Substantial Completion Date, as the case may be, pay to the City the amount of \$[REDACTED] as liquidated damages in respect of damages suffered and costs incurred by the City related to DB Co’s failure to achieve West Substantial Completion and deliver notice thereof in a timely manner;
  - (iii) if the West Subsequent Notice in subparagraph 25.5(k)(j)(i) has not been delivered by DB Co, pay to the City the additional sum of \$[REDACTED] per calendar day for each day after the West Anticipated Substantial Completion Date or the West Revised Substantial Completion Date, as the case may be, that such West Subsequent Notice in respect of the West Further Revised Substantial Completion Date has not been delivered to the City, as liquidated damages in respect of damages suffered and costs incurred by the City related to DB Co’s failure to deliver such notice.
- (l) Notwithstanding the forgoing provisions of this Section 25.5, provided DB Co has complied with, and exercised all commercially reasonable efforts to enforce, the scheduling and completion provisions in the Nominated Signalling Subcontract, liquidated damages shall not accrue under this Section 25.5 with respect to any failure to achieve Substantial Completion by the Anticipated Substantial Completion Date or Revised Substantial Completion Date, as the case may be, that is caused solely by the failure of the Nominated Signalling Subcontractor to perform the Nominated Signalling Subcontractor Works in accordance with the Works Schedules to the extent such failure delays the Critical Path.
- (m) The Parties agree that the liquidated damages set out in this Section 25.5 are not a penalty but represent a genuine and reasonable pre-estimate of the damages that will be suffered by the City related to DB Co’s failure to comply with and observe the provisions of this Section 25.5.
- (n) DB Co acknowledges and agrees that all liquidated damages set out in this Section 25.5 shall be payable whether or not the City incurs or mitigates these damages, and that the City shall have no obligation to mitigate these damages. DB Co further agrees that it is, and shall be, estopped from alleging that any liquidated damages set out in this Section 25.5 are a penalty and not liquidated damages, or are otherwise unenforceable for any reason, including that such damages were not incurred.
- (o) Subject to Section 25.5(p), unless otherwise specified herein, liquidated damages that accrue under this Section 25.5 shall become due and payable from time to time upon the City giving Notice to DB Co. Any such Notice shall specify the amount of liquidated damages that have accrued and are payable by DB Co to the City as of the date of such Notice. If such liquidated damages are not paid by DB Co within 10 Business Days from the date of such Notice, the City may recover any such liquidated damages due by DB Co by setting off such amounts from any amounts due or owing by the City to DB Co hereunder, or by drawing down the corresponding amount from any outstanding letters of credit, as applicable, in each case as required by the City, acting in its discretion. Failure by the City to provide a Notice to DB Co under this Section

25.5(o) shall not constitute a waiver of the City's right to claim, or otherwise release DB Co from liability for, all liquidated damages under this Section 25.5 at any time.

- (p) In the event that there is a Dispute concerning Substantial Completion and such Dispute is ongoing, the City shall not be entitled to payment of related liquidated damages pursuant to this Section 25.5 unless and until such Dispute is resolved in accordance with the Dispute Resolution Procedure outlined in Schedule 27 – Dispute Resolution Procedure and, if resolved in favour of the City, the provisions respecting liquidated damages contained in this Section 25.5 shall apply with retroactive effect, except that there shall be added to the amount payable by DB Co on account of liquidated damages, interest at the rate of [REDACTED] percent per annum from the date the liquidated damages were required to be paid in the absence of the Dispute to the date of payment.

#### **25.6 Operations & Maintenance Manuals**

- (a) DB Co shall prepare and deliver to the City draft copies of all necessary operations & maintenance manuals for the New City Infrastructure and the New MTO Infrastructure in the format set out in the Output Specifications no later than 6 months prior to each of the East Substantial Completion Date and West Substantial Completion Date, as applicable.

#### **25.7 Maintenance Instructions**

- (a) No later than 30 days prior to each Substantial Completion Date, DB Co shall prepare and deliver to the City maintenance data in the format set out in the Output Specifications which is compatible with the City's computerized maintenance management system (CMMS). The maintenance data shall detail all required planned activities for the applicable portion of the Works prescribed by the applicable operation and maintenance manuals and Good Industry Practice, including:
- (i) structural inspection procedures, identifying all components of the Works to be inspected on a regular basis and the recommended frequency of such inspections; and
  - (ii) preventative maintenance activities.
- (b) The provided maintenance data shall be subject to the review and approval of the City, acting reasonably. Following the City's approval of such maintenance data, the City shall upload it into the CMMS.

#### **25.8 [Intentionally Deleted]**

#### **25.9 [Intentionally Deleted]**

#### **25.10 Minor Deficiencies**

- (a) In the event that any Minor Deficiencies exist when DB Co gives an East Substantial Completion Notice, the Independent Certifier, in consultation with DB Co and the City, shall prepare a list of all Minor Deficiencies (the “**East Minor Deficiencies List**”) in respect of the East Works (such Minor Deficiencies, the “**East Minor Deficiencies**”) identified at that time and an estimate of the cost for the City and the time for DB Co, to complete and rectify such East Minor Deficiencies. The City may withhold from the East Substantial Completion Payment a holdback amount that is

- [REDACTED]% of the amount estimated by the Independent Certifier for the City, to complete and rectify all such East Minor Deficiencies identified on the East Minor Deficiencies List (the “**East Completion Holdback**”), which holdback shall be held in an interest bearing account.
- (b) In the event that any Minor Deficiencies exist when DB Co gives a West Substantial Completion Notice, the Independent Certifier, in consultation with DB Co and the City, shall prepare a list of all Minor Deficiencies (the “**West Minor Deficiencies List**”) in respect of the West Works (such Minor Deficiencies, the “**West Minor Deficiencies**”) identified at that time and an estimate of the cost for the City and the time for DB Co, to complete and rectify such West Minor Deficiencies. The City may withhold from the West Substantial Completion Payment a holdback amount that is [REDACTED]% of the amount estimated by the Independent Certifier for the City, to complete and rectify all such West Minor Deficiencies identified on the West Minor Deficiencies List (the “**West Completion Holdback**”), which holdback shall be held in an interest bearing account.
- (c) [Not used]
- (d) Each Minor Deficiencies List will contain the schedule for the completion and rectification of the relevant Minor Deficiencies. In determining the relevant time for rectifying such Minor Deficiencies, DB Co shall schedule the completion and rectification of Minor Deficiencies so as to,
- (i) comply with the Traffic and Transit Management Plan, the Construction Access Management Plan and all rules, requirements and restrictions relating to access, rail safety and operations and track protection, and road safety and operations, as set out in Schedule 15 – Output Specifications; and
- (ii) minimize, to the greatest extent reasonably possible,
- (A) any disruption of the Works or restrictions or other impairment of the public’s use and enjoyment of the New City Infrastructure, the New MTO Infrastructure, the Existing Infrastructure, the Stage 1 Connection Infrastructure, or any portion thereof; and
- (B) any disruption of the operations of the City, any City Party, any Governmental Authority, any Other Contractor, RTG and RTG Parties, including the performance of the Governmental Activities, the Other Works, and RTG Works.
- (e) The Independent Certifier must prepare the East Minor Deficiencies List in relation to the East Substantial Completion Notice as soon as reasonably practicable, and, in any event, before the East Substantial Completion Certificate is issued, but shall not withhold the East Substantial Completion Certificate by reason solely that there are East Minor Deficiencies.
- (f) The Independent Certifier must prepare the West Minor Deficiencies List in relation to the West Substantial Completion Notice as soon as reasonably practicable, and, in any event, before the West Substantial Completion Certificate is issued, but shall not withhold the West Substantial Completion Certificate by reason solely that there are West Minor Deficiencies.
- (g) [Not used]

- (h) No later than 20 Business Days prior to the Anticipated Final Completion Date, the City may direct the Independent Certifier to amend, in consultation with DB Co and the City, a Minor Deficiencies List to include a list of any and all Minor Deficiencies that were identified after the preparation of, or not included in, a Minor Deficiencies List pursuant to Section 25.10(a) to 25.10(b). The Independent Certifier shall prepare the amended Minor Deficiencies List as soon as reasonably practicable and, in any event, within 10 Business Days after such direction given by the City. The amended Minor Deficiencies List shall, following its preparation, be deemed to be the Minor Deficiencies List for the purposes of this Project Agreement, including, without limitation, for the purposes of Sections 25.10 to 25.11 inclusive. For clarity, the amount of the East Completion Holdback or West Completion Holdback, as the case may be, shall not be affected by an amended Minor Deficiencies List.
- (i) Where the Independent Certifier has been directed by the City to amend a Minor Deficiencies List pursuant to Section 25.10(e) to 25.10(f), the Independent Certifier shall specify a commercially reasonable completion and rectification time for any newly added Minor Deficiencies.
- (j) The City may, in its sole discretion, waive any requirement for East Substantial Completion or West Substantial Completion, as the case may be, and the failure to meet any such requirement shall constitute a Minor Deficiency.
- (k) As an alternative to and in substitution for the withholding permitted by each of Sections 25.10(a) and 25.10(b), DB Co may, on or prior to the date on which each relevant Substantial Completion Payment is to be made to DB Co, provide a bond or letter of credit in favour of the City in an amount equal to the relevant Completion Holdback, in a form and from a surety or bank, as applicable, acceptable to the City, which letter of credit will be returned by the City to DB Co on the date that the relevant Completion Holdback would otherwise have been finally released to DB Co by the City. The City shall be entitled to draw against such letters of credit any such amounts as would otherwise be deducted from the applicable Completion Holdback in accordance with Section 25.12(a).
- (l) The Independent Certifier, in consultation with DB Co and the City, shall prepare a list of all Minor Deficiencies Nominated Signalling Subcontractor Works and an estimate of the cost for the City and the time for DB Co, to complete and rectify such Minor Deficiencies Nominated Signalling Subcontractor Works and such Minor Deficiencies Nominated Signalling Subcontractor Works shall be managed in accordance with the Nominated Signalling Subcontract.

#### **25.11 Completion and Rectification of Minor Deficiencies**

- (a) DB Co shall, in consultation with the City Representative and so as to,
  - (i) comply with the Traffic and Transit Management Plan, the Construction Access Management Plan and all rules, requirements and restrictions relating to access, rail safety and operations and track protection, and road safety and operations, as set out in Schedule 15 – Output Specifications; and
  - (ii) minimize, to the greatest extent reasonably possible,

- (A) any disruption of the Works or restrictions or other impairment of the public's use and enjoyment of the New City Infrastructure, the New MTO Infrastructure, or any portion thereof; and
- (B) any disruption of the operations of the City, any City Party, any Governmental Authority, any Other Contractor, RTG and RTG Parties, including the performance of the Governmental Activities, the Other Works, and RTG Works,

complete and rectify all Minor Deficiencies:

- (iii) within 120 days after the issuance of a Minor Deficiencies List pursuant to Section 25.10 for all Minor Deficiencies where no time for completion and rectification has been specified by the Independent Certifier; or
  - (iv) within the time for completion and rectification of a Minor Deficiency where such a time was specified by the Independent Certifier in the Minor Deficiencies List.
- (b) DB Co acknowledges and agrees that the completion and rectification of Minor Deficiencies may require work outside of normal working hours in order to accommodate the efficient operation of the New City Infrastructure, the New MTO Infrastructure, the Existing Infrastructure, the Stage 1 Connection Infrastructure, or any portion thereof and to ensure compliance with the Construction Access Management Plan, the Traffic and Transit Management Plan and all rules, requirements and restrictions relating to access, rail safety and operations and track protection, and road safety and operations, as set out in Schedule 15 – Output Specifications.
- (c) Upon completion and rectification of East Minor Deficiencies, as confirmed by the Independent Certifier in consultation with the City and DB Co for each calendar month after East Substantial Completion (including the month in which East Substantial Completion is achieved) until completion of all East Minor Deficiencies, the City shall release the amount of the East Completion Holdback related to such completed and rectified East Minor Deficiencies during such calendar month, within 5 Business Days of the conclusion of such calendar month. Notwithstanding the forgoing, payment of the final remaining amount of the East Completion Holdback shall be governed by Section 25.11(d).
- (d) After the completion and rectification of all East Minor Deficiencies, as confirmed by the Independent Certifier in consultation with the City and DB Co:
- (i) DB Co shall submit to the City the following documentation,
    - (A) DB Co's written request for the release of the remaining amount of East Completion Holdback, including a declaration that no written notice of lien arising in relation to the performance of the East Works has been received by it that has not been withdrawn by the lien claimant, or otherwise duly released, discharged or vacated in accordance with the CA;
    - (B) DB Co's Statutory Declaration CCDC 9A(2001); and
    - (C) DB Co's WSIB Certificate of Clearance; and

- (ii) Within two Business Days of DB Co submitting such documentation, the City shall release to DB Co the remaining amount of the East Completion Holdback (less any amounts deducted in accordance with Section 25.12(a), together with all interest accrued thereon and applicable HST). Where the City exercises its rights pursuant to 25.12(a), if the cost of such completion and rectification exceeds the amount of the East Completion Holdback and interest, then DB Co shall reimburse the City for all such excess cost.
- (e) Upon completion and rectification of West Minor Deficiencies, as confirmed by the Independent Certifier in consultation with the City and DB Co for each calendar month after West Substantial Completion (including the month in which West Substantial Completion is achieved) until completion of all West Minor Deficiencies, the City shall release the amount of the West Completion Holdback related to such completed and rectified West Minor Deficiencies during such calendar month, within 5 Business Days of the conclusion of such calendar month. Notwithstanding the forgoing, payment of the final remaining amount of the West Completion Holdback shall be governed by Section 25.11(f).
- (f) After the completion and rectification of all West Minor Deficiencies, as confirmed by the Independent Certifier in consultation with the City and DB Co:
  - (i) DB Co shall submit to the City the following documentation,
    - (A) DB Co's written request for the release of the remaining amount of West Completion Holdback, including a declaration that no written notice of lien arising in relation to the performance of the West Works has been received by it that has not been withdrawn by the lien claimant or otherwise duly released, discharged or vacated in accordance with the CA;
    - (B) DB Co's Statutory Declaration CCDC 9A(2001); and
    - (C) DB Co's WSIB Certificate of Clearance; and
  - (ii) Within two Business Days of DB Co submitting such documentation, the City shall release to DB Co the remaining amount of the West Completion Holdback (less any amounts deducted in accordance with Section 25.12(a), together with all interest accrued thereon and applicable HST). Where the City exercises its rights pursuant to 25.12(a), if the cost of such completion and rectification exceeds the amount of the West Completion Holdback and interest, then DB Co shall reimburse the City for all such excess cost.
- (g) [Not used]
- (h) [Not used]

**25.12 Failure to Rectify Minor Deficiencies**

- (a) If DB Co fails to complete and rectify any Minor Deficiency within the time for its completion and rectification specified in Section 25.11, the City may engage others to perform the work necessary to complete and rectify such Minor Deficiency at the risk and cost of DB Co, and the City may deduct such cost,

- (i) in respect of an East Minor Deficiency, from the East Completion Holdback and interest accrued thereon; and
- (ii) in respect of a West Minor Deficiency, from the West Completion Holdback and interest accrued thereon.

#### 25.12A Remaining Works Minor Deficiencies

- (a) DB Co shall request the Independent Certifier to prepare a list of all Remaining Works Minor Deficiencies (the “**Remaining Works Minor Deficiencies List**”) by delivery of a written request (the “**Remaining Works Minor Deficiency Inspection Request**”) to the Independent Certifier. The Remaining Works Minor Deficiency Inspection Request shall be delivered not less than 60 days prior to the West Anticipated Final Completion Date. The Independent Certifier, in consultation with DB Co and the City, shall, within 10 Business Days of DB Co’s delivery of the Remaining Works Minor Deficiency Inspection Request prepare the Remaining Works Minor Deficiencies List which shall include an estimate of the time for completing and rectifying all Remaining Works Minor Deficiencies.
- (b) The Remaining Works Minor Deficiencies List will contain the schedule for the completion and rectification of all relevant Remaining Works Minor Deficiencies. In determining the relevant time for rectifying Minor Deficiencies, DB Co shall schedule the completion and rectification of any Remaining Works Minor Deficiencies so as to:
  - (i) comply with the Traffic and Transit Management Plan, the Construction Access Management Plan and all rules, requirements and restrictions relating to access, rail safety and operations and track protection, and road safety and operations, as set out in Schedule 15 – Output Specifications; and
  - (ii) minimize, to the greatest extent reasonably possible,
    - (A) any disruption of the applicable Works or restrictions or other impairment of the public’s use and enjoyment of the New City Infrastructure, the New MTO Infrastructure, the Existing Infrastructure, or any portion thereof; and
    - (B) any disruption of the operations of the City, any City Party, any Governmental Authority, any Other Contractor, RTG and RTG Parties, including the performance of the Governmental Activities, the Other Works, and RTG Works.

#### 25.12B Rectification of Remaining Works Minor Deficiencies

- (a) DB Co shall, in consultation with the City Representative and so as to,
  - (i) comply with the Traffic and Transit Management Plan, the Construction Access Management Plan and all rules, requirements and restrictions relating to access, rail safety and operations and track protection, and road safety and operations, as set out in Schedule 15 – Output Specifications; and
  - (ii) minimize, to the greatest extent reasonably possible,

- (A) any disruption of the Works or restrictions or other impairment of the public's use and enjoyment of the New City Infrastructure, the New MTO Infrastructure, or any portion thereof; and
- (B) any disruption of the operations of the City, any City Party, any Governmental Authority, any Other Contractor, RTG and RTG Parties, including the performance of the Governmental Activities, the Other Works, and RTG Works,

complete and rectify all Remaining Works Minor Deficiencies within 60 days after the issuance of a Remaining Works Minor Deficiencies List or such other period as the Independent Certifier may specify in such Remaining Works Minor Deficiencies List, and in any event by no later than the West Scheduled Final Completion Date.

- (b) DB Co acknowledges and agrees that the completion and rectification of any Remaining Works Minor Deficiencies may require work outside of normal working hours in order to accommodate the efficient operation of the New City Infrastructure, the New MTO Infrastructure, the Existing Infrastructure or any portion thereof and to ensure compliance with the Construction Access Management Plan, the Traffic and Transit Management Plan and all rules, requirements and restrictions relating to access, rail safety and operations and track protection, and road safety and operations, as set out in Schedule 15 – Output Specifications.

#### 25.13 Final Completion Countdown Notice

- (a) DB Co shall deliver a Notice (each, a “**Final Completion Countdown Notice**”), to the City and the Independent Certifier specifying the:
  - (i) East Anticipated Final Completion Date (the “**East Final Completion Countdown Notice**”); and
  - (ii) West Anticipated Final Completion Date (the “**West Final Completion Countdown Notice**”).
- (b) Each Final Completion Countdown Notice shall be delivered not less than 60 days prior to the relevant Anticipated Final Completion Date pursuant to Section 25.13(a) above. For clarity, if DB Co fails to deliver the,
  - (i) East Final Completion Countdown Notice not less than 60 days prior to the East Scheduled Final Completion Date, the East Anticipated Final Completion Date shall be deemed to be the same date as the East Scheduled Final Completion Date; and
  - (ii) West Final Completion Countdown Notice not less than 60 days prior to the West Scheduled Final Completion Date, the West Anticipated Final Completion Date shall be deemed to be the same date as the West Scheduled Final Completion Date.

#### 25.14 Final Completion Certificate

- (a) DB Co shall give the Independent Certifier and the City Representative at least 10 Business Days' Notice prior to the date upon which DB Co anticipates delivering a Final Completion Notice.

- (b) DB Co shall give the Independent Certifier and the City Representative Notice (the “**East Final Completion Notice**”) upon the satisfaction of all requirements for East Final Completion, which East Final Completion Notice shall describe, in reasonable detail, the satisfaction of the requirements for East Final Completion, including the completion and rectification of all Minor Deficiencies, together with DB Co’s opinion as to whether the conditions for issuance of the East Final Completion Certificate have been satisfied.
- (c) DB Co shall give the Independent Certifier and the City Representative Notice (the “**West Final Completion Notice**”) upon the satisfaction of all requirements for West Final Completion, which West Final Completion Notice shall describe, in reasonable detail, the satisfaction of the requirements for West Final Completion, including the completion and rectification of all Minor Deficiencies, together with DB Co’s opinion as to whether the conditions for issuance of the West Final Completion Certificate have been satisfied.
- (d) [Not used]
- (e) Each Final Completion Notice shall also include the following documentation:
  - (i) a declaration that no written notice of lien arising in relation to the performance of the applicable Works has been received by it that has not been withdrawn by the lien claimant or otherwise duly released, discharged or vacated in accordance with the CA;
  - (ii) DB Co’s Statutory Declaration CCDC 9A (2001);
  - (iii) DB Co’s WSIB Certificate of Clearance;
  - (iv) a written statement that the applicable Works have been performed to the requirements of the Ancillary Documents, itemizing approved changes in such Works, the Independent Certifier’s written instructions, and modifications required by Governmental Authorities; and
  - (v) a written description of the correction of Minor Deficiencies and, for the West Final Completion Notice, Remaining Works Minor Deficiencies, that are seasonal in nature and cannot be completed prior to the applicable Final Completion Date, if any, and the time for completion of such work as agreed between the City and DB Co, each acting reasonably.
- (f) The City shall, within five Business Days after receipt of a Final Completion Notice, provide the Independent Certifier and DB Co with the City’s opinion as to whether the conditions for issuance of a Final Completion Certificate have been satisfied and, if applicable, any reasons as to why they consider that the Final Completion Certificate should not be issued.
- (g) Within five Business Days after DB Co’s receipt of the City’s opinion pursuant to Section 25.14(f), the Parties shall cause the Independent Certifier to determine whether the conditions for issuance of a Final Completion Certificate have been satisfied, having regard for the opinions of both DB Co and the City, and to issue to the City and to DB Co either:
  - (i) such Final Completion Certificate confirming the date of issue as a Final Completion Date; or

- (ii) a report detailing the matters that the Independent Certifier considers are required to be performed by DB Co to satisfy the conditions for issuance of a Final Completion Certificate, including any items on the Minor Deficiencies List and, in respect of West Final Completion, items on the Remaining Works Minor Deficiencies List, which remain outstanding.
- (h) Where the Independent Certifier has issued a report in accordance with Section 25.14(g)(ii) and DB Co has not referred a Dispute in relation thereto for resolution in accordance with Schedule 27 – Dispute Resolution Procedure, DB Co shall, within five Business Days after receipt of such report, provide the Independent Certifier and the City Representative with:
  - (i) a detailed list indicating the rectification actions proposed for all matters raised in such report;
  - (ii) the schedule for completion of all such rectification actions; and
  - (iii) any additional DB Co Commissioning that needs to be undertaken as a result of the rectification actions,

and DB Co shall perform all such additional rectification actions and DB Co Commissioning in a timely manner. Upon completion thereof, DB Co may give a further Final Completion Notice and Sections 25.14(f) to 25.14(h), inclusive, shall be repeated until a Final Completion Certificate has been issued.

- (i) Any Dispute in relation to the Independent Certifier's decision to issue or not to issue a Final Completion Certificate may be referred for resolution in accordance with Schedule 27 – Dispute Resolution Procedure.

#### **25.15 Effect of Certificates/Use**

- (a) The issue of a Substantial Completion Certificate or Final Completion Certificate, the commencement of use by the City or the public of any part of the New City Infrastructure or New MTO Infrastructure under the terms of this Project Agreement or the commencement of any Governmental Activities, shall, in no way:
  - (i) limit the obligations of DB Co under this Project Agreement including in respect of any defects, deficiencies or items of outstanding work existing or discovered prior to or after the date of any of such certificates or the date of the Minor Deficiencies List or of the amended Minor Deficiencies List described in Section 25.10(e) to 25.10(h); or
  - (ii) be construed as an approval by the City of the Works or the way in which they have been carried out.

#### **25.16 Inspection, Commissioning and Handover of New MTO Infrastructure**

- (a) DB Co acknowledges and agrees that New MTO Infrastructure will be inspected, commissioned and handed over to the MTO on a component by component basis and from time to time during the Construction Period.

- (b) For the purposes of this Section 25.16, the City may delegate the responsibility for carrying out interim inspections, final inspections, warranty inspections, and commissioning and Handover activities, on behalf of the City, to MTO, in respect of the New MTO Infrastructure by providing Notice to DB Co of any such delegation (any such notice referred to as a “**Notice of Delegation**”), and the City may, in its sole discretion, and at any time revise such delegation by Notice to DB Co. For clarity, the City may delegate the foregoing responsibility in respect of all or any component of any New MTO Infrastructure. DB Co acknowledges and agrees that, for the purposes of this Section 25.16, DB Co shall Handover all New MTO Infrastructure directly to the City unless the City has delivered to DB Co a Notice of Delegation in respect of New MTO Infrastructure, in which case, DB Co shall Handover such New MTO Infrastructure directly to MTO.
- (c) No later than 5 days prior to the anticipated completion of New MTO Infrastructure, DB Co shall provide Notice to the City or, where a Notice of Delegation has been provided to DB Co, DB Co shall provide Notice to MTO, of the date on which the New MTO Infrastructure will be completed and ready for inspection and testing. DB Co and the City, or DB Co and MTO (where a Notice of Delegation has been provided) shall carry out a joint inspection of such New MTO Infrastructure. Such joint inspection shall occur no later than 90 days after the date of completion of the New MTO Infrastructure. The inspection and testing of New MTO Infrastructure pursuant to this Section 25.16(c) shall follow the inspection and testing requirements set out in the Inspection and Test Plan. Such inspection, shall be for the purposes of:
- (i) assessing whether the New MTO Infrastructure has been constructed in accordance with the Output Specifications and is otherwise in compliance with the requirements in the Project Agreement; and
  - (ii) identifying any defects or deficiencies to the New MTO Infrastructure that DB Co must correct, repair or restore before DB Co completes the commissioning of the New MTO Infrastructure before the Handover of the New MTO Infrastructure.
- (d) Prior to final inspection of New MTO Infrastructure, DB Co shall:
- (i) prepare a record of the following, and submit it to the City for review in accordance with Schedule 10 – Review Procedure at least 30 Business Days before the final inspection:
    - (A) a list of the New MTO Infrastructure to be inspected;
    - (B) the tests, inspection methods and procedures to be used and performed and the standards that apply in respect of tests, inspection methods and procedures, which test and inspection shall follow the inspection and testing requirements set out in the Inspection and Test Plan;
    - (C) the scheduled date for testing and inspection of the applicable New MTO Infrastructure;
    - (D) a list of the names and employers of persons to represent DB Co and the City or, if a Notice of Delegation has been issued in respect of the relevant New MTO Infrastructure, a list of the names and employers of persons to represent DB Co and MTO, as the case may be, at the inspection; and

- (E) a list of existing systems that may be impacted by the tests and inspection.
- (ii) Ensure that:
  - (A) all defects and deficiencies that have been identified by the City or MTO, as applicable, during any interim inspections, have been rectified; and
  - (B) any damage to New MTO Infrastructure is repaired by DB Co in accordance with this Project Agreement.
- (e) DB Co shall prepare a record of each inspection carried out pursuant to Section 25.16(c) in inspection report format including: (i) a list of defects or deficiencies to New MTO Infrastructure identified during the inspection; and (ii) actions to be taken by DB Co to correct each defect or deficiency and to rectify the damage. DB Co shall submit the inspection reports to the City within three Business Days of each inspection for review in accordance with Schedule 10 – Review Procedure.
- (f) After the inspection of the New MTO Infrastructure pursuant to Section 25.16(c), DB Co shall make all arrangements in respect of the applicable New MTO Infrastructure to:
  - (i) correct all defects and deficiencies to the applicable New MTO Infrastructure and repair any damage to the applicable New MTO Infrastructure;
  - (ii) complete commissioning of the applicable New MTO Infrastructure in accordance with Schedule 14 – Testing & Commissioning;
  - (iii) comply with all requirements in respect of New MTO Infrastructure (set out in Schedule 14 – Testing & Commissioning) prior to, and as a pre-condition of Handover of New MTO Infrastructure;
  - (iv) complete Handover of the New MTO Infrastructure to the City or, where the City has delivered to DB Co a Notice of Delegation in respect of New MTO Infrastructure, complete Handover to MTO; and
  - (v) seek, receive, and document confirmation from the City or, where the City has delivered to DB Co a Notice of Delegation in respect of the applicable New MTO Infrastructure, seek, receive, and document confirmation from MTO, that such commissioning and Handover has been completed.
- (g) DB Co shall provide Notice to the City when any New MTO Infrastructure has been commissioned and has achieved Handover to the MTO. Such Notice to the City shall include the following:
  - (i) a clear identification of that portion or component of the New MTO Infrastructure that is the subject of the Notice;
  - (ii) the date of Handover of the applicable New MTO Infrastructure (as set out in the written confirmation required by Section 25.16(g)(iii)); and

- (iii) a written confirmation, signed by an authorized representative of the MTO that commissioning and Handover of the New MTO Infrastructure has been completed, including the confirmed date of Handover.
- (h) MTO and the City may, at any time and from time to time prior to West Final Completion, on providing 30 Business Days' Notice to DB Co, require a joint interim inspection of the New MTO Infrastructure to be carried out for the purposes of:
  - (i) assessing whether the New MTO Infrastructure has been constructed in accordance with the Output Specifications and is otherwise in compliance with the requirements of the Project Agreement; and
  - (ii) identifying any defects or deficiencies to the applicable New MTO Infrastructure.
- (i) Prior to any interim inspection of New MTO Infrastructure, DB Co shall prepare and submit to the City, a record of the following at least 20 Business Days before the applicable interim inspection, as the case may be:
  - (i) a list of the New MTO Infrastructure to be inspected;
  - (ii) the tests, inspection methods and procedures to be used and performed and the standards that apply in respect of tests, inspection methods and procedures, which tests and inspections shall follow the inspection and testing requirements set out in the Inspection and Test Plan;
  - (iii) the date for testing and inspection of the applicable New MTO Infrastructure which shall be no later than 45 Business Days after the Notice has been provided to DB Co pursuant to Section 25.16(h).
  - (iv) a list of the names and employers of persons to represent DB Co and the City or, if a Notice of Delegation has been issued in respect of the relevant New MTO Infrastructure, a list of the names and employers of persons to represent DB Co and MTO, at the inspection; and
  - (v) a list of existing systems that may be impacted by the tests and inspection.
- (j) DB Co shall prepare a record of each interim inspection carried out pursuant to Section 25.16(h) in inspection report format including: (i) a list of defects or deficiencies to the New MTO Infrastructure identified during the inspection, and (ii) actions to be taken by DB Co to correct each defect or deficiency and to rectify the damage. DB Co shall submit the inspection reports to the City for review within 3 Business Days of the inspection for review in accordance with Schedule 10 – Review Procedure.
- (k) DB Co shall arrange, schedule, and facilitate all inspections, and commissioning and Handover activities, in respect of the New MTO Infrastructure directly with the City, except where the City has provided Notice of Delegation to DB Co in respect of any of the New MTO Infrastructure, in which case the City and DB Co shall arrange, schedule, and facilitate all inspections, and commissioning and Handover activities with MTO. DB Co acknowledges and agrees that no joint inspection shall proceed unless, where a Notice of Delegation has been provided, the MTO is in attendance at such inspection, and DB Co shall, with such reasonable assistance from the

City as may be requested by DB Co, coordinate with and ensure MTO is in attendance at all joint inspections contemplated under this Section 25.16. DB Co shall report to the City on the status of all inspections, commissioning and Handover carried out in accordance with this Section 25.16 as part of the Works Report.

## **26. HUMAN RESOURCES**

### **26.1 Admittance of Personnel**

- (a) The City shall have the right to order the removal from the Lands, the New City Infrastructure or the New MTO Infrastructure of any person employed by (or acting on behalf of) DB Co, or any DB Co Party, whose presence, in the reasonable opinion of the City is likely to have an adverse effect on the Other Works or the Governmental Activities or who, in the reasonable opinion of the City is not a fit and proper person to be on the Lands, the New City Infrastructure or the New MTO Infrastructure for any reason, including a failure to comply with any the City policy or any immediate obligation of the City to ensure the safety and well-being of persons on the Lands, the New City Infrastructure and the New MTO Infrastructure.
- (b) Any action taken under this Section 26.1 shall promptly be confirmed by the City to DB Co and, for greater certainty, shall not relieve DB Co of any of its obligations under this Project Agreement.
- (c) Any decision of the City made pursuant to this Section 26.1 shall be final and conclusive.

### **26.2 Staff Competency**

- (a) DB Co shall ensure that:
  - (i) there shall at all times be a sufficient number of persons employed or engaged by DB Co or any DB Co Party (including all relevant grades of supervisory staff) engaged in the performance of the Works with the requisite level of skill and experience to perform the Works in accordance with this Project Agreement. For greater certainty, this obligation shall include ensuring that there are a sufficient number of such skilled and experienced persons employed or engaged by DB Co or any DB Co Party to complete the Works in accordance with the Works Schedule;
  - (ii) all persons employed or engaged by DB Co or any DB Co Party (including all relevant grades of supervisory staff) engaged in the performance of the Works receive such training and supervision as is necessary to ensure the proper performance of this Project Agreement and compliance with all health and safety rules, procedures and requirements, Authority Requirements and the City HR Policy; and
  - (iii) it creates and maintains, and causes all DB Co Parties to create and maintain, a process which allows it to assess, monitor and correct, on an ongoing basis, the competency of persons employed or engaged by DB Co or any DB Co Party (including all relevant grades of supervisory staff) engaged in the performance of the Works to ensure the proper performance of this Project Agreement.

### 26.3 Notification of Convictions

- (a) DB Co (to the extent permitted by Applicable Law) shall, and shall cause such DB Co Party to, ensure that all potential employees (including, for greater certainty, permanent, temporary, full time and part time employees) and persons who may otherwise perform the Works:
  - (i) are questioned concerning Relevant Convictions; and
  - (ii) are required to complete and deliver to DB Co a criminal records search form.
- (b) To the extent permitted by Applicable Law, DB Co shall, and shall cause each DB Co 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 DB Co or a DB Co Party is aware or ought to be aware, is allowed access to the Lands, the New City Infrastructure or the New MTO Infrastructure to perform any Works, without the prior written consent of the City, in its sole discretion.
- (c) To the extent permitted by Applicable Law, DB Co shall ensure that the City is notified as soon as possible, and kept advised at all times of, any person employed or engaged by DB Co or any DB Co 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 DB Co or a DB Co Party becomes aware or whose previous Relevant Convictions become known to DB Co or a DB Co Party). DB Co shall use commercially reasonable efforts to obtain, or to cause all DB Co Parties to obtain, all consents as may be required by Applicable Law or otherwise authorizing the disclosure of such information to the City as contemplated in this Section 26.3.

### 26.4 Disciplinary Action

- (a) The City, acting reasonably, may notify DB Co of any DB Co or DB Co Party employee who engages in misconduct or is incompetent or negligent in the performance of duties or whose presence or conduct on the Lands or at work is otherwise considered by the City to be undesirable, to constitute a threat to the health and/or safety of any of the users of the Lands and/or System Users or which the City considers may potentially compromise (i) the City's reputation or integrity, or (ii) the nature of the public transit system in the City of Ottawa or the Province of Ontario so as to affect public confidence in the public transit system in one or more of the City of Ottawa, the Province of Ontario or the Project. Upon investigation, DB Co may institute, or cause the relevant DB Co Party to institute, disciplinary proceedings, which shall be in accordance with the requirements of Applicable Law, and shall advise the City in writing of the outcome of any disciplinary action taken in respect of such person.

### 26.5 Human Resources Policies

- (a) DB Co shall ensure that there are set up and maintained by it and by all DB Co Parties, human resources policies and procedures covering all relevant matters relating to the Works (including, for example, health and safety). DB Co shall ensure that the terms and the implementation of such policies and procedures comply with Applicable Law, Authority Requirements, and Good Industry Practice and that they are published in written form and that copies of them (and any revisions and amendments to them) are directly issued to the City and all DB Co Parties.

## **26.6 Management Organizations**

- (a) DB Co shall provide, and shall ensure that all DB Co Parties provide, to the City, as required to keep such information current, the names of the management teams responsible for the provision of the Works.

## **26.7 Governmental Authority**

- (a) DB Co shall ensure that it and all DB Co Parties comply at all times with any regulations, policies or directions set by any Governmental Authority related to labour, employment and/or human resources.

## **27. THE CITY'S REMEDIAL RIGHTS**

### **27.1 Exercise of Remedial Rights**

- (a) The City may exercise all rights set out in this Section 27 at any time and from time to time if:
  - (i) the City, acting reasonably, considers that a breach by DB Co of any obligation under this Project Agreement, or any act or omission on the part of DB Co or any DB Co Party:
    - (A) does or can reasonably be expected to create a serious threat to the health, safety or security of any person, including any System Users or City Party; or
    - (B) does or can reasonably be expected to materially prejudice the performance of any Governmental Activities;
    - (C) may potentially compromise the City's reputation or integrity, or the nature of the public transit system in the City of Ottawa or the Province of Ontario, so as to affect public confidence in that system or the Project,

provided that:

- (D) in respect of a breach by DB Co of any obligation under this Project Agreement or any act or omission on the part of DB Co or any DB Co Party which can reasonably be expected to cause any of the consequences set out in Sections 27.1(a)(i)(A) and 27.1(a)(i)(B), the City shall not exercise its rights under this Section 27 unless DB Co has failed to cure the relevant breach, act or omission within 5 Business Days after Notice from the City or, if such breach, act or omission cannot reasonably be cured within such 5 Business Day period, DB Co thereafter fails to diligently and continuously pursue such cure and to cure such breach, act or omission within a reasonable period thereafter, provided that DB Co shall not be entitled to a cure period if any of the consequences set out in Sections 27.1(a)(i)(A) and 27.1(a)(i)(B) actually occur; and
- (E) in respect of Section 27.1(a)(i)(C), the City shall not exercise its rights under this Section 27 unless DB Co has failed to cure the relevant breach, act or omission within 5 Business Days after Notice from the City or, if such

breach, act or omission cannot reasonably be cured within such 5 Business Day period, DB Co thereafter fails to diligently and continuously pursue such cure and to cure such breach, act or omission within a reasonable period thereafter;

- (ii) DB Co has not caused the COR-Qualified Construction DB Co Party or the COR-Certified Construction DB Co Party, as the case may be, to perform its obligations with respect to its COR Certification or OHSAS 18001 Accreditation, as the case may be, in accordance with Section 11.25, or DB Co has not caused the COR-Qualified Construction DB Co Party or the COR-Certified Construction DB Co Party, as the case may be, to perform its obligations with respect to H&S Construction Inspections in accordance with Section 15.2, or to perform its obligations to rectify any non-compliance noted in any H&S Construction Inspection Report in accordance with Section 15.2(c);
- (iii) DB Co has not performed or is not performing its obligations in respect of the Demolition Requirements in accordance with Section 11.26 or DB Co has not performed or is not performing its obligations to rectify any Demolition Default Event in accordance with Section 11.26;
- (iv) DB Co has failed to comply with any written direction issued by or on behalf of the City in accordance with this Project Agreement.

## **27.2 Emergency**

- (a) Notwithstanding that DB Co is not in breach of its obligations under this Project Agreement, the City may exercise all of the rights set out in this Section 27 at any time and from time to time if the City, acting reasonably, considers the circumstances to constitute an Emergency.

## **27.3 Rectification**

- (a) Without prejudice to the City's rights under Section 36 and any other rights under this Project Agreement, in any of the circumstances set out in Sections 27.1 or 27.2, the City may, by written Notice, require DB Co to take such steps as the City, acting reasonably, considers necessary or expedient to mitigate, rectify or protect against such circumstance, including, if applicable, the termination and replacement of Subcontractors or a limited suspension of the performance of the Works, and DB Co shall use commercially reasonable efforts to comply with the City's requirements as soon as reasonably practicable.
- (b) If the City gives Notice to DB Co pursuant to Section 27.3(a) and either:
  - (i) DB Co does not either confirm, within 5 Business Days after such Notice or such shorter period as is appropriate in the case of an Emergency that it is willing to take the steps required in such Notice or present an alternative plan to the City to mitigate, rectify and protect against such circumstances that the City may accept or reject acting reasonably; or
  - (ii) DB Co fails to take the steps required in such Notice or accepted alternative plan within such time as set out in such Notice or accepted alternative plan or within such longer time as the City, acting reasonably, shall think fit,

then the City may take such steps as it considers to be appropriate, acting reasonably, requiring the termination and replacement of Subcontractors, either themselves or by engaging others (including a third party) to take any such steps.

- (c) Notwithstanding the foregoing provisions of this Section 27.3, in the event of an Emergency, the Notice under Section 27.3(a) shall be given as promptly as possible having regard to the nature of the Emergency and the City may, prior to DB Co's confirmation under Section 27.3(b)(i), take such steps as are appropriate having regard to the nature of the Emergency.

#### **27.4 Costs and Expenses**

- (a) Subject to the City's obligations pursuant to Sections 27.5 and 27.6:
  - (i) DB Co shall bear all costs and expenses incurred by DB Co in relation to the exercise of the City's rights pursuant to this Section 27; and
  - (ii) DB Co shall reimburse the City for all reasonable costs and expenses incurred by the City in relation to the exercise of the City's rights pursuant to this Section 27, including in relation to the City taking such steps, either itself or by engaging others (including a third party) to take any such steps as the City considers appropriate and as are in accordance with this Section 27.

#### **27.5 Reimbursement Events**

- (a) In this Section 27.5, a "**Reimbursement Event**" means:
  - (i) an act or omission of DB Co or any DB Co Party or a breach by DB Co or any DB Co Party of any obligation under this Project Agreement, but only to the extent such act, omission or breach is caused by the City or a the City Party; or
  - (ii) an Emergency that is not caused or contributed to by an act or omission of DB Co or any DB Co Party or a breach by DB Co or any DB Co Party of any obligation under this Project Agreement.
- (b) If the City either takes steps itself or requires DB Co to take steps in accordance with this Section 27 as a result of a Reimbursement Event:
  - (i) the City shall reimburse DB Co for the reasonable costs and expenses incurred by DB Co in relation to the exercise of the City's rights pursuant to this Section 27 that would not otherwise have been incurred by DB Co in the proper performance of its obligations under this Project Agreement; and
  - (ii) the City shall bear all costs and expenses incurred by the City in relation to the exercise of the City's rights pursuant to this Section 27.

#### **27.6 Reimbursement if Improper Exercise of Rights**

- (a) If the City exercises its rights pursuant to this Section 27, but the City was not entitled to do so, the City shall reimburse DB Co for the reasonable costs and expenses directly incurred by DB Co over and above those that would otherwise have been incurred by DB Co in the proper

performance of its obligations under this Project Agreement and that are directly and reasonably incurred by DB Co in complying with those written requirements of the City issued as a result of the City having exercised such rights.

- (b) DB Co acknowledges and agrees that DB Co has no right to require a determination of whether or not the City is entitled to exercise its rights pursuant to this Section 27 before taking any such action that the City may require and DB Co shall comply with all of the City's requirements. Only concurrently with or after complying with the City's requirements shall DB Co be entitled to refer any Dispute for resolution in accordance with Schedule 27 – Dispute Resolution Procedure. No action taken by DB Co pursuant to any direction issued by the City under this Section 27 shall be considered an acceptance or affirmation of the City's entitlement to exercise its rights under this Section 27, and such action shall be without prejudice to DB Co's rights under this Project Agreement or under the Dispute Resolution Procedure.

## **28. RECORDS, INFORMATION AND AUDIT**

### **28.1 Records Provisions**

- (a) DB Co shall comply with Schedule 26 – Record Provisions.

### **28.2 Information and General Audit Rights**

- (a) DB Co shall provide, and shall cause each Subcontractor to provide, to the City all information, reports, documents, records and the like, including as referred to in Schedule 26 – Record Provisions, in the possession of, or available to, DB Co as the City may reasonably require from time to time for any purpose in connection with this Project Agreement, other than Sensitive Information. DB Co shall use commercially reasonable efforts to ensure that, for such purpose, all such information, reports, documents, records and the like in the possession of, or available to, the Construction Contractor shall be available to DB Co and DB Co shall include relevant terms in all Subcontracts to this effect.
- (b) DB Co shall also provide to the City, and shall require each Subcontractor, including the Construction Contractor, to provide to the City (at the City's reasonable cost), all information, reports, documents, records and the like required to be provided pursuant to Section 28.2(a) which subsequently come into the possession of, or become available to, DB Co or each Subcontractor, as the City may reasonably require from time to time to enable the City to provide reports, notices, returns and the like pursuant to Applicable Law, including information and documentation pertaining to the physical condition of the Lands, the New City Infrastructure and the New MTO Infrastructure, security, health and safety, fire safety, emergency preparedness, environmental matters, employees and human resources related matters, other than Sensitive Information.
- (c) DB Co shall promptly after receipt provide the City 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 any of the Works, the Lands, the New City Infrastructure and the New MTO Infrastructure, and DB Co shall include relevant terms in all Subcontracts to this effect.
- (d) DB Co shall promptly notify the City of any actions, suits, proceedings, or investigations commenced, pending or threatened against DB Co or, to DB Co's knowledge, any Subcontractor

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 DB Co or in any impairment of its ability to perform its obligations under this Project Agreement.

- (e) All information, reports, documents and records in the possession of, or available to, DB Co, including as referred to in Schedule 26 – Record Provisions, which are required to be provided to or available to the City hereunder, shall be subject and open to inspection and audit by the City at any time and from time to time, which inspection and audit shall take place during normal business hours and at DB Co’s normal places of business unless the City and DB Co otherwise agree. The City shall also have the right to monitor and audit the performance of any and all parts of the Works wherever located, and DB Co shall cooperate with, and shall require each Subcontractor to cooperate with, and provide access to the representatives of the City monitoring and auditing such parts of the Works, including providing them with access and copies (at the City’s reasonable cost) of all relevant information, reports, documents and records pertaining to the performance of such parts of the Works. Except as otherwise provided herein, all of the City’s costs for the inspections, audits and monitoring shall be borne by the City.
- (f) In conducting an audit of DB Co under Section 28.2(e) or as otherwise provided under this Project Agreement, the City shall have all rights necessary or incidental to conducting an audit, including the right to have access to and inspect and take copies (at the City’s reasonable cost) of all books and records of DB Co required to be provided to or available to the City hereunder, upon reasonable Notice and at reasonable times. DB Co shall fully cooperate with the City and its auditors in the conduct of any audits, including by making available all such records and accounts (other than Sensitive Information) in existence at that time as they may require to perform a full and detailed audit, and DB Co further agrees to promptly review and settle with the City all matters arising from such audits, including the refunding of monies to the City where applicable. At the reasonable request of the City’s auditors, DB Co shall provide such information, reports, documents and records as the City’s auditors may reasonably require, other than Sensitive Information.
- (g) The City’s rights pursuant to this Section 28.2 shall be in addition to, and shall not limit, any other audit, information, inspection or similar rights under this Project Agreement.
- (h) The City’s rights pursuant to this Section 28.2 shall not limit or restrict any Governmental Authority’s right of review, audit, information or inspection under Applicable Law. The City’s right pursuant to this Section 28.2 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 City.
- (i) Without limiting the generality of Section 28.2(a) and subject to Sections 42.1(a) and 42.3, in the event that the City is required to provide information, including financial information, in relation to the Project, to the Province for corporate or financial reporting purposes, DB Co shall provide such information to the City as the City may reasonably require in order to comply with its corporate or financial reporting obligations. DB Co acknowledges and agrees that such information may include Sensitive Information.

### **28.3 Lenders' Consultant Reports**

- (a) DB Co shall cause the Lenders' Agent to cause, in accordance with Section 5(j) of Schedule 4 – Lenders' Direct Agreement, the Lenders' Consultant to provide the City a copy of any written assessment or report of the Works under the Design and Construction Contract, including but not limited to, any certificate of payment, concurrently with its delivery to the Lenders' Agent.

## **29. COMMUNICATIONS**

### **29.1 Communications**

- (a) Each of the Parties shall comply with Schedule 18 – Communication and Stakeholder Engagement Obligations.

## **30. CHANGES IN LAW**

### **30.1 Performance after Change in Law**

- (a) Following any and all Changes in Law, DB Co shall perform the Works in accordance with the terms of this Project Agreement, including in compliance with Applicable Law.

### **30.2 Works Change in Law**

- (a) On the occurrence of a Works Change in Law:
  - (i) either Party may give Notice to the other of the need for a Variation as a result of such Works Change in Law;
  - (ii) the Parties shall meet within 10 Business Days after such Notice to consult with respect to the effect of the Works Change in Law and to reach an agreement on whether a Variation is required as a result of such Works Change in Law, and, if the Parties have not, within 10 Business Days after this meeting, reached an agreement, either Party may refer the question of whether a Works Change in Law has occurred or the effect of any Works Change in Law for resolution in accordance with Schedule 27 – Dispute Resolution Procedure; and
  - (iii) the City shall, within 10 Business Days after agreement or determination that a Variation is required, issue a Variation Enquiry and the relevant provisions of Schedule 22 – Variation Procedure shall apply except that:
    - (A) DB Co may only object to any such Variation Enquiry on the grounds that the implementation of the Variation would not enable it to comply with the Works Change in Law;
    - (B) DB Co shall be responsible for obtaining all Development Approvals and DB Co Permits, Licences, Approvals and Agreements required in respect of the Variation;
    - (C) the City shall not be entitled to withdraw any such Variation Enquiry unless the Parties otherwise agree;

- (D) DB Co shall proceed to implement the Variation within such period as will enable it to comply with the Works Change in Law as soon as reasonably practicable; and
- (E) DB Co shall not be entitled to any payment or other compensation or relief from performance of its obligations under this Project Agreement in respect of any Works Change in Law or associated Variation other than as established pursuant to Schedule 22 – Variation Procedure.

### **30.3 Relevant Change in Law**

- (a) On the occurrence of a Relevant Change in Law, either Party shall be entitled to seek compensation for any increase or decrease (as the case may be) in the net cost to DB Co of performing the Works so as to put such Party in no better and no worse position than it would have been in had the Relevant Change in Law not occurred. Any such compensation shall be calculated in accordance with this Section 30.3.
- (b) On the occurrence of a Relevant Change in Law:
  - (i) either Party may give Notice to the other of the need for a Variation as a result of such Relevant Change in Law;
  - (ii) the Parties shall meet within 10 Business Days after such Notice to consult with respect to the effect of the Relevant Change in Law and to reach an agreement on whether a Variation is required as a result of such Relevant Change in Law, and, if the Parties have not, within 10 Business Days after this meeting, reached an agreement, either Party may refer the question of whether a Relevant Change in Law has occurred or the effect of any Relevant Change in Law for resolution in accordance with Schedule 27 – Dispute Resolution Procedure; and
  - (iii) the City shall, within 10 Business Days after agreement or determination that a Variation is required, issue a Variation Enquiry and the relevant provisions of Schedule 22 – Variation Procedure shall apply except that:
    - (A) DB Co may only object to any such Variation Enquiry on the grounds that the implementation of the Variation would not enable it to comply with the Relevant Change in Law;
    - (B) DB Co shall be responsible for obtaining all Development Approvals and DB Co Permits, Licences, Approvals and Agreements required in respect of the Variation;
    - (C) the City shall not be entitled to withdraw any such Variation Enquiry unless the Parties otherwise agree;
    - (D) DB Co shall proceed to implement the Variation within such period as will enable it to comply with the Relevant Change in Law as soon as reasonably practicable;

- (E) the Parties shall, without prejudice to their respective general obligations to comply with the terms of this Project Agreement:
  - (I) use commercially reasonable efforts to mitigate the adverse effects of any Relevant Change in Law and take commercially reasonable steps to minimize any increase in costs arising from such Relevant Change in Law; and
  - (II) use commercially reasonable efforts to take advantage of any positive or beneficial effects of any Relevant Change in Law and take commercially reasonable steps to maximize any reduction in costs arising from such Relevant Change in Law; and
- (F) any entitlement to compensation payable shall be in accordance with this Section 30.3, and any calculation of compensation shall take into consideration, inter alia:
  - (I) any failure by a Party to comply with Section 30.3(b)(iii)(E);
  - (II) any increase or decrease in its costs resulting from such Relevant Change in Law; and
  - (III) any amount which DB Co recovers under any insurance policy (or would recover if it complied with its obligations to insure under this Project Agreement or the terms of any policy of insurance required under this Project Agreement) which amount, for greater certainty, shall not include the amount of any excess or deductibles or any amount above the maximum insured amount applicable to any such insurance policy.
- (c) DB Co shall not be entitled to any payment or compensation or, except as provided in Section 32 or otherwise in this Project Agreement, relief in respect of any Relevant Change in Law, or the consequences thereof, other than in accordance with this Section 30.3, and Section 33 shall be construed accordingly.

## **31. VARIATIONS**

### **31.1 Variation Procedure**

- (a) Except as otherwise expressly provided in this Project Agreement, Schedule 22 – Variation Procedure shall apply in respect of Variations and any Small Works.
- (b) For greater certainty, DB Co shall, subject to and in accordance with Schedule 22 – Variation Procedure, be entitled to a Variation if a written direction issued by or on behalf of the City to DB Co or any DB Co Party results in a variation, addition, reduction, substitution, omission, modification, deletion, removal or other change to the whole or any part of the Works.
- (c) Without limiting DB Co’s obligations pursuant to Section 11.10(a) and Schedule 22 – Variation Procedure, DB Co shall include in each Subcontract, and shall cause each DB Co Party to comply with, the Variation Procedure, to the extent that the Variation Procedure requires DB Co to minimize the cost and impact of Variations.

### 31.2 Innovation and Value Engineering

- (a) DB Co acknowledges that the City at all times desires to reduce the overall cost to the City of the Project, and DB Co agrees to cooperate, explore and work with the City in investigating and considering innovation and value engineering and other cost saving measures.
- (b) If an innovation and value engineering proposal is at any time and from time to time originated and initiated solely by DB Co, DB Co may make a proposal (the “**Innovation Proposal**”) by Notice to the City.
- (c) The Parties agree that the subject of an Innovation Proposal shall not include:
  - (i) any Variation Enquiry initiated by the City;
  - (ii) any Variation resulting from a Change in Law; or
  - (iii) any change to the City Activities.
- (d) The Innovation Proposal must:
  - (i) set out sufficient detail to enable the City to evaluate the Innovation Proposal in full;
  - (ii) specify DB Co’s reasons and justification for proposing the Innovation Proposal;
  - (iii) request the City to consult with DB Co with a view to deciding whether to agree to the Innovation Proposal and, if so, what consequential changes the City requires as a result;
  - (iv) indicate any implications of the Innovation Proposal, including a difference between the existing and the proposed requirements of this Project Agreement, and the comparative advantages of each to DB Co and the City;
  - (v) indicate if there are any dates by which a decision by the City must be made;
  - (vi) indicate the capital cost of the Innovation Proposal, including the cost of financing; and
  - (vii) include such other information and documentation as may be reasonably requested by the City to fully evaluate and consider the Innovation Proposal.
- (e) The City shall, acting in good faith, evaluate the Innovation Proposal, taking into account all relevant issues, including whether:
  - (i) the Innovation Proposal affects the quality of the Works, the New City Infrastructure, the New MTO Infrastructure, or the likelihood of successful completion of the Works;
  - (ii) the Innovation Proposal will benefit or interfere with the efficient operation of the New City Infrastructure, the New MTO Infrastructure or the performance of the City Activities;
  - (iii) the Innovation Proposal will interfere with the relationship between the City and third parties;

- (iv) the financial strength of DB Co is sufficient to deliver the changed Works;
  - (v) the residual value of the New City Infrastructure, or the New MTO Infrastructure is affected;
  - (vi) the Innovation Proposal materially affects the risks or costs to which the City is exposed;  
or
  - (vii) any other matter the City considers relevant.
- (f) The City may request clarification or additional information regarding the Innovation Proposal, and may request modifications to the Innovation Proposal.
- (g) The City may, in its sole discretion, accept or reject any Innovation Proposal.
- (h) If the City accepts the Innovation Proposal, with or without modification, the relevant Innovation Proposal shall be documented and evidenced by a written Variation Confirmation, together with any other documents necessary to amend this Project Agreement or any relevant Project Documents to give effect to the Innovation Proposal.
- (i) If, after taking into account the agreed implementation and reasonably allocated development costs incurred by DB Co in connection with the Innovation Proposal and any other uses of the Innovation Proposal by DB Co, the Innovation Proposal causes or will cause the costs of DB Co and/or of a Subcontractor to decrease, the net savings in the costs of DB Co and/or the Subcontractor will be shared equally by DB Co and the City, and the City's share of the net savings shall, if the Parties agree, be reflected in a lump sum payment.
- (j) If an Innovation Proposal causes or will cause the costs of the City to decrease, the net savings in the costs of the City will be shared:
- (i) equally by DB Co and the City following the implementation of the Innovation Proposal until the Termination Date; and
  - (ii) thereafter, the City shall be entitled to the full benefit of the net savings in costs (if applicable),
- and DB Co's share of the net savings shall be reflected in a lump sum payment.

## 32. DELAY EVENTS

### 32.1 Definition

- (a) For the purposes of this Project Agreement, "**Delay Event**" means any of the following events or circumstances only to the extent, in each case, that it affects the Works so as to cause a delay in achieving any Substantial Completion by the applicable Scheduled Substantial Completion Date, or a delay in achieving any Final Completion by the applicable Scheduled Final Completion Date:
- (i) the implementation of a Variation to the extent DB Co has identified such delay in its Estimate and such delay has been documented in the Variation Confirmation;

- (ii) subject to compliance by DB Co with the provisions of Section 11.12, damage, costs or delays from the execution of Additional Works on the Lands by Additional Contractors, as applicable, in the circumstances described in Section 11.12(f);
- (iii) a requirement that DB Co perform obligations under an Encumbrance pursuant to Section 17.2(c)(iii) or Section 17.2(d), which performance imposes costs or delays in the performance of the Works;
- (iv) any breach by the City of any of the City's obligations under this Project Agreement (including, subject to Section 32.2(o), any delay by the City in giving access to the Lands pursuant to Section 16.1, any obstruction of the rights afforded to DB Co under Section 16.1 or any delay by the City in carrying out its obligations set forth in Schedule 10 – Review Procedure), except to the extent that any such breach is caused, or contributed to, by DB Co or any DB Co Party;
- (v) a requirement pursuant to Section 18.2(g) for DB Co to perform any alteration, addition, Demolition, extension or variation in the Works, or to suspend or delay performance of the Works, upon the discovery of Contamination, which alteration, addition, Demolition, extension or variation in the Works, or suspension or delay in the performance of the Works, would not otherwise be required under this Project Agreement;
- (vi) a requirement pursuant to Section 18.3(c)(ii)(A) or Section 18.3(d) for DB Co to perform any alteration, addition, Demolition, extension or variation in the Works, or to suspend or delay performance of the Works, upon the discovery of any fossils, artifacts or other objects having artistic, historic, archaeological or monetary value, including human remains and burial sites, which alteration, addition, Demolition, extension or variation in the Works, would not otherwise be required under this Project Agreement;
- (vii) a requirement pursuant to Sections 18.4(b) or 18.4(c) for DB Co to perform any alteration, addition, demolition, extension or variation in the Works, or to suspend or delay performance of the Works, upon the discovery of Species-at-Risk for which the City is responsible, which alteration, addition, demolition, extension or variation in the Works, or suspension or delay in the performance of the Works, would not otherwise be required under this Project Agreement;
- (viii) subject to and in accordance with Section 18.5(b), a requirement for DB Co to perform any alteration, addition, demolition, extension or variation in the Works, or other delay in performance of the Works, due to a deviation from the Stage 1 Connection Infrastructure Preliminary Report;
- (ix) an uncovering of the Works pursuant to Section 20.3 where such Works are not subsequently found to be defective or not in compliance with the requirements of this Project Agreement (including the Output Specifications, the DB Co Proposal Extracts and the Design Data), unless such opening up of the Works was reasonable in the light of other defects or non-compliance previously discovered by the City in respect of the same or a similar component of the Works or subset of the Works;
- (x) a requirement pursuant to Section 13.1 of Schedule 27 – Dispute Resolution Procedure for DB Co to proceed in accordance with the direction of the City during the pendency of a Dispute, which Dispute is subsequently determined in DB Co's favour;

- (xi) a Relief Event;
- (xii) an event of Force Majeure;
- (xiii) a Relevant Change in Law;
- (xiv) a requirement for DB Co to perform any alteration, addition, demolition, extension or variation in the Works, or to suspend or delay performance of the Works, upon the discovery of unknown Utility Infrastructure or Mislocated Utility Infrastructure pursuant to Section 18.6, which alteration, addition, demolition, extension or variation in the Works, or suspension or delay in the performance of the Works, would not otherwise be required under this Project Agreement; or
- (xv) subject to compliance with Section 11.8(g), the City's failure to issue to DB Co a final determination in respect of a Listed DB Co PLAA as set out in and subject to Section 11.8(e),
- (xvi) damage, costs or delays caused by an act or omission of RTG or any RTG Party in the execution of the RTG Stage 1 PA Works or RTG City Party Works, in the circumstances described in Section 11.12(k);
- (xvii) changes to the terms, conditions or requirements of the Environmental Assessments (except to the extent resulting from any change by DB Co to the design of the Project or any act, omission or fault of DB Co or a DB Co Party);
- (xviii) a stop work order issued by a Governmental Authority in respect of the Works, provided that such order was not issued as a result of a Relief Event, an act of Force Majeure, or as a result of an act, omission or fault of DB Co or a DB Co Party;
- (xix) a Delay Event determined by the Adjudicator pursuant to Section 6.4(b) of Schedule 27 – Dispute Resolution Procedure;
- (xx) pursuant to an explicit provision in a permit, licence or approval granted by the City to a third party developer in respect of an Adjacent Property, that third party developer,
  - (A) constructs a physical barrier that prevents DB Co from carrying out the Works; or
  - (B) creates a significant physical impediment that prevents DB Co from carrying out the Works for a period greater than or equal to 30 consecutive days;
- (xxi) replacement or substitution of a prescribed item in accordance with Section 11.20 causes delay in the Works or increases the costs of the Works; or
- (xxii) in accordance with Section 11.7(a)(iv), compliance with any amendments made to any disclosed collective agreements or labour-related agreements, or any disclosed collective agreements or labour-related agreements entered into or disclosed to DB Co after Financial Close, adversely interferes with DB Co's ability to perform the Works or materially adversely affects DB Co's schedule for performing the Works,

- (xxiii) subject to and in accordance with Section 18.7, a requirement for DB Co to perform any alteration, addition, demolition, extension or variation in the Works, or other delay in performance of the Works, due to a defect, error or inaccuracy in the Stage 1 Systems Information;
- (xxiv) failure by a Category 1 Utility Company to perform its obligations, as set out in the Utility Baseline Report within the applicable time periods set out in the Utility Baseline Report, to the extent that such event does not arise (directly or indirectly) as a result of any act or omission of the DB Co or any DB Co Party. For clarity, for the purposes of determining whether a failure of a Category 1 Utility Company described in this Section 32.1(a)(xxiv) has caused a delay in achieving any Substantial Completion by the applicable Scheduled Substantial Completion Date, or a delay in achieving any Final Completion by the applicable Scheduled Final Completion Date, the Parties shall have regard to the cumulative effect of all failures by the Category 1 Utility Companies in accordance with this Section 32.1(a)(xxiv);
- (xxv) a defect in Major Existing Third Party Infrastructure that is the responsibility of the City pursuant to Section 18.8(a);
- (xxvi) subject to Section 3.1(a) of Part A of Schedule 34 – Mobility Matters and Section 3.1(a) of Part B of Schedule 34 – Mobility Matters, the City’s issuance of a DB Co Permit, Licence, Approval and Agreement that requires DB Co to meet more onerous lane opening or lane width requirements than those explicitly set out in Schedule 15-2 Part 7 Table 7-1.3; and
- (xxvii) any of the following event occurs in respect of the Nominated Signalling Subcontractor:
  - (A) any arrangement or composition with or for the benefit of creditors being entered into by or in relation to the Nominated Signalling Subcontractor pursuant to any insolvency law;
  - (B) a trustee, receiver, receiver and manager, interim receiver, liquidator, administrator or other custodian or other encumbrance holder taking possession of or being appointed over, or any distress, attachment, execution or other process being levied or enforced upon, the whole or any material part of the assets of the Nominated Signalling Subcontractor;
  - (C) the Nominated Signalling Subcontractor ceases to carry on business in the normal course or fails to maintain or breaches any franchise, licence, authorisation or right necessary to conduct its business;
  - (D) the Nominated Signalling Subcontractor making an assignment for the benefit of its creditors, being declared bankrupt or committing an act of bankruptcy, becoming insolvent, making a proposal or otherwise taking advantage of provisions for relief under the *Bankruptcy and Insolvency Act* (Canada), the *Companies’ Creditors Arrangement Act* (Canada), the *Winding Up and Restructuring Act* (Canada) or any other applicable insolvency legislation or similar legislation in any jurisdiction (“Insolvency Legislation”), or any other type of insolvency proceedings being commenced by or against the Nominated Signalling Subcontractor under any insolvency

- legislation and, if commenced against the Nominated Signalling Subcontractor, not stayed, dismissed or otherwise remedied within thirty (30) days of its commencement;
- (E) a petition being filed (and not being contested in good faith using all reasonable efforts), or a resolution being passed or an order being made for the winding-up, liquidation, administration, dissolution or other similar proceeding of the Nominated Signalling Subcontractor;
  - (F) any legal proceedings are taken by any person (and not stayed within thirty (30) days of commencement) with a view to proposing (under any enactment or otherwise) any kind of composition, scheme of arrangement, compromise or arrangement involving the Nominated Signalling Subcontractor and its creditors generally (or any class of them); or
  - (G) any Governmental Authority or any person or entity acting or purporting to act under any Governmental Authority takes any action in order to condemn, seize or appropriate, or to assume custody or control of, the Nominated Signalling Subcontractor or of all or any substantial part of the assets of the Nominated Signalling Subcontractor or takes action to curtail the Nominated Signalling Subcontractor's authority in the overall conduct of its business or operations.
- (b) For clarity, in respect of Section 32.1(a)(xxiv), a failure by a Category 1 Utility Company to perform its obligations as set out in the Utility Baseline Report within the applicable time periods set out in the Utility Baseline Report shall not, in any event, be cause for a Delay Event unless DB Co has,
- (i) fully complied with its obligations pursuant to the applicable Utility Agreement and the Baseline Utility Report;
  - (ii) properly coordinated the work being performed by the applicable Category 1 Utility Company with the Works; and
  - (iii) provided sufficient access to Site to the applicable Category 1 Utility Company for the purposes of carrying out the Category 1 Utility Company's work.
- (c) For further clarity, Section 32.1(a)(xxiv) does not apply in respect of,
- (i) Category 1 Utility Companies in circumstances other than those specifically set out in the Utility Baseline Report;
  - (ii) failures of any Utility Companies that are not Category 1 Utility Companies including failures of such Utility Companies to perform in accordance with the applicable Utility Agreement; or
  - (iii) Works carried out by DB Co or DB Co Parties or goods or services provided by DB Co or DB Co Parties to the Utility Companies.

## **32.2 Consequences of a Delay Event**

- (a) DB Co shall provide written Notice to the City Representative and the Independent Certifier within five Business Days after becoming aware of the occurrence of any event or circumstances described in Section 32.1(a)(ii), Section 32.1(a)(iii), Section 32.1(a)(iv), Section 32.1(a)(v), Section 32.1(a)(vi), Section 32.1(a)(vii), Section 32.1(a)(viii), Section 32.1(a)(ix), Section 32.1(a)(xiv), Section 32.1(a)(xv), Section 32.1(a)(xvi), Section 32.1(a)(xvii), Section 32.1(a)(xviii), Section 32.1(a)(xix), Section 32.1(a)(xx), Section 32.1(a)(xxi), Section 32.1(a)(xxii), Section 32.1(a)(xxiii), Section 32.1(a)(xxiv), Section 32.1(a)(xxv), Section 32.1(a)(xxvi) or Section 32.1(a)(xxvii) which, at the time of its occurrence, has caused, or is reasonably likely to cause, an entitlement under this Section 32, which Notice shall identify such event or circumstances and, to the extent of DB Co's knowledge at the time of such Notice, summarize the consequences and the nature of DB Co's claim.
- (b) DB Co shall, within 10 Business Days (or such longer period of time as the Parties may agree) after delivering such Notice under Section 32.2(a), provide further written details to the City Representative and the Independent Certifier which shall include, to the extent of DB Co's knowledge at such time:
- (i) identification of the category of Delay Event on which DB Co's claim for relief is based;
  - (ii) details of the event or circumstances forming the basis of DB Co's notification under Section 32.2(a);
  - (iii) details of the contemporary records which DB Co shall thereafter maintain to substantiate any claim for extra time;
  - (iv) details of the consequences (whether direct or indirect, financial or non-financial) that such event or circumstances may have upon Scheduled Substantial Completion Dates or Scheduled Final Completion Dates, including a Critical Path analysis of the event or circumstances indicating the impact upon Scheduled Substantial Completion Dates or Scheduled Final Completion Dates; and
  - (v) details of any measures that DB Co has adopted or proposes to adopt to mitigate the consequences of such claimed Delay Event.
- (c) As soon as possible but in any event within three Business Days after DB Co receiving, or becoming aware of, any supplemental information pertaining to the event or circumstances disclosed in Section 32.2(a), DB Co shall submit further particulars based on such information to the City Representative and the Independent Certifier.
- (d) The City Representative shall, after receipt of written details under Section 32.2(b), or of further particulars under Section 32.2(c), be entitled by written Notice to require DB Co to provide such further supporting particulars as the City Representative may reasonably consider necessary. DB Co shall afford the City Representative and the Independent Certifier reasonable facilities for their investigations, including, without limitation, on-site inspection.
- (e) [Not used]
- (f) [Not used]

- (g) [Not used]
- (h) Subject to the provisions of this Section 32, the City Representative shall allow DB Co an extension of time equal to the delay caused by the Delay Event and shall fix (A) revised Scheduled Substantial Completion Date(s), or (B) revised Scheduled Final Completion Date(s), as applicable, as soon as reasonably practicable and in any event within 10 Business Days following the later of:
- (i) the date of receipt by the City Representative of DB Co's Notice given in accordance with Section 32.2(b) and the date of receipt of any further particulars (if such are required under Section 32.2(c), whichever is later; and
  - (ii) the date of receipt by the City Representative of any supplemental information supplied by DB Co in accordance with Section 32.2(c) and the date of receipt of any further particulars (if such are required under Section 32.2(d)), whichever is later.
- (i) For the sake of clarity, where the City issues a revised Scheduled Substantial Completion Date in accordance with Section 32.2(h), if the applicable Initial Countdown Notice has been delivered, DB Co shall be deemed to have delivered a Subsequent Notice referred to in Section 25.5 effecting such a new date.
- (j) If:
- (i) the City Representative declines to fix (A) revised Scheduled Substantial Completion Date(s); or (B) a revised Scheduled Final Completion Date(s), as applicable;
  - (ii) DB Co considers that different (A) Scheduled Substantial Completion Date(s), or (B) Scheduled Final Completion Date(s) should be fixed; or
  - (iii) there is a dispute as to whether a Delay Event has occurred,
- then DB Co shall be entitled to refer the matter for determination by the Independent Certifier. The decision of the Independent Certifier may be disputed by either Party and referred for resolution in accordance with Schedule 27 – Dispute Resolution Procedure.
- (k) DB Co shall be relieved from liability for liquidated damages that would otherwise accrue under Section 25.5 for the period of extension resulting from a Delay Event determined in accordance with Sections 32.2(h) or (j).
- (l) If DB Co does not provide the Notice, details or further particulars required by Sections 32.2(a), (b), (c) or (d) to the City Representative and the Independent Certifier in respect of any Delay Event in accordance with the time periods specified herein, DB Co will not be entitled to any additional compensation, extension of time or other relief from its obligations under this Project Agreement to the extent the amount thereof was increased or the ability to mitigate was adversely affected as a result of such delay in providing such Notice, details or further particulars. If the period of delay in providing such Notice, details or further particulars is 6 months or more, the rights of DB Co with respect to such Delay Event will be of no further force or effect.
- (m) If the Works are behind schedule for a reason other than a Delay Event, or if a DB Co Party delays the progress of any portion of the Works necessary to complete the Works on schedule,

DB Co shall use all reasonable measures to bring the Works back on schedule. DB Co shall exercise all means within its discretion, such as directing any DB Co Party that is creating delays to increase their labour forces and equipment, to improve the organization and expediting of the Works, or to work overtime as may be necessary. DB Co shall provide any additional supervision, coordination and expediting, including overtime by its own personnel as may be required to achieve this end. The costs and expenses incurred by the use of such measures and overtime shall be borne by DB Co and/or the DB Co Parties and there shall be no adjustment to the Guaranteed Price as a result of such costs and expenses and for clarity, no extension to any Scheduled Substantial Completion Date.

- (n) Where there are Concurrent Delays, some of which are Delay Events for which DB Co would otherwise be entitled to schedule relief hereunder, and some of which are not Delay Events for which DB Co would otherwise be entitled to schedule relief hereunder, then DB Co shall not be entitled to:
- (i) an extension in any Scheduled Substantial Completion Date, or Scheduled Final Completion Date, to the extent of such Concurrent Delays; or
  - (ii) any compensation for Concurrent Delay Direct Costs attributable to such Concurrent Delays,

except to the extent that one of the events that occurs as part of the Concurrent Delay is a Delay Event referred to in Section 32.1(a)(i), 32.1(a)(ii), 32.1(a)(iv), 32.1(a)(ix), 32.1(a)(xv) or 32.1(a)(xvi) in which case DB Co shall be entitled to schedule relief and compensation in accordance with Sections 32 (without regard to this Section 32.2(n)) and 33 of this Project Agreement. For greater certainty, the compensation payable by the City to DB Co pursuant to Section 33 of this Project Agreement with respect to all other Compensation Events by reason of such event being a Compensation Event (as opposed to being both a Compensation Event and a Delay Event) shall be payable in full without regard to the terms of this Section 32.2(n).

- (o) Subject to Sections 11.19, the City shall provide DB Co with access to and use of the Lands as required pursuant to Section 16 of this Project Agreement in a manner consistent with the Works Schedule and in accordance with the notification requirements and restrictions set out in the Project Agreement, provided that DB Co agrees that the inability of the City to provide DB Co with access to an area for construction activities not on the Critical Path for reasons set out in Section 11.19 will not result in the occurrence of a Delay Event (and, for greater certainty, there shall not be a resulting change to a Scheduled Substantial Completion Date) or a Compensation Event (and, for certainty, there shall not be any resulting change to the Guaranteed Price).
- (p) In no event shall the extension of time for a Delay Event be more than the necessary extension of the Critical Path as a result of the delay caused by the Delay Event.
- (q) Subject to DB Co meeting the obligations set out in Section 32.2 and Section 32.3, if, (i) a Lane Closure or Bus Rapid Transit Lane Closure is directly caused or extended by one or more of the events set out in Section 32.1(a), whether or not such event constitutes a Delay Event, such Lane Closure or Bus Rapid Transit Lane Closure or extension thereof shall not be included in the Aggregate Actual Lane Closures, or Aggregate Actual Bus Rapid Transit Lane Closures, or the Aggregate Actual Lane Closures Cost, or the Aggregate Actual Bus Rapid Transit Lane Closures Cost for the relevant Road Section for the purposes of calculating the Lane Closure Adjustment in accordance with the process set out in Schedule 34 – Mobility Matters.

- (r) Subject to DB Co meeting the obligations set out in Section 32.2 and Section 32.3, if (i) a date or duration in the Systems Integration Management Plan, or a Commencement Date or duration for use of the Lands identified in Schedule 20 – Lands, is delayed by one or more events set out in Section 32.1(a), whether or not such event constitutes a Delay Event, such date or extension of the applicable duration shall be amended in the Systems Integration Management Plan, and/or the City shall use commercially reasonable efforts to amend such Commencement Date or duration in Schedule 20 – Lands, as applicable.

### 32.3 Mitigation

- (a) If DB Co is (or claims to be) affected by a Delay Event, DB Co shall, and shall require all DB Co Parties to, take and continue to take commercially reasonable steps:
- (i) to eliminate or mitigate the consequences of such event upon the performance of its obligations under this Project Agreement;
  - (ii) to continue to perform its obligations under this Project Agreement to the extent possible notwithstanding the Delay Event; and
  - (iii) to resume performance of its obligations under this Project Agreement affected by the Delay Event as soon as practicable.
- (b) To the extent that DB Co does not comply with its obligations under this Section 32.3, such failure shall be taken into account in determining DB Co's entitlement to an extension of time pursuant to this Section 32.

### 32.4 Change in Sequence of Scheduled Substantial Completion Dates

- (a) If, as a result of one or more Delay Events, the East Scheduled Substantial Completion Date is scheduled to occur after the West Scheduled Substantial Completion Date, the Parties hereby undertake to promptly negotiate in good faith any necessary amendments to this Project Agreement to effect such change in the sequence of Scheduled Substantial Completion Dates, with a view to ensuring that, subject to the obligations and rights to relief arising hereunder from such Delay Event(s), neither Party is in any worse position than it would have been had the East Scheduled Substantial Completion Date remained scheduled to occur prior to the West Scheduled Substantial Completion Date.

## 33. COMPENSATION EVENTS

### 33.1 Definition

- (a) For the purposes of this Project Agreement, “**Compensation Event**” means any event referred to in Sections 32.1(a)(ii), 32.1(a)(iii), 32.1(a)(iv) (subject to Section 32.2(o)), 32.1(a)(v), 32.1(a)(vi), 32.1(a)(vii), 32.1(a)(viii), 32.1(a)(ix), 32.1(a)(x), 32.1(a)(xiv), 32.1(a)(xv), 32.1(a)(xvi), 32.1(a)(xvii), 32.1(a)(xviii), 32.1(a)(xix), 32.1(a)(xx), 32.1(a)(xxi), 32.1(a)(xxii) and 32.1(a)(xxiii), 32.1(a)(xxv), 32.1(a)(xxvi) and 32.1(a)(xxvii) as a direct result of which DB Co has incurred loss or expense, whether or not any of these events has also caused a delay, and the procedure described in Section 32.2 shall apply, *mutatis mutandis*, to such events as Compensation Events (including, for certainty, Section 32.2(l)).

### **33.2 Consequences of a Compensation Event**

- (a) If a Compensation Event occurs, DB Co's sole right to compensation shall be as set out in this Section 33. For greater certainty, except as aforesaid, no other Delay Event shall entitle DB Co to receive any compensation, except as otherwise provided in:
  - (i) Schedule 22 – Variation Procedure, in the case of a Delay Event referred to in Section 32.1(a)(i);
  - (ii) Section 35, in the case of a Delay Event referred to in Section 32.1(a)(xii);
  - (iii) Section 33.6, in the case of a Delay Event referred to in Section 32.1(a)(xi);
  - (iv) Section 30, in the case of a Delay Event referred to in Section 32.1(a)(xiii); and
  - (v) Section 33.6, in the case of a Delay Event referred to in Section 32.1(a)(xxiv).
- (b) Subject to Sections 33.2(c), 33.3, 33.4 and 33.5, if it is agreed, or determined in accordance with Schedule 27 – Dispute Resolution Procedure, that there has been a Compensation Event, DB Co shall be entitled to such compensation as would place DB Co in no better and no worse position than it would have been in had the relevant Compensation Event not occurred. For greater certainty, in respect of a Compensation Event that is also a Delay Event, such compensation will include amounts which, but for the Delay Event, would have been paid by the City to DB Co. DB Co shall promptly provide the City Representative with any information the City Representative may require in order to determine the amount of such compensation.
- (c) If the City is required to compensate DB Co pursuant to this Section 33.2, then the City may either pay such compensation as a lump sum payment or payments at times and in a manner to be agreed with DB Co, acting reasonably.
- (d) To the extent DB Co does not comply with its obligations under Sections 32.2(a), (b), (c), (d), (e) or (l), and subject to Section 32.2(l), such failure shall be taken into account in determining DB Co's entitlement to relief pursuant to this Section 33.

### **33.3 Mitigation**

- (a) If DB Co is (or claims to be) affected by a Compensation Event, DB Co shall, and shall require all DB Co Parties to, take and continue to take commercially reasonable steps to minimize the amount of compensation due in accordance with this Section 33 in relation to any Compensation Event.
- (b) To the extent that DB Co does not comply with its obligations under this Section 33.3, such failure shall be taken into account in determining DB Co's entitlement to relief pursuant to this Section 33.

### **33.4 Insured Exposure**

- (a) The compensation payable to DB Co pursuant to this Section 33 shall be reduced by any amount which DB Co or a DB Co Party recovers, or is entitled to recover, under any insurance policy, or would have recovered if it had complied with the requirements of this Project Agreement in

respect of insurance or the terms of any policy of insurance required under this Project Agreement, which amount, for greater certainty, shall not include any excess or deductibles or any amount over the maximum amount insured under any such insurance policy.

### 33.5 Delivery of PBS-2

- (a) If an event referred to in Section 32.1(a)(ii), Section 32.1(a)(iii), Section 32.1(a)(v), Section 32.1(a)(vi), Section 32.1(a)(vii), Section 32.1(a)(ix), Section 32.1(a)(x), 32.1(a)(xiv), Section 32.1(a)(xx), Section 32.1(a)(xxi), Section 32.1(a)(xxii), Section 32.1(a)(xxiii) or Section 32.1(a)(xxiv) occurs after the 240<sup>th</sup> day following Financial Close (provided that in the event that the City failed to comply with the time periods stipulated in Schedule 10 – Review Procedure in respect of PBS-2 such 240 day time period shall be automatically extended on a day-for-day basis) and prior to the City assigning the comment “NO COMMENT” or “MINOR COMMENT” to PBS-2 in accordance with Schedule 12 – Works Scheduling Requirements, DB Co shall not be entitled to receive any compensation under this Section 33 in respect of such Compensation Event, unless such Compensation Event is also a Delay Event, in which case DB Co shall be entitled to compensation in an amount equal to the lesser of:
- (i) the Debt Service Amount accrued and paid or that became payable in accordance with the Lending Agreements during the period of delay; and
  - (ii) the compensation which, but for the application of this Section 33.5, DB Co would have been entitled to receive pursuant to Section 33.2(b).

### 33.6 Special Compensation Regarding Category 1 Utility Company

- (a) For the purposes of the special compensation regarding Category 1 Utility Companies, the following shall apply:
- (i) Sections 33.3 and 33.4 shall apply to the compensation set out in this Section 33.6 notwithstanding that the Delay Event referred to in Section 32.1(a)(xxiv) is not a Compensation Event.
- (b) If it is agreed, or determined in accordance with Schedule 27 - Dispute Resolution Procedure, that there has been a Delay Event referred to in Section 32.1(a)(xxiv), DB Co shall be entitled to the following:
- (i) an amount calculated in accordance with the following:
    - (A) For the purpose of this Section 33.6(b)(i) “**Non-Debt Compensation Amount**” means an amount that would place DB Co in no better and no worse position than it would have been in had the applicable Delay Event referred to in Section 32.1(a)(xxiv) not occurred but excluding, any interest or financing costs accrued and paid or which became payable in accordance with the Lending Agreements during the period of the applicable Delay Event (such excluded amount, the “**Special Utility Debt Compensation Amount**”).
    - (B) If the applicable Delay Event delays any Substantial Completion for 30 or fewer days, the City shall pay to DB Co an amount equal to [REDACTED]

per cent of the Non-Debt Compensation Amount and [REDACTED] per cent of the Special Utility Debt Compensation Amount for the period of the delay.

- (C) If the applicable Delay Event delays any Substantial Completion for 60 or fewer days, the City shall pay to DB Co an amount equal to,
  - (I) [REDACTED] per cent of the Non-Debt Compensation Amount in respect of the first 30 days of the delay, plus,
  - (II) [REDACTED] per cent of the Non-Debt Compensation Amount for the number of days of delay exceeding 30 days of delay; plus
  - (III) [REDACTED] per cent of the Special Utility Debt Compensation Amount for the period of the delay.
  
- (D) If the applicable Delay Event delays any Substantial Completion for 180 or fewer days, the City shall pay to DB Co an amount equal to,
  - (I) [REDACTED] per cent of the Non-Debt Compensation Amount in respect of the first 30 days of delay, plus,
  - (II) [REDACTED] per cent of the Non-Debt Compensation Amount in respect of the next 30 days of delay, plus,
  - (III) [REDACTED] per cent of the Non-Debt Compensation Amount in respect of the number of days exceeding 60 days of delay; plus
  - (IV) [REDACTED] per cent of the Special Utility Debt Compensation Amount for the period of the delay.
  
- (E) If the applicable Delay Event delays any Substantial Completion for more than 180 days, the City shall pay to DB Co an amount equal to,
  - (I) [REDACTED] per cent of the Non-Debt Compensation Amount in respect of the first 30 days of delay, plus,
  - (II) [REDACTED] per cent of the Non-Debt Compensation Amount in respect of the next 30 days of delay, plus,
  - (III) [REDACTED] per cent of the Non-Debt Compensation Amount in respect of the next 120 days of delay, plus,
  - (IV) [REDACTED] per cent of the Non-Debt Compensation Amount in respect of the number of days exceeding 180 days of delay, plus
  - (V) [REDACTED] per cent of the Special Utility Debt Compensation Amount for the period of the delay.

## 34. RELIEF EVENTS

### 34.1 Definition

(a) For the purposes of this Project Agreement, “**Relief Event**” means any of the following events or circumstances to the extent, in each case, that it causes any failure by a Party to perform any of its obligations under this Project Agreement:

- (i) fire, explosion, lightning, storm, tempest, hurricane, tornado, flood, bursting or overflowing of water tanks, apparatus or pipes, ionizing radiation (to the extent it does not constitute Force Majeure), earthquake, riot or civil commotion;
- (ii) failure by any Utility Company, local authority or other like body to perform works or provide services (solely in its role as utility service provider or similar service provider to the Project), provided, however, that such a failure shall not, in any event, be cause for a Relief Event, unless DB Co:
  - (A) has performed its obligations under any applicable agreement with the Utility Company with respect to the provision of such services and the relevant Utility Company has failed to meet its obligations thereunder; and
  - (B) has made all, and is continuing to make all, commercially reasonable efforts to diligently enforce its legal rights under any applicable agreement in respect of such services and otherwise cause the Utility Company to perform those works or services.

For clarity, Section 34.1(a)(ii) shall apply only in circumstances where the Utility Company is providing services to DB Co of the type provided by the Utility Company in the normal course of its business. For further clarity, Section 34.1(a)(ii) shall not apply in circumstances where DB Co has entered into an agreement for the design and construction of Utility Infrastructure and the applicable Utility Company has failed to comply with its obligations under such an agreement;

- (iii) accidental loss or damage to the Works and/or the New City Infrastructure or any roads servicing the Lands;
- (iv) without prejudice to any obligation of DB Co to provide stand-by power facilities in accordance with this Project Agreement, failure or shortage of power, fuel or transport;
- (v) blockade or embargo falling short of Force Majeure;
- (vi) any official or unofficial strike, lockout, work to rule or other labour-related action generally affecting the New City Infrastructure, the New MTO Infrastructure or construction industry (or a significant sector of that industry) in the Province of Ontario; or
- (vii) any civil disobedience or protest action, including any action taken by any person or persons protesting or demonstrating against the carrying out of any part of the Works or the construction and/or operation of transit systems in general, provided, however, that a

civil disobedience or protest action shall not, in any event, be cause for a Relief Event unless DB Co has fully complied with Section 11.13,

provided, in each case, that such event does not arise (directly or indirectly) as a result of any act or omission of the Party claiming relief and/or (i) in the case of DB Co claiming relief, as a result of any act or omission of any DB Co Party and (ii) in the case of the City claiming relief, as a result of any act or omission of any City Party.

### **34.2 Consequences of a Relief Event**

- (a) Subject to Section 34.3, no right of termination, other than either Party's right to terminate this Project Agreement pursuant to Section 38.1, shall arise under this Project Agreement by reason of any failure by a Party to perform any of its obligations under this Project Agreement, but only to the extent that such failure to perform is caused by the occurrence of a Relief Event (it being acknowledged and agreed by the Parties that all other rights and obligations of the Parties under this Project Agreement remain unaffected by the occurrence of a Relief Event).
- (b) In respect of a Relief Event that is also a Delay Event pursuant to Section 32.1(a)(xi):
  - (i) DB Co shall only be relieved of its obligations under this Project Agreement to the extent, if any, provided for in Section 32, and, to the extent such Relief Event causes any Lane Closure or Bus Rapid Transit Lane Closure, DB Co shall be relieved from any Lane Closure Adjustment, Bus Rapid Transit Lane Closure Adjustment or Peak Hour Lane Interruption that would otherwise result therefrom; and
  - (ii) in respect of a Relief Event referred to in Sections 34.1(a)(ii) (but only in respect of failure by a Utility Company to perform works or provide services), 34.1(a)(v), 34.1(a)(vi) or 34.1(a)(vii), on the earlier of (A) the affected Substantial Completion Date and (B) the date of payment of the City Default Termination Sum or Non-Default Termination Sum (and as a part thereof) in accordance with Schedule 23 – Compensation on Termination, the City shall pay to DB Co an amount equal to the Debt Service Amount accrued and paid or that became payable in accordance with the Lending Agreements during the period of delay by DB Co or any DB Co Party to the Lenders up to and including the applicable Scheduled Substantial Completion Date or the date of payment of the City Default Termination Sum or Non-Default Termination Sum, as applicable, together with interest thereon at the rate payable on the principal amount funded under the Lending Agreements, which, but for the Delay Event, would not have been paid by DB Co to the Lenders.
- (c) If a Relief Event occurs, DB Co shall not be entitled to receive any compensation other than as expressly provided in Sections 34.2(b)(ii) and 40.
- (d) Subject to Section 40, DB Co's sole right to payment or otherwise in relation to the occurrence of a Relief Event shall be as provided in this Section 34.

### **34.3 Mitigation and Process**

- (a) Where a Party is (or claims to be) affected by a Relief Event, such Party shall take commercially reasonable steps to mitigate the consequences of the Relief Event upon the performance of its obligations under this Project Agreement, shall resume performance of its obligations affected by

the Relief Event as soon as practicable and shall use commercially reasonable efforts to remedy its failure to perform.

- (b) To the extent that the Party claiming relief does not comply with its obligations under this Section 34.3, such failure shall be taken into account in determining such Party's entitlement to relief pursuant to this Section 34.
- (c) The Party claiming relief shall give written Notice to the other Party within 5 Business Days after such Party becoming aware of the relevant Relief Event. Such initial Notice shall give sufficient details to identify the particular event claimed to be a Relief Event.
- (d) A subsequent written Notice shall be given by the Party claiming relief to the other Party within a further 5 Business Days of the initial Notice, which Notice shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including, without limitation, the effect of the Relief Event on the ability of the Party to perform, the action being taken in accordance with Section 34.3(a), the date of the occurrence of the Relief Event, and an estimate of the period of time required to overcome the Relief Event and/or its effects.
- (e) The Party claiming relief shall notify the other as soon as the consequences of the Relief Event have ceased and of when performance of its affected obligations can be resumed.
- (f) If, following the issue of any Notice referred to in Section 34.3(d), the Party claiming relief receives or becomes aware of any further information relating to the Relief Event and/or any failure to perform, such Party shall submit such further information to the other Party as soon as reasonably possible.

#### **34.4 Insured Exposure**

- (a) The compensation payable to DB Co pursuant to this Section 34 shall be reduced by any amount which DB Co or a DB Co Party recovers, or is entitled to recover, under any insurance policy, or would have recovered if it had complied with the requirements of this Project Agreement in respect of insurance or the terms of any policy of insurance required under this Project Agreement, which amount, for greater certainty, shall not include any excess or deductibles or any amount over the maximum amount insured under any such insurance policy.

### **35. FORCE MAJEURE**

#### **35.1 Definition**

- (a) For the purposes of this Project Agreement, "**Force Majeure**" means any of the following events or circumstances which directly causes either Party to be unable to perform all or a material part of its obligations under this Project Agreement:
  - (i) war, civil war, armed conflict, terrorism, acts of foreign enemies or hostilities;
  - (ii) nuclear or radioactive contamination of the Works, the New City Infrastructure and/or the Lands, unless DB Co or any DB Co Party is the source or cause of the contamination;
  - (iii) chemical or biological contamination of the Works, the New City Infrastructure and/or the Lands from any event referred to in Section 35.1(a)(i);

- (iv) pressure waves caused by devices traveling at supersonic speeds; or
- (v) the discovery of any Species-at-Risk, fossils, artefacts and other objects having artistic, historic, archaeological or monetary value, including human remains and burial sites, which, as a result of Applicable Law, require the Works to be abandoned.

### **35.2 Consequences of Force Majeure**

- (a) Subject to Section 35.3, the Party claiming relief shall be relieved from liability under this Project Agreement to the extent that, by reason of the Force Majeure, it is not able to perform its obligations under this Project Agreement.
- (b) In respect of an event of Force Majeure that is also a Delay Event pursuant to Section 32.1(a)(xii):
  - (i) DB Co shall only be relieved of its obligations under this Project Agreement to the extent, if any, provided for in Section 32; and
  - (ii) on the earlier of (A) the affected Substantial Completion Date(s) and (B) the date of payment of the City Default Termination Sum or Non-Default Termination Sum (and as a part thereof) in accordance with Schedule 23 – Compensation on Termination, the City shall pay to DB Co an amount equal to the Debt Service Amount accrued and paid or that accrued in accordance with the Lending Agreements during the period of delay by DB Co or any DB Co Party to the Lenders up to and including the applicable Scheduled Substantial Completion Date(s) or the date of payment of the City Default Termination Sum or Non-Default Termination Sum, as applicable, together with interest thereon at the rate payable on the principal amount of debt funded under the Lending Agreements, which, but for the Delay Event, would not have been paid by DB Co to the Lenders.
- (c) If an event of Force Majeure occurs prior to the affected Substantial Completion Date(s), DB Co shall not be entitled to receive any compensation other than as expressly provided in Sections 35.2(b)(ii) and 40.
- (d) Subject to Section 40, DB Co's sole right to payment or otherwise in relation to the occurrence of an event of Force Majeure shall be as provided in this Section 35.
- (e) Subject to the provisions of this Section 35, and with respect to an event of Force Majeure that is not a Delay Event and that arises prior to the affected Substantial Completion Date(s), (i) a Lane Closure that is directly caused or extended by the occurrence of an event of Force Majeure shall not be included in the Aggregate Actual Lane Closures or the Aggregate Actual Lane Closure Cost for the relevant Road Section for the purposes of calculating the Lane Closure Adjustment in accordance with the process set out in Schedule 34 – Mobility Matters.

### **35.3 Mitigation and Process**

- (a) Where a Party is (or claims to be) affected by an event of Force Majeure, such Party shall take commercially reasonable steps to mitigate the consequences of such event of Force Majeure upon the performance of its obligations under this Project Agreement, shall resume performance of its obligations affected by the event of Force Majeure as soon as practicable and shall use

commercially reasonable efforts to remedy its failure to perform, including efforts to minimize any negative impact of the event of Force Majeure on the Works Schedule.

- (b) To the extent that the Party claiming relief does not comply with its obligations under this Section 35.3, such failure shall be taken into account in determining such Party's entitlement to relief pursuant to this Section 35.
- (c) The Party claiming relief shall give written Notice to the other Party within 5 Business Days after such Party becoming aware of the relevant event of Force Majeure. Such initial Notice shall give sufficient details to identify the particular event claimed to be an event of Force Majeure.
- (d) A subsequent written Notice shall be given by the Party claiming relief to the other Party within a further 5 Business Days of the initial Notice, which Notice shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including, without limitation, the effect of the event of Force Majeure on the ability of the Party to perform, the action being taken in accordance with Section 35.3(a), the date of the occurrence of the event of Force Majeure, and an estimate of the period of time required to overcome the event of Force Majeure and its effects.
- (e) The Party claiming relief shall notify the other as soon as the consequences of the event of Force Majeure have ceased and of when performance of its affected obligations can be resumed.
- (f) If, following the issue of any Notice referred to in Section 35.3(d), the Party claiming relief receives or becomes aware of any further information relating to the event of Force Majeure and/or any failure to perform, such Party shall submit such further information to the other Party as soon as reasonably possible.

#### **35.4 Insured Exposure**

- (a) The compensation payable to DB Co pursuant to this Section 35 shall be reduced by any amount which DB Co or a DB Co Party recovers, or is entitled to recover, under any insurance policy, or would have recovered if it had complied with the requirements of this Project Agreement in respect of insurance or the terms of any policy of insurance required under this Project Agreement, which amount, for greater certainty, shall not include any excess or deductibles or any amount over the maximum amount insured under any such insurance policy.

#### **35.5 Modifications**

- (a) The Parties shall use commercially reasonable efforts to agree to any modifications to this Project Agreement which may be equitable having regard to the nature of an event or events of Force Majeure. Schedule 27 – Dispute Resolution Procedure shall not apply to a failure of the City and DB Co to reach agreement pursuant to this Section 35.5.

### **36. DB CO DEFAULT**

#### **36.1 DB Co Events of Default**

- (a) For the purposes of this Project Agreement, “**DB Co Event of Default**” means any one or more of the following events or circumstances:

- (i) the occurrence of any of the following events other than as a consequence of a breach by the City of its payment obligations hereunder:
- (A) DB Co admits in writing its inability to pay its debts generally 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 DB Co with respect to DB Co or any of the property, assets or undertaking of DB Co, or any creditor of DB Co takes control, or takes steps to take control, of DB Co or any of DB Co's assets, or any proceedings are instituted against DB Co that result in DB Co being declared or ordered bankrupt or in administration, liquidation, 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 DB Co seeking any such result, or any such proceedings are instituted by a person other than DB Co, the City, a City Party or a person related to any of them seeking such result and such proceedings have or will have a material adverse effect on the performance of the Works or of the City Activities (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 DB Co are taken to authorize any of the actions set forth in this Section 36.1(a)(i);
  - (B) DB Co ceases performing a substantial portion of its business, or a substantial portion of such business is suspended or is not being performed, whether voluntarily or involuntarily, that has or will have a material adverse effect on DB Co's ability to perform its obligations under this Project Agreement;
  - (C) if any execution, sequestration, extent, garnishment or other process of or order by any court becomes enforceable against DB Co or if a distress or analogous process is levied against any property of DB Co that materially adversely affects DB Co's ability to perform its obligations hereunder; or
  - (D) DB Co 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 Section 36.1(a)(i) in any jurisdiction in which it is incorporated or resident and such event or set of circumstances would, if set out in Section 36.1(a)(i)(A), (B) or (C), constitute a DB Co Event of Default;

- (ii) DB Co failing to achieve East Substantial Completion or West Substantial Completion within 365 days after the West Scheduled Substantial Completion Date (the “**Longstop Date**”);
- (iii) [Not used];
- (iv) [Not used];
- (v) DB Co either:
  - (A) failing to deliver a Recovery Schedule under Section 2.4 of Schedule 12 – Works Scheduling Requirements;
  - (B) delivering a Recovery Schedule under Section 2.4 of Schedule 12 – Works Scheduling Requirements which indicates that DB Co will not achieve East Substantial Completion or West Substantial Completion by the Longstop Date;
  - (C) delivering a Recovery Schedule under Section 2.4 of Schedule 12 – Works Scheduling Requirements that is not acceptable to the Independent Certifier, acting reasonably, as to the matters set out in Section 2.4 of Schedule 12 – Works Scheduling Requirements.
- (vi) DB Co making any representation or warranty herein that is false or misleading when made, and that has or will have at any time a material adverse effect on the performance of Works, or the Governmental Activities, or that may compromise (A) the City’s reputation or integrity, or (B) the nature of the public transit system in the City of Ottawa or the Province of Ontario so as to affect public confidence in the public transit system in the City of Ottawa or the Province of Ontario or the Project, and, in the case of a false or misleading representation or warranty that is capable of being remedied, such breach is not remedied within 10 Business Days after receipt of Notice of the same from the City;
- (vii) DB Co committing a breach of Sections 42 or 43;
- (viii) DB Co committing a breach of its obligations under this Project Agreement which has or will have a material adverse effect on the performance of the City Activities (other than a breach that is otherwise referred to in Sections 36.1(a)(i) to (vii) inclusive or (ix) to (xviii) inclusive) other than where such breach is a consequence of a breach by the City of its obligations under this Project Agreement or the result of any circumstance described in Section 11.12(k), and upon becoming aware of such breach DB Co failing to remedy such breach in accordance with all of the following:
  - (A) DB Co shall:
    - (I) immediately commence and thereafter diligently continue to remedy the breach and to mitigate any adverse effects on the City and the performance of the City’s operations and the City Activities;
    - (II) put forward, within 5 Business Days after receipt of Notice of such breach from the City, a reasonable plan and schedule for diligently

remediating the breach and mitigating its effect, which plan and schedule shall specify in reasonable detail the manner in which, and the latest date by which, such breach is proposed to be remedied, which latest date shall in any event be within 60 days after Notice of such breach, or if such breach is not capable of being rectified in such period then such longer period as is reasonable in the circumstances; and

- (III) thereafter perform its obligations to achieve all elements of such plan and schedule in accordance with its terms within the time for the performance of its obligations thereunder;
- (ix) DB Co wholly abandoning the Works for a period which exceeds three Business Days from receipt by DB Co of a written request to return to the Site, other than as a consequence of a breach by the City of its obligations under this Project Agreement;
- (x) DB Co failing to comply with Sections 49.1 or 49.3;
- (xi) the occurrence of any Change in Ownership or Change in Control which is prohibited by Section 49.4;
- (xii) DB Co failing to remove an Encumbrance that arose due to an act or omission of DB Co or any DB Co Party (other than any Encumbrance derived through the City) within 45 days following the earlier of:
  - (A) the registration of such Encumbrance against title to the Lands or any part thereof; and
  - (B) the date on which DB Co or any DB Co Party knew, or ought to have known, about the existence of the Encumbrance;
- (xiii) DB Co failing to pay any sum or sums due to the City under this Project Agreement, which sum or sums are not being disputed by DB Co in accordance with Schedule 27 – Dispute Resolution Procedure or have not been set off by DB Co pursuant to Section 4.8(a)(ii), and which sum or sums, either singly or in aggregate, exceed(s) \$[REDACTED] (index linked), and such failure continues for 30 days from receipt by DB Co of a Notice of non-payment from the City;
- (xiv) DB Co failing to comply with Section 50;
- (xv) DB Co failing to comply with Section 8.3 or Schedule 28 – Refinancing;
- (xvi) DB Co failing to obtain any bond, security or insurance required to be obtained by or on behalf of DB Co pursuant to this Project Agreement or any such bond, security or insurance being vitiated or otherwise ceasing to be in full force and effect or in material compliance with the requirements set out in this Project Agreement, other than
  - (A) as a consequence of a breach by the City of its obligations under this Project Agreement; or

- (B) the failure to deliver the East Warranty Letter of Credit, West Warranty Letter of Credit, and/or the Remaining Works Letter of Credit (in respect of which failure the City will have the rights set out in Section 4.2(d), (e) and (h), respectively); or
  - (C) the failure to replace a Non-Renewed Warranty Letter of Credit, or renew the Remaining Works Letter of Credit (in respect of which failure the City will have the rights set out in Section 11.18(i) and 11.18A(i) respectively),  
and,
  - (D) in respect of insurance, such breach by DB Co is not remedied within 10 Business Days after the occurrence of the breach; and
  - (E) in respect of a bond or security, such breach by DB Co is not remedied within 5 Business Days after DB Co becoming aware of such breach;
- (xvii) DB Co failing to comply with any determination, order or award made against DB Co in accordance with Schedule 27 – Dispute Resolution Procedure;
- (xviii) A default by DB Co or any DB Co Party under any of the Ancillary Documents following the expiry of any applicable notice and cure periods thereunder.

### **36.2 Notification of Occurrence**

- (a) DB Co shall, promptly upon DB Co becoming aware of the occurrence, notify the City of the occurrence, and details, of any DB Co Event of Default and of any event or circumstance which is likely, with the passage of time, giving of Notice, determination of any condition, or otherwise, to constitute or give rise to a DB Co Event of Default.

### **36.3 Right to Termination**

- (a) On the occurrence of a DB Co Event of Default, or at any time after the City becomes aware of a DB Co Event of Default, and, if the occurrence of a DB Co Event of Default is disputed by DB Co in good faith, then following confirmation in accordance with Schedule 27 – Dispute Resolution Procedure that a DB Co Event of Default has occurred, the City may, subject to Section 36.4 and 36.3(b), terminate this Project Agreement in its entirety by written Notice having immediate effect, such Notice to be given to DB Co, and to any person specified in the Lenders' Direct Agreement to receive such Notice.
- (b) In the event a DB Co Event of Default was caused solely by the Nominated Signalling Subcontractor, the City's rights to terminate this Project Agreement for such DB Co Event of Default shall be stayed for a period of 180 days after a Notice of default to DB Co for such DB Co Event of Default. In the event that during such 180 day period the City and DB Co mutually agree that the Nominated Signalling Contractor will not be able to perform the Nominated Signalling Subcontractor Works in accordance with the Current PBS, then subject to and in accordance with Schedule 22 – Variation Procedure, any consequential alteration, extension or variation in the Works shall result in a Variation.

### 36.4 Remedy Provisions

- (a) In the case of a DB Co Event of Default referred to in Sections 36.1(a)(i)(B), 36.1(a)(i)(C), 36.1(a)(i)(D) (where the DB Co Event of Default referred to in Section 36.1(a)(i)(D) is analogous to a DB Co Event of Default referred to in Section 36.1(a)(i)(B) or 36.1(a)(i)(C)), 36.1(a)(v), 36.1(a)(vi), 36.1(a)(vii), 36.1(a)(ix), 36.1(a)(x), 36.1(a)(xi), (where the DB Co Event of Default referred to in Section 36.1(a)(xi) is capable of being remedied), 36.1(a)(xiii), 36.1(a)(xv), 36.1(a)(xvi) (where the DB Co Event of Default referred to in Section 36.1(a)(xvi)) is not in respect of insurance), 36.1(a)(xvii), or 36.1(a)(xviii), the City shall, prior to being entitled to terminate this Project Agreement, give Notice of default to DB Co, and to any person specified in the Lenders' Direct Agreement to receive such Notice, and DB Co shall:
- (i) within five Business Days after such Notice of default, put forward a reasonable plan and schedule for diligently remedying the DB Co Event of Default, which schedule shall specify in reasonable detail the manner in, and the latest date by which, such DB Co Event of Default is proposed to be remedied, which latest date shall, in any event, be within 30 days after the Notice of default, or if such breach is not capable of being remedied in such period then such longer period as is acceptable to the City, acting reasonably; and
  - (ii) thereafter, perform its obligations to achieve all elements of such plan and schedule in accordance with its terms within the time for the performance of its obligations thereunder.
- (b) Where DB Co puts forward a plan and schedule in accordance with Section 36.4(a)(i) that has a date for the DB Co Event of Default to be remedied that is beyond 30 days from the Notice of default, the City shall have 5 Business Days from receipt of the same within which to notify DB Co that the City does not accept such longer period in the plan and schedule and that the 30 day limit will apply, failing which the City shall be deemed to have accepted the longer period in the plan and schedule.
- (c) If a DB Co Event of Default, of which a Notice of default was given under Section 36.4(a), occurs and:
- (i) DB Co fails to immediately commence and thereafter diligently continue to remedy the DB Co Event of Default and to mitigate any adverse effects on the City and the Governmental Activities; or
  - (ii) DB Co fails to put forward a plan and schedule pursuant to Section 36.4(a)(i); or
  - (iii) such DB Co Event of Default is not remedied within 30 days after such Notice of default or such longer period as is established pursuant to the plan and schedule established pursuant to Sections 36.4(a) and (b); or
  - (iv) where DB Co puts forward a plan and schedule pursuant to Section 36.4(a)(i) and DB Co fails to perform its obligations thereunder necessary to achieve all elements of such plan and schedule in accordance with its terms within the time for the performance of its obligations,

then the City may terminate this Project Agreement in its entirety by written Notice with immediate effect, such Notice to be given to DB Co, and to any person specified in the Lenders' Direct Agreement to receive such Notice.

- (d) Notwithstanding that the City may give the Notice referred to in Section 36.4(a), and without prejudice to the other rights of the City in this Section 36.4, at any time during which a DB Co Event of Default is continuing, the City may, at DB Co's risk and expense, take such steps as the City considers appropriate, either themselves or by engaging others (including a third party) to take such steps, to perform or obtain the performance of DB Co's obligations under this Project Agreement or to remedy such DB Co Event of Default.
- (e) Upon the occurrence of a DB Co Event of Default that DB Co has remedied pursuant to this Section 36.4, such occurrence of a DB Co Event of Default shall thereafter cease to be a DB Co Event of Default and the City shall not be entitled to terminate this Project Agreement for that occurrence of a DB Co Event of Default.

### **36.5 City Costs**

- (a) DB Co shall reimburse the City for all reasonable costs (including all applicable Taxes and all legal or professional services, legal costs being on a full indemnity basis) properly incurred by the City in exercising its rights under this Section 36, including any relevant increased administrative expenses. The City shall take commercially reasonable steps to mitigate such costs.

### **36.6 No Other Rights to Terminate**

- (a) The City shall have no right or entitlement to terminate this Project Agreement, or to accept any repudiation of this Project Agreement, and shall not purport to exercise any such right or entitlement except as set forth in Sections 36 and 38.

## **37. CITY DEFAULT**

### **37.1 City Events of Default**

- (a) For the purposes of this Project Agreement, "**City Event of Default**" means any one or more of the following events or circumstances:
  - (i) the City failing to pay any sum or sums due to DB Co under this Project Agreement, which sum or sums are not being disputed by the City in accordance with Schedule 27 – Dispute Resolution Procedure or have not been set off by the City pursuant to Section 4.8(a)(i), and which sum or sums, either singly or in aggregate, exceed(s) **[\$[REDACTED]]** (index linked), and:
    - (A) in respect of a Substantial Completion Payment or Construction Period Payment, such failure continues for a period of 10 Business Days; or
    - (B) in respect of any other payment due and payable by the City to DB Co under this Project Agreement, such failure continues for a period of 90 days,

in any such case, from receipt by the City of a Notice of non-payment from or on behalf of DB Co;

- (ii) the City committing a material breach of its obligations under Section 16 (other than as a consequence of a breach by DB Co of its obligations under this Project Agreement), which breach materially adversely affects the ability of DB Co to perform its obligations under this Project Agreement for a continuous period of not less than 60 days; or
- (iii) an act of any Governmental Authority which renders it impossible for DB Co to perform all or substantially all of its obligations under this Project Agreement (other than as a consequence of a breach by DB Co of its obligations under this Project Agreement) for a continuous period of not less than 60 days, provided that, for greater certainty, the non-issuance of, or the imposition of any conditions or limitations in, any of the DB Co Permits, Licences, Approvals and Agreements shall not constitute an “act of any Governmental Authority”.

### **37.2 DB Co’s Options**

- (a) On the occurrence of a City Event of Default and while the same is continuing, DB Co may give Notice to the City of the occurrence of such City Event of Default, which Notice will specify the details thereof, and, at DB Co’s option and without prejudice to its other rights and remedies under this Project Agreement, DB Co may:
  - (i) suspend performance of the Works until such time as the City has remedied such City Event of Default; or
  - (ii) if such City Event of Default has not been remedied within 30 days after receipt by the City of Notice of the occurrence of such City Event of Default, terminate this Project Agreement in its entirety by Notice in writing having immediate effect.

### **37.3 DB Co’s Costs**

- (a) The City shall reimburse DB Co for all reasonable costs (including all applicable Taxes and all legal or professional services, legal costs being on a full indemnity basis) properly incurred by DB Co in exercising its rights under this Section 37, including any relevant increased administrative expenses. DB Co shall take commercially reasonable steps to mitigate such costs.

### **37.4 No Other Rights to Terminate**

- (a) DB Co shall have no right or entitlement to terminate this Project Agreement, nor to accept any repudiation of this Project Agreement, and shall not exercise, nor purport to exercise, any such right or entitlement except as expressly set forth in this Project Agreement.

## **38. RELIEF EVENT AND NON DEFAULT TERMINATION**

### **38.1 Termination for Relief Event**

- (a) If a Relief Event occurs and the effects of the Relief Event continue for 180 days from the date on which the Party affected gives Notice to the other Party pursuant to Section 34.3(c), either Party may, at any time thereafter, terminate this Project Agreement by written Notice to the other Party having immediate effect, provided that the effects of the Relief Event continue during such period to prevent either Party from performing a material part of its obligations under this Project Agreement.

### **38.2 Termination for Force Majeure**

- (a) If an event of Force Majeure occurs and the Parties, having used commercially reasonable efforts, have failed to reach agreement on any modification to this Project Agreement pursuant to Section 35.5 within 180 days after the date on which the Party affected gives Notice to the other Party as set out therein, either Party may, at any time thereafter, terminate this Project Agreement by written Notice to the other Party having immediate effect, provided that the effects of the event of Force Majeure continue during such period to prevent either Party from performing a material part of its obligations under this Project Agreement.

### **38.3 Termination for Convenience**

- (a) The City shall, in its sole discretion and for any reason whatsoever, be entitled to terminate this Project Agreement at any time on 180 days written Notice to DB Co.
- (b) In the event of Notice being given by the City in accordance with this Section 38.3, the City shall, at any time before the expiration of such Notice, be entitled to direct DB Co to refrain from commencing, or allowing any third party to commence, the Works, or any part or parts of the Works where such Works have not yet been commenced.

### **38.4 Automatic Expiry on Expiry Date**

- (a) This Project Agreement shall terminate automatically on the Expiry Date.
- (b) DB Co shall not be entitled to any compensation due to termination of this Project Agreement on expiry of the Project Term on the Expiry Date.

## **39. EFFECT OF TERMINATION**

### **39.1 Termination**

- (a) Notwithstanding any provision of this Project Agreement, upon the service of a Notice of termination or termination on the Expiry Date pursuant to Section 38.4, this Section 39 shall apply in respect of such termination.

### **39.2 Continued Effect – No Waiver**

- (a) Notwithstanding any breach of this Project Agreement by a Party, the other Party may elect to continue to treat this Project Agreement as being in full force and effect and to enforce its rights under this Project Agreement without prejudice to any other rights which such other Party may have in relation to such breach. The failure of either Party to exercise any right under this Project Agreement, including any right to terminate this Project Agreement and any right to claim damages, shall not be deemed to be a waiver of such right for any continuing or subsequent breach.

### **39.3 Continuing Performance**

- (a) Subject to any exercise by the City of its rights to perform, or to seek, pursuant to this Project Agreement, a third party to perform, the obligations of DB Co, and subject to the rights of DB Co pursuant to Section 37.2, the Parties shall continue to perform their obligations under this Project

Agreement (including, if applicable, pursuant to Schedule 23 – Compensation on Termination) notwithstanding the giving of any Notice of default or Notice of termination, until the termination of this Project Agreement becomes effective in accordance with this Section 39.

#### **39.4 Effect of Notice of Termination**

- (a) On the service of a Notice of termination, or termination on the Expiry Date pursuant to Section 38.4:
- (i) if termination is prior to any Substantial Completion Date(s), in so far as any transfer shall be necessary to fully and effectively transfer such property to the City as shall not already have been transferred to the City pursuant to Section 45.1, DB Co shall transfer to, and there shall vest in, the City, free from all Encumbrances (other than the Encumbrances caused or consented to by the City), such part of the Works, the New City Infrastructure, and the New MTO Infrastructure as shall have been constructed and such items of the plant, infrastructure and equipment as shall have been procured by DB Co, and, if the City so elects:
    - (A) all plant, equipment and materials (other than those referred to in Section 39.4(a)(i)(B)) on or near to the Lands shall remain available to the City for the purposes of completing the Works; and
    - (B) all construction plant and equipment shall remain available to the City for the purposes of completing the Works, subject to payment by the City of the Construction Contractor's reasonable charges;
  - (ii) if termination is prior to any Substantial Completion Date(s), DB Co shall deliver to the City (to the extent such items have not already been delivered to the City) one complete set of all Project Data and Intellectual Property relating to the design, construction and completion of the Works, the New City Infrastructure, and the New MTO Infrastructure, as applicable, comprising the Works that are the subject of such Substantial Completion Date(s);
  - (iii) in so far as title shall not have already passed to the City pursuant to Section 45.1 or Section 39.4(a)(i), DB Co shall hand over to, and there shall vest in, the City, free from all Encumbrances (other than any Encumbrances caused or consented to by the City), the New City Infrastructure and the New MTO Infrastructure together with all other assets and rights capable of being transferred that are necessary for the performance of the Project and the Works and all facilities and equipment, and to the extent that any such assets or rights are not capable of being transferred by DB Co to the City, DB Co shall enter into agreements or make other arrangements in order to permit the use of the assets or rights by the City in order to enable them, or their designated agents or subcontractors, to continue to perform the activities which would have otherwise been performed by DB Co if this Project Agreement had not been terminated;
  - (iv) if the City so elects, DB Co shall ensure that any of the Subcontracts between DB Co and a Subcontractor (including the Design and Construction Contract), any other instrument entered into between any such Subcontractor and DB Co for securing the performance by such Subcontractor of its obligations in respect of the Works or to protect the interests of DB Co, shall be novated or assigned to the City or its nominee, provided that where

termination occurs other than as a result of a DB Co Event of Default, the consent of the relevant Subcontractor shall be required, and further provided that any such novation or assignment of the Design and Construction Contract with the Construction Contractor shall be made by the City pursuant to, and subject to, the terms of the Construction Contractor's Direct Agreement;

- (v) DB Co shall, or shall ensure that any DB Co Party shall, offer to sell (and if the City so elects, execute such sale) to the City at a fair value (determined as between a willing vendor and willing purchaser, with any Disputes as to such fair value being resolved in accordance with Schedule 27 – Dispute Resolution Procedure), free from all Encumbrances (other than any Encumbrances caused or consented to by the City), all or any part of the stocks of material and other assets, road vehicles, construction equipment, spare parts and other moveable property owned by DB Co or any DB Co Parties and dedicated to or predominantly used in respect of the New City Infrastructure, and reasonably required by the City in connection with the operation of the New City Infrastructure;
- (vi) DB Co shall use commercially reasonable efforts to assign, or otherwise transfer, to the City, free from all Encumbrances (other than any Encumbrances caused or consented to by the City), the benefit of all manufacturers' warranties, including all documentation in respect thereof, in respect of mechanical and electrical plant and equipment used or made available by DB Co under this Project Agreement and included in the New City Infrastructure and the New MTO Infrastructure; and
- (vii) DB Co shall deliver to the City all information, reports, documents, records and the like referred to in Section 28, including as referred to in Schedule 26 – Record Provisions, except where such are required by Applicable Law to be retained by DB Co or the DB Co Parties (in which case complete copies shall be delivered to the City).

### **39.5 Ownership of Information**

- (a) Subject to Section 41, all information obtained by DB Co, including the As-Built Drawings, Record Drawings, and other technical drawings and data, supplier agreements and contracts, utilities consumption information, environmental and technical reports, static building information, lease, licence and subletting data and contracts, asset condition data, standard operating procedures, processes and manuals and all other information directly related to the Works accumulated over the course of the Project Term shall be the property of the City and upon termination of this Project Agreement shall be provided or returned to the City, as applicable, in electronic format acceptable to the City, acting reasonably, where it exists in electronic format, and in its original format, when not in electronic format.

### **39.6 Provision in Subcontracts**

- (a) DB Co shall make provision in all Subcontracts to which it is a party (including requiring the relevant DB Co Parties to make such provision and to require other DB Co Parties to make such provision) to ensure that the City shall be in a position to exercise its rights, and DB Co shall be in a position to perform its obligations, under this Section 39.

### **39.7 Transitional Arrangements**

- (a) On the termination of this Project Agreement for any reason, for a reasonable period both before and after any such termination, DB Co shall:
- (i) as soon as practicable remove from the Lands all property belonging to DB Co or any DB Co Party that is not acquired by the City pursuant to Section 39.4 or otherwise, and, if DB Co has not done so within 60 days after any Notice from the City requiring it to do so, the City may, without being responsible for any loss, damage, costs or expenses, remove and sell any such property and shall hold any proceeds, less all costs incurred to the credit of DB Co;
  - (ii) forthwith deliver to the City Representative:
    - (A) all keys to, and any pass cards and other devices used to gain access to any part of the New City Infrastructure; and
    - (B) to the extent transferable and without prejudice to the City's rights pursuant to Section 41, any copyright licences for any computer programs, or licences to use the same, used in connection with the operation of the New City Infrastructure; and
  - (iii) as soon as practicable vacate the Lands and shall leave the Lands and the New City Infrastructure in a safe, clean and orderly condition.

### **39.8 Termination upon Aforesaid Transfer**

- (a) On completion of DB Co's obligations pursuant to this Section 39, this Project Agreement shall terminate and, except as provided in Section 39.9, all rights and obligations of the City and DB Co under this Project Agreement shall cease and be of no further force and effect.

### **39.9 Survival**

- (a) Except as otherwise provided in this Project Agreement, termination of this Project Agreement shall be without prejudice to, and shall not affect:
- (i) all representations, warranties and indemnities under this Project Agreement; and
  - (ii) Sections 1.2, 1.3, 1.5, 4.8, 4.9, 4.11, 6, 7, 8, 11.15(b), 11.16(a), 11.17, 11.17A, 11.18, 11.18A, 17.2, 17.3, 18.1, 18.2, 18.3(a), 18.4(a), 22.6, 25.15, 27, 28, 36.5, 37.3, 38.4, 39, 40, 41 (with the exception of 41.4(b)), 42, 43, 44.3, 45, 46, 47, 48, 50.3, 51.1, 53.2, 53.3, 53.4, 53.8, 53.9, 53.10, 53.11, 53.12 of this Project Agreement, Schedule 7B – Warranty Letters of Credit, Schedule 7C – Remaining Works Letter of Credit, Schedule 14 – Testing & Commissioning, Schedule 23 – Compensation on Termination, Schedule 32 – Financial Model, Sections 1.2 – 1.8 of Schedule 26 – Record Provisions, Schedule 27 – Dispute Resolution Procedure, Sections 2.1 – 2.6 and 3.2-3.9 of Schedule 24 – Intellectual Property, Schedule 34 – Mobility Matters, and any other provisions of this Project Agreement which are expressed to survive termination or which are required to give effect to such provisions which survive termination or to such termination or the consequences of such termination,

all of which shall survive the termination of this Project Agreement, including for termination on the Expiry Date pursuant to Section 38.4. For clarity, any termination of this Project Agreement shall be without prejudice to, and shall not affect, the Performance Guarantee of Construction Guarantor, which shall survive the termination of this Project Agreement, including termination on the Expiry Date pursuant to Section 38.4, in respect of any and all of such surviving provisions of the Project Agreement.

#### **40. COMPENSATION ON TERMINATION**

##### **40.1 Compensation on Termination**

- (a) If this Project Agreement is terminated in accordance with the terms hereof, then Schedule 23 – Compensation on Termination shall apply and the City shall pay DB Co any applicable compensation on termination.

##### **40.2 Full and Final Settlement**

- (a) Except as otherwise provided in Section 40.2(b), any compensation paid pursuant to this Section 40, including pursuant to Schedule 23 – Compensation on Termination in the total amount owing thereunder, shall be in full and final settlement of any claims, demands and proceedings of DB Co and the City, and each shall be released from all liability to the other in relation to any breaches or other events leading to such termination of this Project Agreement, and the circumstances leading to such breach or termination, and DB Co and the City shall be precluded from exercising all other rights and remedies in respect of any such breach or termination whether in contract, tort, restitution, statute, at common law or otherwise.
- (b) Section 40.2(a) shall be without prejudice to:
- (i) any liability of either Party to the other, including under the indemnities contained in this Project Agreement, that arose prior to the Termination Date (but not from the termination itself or the events leading to such termination) to the extent such liability has not already been set off pursuant to Section 4.8 or taken into account pursuant to Schedule 23 – Compensation on Termination in determining or agreeing upon the City Default Termination Sum, Non-Default Termination Sum, DB Co Default Termination Sum or any other termination sum, as the case may be; and
  - (ii) any liabilities arising under or in respect of any breach by either Party of their obligations surviving termination of this Project Agreement pursuant to Section 39.9, or the Sections referred to therein, which did not lead to such termination and which arises or continues after the Termination Date.

#### **41. INTELLECTUAL PROPERTY**

##### **41.1 Ownership of Intellectual Property**

- (a) Subject to Section 41.3(a), the Ownership of Intellectual Property shall be as set out in Schedule 24 – Intellectual Property. DB Co and the City shall each comply with the requirements of Schedule 24 – Intellectual Property.

#### 41.2 Licenses to Intellectual Property

- (a) Schedule 24 – Intellectual Property sets out the terms on which Intellectual Property used or supplied in connection with the Project will be licenced.

#### 41.3 Representation and Warranty

- (a) DB Co represents, warrants and covenants to the City that:
- (i) DB Co has and shall have the full and unencumbered right to provide all rights and licenses granted to the City in this Project Agreement and to make all assignments of Intellectual Property as contemplated in this Project Agreement and to otherwise fully comply with the terms and requirements of Schedule 24 – Intellectual Property and its obligations therein;
  - (ii) any Intellectual Property licenses to the City pursuant to this Project Agreement does not and shall not infringe, and is not and shall not be misappropriation of, any third party Intellectual Property rights;
  - (iii) as of Commercial Close:
    - (A) DB Co has not received any alleged infringement or misappropriation notices from third parties regarding any such Intellectual Property; and
    - (B) no fact is known to DB Co (including in respect of any actual, pending or threatened disputes, claims, suits, actions or proceedings or any other circumstance or event) that will, or could reasonably, effect, limit or prevent DB Co from fully complying with this Section 41.3(a).

#### 41.4 Jointly Developed Materials

- (a) To the extent any data, documents, drawings, reports, plans, software, formulae, calculations or designs or any other materials or Intellectual Property are developed jointly by,
- (i) DB Co or any Subcontractor and the City to the exclusion of any other party pursuant to this Project Agreement or in relation to the New City Infrastructure, the Lands or Works (the “**City Jointly Developed Materials**”); and
  - (ii) DB Co or any Subcontractor and MTO to the exclusion of any other party in relation to the New MTO Infrastructure that will be owned by MTO (the “**MTO Jointly Developed Materials**”),
- (together, the “**Jointly Developed Materials**”), then the Parties hereby acknowledge and agree that,
- (iii) the City shall be the sole and exclusive owner of all right, title and interest in and to the City Jointly Developed Materials, any Intellectual Property associated therewith and any and all Modifications thereto and DB Co shall, at the request of the City, execute such further agreements and cause the Subcontractors to execute any and all assignments,

waivers of moral rights and other documents as may be reasonably required to fulfill the intent of this provision; and

- (iv) MTO shall be the sole and exclusive owner of all right, title and interest in and to the MTO Jointly Developed Materials, any Intellectual Property associated therewith and any and all Modifications thereto and that DB Co shall, at the request of MTO, execute such further agreements and cause the Subcontractors to execute any and all assignments, waivers of moral rights and other documents as may be reasonably required to fulfill the intent of this provision.
- (b) The City hereby grants DB Co, and shall procure that MTO grants DB Co, a royalty free, non-exclusive and non-transferable licence, with a right to grant sub-licences to each Subcontractor, to use the Jointly Developed Materials during the Project Term for the sole purposes of DB Co or any Subcontractor performing its obligations under this Project Agreement or its Subcontract, as applicable.
- (c) Upon termination of this Project Agreement, all rights and licences whatsoever granted to DB Co in the Jointly Developed Materials shall automatically terminate, and DB Co shall return any and all Jointly Developed Materials in the custody or possession of DB Co to,
  - (i) the City, in the case of the City Jointly Developed Materials; and
  - (ii) MTO, in the case of the MTO Jointly Developed Materials.
- (d) In the event of any inconsistency between this Section 41 and any provision of Schedule 24 – Intellectual Property, the wording of this Section 41 shall prevail.

#### **41.5 Maintenance of Data**

- (a) To the extent that any of the data, materials and documents referred to in this Section 41 or Schedule 24 – Intellectual Property are generated by, or maintained on, a computer or similar system, DB Co shall procure for the benefit of the City, either at no charge or at the lowest reasonable fee, the grant of a licence or sub-licence for any relevant software to enable the City or its nominee to access and otherwise use (subject to the payment by the City of any relevant fee) such data, materials and documents in accordance with rights granted pursuant to Schedule 24 – Intellectual Property.
- (b) For the purposes of Section 41.5(a), “use” has the meaning set out in Schedule 24 – Intellectual Property, and includes the Limited Modification Rights.
- (c) Without limiting the obligations of DB Co under Section 41.5(a), DB Co shall ensure the back-up and storage in safe custody of the data, materials and documents referred to in this Section 41 in accordance with Good Industry Practice. DB Co shall submit to the City Representative DB Co’s proposals for the back-up and storage in safe custody of such data, materials and documents and the City shall be entitled to object if the same is not in accordance with Good Industry Practice. DB Co shall comply, and shall cause all DB Co Parties to comply, with all procedures to which the City Representative has not objected. DB Co may vary its procedures for such back-up and storage subject to submitting its proposals for change to the City Representative, who shall be entitled to object on the basis set out above. Any Disputes in connection with the provisions of

this Section 41.5(c) may be referred for resolution in accordance with Schedule 27 – Dispute Resolution Procedure with reference to Good Industry Practice.

#### **41.6 City Trade-Marks**

- (a) DB Co shall not:
  - (i) use any City Trade-Marks without obtaining a trade-mark licence on terms and conditions mutually satisfactory to the City and DB Co, each acting reasonably;
  - (ii) use the names or any identifying logos or otherwise of the City or the City Representative in any advertising or permit them so to be used except with the prior written consent of the City; or
  - (iii) use any Trade-Marks of RTG or any RTG Party without obtaining a trade-mark licence on terms and conditions satisfactory to the RTG or such RTG Party.

#### **41.7 Confidential Information**

- (a) It is expressly acknowledged and agreed that nothing in this Section 41 shall be deemed to create or convey to a Party any right, title, or interest in and/or to the Confidential Information of the other Party.

#### **41.8 Government Use of Documents**

- (a) DB Co hereby disclaims any right, title or interest of any nature whatsoever it may have in or to this Project Agreement that might prohibit or otherwise interfere with the City's ability to use this Project Agreement in any manner desired by the City.
- (b) DB Co hereby consents to the use by the City of this Project Agreement, and any portion thereof, subject to compliance with FIPPA and to the removal by the City (in consultation with DB Co) of any information supplied in confidence to the City by DB Co in circumstances where disclosure may be refused under section 17(1) of FIPPA.

#### **41.9 Restrictions**

- (a) The Parties hereby agree that either Party may use the Project Know-How for any purpose, provided, however, that neither DB Co nor any Subcontractor shall use the Project Know-How to the extent that such Project Know-How incorporates, references or is otherwise based on the Project Data, the Intellectual Property Rights, the Jointly Developed Material, the Intellectual Property of the City, the Intellectual Property of any City Party or any third party provided by the City, the Confidential Information of the City, or the Confidential Information of any City Party or any third party provided by the City, including the Output Specifications unless such use is otherwise permitted pursuant to this Project Agreement in order to enable DB Co and the DB Co Parties to meet DB Co's obligations under this Project Agreement.
- (b) DB Co hereby covenants and agrees that it will not make any commercial use, including use in any other request for proposal or similar procurement process, of the Project Data, the Intellectual Property Rights, the Jointly Developed Material, the Intellectual Property of the City, the Intellectual Property of any City Party or any third party provided by the City, the Confidential

Information of the City, or the Confidential Information of any City Party or any third party provided by the City, including the Output Specifications, or any other drawings, reports, documents, plans, formulae, calculations, manuals, or other data that was created specifically for the Project or was based upon the Project Data, the Intellectual Property Rights, the Jointly Developed Material, the Intellectual Property of the City, the Intellectual Property of any City Party provided by the City, the Confidential Information of the City, or the Confidential Information of any City Party provided by the City, including the Output Specifications.

- (c) Nothing in this Section 41.9 shall be deemed to grant to any party (including any Subcontractor or any personnel thereof) any right or license in respect of any other party's or other persons' Intellectual Property.

## **42. CONFIDENTIALITY**

### **42.1 Disclosure**

- (a) Subject to Sections 42.1(b), 42.1(c) and 42.2, but notwithstanding anything else in this Project Agreement to the contrary, DB Co acknowledges and agrees that the City has a right to disclose or publish (including on websites) this Project Agreement, any or all terms hereof, including any or all contractual submissions and other records kept in accordance with this Project Agreement, any information related to the performance of DB Co (or any DB Co Party) or any information derived from this Project Agreement or the information related to the performance of DB Co (or any DB Co Party) as the City, in its sole discretion, may consider appropriate. In exercising its discretion, the City will be guided by the principles set out in Sections 42.1(b) and 42.1(c).
- (b) The City will not disclose portions of this Project Agreement, any terms hereof, including any contractual submissions or other records kept in accordance with this Project Agreement, any information related to the performance of DB Co (or any DB Co Party) or any information derived from this Project Agreement or the information related to the performance of DB Co (or any DB Co Party) which would be exempt from disclosure under section 17(1) of FIPPA.
- (c) Notwithstanding Section 42.1(b), but subject to Section 42.2, 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 DB Co (or any DB Co Party), the City may disclose such information.
- (d) Except as otherwise specified herein or in the Interface Agreement, or as otherwise reasonably required to be disclosed to RTG in respect of any bona fide dispute between RTG and DB Co or RTG and the City arising from or related to this Project Agreement or the Interface Agreement to substantiate any claim or defence thereto, the City shall not, DB Co shall not be required to, and the City shall have no right to compel DB Co to, disclose any commercially sensitive information of DB Co to RTG or any RTG Party. Without limiting the generality of the foregoing, commercially sensitive information shall include any information identified to the City as such by DB Co and shall include, the Lending Agreements, the Financial Model, any cost or draw schedules prepared in connection with this Project Agreement (including any fully-loaded cost schedule), any draw request or information submitted to the City in accordance with Schedule 21 – Construction Period Payments, any financial statements of DB Co, the Construction Contractor, the Construction Guarantors or any Affiliates thereof, and any pricing information obtained by the City, including any such information submitted in connection with any Variation or claim pursuant to Section 33, Section 33.6 or Section 35.

#### **42.2 Redaction**

- (a) Prior to disclosing or publishing this Project Agreement, any terms hereof, including any contractual submissions or other records kept in accordance with this Project Agreement, any information related to the performance of DB Co (or any DB Co Party) or any information derived from this Project Agreement or the information related to the performance of DB Co (or any DB Co Party), the City shall provide to DB Co a redacted version of this Project 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 42.1(b). The Parties acknowledge and agree that the Guaranteed Price, but not any breakdown thereof, may be disclosed.
- (b) If DB Co, acting in good faith, contends that any of the information not redacted constitutes information that falls within the scope of Section 42.1(b) and, accordingly, would be exempt from disclosure under FIPPA, the dispute may be referred for resolution in accordance with Schedule 27 – Dispute Resolution Procedure, and the City shall not disclose any information in dispute until a determination is made. Any such determination shall be made with reference to the text and principles of FIPPA.

#### **42.3 Disclosure to Government**

- (a) DB Co acknowledges and agrees that subject to compliance with FIPPA, the City 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 City see fit.
- (b) For greater certainty, DB Co acknowledges and agrees that, subject only to the removal of any information which DB Co is (or would be) entitled to refuse to disclose pursuant to section 17(1) of FIPPA, this Project Agreement, any contractual submissions or other records kept in accordance with this Project Agreement, any information related to the performance of DB Co (or any DB Co Party) or any information derived from this Project Agreement or the information related to the performance of DB Co (or any DB Co Party) are public documents and information and, as such, may be disclosed by the City.

#### **42.4 *Freedom of Information and Protection of Privacy Acts***

- (a) The Parties acknowledge and agree that,
  - (i) MFIPPA applies to the City, and that the City is required to fully comply with MFIPPA; and
  - (ii) FIPPA applies to the MTO, and that the MTO is required to fully comply with FIPPA.
- (b) The City shall, within the time periods provided in MFIPPA for a party to exercise rights to prevent disclosure of information, advise DB Co of any request for Confidential Information that relates to DB Co (or any DB Co Party) or of the City's intention to voluntarily release any information or documents which contain Confidential Information that relates to DB Co (or any DB Co Party).

**42.5 Use and Disclosure of Confidential Information**

- (a) 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 of the other Party, provided that this Section 42 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 Project Agreement.
- (b) DB Co may:
  - (i) disclose in confidence to the Lenders and prospective Lenders, including any trustee or agent of the Lenders and the Lenders' Agent, and their respective professional advisors such Confidential Information as is reasonably required by the Lenders in connection with the raising or syndication of the financing or any sub-participation in the financing of the Works or which DB Co is obliged to supply by the terms of the Lending Agreements; and
  - (ii) disclose in confidence to any DB Co Party and their professional advisors, such Confidential Information as is necessary for the performance by that DB Co Party of that DB Co Party's obligations under this Project Agreement.
- (c) DB Co acknowledges that the City may use the Confidential Information of DB Co for purposes not specific to the Project, but for other general governmental purposes, such as development of the City's alternate procurement and financing policies and framework. The City will advise DB Co prior to using any Confidential Information of DB Co for non-Project purposes.
- (d) Subject to the foregoing, neither Party shall use, or directly or indirectly cause, authorize or permit any other person to use, any Confidential Information of the other Party except for the purposes of this Project Agreement, as permitted by this Project Agreement or as authorized by the disclosing Party in writing.
- (e) Each Party shall,
  - (i) 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;
  - (ii) if legally compelled to disclose any Confidential Information,
    - (A) 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
    - (B) disclose only that portion of the Confidential Information that it is legally required to disclose; and
  - (iii) provide Confidential Information to the disclosing Party upon demand by the disclosing Party.

Section 42.5(e)(iii) shall not apply to Confidential Information in relation to which a Party has been provided a licence pursuant to Schedule 24 – Intellectual Property provided that the use of such Confidential Information is in accordance with Schedule 24 – Intellectual Property.

- (f) Without limiting the generality of this Section 42.5, DB Co shall comply with the document control and security protocol submitted by DB Co pursuant to Section 11.5 and approved by the City, which protocol shall prescribe limitations on the use, disclosure and storage of this Project Agreement and any other Confidential Information specified by the City.

#### 42.6 Exceptions

- (a) 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:
- (i) 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;
  - (ii) the information is as of the date of this Project Agreement, or becomes at any time thereafter, generally available to or accessible by the public through no fault or wrongdoing of the Confidant;
  - (iii) the information is a matter of public record or in the public domain;
  - (iv) 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 Project Agreement;
  - (v) 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;
  - (vi) the information was independently developed by the Confidant without access to the Confidential Information, as evidenced by written records;
  - (vii) 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;
  - (viii) the information is disclosed to the City upon a termination of this Project Agreement, pursuant to Section 38 or is otherwise required by the City for the purposes of performing (or having performed) the Works, including the design or construction of the New City Infrastructure, or any other operations or services the same as, or similar to, the Works; or
  - (ix) the information would not be exempt from disclosure under FIPPA.

#### **42.7 Survival of Confidentiality**

- (a) The obligations in Section 42.1 to Section 42.6 will cease on the date that is three years after the Termination Date and accordingly shall survive the termination of the Project Agreement.

#### **42.8 Confidentiality of Intellectual Property**

- (a) Nothing in this Section 42 shall prevent the City from exercising any right granted to the City pursuant to Schedule 24 – Intellectual Property. The City shall have the right to disclose Confidential Information of DB Co Parties when exercising the rights granted pursuant to Schedule 24 – Intellectual Property in accordance therewith.

### **43. PERSONAL INFORMATION**

#### **43.1 General**

- (a) DB Co acknowledges the importance of maintaining the confidentiality and privacy of Personal Information.
- (b) DB Co shall, and shall require each DB Co Party to, only collect, hold, process, use, store and disclose Personal Information with the prior consent of the City and: (i) shall not collect, hold, process, use or store Personal Information except to the extent necessary to perform DB Co's obligations under this Project 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 City.
- (c) DB Co shall, and shall require each DB Co Party to, at all times treat Personal Information as strictly confidential and shall comply with all applicable requirements of the Output Specifications and the requirements of Applicable Law, including *FIPPA*, the *Personal Information Protection and Electronic Documents Act (Canada)*, 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 DB Co, each DB Co Party or to the Works.
- (d) DB Co shall take all necessary and appropriate action, and shall require each DB Co Party to take all necessary and appropriate action, against any person who fails to comply with this Section 43.1.
- (e) DB Co shall allow the City on reasonable Notice to inspect any Personal Information in the custody or possession of DB Co or a DB Co Party and to audit DB Co and each DB Co Party's compliance with this Section 43 including the measures used by DB Co and each DB Co Party to protect Personal Information, and otherwise promptly and properly respond to all reasonable inquiries of the City with respect to DB Co or each DB Co Party's handling of Personal Information.
- (f) DB Co 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 City and without obtaining written contractual commitments of such third party substantially the same as those of this Section 43.

### **43.2 Protection of Personal Information**

- (a) DB Co shall implement and use, and shall require each DB Co 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 DB Co, the DB Co Parties, and its and their staff shall protect, secure and keep confidential any Personal Information.
- (b) DB Co shall and shall cause each DB Co Party to restrict access to Personal Information to only those authorized employees and permitted DB Co 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 of this Section 43.
- (c) Upon termination of this Project Agreement or upon request of the City, whichever comes first, DB Co shall immediately cease all use of and return to the City or, at the direction of the City, 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.
- (d) 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 43.2(c), 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.
- (e) DB Co shall immediately inform the City of any actual or suspected loss, theft or accidental or unauthorized access, disclosure, copying, use, modification or destruction of Personal Information by DB Co or any DB Co Party or any other breach of this Section 43.
- (f) The City may from time to time require that DB Co and any DB Co Party or member of its or their staff execute and deliver within two Business Days after such request an agreement satisfactory to the City, acting reasonably, requiring such person to keep Personal Information confidential.

### **43.3 Personal Information**

- (a) DB Co shall provide, and shall cause each DB Co Party to provide, in a timely manner, all necessary and reasonable information and co-operation to the City 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.
- (b) To the extent of any conflict or inconsistency between this Section 43 and any other provision of the Project Agreement, this Section 43 shall prevail.
- (c) The obligations in this Section 43.3 shall survive the termination of this Project Agreement.

#### **44. INSURANCE AND PERFORMANCE SECURITY**

##### **44.1 General Requirements**

- (a) DB Co and the City shall comply with the provisions of Schedule 25 – Insurance and Performance Security Requirements.

##### **44.2 No Relief from Liabilities and Obligations**

- (a) Neither compliance nor failure to comply with the insurance provisions of this Project Agreement shall relieve DB Co or the City of their respective liabilities and obligations under this Project Agreement.

##### **44.3 Performance Guarantee of Construction Guarantor**

- (a) At all times during the Project Term and, in respect of the provisions described in Section 39.9, following the Project Term, DB Co shall ensure that a valid and binding Performance Guarantee of the Construction Guarantor in favour of DB Co and the City from the Construction Guarantor (or a party of comparable financial strength, capacity and stability, as determined by the City acting in its sole discretion) of the obligations of the Construction Contractor under the Design and Construction Contract and in the form of guarantee attached as Schedule 29 – Form of Performance Guarantee of Construction Guarantor, is in place and enforceable by the City. The Performance Guarantee of the Construction Guarantor will be delivered to, and held by, the Account Trustee.

#### **45. TITLE**

##### **45.1 Title**

- (a) Title to each item and part of the New City Infrastructure or the New MTO Infrastructure, including any materials, supplies, equipment, facilities, parts and any other deliverable or component items, but not the risk of loss or damage or destruction thereto or thereof, shall pass to the City (or as the City may direct) upon the receipt of such item on the Lands, provided however that title to items of tangible personal property (personal property that can be seen, weighed, measured, felt or touched or that is in any way perceptible to the senses and includes computer programs, natural gas and manufactured gas) that comprise the New City Infrastructure and the New MTO Infrastructure or are to be affixed or attached to the New City Infrastructure and the New MTO Infrastructure prior to Substantial Completion shall pass to the City (or as the City may direct) at the time that such items are included in the New City Infrastructure and the New MTO Infrastructure or are to be affixed or attached to the New City Infrastructure and the New MTO Infrastructure.

#### **46. INDEMNITIES**

##### **46.1 DB Co Indemnities to the City**

- (a) DB Co shall indemnify and save harmless the City and its directors, officers, employees, agents and representatives and, in respect of (iii) and (iv) below, City Parties and each of their respective directors, officers, employees, agents and representatives, from and against any and all Direct

Losses which may be suffered, sustained, incurred or brought against them as a result of, in respect of, or arising out of any one or more of the following:

- (i) [Intentionally Deleted]
- (ii) a failure by DB Co to achieve,
  - (A) East Substantial Completion by the East Scheduled Substantial Completion Date; or
  - (B) West Substantial Completion by the West Scheduled Substantial Completion Date;
- (iii) any physical loss of or damage to all or any part of the Lands, lands that are adjacent to the Lands (but that are not Lands), the New City Infrastructure, the New MTO Infrastructure, the Existing Infrastructure, the Stage 1 Connection Infrastructure, the RTG Works, or to any equipment, assets or other property related thereto;
- (iv) the death or personal injury of any person;
- (v) any physical loss of or damage to property or assets of any third party, including, for clarity, any physical loss of or damage to Existing Infrastructure, or New MTO Infrastructure;
- (vi) any other loss or damage of any third party;
- (vii) Injurious Affection claims made by third parties,  
  
in the case of Sections 46.1(a)(ii) to 46.1(a)(vi), arising, directly or indirectly, out of, or in consequence of, or involving or relating to, the performance or any breach of this Project Agreement by DB Co or any act or omission of DB Co or any DB Co Party, and in the case of Section 46.1(a)(vii), arising, directly or indirectly, out of, or in consequence of, or involving or relating to, any breach of this Project Agreement by DB Co or any DB Co Party, except to the extent caused, or contributed to, by:
  - (viii) the breach of this Project Agreement by the City; or
  - (ix) in respect of Section 46.1(a)(ii), any deliberate or negligent act or omission of the City, any City Party or, to the extent related to Highway Works, MTO; or
  - (x) in respect of Sections 46.1(a)(iii), 46.1(a)(iv), 46.1(a)(v), 46.1(a)(vi) or 46.1(a)(vii), any act or omission of the City, any City Party or, to the extent related to Highway Works, MTO.
- (b) DB Co shall indemnify and save harmless the City and its directors, officers, employees, agents and representatives from and against any and all Direct Losses which may be suffered, sustained, incurred or brought against them as a result of, in respect of, or arising out of any breach of a representation or warranty by DB Co set out in Section 6.1.

- (c) DB Co shall indemnify and save harmless the City and its directors, officers, employees, agents and representatives from and against any and all Direct Losses which may be suffered, sustained, incurred or brought against them as a result of, in respect of, arising out of, or involving or relating to any one or more of the following:
- (i) the performance by DB Co of this Project Agreement not in accordance with or in breach of the requirements of any Permits, Licences, Approvals and Agreements, Applicable Law or requirements of Governmental Authorities, or the failure of DB Co to obtain all necessary DB Co Permits, Licences, Approvals and Agreements in accordance with this Project Agreement;
  - (ii) any Contamination for which DB Co is responsible pursuant to Sections 18.2(a) or 18.2(b); or
  - (iii) the provision of assistance by the City to DB Co pursuant to Section 11.13(d),
- except to the extent that such Direct Losses are caused, or contributed to, by the breach of this Project Agreement by the City or by any act or omission of the City, any City Party or, to the extent related to Highway Works, MTO.
- (d) Without prejudice to the City's rights under Section 36 and any other rights under this Project Agreement, if the City exercises its step-in rights under the Construction Contractor's Direct Agreement, DB Co shall indemnify the City for all obligations of DB Co assumed by the City under the Design and Construction Contract, as the case may be, and for all reasonable costs and expenses incurred by the City in relation to the exercise of the City's rights.
- (e) DB Co shall indemnify the City for damages suffered or incurred on account of (i) any payment not duly made by DB Co pursuant to the terms of this Project Agreement on the due date; (ii) any overpayment to or underpayment by DB Co; or (iii) an amount determined as payable by DB Co to the City under Schedule 27 – Dispute Resolution Procedure, by payment of an amount equal to the Payment Compensation Amount calculated from day to day at a rate per annum from the day after the date on which payment was due, the day on which overpayment was made by the City, or from the date identified (if any) applicable to an amount determined as payable by DB Co to the City under Schedule 27 – Dispute Resolution Procedure, up to and including the date of payment.
- (f) DB Co shall defend, in accordance with the procedures of Section 46.3, and indemnify and save harmless the City, the City Parties, and any Governmental Authorities and each of their respective directors, officers, employees, agents and representatives from and against any and all Direct Losses which may be suffered, sustained, incurred or brought against them as a result of, in respect of, or arising out of any one or more of the following:
- (i) any breach of Section 41.3;
  - (ii) any claim, suit, action or proceeding by a person alleging that (x) any Intellectual Property licensed or assigned to and used by the City, any City Party, RTG, any RTG Party, or any Governmental Authority pursuant to this Project Agreement; or (y) any Intellectual Property or other materials used by DB Co or any DB Co Party or any Subcontractor in the performance of the Works and the Project, infringes or

misappropriates any Intellectual Property rights of that person, other than where such claim, suit, action or proceeding is directly caused by,

- (A) the use of such Intellectual Property by the City not in accordance with this Project Agreement or the applicable Technical Information; or
  - (B) the use of such Intellectual Property by the City in combination with other products, software or equipment not supplied by or on behalf of DB Co or the Subcontractors and not authorized by any of them;
- (iii) any claim, suit, action or proceeding arising out of the alleged infringement or misappropriation of any rights in or to any Project Data or Intellectual Property Rights or the use thereof by any City Party, RTG, any RTG Party, or any Governmental Authority or due to the use of any materials, machinery or equipment in connection with the Works infringes any rights in or to any Intellectual Property of a third party unless such infringement has arisen out of the use of any Project Data or Intellectual Property Rights by the relevant City Party, RTG, any RTG Party, otherwise than in accordance with the terms of this Project Agreement or the applicable Technical Information; and
- (iv) any claim, suit, action or proceeding by any Licensor alleging that DB Co or any DB Co Party or any Subcontractor has used any City Supplied Third Party Intellectual Property in breach of Sections 3.1(a)(ii), 3.1(b), 3.1(c) or 3.1(d) of Schedule 24 – Intellectual Property.
- (g) Without limiting and in addition to the obligations in Section 46.1(f), if, as a result of a claim under Section 46.1(f)(i) or Section 46.1(f)(ii), all or any part of any Intellectual Property licensed or assigned to and used by the City pursuant to this Project Agreement; or any Intellectual Property or other materials used by DB Co or any Subcontractor in the performance of the Works and the Project (any or all of the foregoing the “**Infringing Material**”) becomes, or in DB Co’s opinion is likely to be, enjoined from use, DB Co will:
- (i) give Notice to the City of the same; and
  - (ii) at its sole option and expense, either:
    - (A) procure for itself and the City, to the extent required, the right to continue to use the infringing element or component of the Infringing Material as contemplated in this Project Agreement; or
    - (B) modify the infringing element or component of the Infringing Material so that it is non-infringing without materially affecting the quality, performance and functionality of such infringing element or component, or replace the infringing element or component with a substitute of materially equivalent quality, performance and functionality.

#### 46.2 City Indemnities to DB Co

- (a) The City shall indemnify and save harmless DB Co and the DB Co Parties and each of their respective directors, officers, employees, agents and representatives from and against any and all

Direct Losses which may be suffered, sustained, incurred or brought against them as a result of, in respect of, or arising out of any one or more of the following:

- (i) the death or personal injury of any person arising, directly or indirectly, out of, or in consequence of, or involving or relating to, the performance or breach of this Project Agreement by the City or any act or omission of any City Party, except to the extent caused, or contributed to, by the breach of this Project Agreement by DB Co or by any act or omission of DB Co or any DB Co Party;
- (ii) any physical loss of or damage to all or any part of any property or assets of DB Co or any DB Co Party, arising, directly or indirectly, out of, or in consequence of, or involving or relating to, breach of this Project Agreement by the City or any deliberate or negligent act or omission of any City Party, except to the extent caused, or contributed to, by the breach of this Project Agreement by DB Co or by any act or omission of DB Co or any DB Co Party;
- (iii) any physical loss of or damage to property or assets of any third party, or any other loss or damage of any third party, arising, directly or indirectly, out of, or in consequence of, or involving or relating to, breach of this Project Agreement by the City or any deliberate or negligent act or omission of any City Party, except to the extent caused, or contributed to, by the breach of this Project Agreement by DB Co or by any act or omission of DB Co or any DB Co Party; and
- (iv) Contamination for which the City is responsible pursuant to Section 18.2(c),

provided that there shall be excluded from the indemnity given by the City any liability for the occurrence of risks against which DB Co is required to insure under this Project Agreement to the extent of the proceeds available or that should have been available but for a failure by DB Co to comply with its obligations to properly insure under this Project Agreement.

- (b) The City shall indemnify and save harmless DB Co and its directors, officers, employees, agents and representatives from and against any and all Direct Losses which may be suffered, sustained, incurred or brought against them as a result of, in respect of, or arising out of any breach of a representation or warranty by the City set out in Section 6.2(a).
- (c) The City shall indemnify DB Co for damages suffered or incurred on account of (i) any payment not duly made by the City pursuant to the terms of this Project Agreement on the due date; (ii) any overpayment to or underpayment by the City; or (iii) an amount determined as payable by the City to DB Co under Schedule 27 – Dispute Resolution Procedure, by payment of an amount equal to the Payment Compensation Amount calculated from day to day at a rate per annum from the day after the date on which payment was due, the day on which overpayment was made by DB Co, or from the date identified (if any) applicable to an amount determined as payable by the City to DB Co under Schedule 27 – Dispute Resolution Procedure, up to and including the date of payment.

#### **46.3 Conduct of Claims**

- (a) This Section 46.3 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 Project 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**”.

- (b) 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 46, the Beneficiary shall give written Notice to the Indemnifier as soon as reasonably practicable and in any event within 10 Business Days after 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.
- (c) Subject to Sections 46.3(d), 46.3(e) and 46.3(f), on the giving of 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.
- (d) With respect to any claim conducted by the Indemnifier:
  - (i) the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;
  - (ii) the Indemnifier shall not bring the name or reputation of the Beneficiary into disrepute;
  - (iii) 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;
  - (iv) 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
  - (v) 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 46.3 relates.
- (e) 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 Project Agreement if:
  - (i) the Indemnifier is not entitled to take conduct of the claim in accordance with Section 46.3(c);
  - (ii) the Indemnifier fails to notify the Beneficiary of its intention to take conduct of the relevant claim as soon as reasonably practicable and in any event within 10 Business

Days following the Indemnifier's receipt of the Notice from the Beneficiary under Section 46.3(b) or notifies the Beneficiary that the Indemnifier does not intend to take conduct of the claim; or

- (iii) the Indemnifier fails to comply in any material respect with Section 46.3(d).
- (f) 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 46.3(c) applies. For greater certainty, DB Co acknowledges and agrees that where the City is the Beneficiary, the City 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 46.3(f), then the Indemnifier shall be released from any liabilities arising under the applicable indemnity hereunder in respect of the applicable claim.
- (g) 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:
  - (i) 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
  - (ii) 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.

- (h) Any person taking any of the steps contemplated by this Section 46.3 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 Project Agreement.

#### 46.4 Mitigation – Indemnity Claims

- (a) For greater certainty, Section 53.4 applies to any indemnity given under this Project Agreement and any such indemnity shall not extend to Direct Losses which could have been reduced or avoided by the Beneficiary complying with such Section.

## 47. LIMITS ON LIABILITY

### 47.1 Indirect Losses

- (a) Subject to Section 47.1(b) and without prejudice to the Parties' rights in respect of payments provided for herein, the indemnities under this Project Agreement shall not apply and there shall be no right to claim damages for breach of this Project Agreement, in tort or on any other basis whatsoever, to the extent that any loss claimed by either Party is:
- (i) for punitive, exemplary or aggravated damages;
  - (ii) for loss of profits, loss of use, loss of production, loss of business or loss of business opportunity; or
  - (iii) a claim for consequential loss or for indirect loss of any nature suffered or allegedly suffered by either Party,
- (collectively, "**Indirect Losses**").
- (b) With respect to the indemnity in Section 46.1(a)(ii) only, the exceptions for loss of use and loss of production in Section 47.1(a)(ii) and the exceptions in Section 47.1(a)(iii) shall not apply as a result of, or in relation to, the City's loss of use of the New City Infrastructure or a portion thereof, which for the purposes of Section 47.1(a)(ii), shall be Direct Losses.

### 47.2 No Liability in Tort

- (a) Subject to the indemnities provided herein, the City shall not be liable in tort to DB Co or any DB Co Party, and neither DB Co nor any DB Co Party shall be liable in tort to the City, any City Party or MTO in respect of any negligent act or omission of any such person relating to or in connection with this Project Agreement and no such person shall bring such a claim.

### 47.3 Sole Remedy

- (a) Nothing in this Project Agreement shall prevent or restrict the right of the City to seek injunctive relief or a decree of specific performance or other discretionary remedies of a court of competent jurisdiction.
- (b) Notwithstanding any other provision of this Project Agreement, and except to the extent recovered under any of the insurances required pursuant to Schedule 25 – Insurance and Performance Security Requirements, neither Party shall be entitled to recover compensation or make a claim under this Project Agreement, or any other agreement in relation to the Project, in respect of any loss that it has incurred (or any failure of the other Party) to the extent that the Party has already been compensated in respect of that loss or failure pursuant to this Project Agreement, or otherwise.
- (c) For clarity, the following shall apply with respect to the remedies and damages set out in the Project Agreement:
- (i) the amounts deducted from the Substantial Completion Payment pursuant to Schedule 34 – Mobility Matters shall be the City's sole remedy with respect to exceedances in Lane

Closures, or Bus Rapid Transit Lane Closures, which exceedances are contemplated in Schedule 34 – Mobility Matters;

- (ii) the liquidated damages paid by DB Co pursuant to Section 25.5 and the indemnity provided in Section 46.1(a)(ii) shall be the sole remedy in respect of the City's mobilization costs and other costs incurred by the City in accordance with of DB Co's failure to achieve East Substantial Completion by the East Scheduled Substantial Completion Date, and West Substantial Completion by the West Scheduled Substantial Completion Date, but, for clarity, shall not limit the City's rights otherwise provided for in Schedule 12 – Works Scheduling Requirements, or herein in connection with a termination pursuant to Section 36.1(a)(ii);
- (iii) the liquidated damages paid by DB Co pursuant to Section 12.4 shall be the sole remedy in respect of failure by DB Co to provide the Key Individuals named in Schedule 9 – Key Individuals immediately after Commercial Close;
- (iv) the right to withhold the East Warranty Cash Amount, the West Warranty Cash Amount and the Remaining Works Cash Amount, in each case, in accordance with Section 4.2, shall be the sole remedy of the City in respect of the failure by DB Co to deliver the East Warranty Letter of Credit, West Warranty Letter of Credit and/or the Remaining Works Letter of Credit, as applicable; and
- (v) the liquidated damages paid by DB Co pursuant to Section 11.17A shall be the City's sole remedy for the costs related to Minor Construction Defect, Medium Construction Defect, Major Construction Defect or Critical Construction Defect, but shall not otherwise diminish DB Co's obligation to perform the Warranty Work nor DB Co's obligations under the Interface Agreement.

#### **47.4 Maximum Liability**

- (a) Subject to Section 47.4(b), the maximum aggregate liability of each Party in respect of all claims under Section 46 shall not exceed \$[REDACTED]. This limit shall be index linked and shall be exclusive of any insurance or performance security proceeds received or which will be received pursuant to policies or performance security maintained in accordance with Schedule 25 – Insurance and Performance Security Requirements. This limit shall not apply in cases of wilful misconduct or deliberate acts of wrongdoing. This maximum aggregate liability of DB Co shall be reduced by the amount of any liability of DB Co to RTG that is subject to the aggregate limit of liability under Section 2.4(b) of the Interface Agreement. Notwithstanding the foregoing, the City acknowledges that all liability of DB Co to RTG or the City under the Interface Agreement, whether incurred directly to RTG or indirectly through the City pursuant to Section 1.5(b)(iv), shall be treated as obligations of DB Co to the City for the purpose of the limitation of liability set out in the Performance Guarantee of Construction Contractor. Under no circumstance shall the City be entitled, whether under an indemnity listed in Section 46.1 or Section 1.5(b)(iv), to recover from DB Co any amounts or liability that is in duplication of amounts due and owing by DB Co under the Interface Agreement pursuant to a claim that has been made under the Interface Agreement.
- (b) DB Co's maximum aggregate liability in respect of all claims under Sections 46.1(a)(ii) and 25.5 shall not exceed \$[REDACTED]. This limit shall be index linked and shall be exclusive of any insurance or performance security proceeds received or which will be received pursuant to

policies or performance security maintained in accordance with Schedule 25 – Insurance and Performance Security Requirements. This limit shall not apply in cases of wilful misconduct or deliberate acts of wrongdoing. For certainty, this limit shall be included in the limit of liability under Section 47.4(a).

- (c) Nothing in this Section 47.4 shall restrict, limit, prejudice or in any other way impair the rights and/or remedies of the Parties under any other provision of this Project Agreement.

#### **48. DISPUTE RESOLUTION PROCEDURE**

- (a) All Disputes shall be resolved in accordance with, and the Parties shall comply with, Schedule 27 – Dispute Resolution Procedure.

#### **49. ASSIGNMENT, SUBCONTRACTING AND CHANGES IN CONTROL**

##### **49.1 DB Co Assignment**

- (a) DB Co 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 Project Agreement or any Ancillary Document without the prior written consent of the City, provided however that no assignment, transfer, charge, disposition 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 City’s reputation or integrity, or (ii) the nature of the public transit system in the City of Ottawa or the Province of Ontario, so as to affect public confidence in the public transit system in one or more of the City of Ottawa, the Province of Ontario or the Project.
- (b) Section 49.1(a) shall not apply to the grant of any security for any loan made to DB Co under the Lending Agreements provided that any grantee of such security shall enter into the Lenders’ Direct Agreement in relation to the exercise of its rights, if the City so requires.

##### **49.2 City Assignment**

- (a) The City may assign, transfer, dispose of or otherwise alienate any interest in this Project Agreement or any agreement in connection with this Project Agreement to which DB Co and the City are parties:
  - (i) as may be required to comply with Applicable Law;
  - (ii) in circumstances other than those described in Section 49.2(a)(i) with the prior written consent of DB Co; 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 DB Co that it will perform all the obligations of the City hereunder and under any agreement in connection with this Project Agreement to which DB Co and the City are parties in respect of the period from and after the assignment.
- (b) The City shall not be released of any of its obligations under this Project Agreement except upon an assignment, transfer, disposition or other alienation of their interest in this Project Agreement in accordance with this Section 49.2.

### **49.3 Subcontracting**

- (a) DB Co shall not subcontract any interest in this Project Agreement or the Design and Construction Contract, and shall not permit the Construction Contractor to subcontract any interest in the Design and Construction Contract, to a Restricted Person, or any Affiliate thereof, or a person whose standing or activities may compromise (i) the City's reputation or integrity, or (ii) the nature of the public transit system in the City of Ottawa or the Province of Ontario so as to affect public confidence in the public transit system in one or more of the City of Ottawa, the Province of Ontario or the Project.
- (b) DB Co shall not terminate, agree to the termination of or replace the Construction Contractor unless DB Co has complied with Sections 8.2(a), 49.3(c) and 49.3(d) or received the prior written consent of the City.
- (c) Subject to Section 49.3(d), if the Design and Construction Contract shall at any time lapse, terminate or otherwise cease to be in full force and effect, whether by reason of expiry, default or otherwise, with the effect that the Construction Contractor shall cease to act in relation to the Project, DB Co shall forthwith appoint a replacement, subject to the City's prior written consent, acting reasonably, as to the suitability of the replacement.
- (d) It is a condition of replacement of the Construction Contractor, and DB Co shall require, that any replacement enter into a contract upon the same or substantially similar terms as the person so replaced and into a direct agreement on the same terms as the Construction Contractor's Direct Agreement entered into by the person so replaced, unless any material variations are approved by the City, acting reasonably.

### **49.4 Changes in Ownership and Control**

- (a) No Restricted Person or a person whose standing or activities are inconsistent with the City's reputation or integrity shall be permitted to have at any time or acquire, Direct or Indirect Power or Control over any member of the DB Co Group in relation to the decisions, management, actions or policies of DB Co or in relation to the operation, management and ownership of the Project.
- (b) No Change in Ownership of DB Co, or of any Control Party, shall be permitted:
  - (i) where the person acquiring the ownership interest is a Restricted Person or a person whose standing or activities may compromise (A) the City's reputation or integrity, or (B) the nature of the public transit system in the City of Ottawa or the Province of Ontario so as to affect public confidence in the public transit system in one or more of the City of Ottawa, the Province of Ontario or the Project; or
  - (ii) if such Change in Ownership would have a material adverse effect on the performance of the Works or the Governmental Activities.
- (c) In the event that a person having Direct or Indirect Power or Control over any member of the DB Co Group in relation to the decisions, management, actions or policies of DB Co or in relation to the operation, management and ownership of the Project becomes a Restricted Person, the City may:

- (i) 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
- (ii) 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 the City, in its discretion.

- (d) DB Co shall provide Notice to the City of any Change in Ownership of DB Co or of any Control Party, as the case may be, that is not a Change in Control within 5 Business Days after such Change in Ownership, and such Notice shall include a statement identifying all persons with an ownership interest in DB Co 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.
- (e) Subject to Sections 49.4(b), 49.4(c) and 49.4(d), no Change in Control of DB Co, or of any Control Party, shall be permitted without the prior written consent of the City.
- (f) DB Co shall provide Notice to the City of any proposed Change in Control of DB Co 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:
  - (i) a statement identifying all persons with an ownership interest in DB Co 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
  - (ii) 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 DB Co or the relevant Control Party pursuant to such Change in Control.

Following the delivery to the City of the Notice referred to in this Section 49.4(f), DB Co shall provide the City with such other information pertaining to the proposed Change in Control as the City may reasonably request.

- (g) Upon request by DB Co and delivery of the information required by the City, the City shall advise DB Co whether the person described in such particulars is a Restricted Person or a person whose standing or activities may compromise (i) the City's reputation or integrity, or (ii) the nature of the public transit system in the City of Ottawa or the Province of Ontario so as to affect public confidence in the public transit system in one or more of the City of Ottawa, the Province of Ontario or the Project.
- (h) Notwithstanding the definition of "Control Parties" set out Schedule 1 – Definitions and Interpretation, this Section 49.4 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.

#### **49.5 The City's Due Diligence**

- (a) DB Co shall promptly reimburse the City for the City's reasonable due diligence costs (including fees of professional advisors) in connection with any consent required of the City pursuant to, or

the City's determination of DB Co's compliance with, Sections 49.1, 49.3 or 49.4, whether or not such consent is granted.

## **50. PROHIBITED ACTS**

### **50.1 Definition**

(a) The term "**Prohibited Act**" means:

- (i) offering, giving or agreeing to give to the City 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:
  - (A) for doing or not doing, or for having done or not having done, any act in relation to the obtaining or performance of this Project Agreement or any other agreement with the City or any public body in connection with the Project; or
  - (B) for showing or not showing favour or disfavour to any person in relation to this Project Agreement or any other agreement with the City or any public body in connection with the Project,

provided that this Section 50.1(a)(i) shall not apply to DB Co or any DB Co Party (or anyone employed by or acting on their behalf) providing consideration to the City or any public body in the ordinary course, or as reasonably necessary, to fulfill or comply with the obligations and liabilities of DB Co under this Project Agreement or any other agreement with the City or any public body in connection with the Project;

- (ii) entering into this Project Agreement or any other agreement with the City 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 DB Co, or on its behalf or to its knowledge, the City 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 City, provided that this Section 50.1(a)(ii) shall not apply to a fee or commission paid by DB Co or any DB Co Party (or anyone employed by or acting on their behalf) to the City 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 DB Co under this Project Agreement or any other agreement with the City or any public body in connection with the Project without contravening the intent of this Section 50;
- (iii) breaching or committing any offence under Applicable Law in respect of corrupt or fraudulent acts in relation to this Project Agreement or any other agreement with the City or any public body in connection with the Project; or
- (iv) defrauding or attempting to defraud or conspiring to defraud the City or any other public body.

## **50.2 Remedies**

- (a) If DB Co or any DB Co Party (or anyone employed by or acting on their behalf) commits any Prohibited Act, then the City shall be entitled to act in accordance with the following:
- (i) if the Prohibited Act is committed by DB Co or by an employee acting under the direction of a director or officer of DB Co, then the City may give written Notice to DB Co and Section 36 shall apply;
  - (ii) if the Prohibited Act is committed by an employee of DB Co acting independently of a direction of a director or officer of DB Co, then the City may give written Notice to DB Co and Section 36 shall apply, unless, within 30 days after receipt of such Notice, DB Co terminates the employee's employment and ensures that the relevant part of the Works shall be performed by another person;
  - (iii) if a Prohibited Act is committed by a DB Co Party or by an employee of that DB Co Party not acting independently of a direction of a director or officer of that DB Co Party, then the City may give written Notice to DB Co and Section 36 shall apply, unless, within 30 days after receipt of such Notice, DB Co terminates the relevant Subcontract and ensures that the relevant part of the Works shall be performed by another person, where relevant, in accordance with Section 49.3;
  - (iv) if the Prohibited Act is committed by an employee of a DB Co Party acting independently of a direction of a director or officer of that DB Co Party, then the City may give Notice to DB Co and Section 36 shall apply, unless, within 30 days after receipt of such Notice, DB Co causes the termination of the employee's employment and ensures that the relevant part of the Works shall be performed by another person; and
  - (v) if the Prohibited Act is committed on behalf of DB Co or a DB Co Party by a person not specified in Sections 50.2(a)(i) to 50.2(a)(iv), then the City may give Notice to DB Co and Section 36 shall apply, unless, within 30 days after receipt of such Notice, DB Co 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.
- (b) Any Notice of termination under this Section 50.2 shall specify:
- (i) the nature of the Prohibited Act;
  - (ii) the identity of the person whom the City believes has committed the Prohibited Act; and
  - (iii) the date of termination in accordance with the applicable provisions of this Project Agreement.
- (c) Without prejudice to its other rights or remedies under this Section 50.2, the City shall be entitled to recover from DB Co any Direct Loss sustained in consequence of any breach of this Section 50.

### 50.3 Permitted Payments

- (a) Nothing contained in this Section 50 shall prevent DB Co 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.

### 50.4 Notification

- (a) DB Co shall notify the City of the occurrence and details of any Prohibited Act promptly on DB Co becoming aware of its occurrence.

### 50.5 Replacement of DB Co Party

- (a) Where DB Co is required to replace any DB Co Party pursuant to this Section 50, the party replacing such DB Co Party shall from the time of the replacement be deemed to be a DB Co Party and the provisions of this Project Agreement shall be construed accordingly.

## 51. NOTICES

### 51.1 Notices to Parties

- (a) All notices, requests, demands, instructions, certificates, consents and other communications (each being a “Notice”) required or permitted under this Project Agreement shall be in writing (whether or not “written notice” or “notice in writing” is specifically required by the applicable provision of this Project Agreement) and served by sending the same by registered mail, email, facsimile or by hand, as follows:

If to DB Co:

East West Connectors GP  
[REDACTED]

Attn.: [REDACTED]  
Email: [REDACTED]

with a copy to:

[REDACTED]

Attn.: [REDACTED]  
Email: [REDACTED]

If to the City:

City of Ottawa  
110 Laurier Ave West  
Ottawa, Ontario K1P 1J1  
Mail code: [REDACTED]

Attn.: [REDACTED]

With an electronic copy, for information purposes only, to: [REDACTED]

## 51.2 Notices to Representatives

- (a) In addition to the notice requirements set out in Section 51.1, where any Notice is to be provided or submitted to the City Representative or the DB Co Representative it shall be provided or submitted by sending the same by registered mail, email, facsimile or by hand, as follows:

If to the DB Co Representative: [REDACTED]

Attn.: [REDACTED]  
Email: [REDACTED]

If to the City Representative:

City of Ottawa  
110 Laurier Ave West  
Ottawa, Ontario K1P 1J1  
Mail code: [REDACTED]

Attn.: [REDACTED]

With an electronic copy, for information purposes only, to: [REDACTED]

## 51.3 Facsimile and Email

- (a) Where any Notice is provided or submitted to a Party via facsimile or email, an original of the Notice sent via facsimile or email shall promptly be sent by regular mail, registered mail or hand delivered. For greater certainty, a Notice given via facsimile or email shall not be invalid by reason only of a Party's failure to comply with this Section 51.3.

## 51.4 Change of Address

- (a) Either Party to this Project Agreement may, from time to time, change any of its contact information set forth in Sections 51.1 or 51.2 by prior Notice to the other Party, 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.

## 51.5 Deemed Receipt of Notices

- (a) Subject to Sections 51.5(b), 51.5(c) and 51.5(d):
- (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;
  - (iii) a Notice given by facsimile shall be deemed to have been received on the day it is transmitted by facsimile; and

- (iv) a Notice given by email shall be deemed to have been received on the day it is transmitted by email.
- (b) 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 51.
- (c) If any Notice delivered by hand, email, 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.
- (d) 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.
- (e) A Notice given by email shall be deemed to have been received by the recipient on the day it is transmitted only if the sender's email "Sent" folder indicated that the transmission of such Notice was delivered.
- (f) In addition to the above methods of delivery for a Notice, each Notice shall be delivered via the secure document-sharing site approved by the City.

#### **51.6 Service on the City**

- (a) Where any Notice is required to be served on the City, the obligation to serve such Notice shall be fulfilled by serving it on the City in accordance with the provisions of this Section 51.

### **52. EMERGENCY MATTERS**

#### **52.1 Emergency**

- (a) From Financial Close until the last Substantial Completion Date, upon the occurrence of an Emergency, DB Co shall comply with the Construction Safety Management Plan.
- (b) From and after each Substantial Completion Date, upon the occurrence of an Emergency, DB Co shall comply with its Construction Safety Management Plan in accordance with the Output Specifications.
- (c) If, in respect of any Emergency, the City notifies DB Co that it requires compliance with any additional or overriding procedures as may be determined by the City or any other statutory body, then DB Co shall, subject to Schedule 22 – Variation Procedure (if compliance with such procedures constitutes a Variation), comply with such procedures (whether such procedures are specific to the particular Emergency or of general application and on the basis that such procedures shall take precedence to the extent that they overlap with the procedures mentioned in Sections 52.1(a) or 52.1(b)).

**53. GENERAL**

**53.1 Amendments**

- (a) This Project 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 Project Agreement.

**53.2 Waiver**

- (a) No waiver made or given by a Party under or in connection with this Project 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 either 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.

**53.3 Relationship Between the Parties**

- (a) The Parties are independent contractors. This Project Agreement is not intended to and does not create or establish between the Parties, or between the City and any DB Co Party, any relationship as partners, joint venturers, employer and employee, master and servant, or (except as provided in this Project Agreement), of principal and agent, and does not create or establish any relationship whatsoever between the City and any representative or employee of DB Co or the DB Co Parties.
- (b) The Parties further agree that:
- (i) except as expressly provided in this Project Agreement, neither Party shall be, or be deemed to be, an agent of the other Party, and neither Party shall have authority hereunder to represent that it is an agent of the other Party, or to accept any order, or enter into any contract or agreement, or make any representations or warranties of any kind to any person, or to assume or create any obligation, express or deemed, on behalf of or binding, or purportedly binding upon, the other Party;
  - (ii) neither Party shall be required to make or pay employment benefits, contributions for Employment Insurance, Canada Pension Plan, Workers' Compensation Board or other similar levies with respect to any persons employed or engaged by the other Party;
  - (iii) except as otherwise expressly provided in this Project Agreement, each Party shall be free from the control of the other Party as to the manner in which it shall perform its obligations, or cause same to be performed, under this Project Agreement; and

- (iv) any person which a Party may engage as an agent, employee, subcontractor or otherwise, to perform such Party's obligations under this Project Agreement, as permitted hereby, shall, unless the Parties otherwise agree in writing, be engaged by such Party to act solely on behalf of such Party, and such person shall not act, or be deemed to act, on behalf of the Party that did not engage its services.

#### **53.4 General Duty to Mitigate**

- (a) The City and DB Co shall at all times take commercially reasonable steps to minimize and mitigate any loss for which the relevant Party is entitled to bring a claim against the other Party pursuant to this Project Agreement.

#### **53.5 Actual Knowledge**

- (a) Except where limited to actual knowledge and/or such knowledge which they, at law, may from time to time, be deemed to have, DB Co and the City shall, for all purposes of this Project Agreement, be deemed to have such knowledge in respect of the Project as is actually held (or ought reasonably to be held) by the directors, officers and senior management of DB Co and in the case of the City, its directors, officers and senior management, and the City Representative or the DB Co Representative, as applicable. For clarity, except as expressly set out to the contrary, a reference in this Project Agreement to the "knowledge" of DB Co or of the City shall be construed in a manner consistent with the foregoing sentence.

#### **53.6 Entire Agreement**

- (a) Except where provided otherwise in this Project Agreement, this Project 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 Project Agreement.

#### **53.7 No Reliance**

- (a) Each of the Parties acknowledge that:
  - (i) it has not entered into this Project Agreement on the basis of and does not rely, and has not relied, upon any statement or representation, whether negligent or innocent, or warranty or other provision, whether oral, written, express or implied, made or agreed to by any person, whether a Party to this Project Agreement or not, except those expressly made, given or repeated in this Project Agreement and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be those expressly provided for in this Project Agreement; and
  - (ii) this Section 53.7 shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Project Agreement which was induced by fraud, for which the remedies available shall be all those available under the law governing this Project Agreement.

### 53.8 Severability

- (a) Each provision of this Project Agreement shall be valid and enforceable to the fullest extent permitted by law. If any provision of this Project 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 Project Agreement. If any such provision of this Project 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 Project Agreement as near as possible to its original intent and effect.

### 53.9 Enurement

- (a) This Project Agreement and any other agreement entered into in connection with the Project to which both the City and DB Co are parties shall enure to the benefit of, and be binding on, the City and DB Co and their respective successors and permitted transferees and assigns.

### 53.10 Governing Law and Jurisdiction

- (a) This Project Agreement, and each of the documents contemplated by or delivered under or in connection with this Project 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) Subject to Schedule 27 – Dispute Resolution Procedure, both Parties hereby irrevocably attorn to the exclusive jurisdiction of the courts of the Province of Ontario and all courts competent to hear appeals therefrom.
- (c) Nothing in this Project Agreement affects the rights, protections and immunities of the Crown under the *Proceedings Against the Crown Act* (Ontario).

### 53.11 Cumulative Remedies

- (a) Except as otherwise set forth in this Project Agreement, the rights, powers and remedies of each Party set forth in this Project 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 Project Agreement.

### 53.12 Further Assurance

- (a) Each Party shall do all things, from time to time, and execute all further documents necessary to give full effect to this Project Agreement.

### 53.13 Costs

- (a) Each Party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution and delivery of this Project Agreement.

**53.14 Language of Agreement**

- (a) Each of the parties acknowledges having requested and being satisfied that this Project 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.
- (b) For greater certainty, all correspondence, Notices, drawings, test reports, certificates, specifications, information, operation and maintenance instructions, name plates, identification labels, instructions and notices to the public and staff and all other written, printed or electronically readable matter required in accordance with, or for purposes envisaged by, this Project Agreement shall be in English

**53.15 Proof of Authority**

- (a) The City and DB Co each reserve the right to require any person executing this Project Agreement on behalf of the other Party to provide proof, in a form acceptable to the City or DB Co, as applicable, that they have the requisite authority to execute this Project Agreement on behalf of and to bind the City or DB Co, as applicable.

**53.16 Counterparts**

- (a) This Project 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 Project Agreement which was so faxed.

**53.17 Time is of the Essence**

- (a) Time is of the essence in this Project Agreement.

*[SIGNATURE PAGES IMMEDIATELY FOLLOW]*

IN WITNESS WHEREOF the Parties have executed this Project Agreement as of the date first above written.

**THE CITY OF OTTAWA**

Per: \_\_\_\_\_  
Name: [REDACTED]  
Title: [REDACTED]

I have authority to bind the corporation.

**EAST WEST CONNECTORS GP**

Per: \_\_\_\_\_  
Name: [REDACTED]  
Title: [REDACTED]

Per: \_\_\_\_\_  
Name: [REDACTED]  
Title: [REDACTED]

I/We have authority to bind the corporation.