

SCHEDULE 5

CONSTRUCTION CONTRACTOR'S DIRECT AGREEMENT

THIS AGREEMENT is made as of the 24th day of April, 2019

BETWEEN:

THE CITY OF OTTAWA

(the "City")

- AND -

EAST WEST CONNECTORS GP, [REDACTED]

("DB Co")

- AND -

[REDACTED]

(the "Construction Contractor")

- AND -

[REDACTED]

(each a "Construction Guarantor", collectively the "Construction Guarantors")

WHEREAS:

- A. The City and DB Co have entered into the Project Agreement, which requires DB Co to enter into, and to cause the Construction Contractor and the Construction Guarantors to enter into, this Construction Contractor's Direct Agreement with the City.
- B. DB Co and the Construction Contractor have entered into the Design and Construction Contract, which requires the Construction Contractor and the Construction Guarantor to enter into this Construction Contractor's Direct Agreement with the City.

NOW THEREFORE in consideration of the mutual covenants and agreements of the Parties hereinafter contained and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties covenant and agree as follows:

1. DEFINITIONS

In this Schedule 5 – Construction Contractor's Direct Agreement, unless the context indicates a contrary intention, terms which are defined in the Project Agreement (and not otherwise defined in this in this Schedule 5 – Construction Contractor's Direct Agreement) shall have meanings given to them in the Project Agreement and the following terms shall have the following meanings:

- (a) “**Default Notice**” has the meaning given in Section 5(a).
- (b) “**Party**” means the City, the Construction Contractor, each of the Construction Guarantors or DB Co, and “**Parties**” means, collectively, the City, the Construction Contractor, the Construction Guarantors and DB Co.
- (c) “**Step-In Notice**” has the meaning given in Section 6(a).
- (d) “**Substitute**” has the meaning given in Section 6(a).

2. INTERPRETATION

This Construction Contractor’s Direct Agreement shall be interpreted according to the following provisions, unless the context requires a different meaning:

- (a) The headings in this Construction Contractor’s Direct Agreement are for convenience of reference only, shall not constitute a part of this Construction Contractor’s Direct Agreement, and shall not be taken into consideration in the interpretation of, or affect the meaning of, this Construction Contractor’s Direct Agreement.
- (b) Unless the context otherwise requires, references to specific Sections, Clauses, Paragraphs, Subparagraphs, and other divisions are references to such Sections, Clauses, Paragraphs, Subparagraphs, or divisions of this Construction Contractor’s Direct Agreement and the terms “Section” and “Clause” are used interchangeably and are synonymous.
- (c) Words importing persons or parties are to be broadly interpreted and include an individual, corporation, limited liability company, joint stock company, firm, partnership, joint venture, trust, unincorporated organization, Governmental Authority, unincorporated body of persons or association and any other entity having legal capacity, and the heirs, beneficiaries, executors, administrators or other legal representatives of a person in such capacity.
- (d) Unless the context otherwise requires, wherever used herein the plural includes the singular, the singular includes the plural, and each of the masculine, feminine and neuter genders include all other genders.
- (e) References to any standard, principle, agreement or document include (subject to all relevant approvals and any other provisions of this Construction Contractor’s Direct Agreement concerning amendments) a reference to that standard, principle, agreement or document as amended, supplemented, restated, substituted, replaced, novated or assigned.
- (f) The words in this Construction Contractor’s Direct Agreement shall bear their natural meaning.
- (g) References containing terms such as:
 - (i) “hereof”, “herein”, “hereto”, “hereinafter”, and other terms of like import are not limited in applicability to the specific provision within which such references are

set forth but instead refer to this Construction Contractor’s Direct Agreement taken as a whole; and

- (ii) “includes” and “including”, whether or not used with the words “without limitation” or “but not limited to”, shall not be deemed limited by the specific enumeration of items but shall, in all cases, be deemed to be without limitation and construed and interpreted to mean “includes without limitation” and “including without limitation”.
- (h) In construing this Construction Contractor’s Direct Agreement, the rule known as the *ejusdem generis rule* shall not apply nor shall any similar rule or approach to the construction of this Construction Contractor’s Direct Agreement and, accordingly, general words introduced or followed by the word “other” or “including” or “in particular” shall not be given a restrictive meaning because they are followed or preceded (as the case may be) by particular examples intended to fall within the meaning of the general words.
- (i) Where this Construction Contractor’s Direct Agreement states that an obligation shall be performed “no later than” or “within” or “by” a stipulated date or event which is a prescribed number of days after a stipulated date or event, the latest time for performance shall be 5:00 p.m. on the last day for performance of the obligation concerned, or, if that day is not a Business Day, 5:00 p.m. on the next Business Day.
- (j) Where this Construction Contractor’s Direct Agreement states that an obligation shall be performed “on” a stipulated date, the latest time for performance shall be 5:00 p.m. on that day, or, if that day is not a Business Day, 5:00 p.m. on the next Business Day.
- (k) Any reference to time of day or date means the local time or date in Ottawa, Ontario.
- (l) Unless otherwise indicated, time periods will be strictly construed.
- (m) Whenever the terms “will” or “shall” are used in this Construction Contractor’s Direct Agreement they shall be construed and interpreted as synonymous and to read “shall”.

3. CONFLICT IN DOCUMENTS

- (a) In the event of ambiguities, conflicts or inconsistencies between or among this Construction Contractor’s Direct Agreement, the Project Agreement and the Design and Construction Contract, this Construction Contractor’s Direct Agreement shall prevail.
- (b) In the event of ambiguities, conflicts or inconsistencies between or among this Construction Contractor’s Direct Agreement and the Lenders’ Direct Agreement, the Lenders’ Direct Agreement shall prevail.

4. AGREEMENTS

- (a) DB Co and the Construction Contractor shall not amend, modify, or depart from the terms of the Design and Construction Contract without the prior written consent of the City, acting reasonably, which consent shall not be withheld or delayed where such amendment, modification or departure does not materially and adversely affect the ability

of DB Co or the Construction Contractor to perform its obligations under this Construction Contractor's Direct Agreement and does not have the effect of increasing any liability of the City, whether actual or potential. The City shall respond to any request for consent under this Section 4(a) within 30 days following its receipt thereof. DB Co and the Construction Contractor shall provide to the City a written copy of all such amendments, modifications or departures. The Parties acknowledge and agree that this Section 4(a) shall not apply to Variations provided for under the Project Agreement.

- (b) Each of the Parties acknowledges having received a copy of the Project Agreement and the Design and Construction Contract.
- (c) If the Construction Contractor gives DB Co any notice of any default(s) under the Design and Construction Contract that may give the Construction Contractor a right to terminate the Design and Construction Contract or to treat it as having been repudiated by DB Co or to discontinue the Construction Contractor's performance thereunder, then the Construction Contractor shall concurrently provide the City with a copy of such notice and set out in reasonable detail the default(s).

5. NO TERMINATION BY CONSTRUCTION CONTRACTOR WITHOUT DEFAULT NOTICE

The Construction Contractor shall not exercise any right it may have to terminate the Design and Construction Contract or to treat it as having been repudiated by DB Co or to discontinue the Construction Contractor's performance thereunder unless:

- (a) the Construction Contractor first delivers a written notice (a "**Default Notice**") to the City setting out in reasonable detail the default(s) on which the Construction Contractor intends to rely in terminating the Design and Construction Contract or to treat it as having been repudiated by DB Co or to discontinue the Construction Contractor's performance thereunder; and
- (b) within a period of ten Business Days of the City receiving the Default Notice:
 - (i) the default(s) on which the Construction Contractor intends to rely in terminating the Design and Construction Contract or to treat it as having been repudiated by DB Co or to discontinue the Construction Contractor's performance thereunder have not been remedied; and
 - (ii) the Construction Contractor has not received a Step-In Notice from the City,

provided that if, within such period of ten Business Days, the City agrees to pay the Construction Contractor's reasonable costs of continued performance, such period of five Business Days shall be extended to 45 days.

6. STEP-IN RIGHTS

- (a) The City may at any time:
 - (i) within five Business Days or, if such period has been extended in accordance with Section 5, 45 days of the City receiving a Default Notice; or

- (ii) if the City has not received a Default Notice and if the City's right to terminate the Project Agreement has arisen and is continuing,

deliver a notice (a "Step-In Notice") electing to replace DB Co under the Design and Construction Contract either with the City or a third party designated by the City in the Step-In Notice (the "Substitute"), provided that the City can demonstrate to the Construction Contractor, acting reasonably, that the Substitute shall have sufficient financial resources, or shall be supported by a satisfactory guarantee, and have the legal capacity, power and authority, to carry out the obligations of the Substitute under the Design and Construction Contract.

- (b) Subject to Section 6(d), upon receipt by the Construction Contractor of a Step-In Notice:
 - (i) DB Co and the Construction Contractor will be deemed to be released from their existing and future obligations under the Design and Construction Contract to each other (except with respect to any and all indemnities from DB Co or the Construction Contractor to the other in respect of the period prior to the receipt of the Step-In Notice), and the City or the Substitute, as applicable, and the Construction Contractor will be deemed to assume those same existing and future obligations towards each other (except in respect of the aforesaid indemnities);
 - (ii) the existing and future rights of DB Co against the Construction Contractor under the Design and Construction Contract and vice versa will be deemed to be cancelled (except with respect to any and all indemnities from DB Co or the Construction Contractor to the other in respect of the period prior to the receipt of the Step-In Notice), and the City or the Substitute, as applicable, and the Construction Contractor will be deemed to acquire those same existing and future rights against each other (except in respect of the aforesaid indemnities), subject to any applicable credit from the Construction Contractor to the City if the City pays for the Construction Contractor's reasonable costs of continued performance pursuant to Section 5;
 - (iii) any guarantee, bond, covenant, letter of credit or similar performance security in favour of DB Co from any third party in respect of any term, provision, condition, obligation, undertaking or agreement on the part of the Construction Contractor to be performed, observed or carried out by the Construction Contractor as contained in, referred to, or inferred from the Design and Construction Contract shall be assigned, novated or granted, as required by the City or the Substitute, as applicable, each acting reasonably, to the City or the Substitute, as applicable, and the Construction Contractor shall cause such assignment, novation or grant on substantially the same terms and conditions as the original guarantee, bond, covenant, letter of credit or similar performance security, provided however that where DB Co shall continue to hold, or shall continue to be entitled to or have rights under, such guarantee, bond, covenant, letter of credit or similar performance security, as security for any obligations of the Construction Contractor, the assignment, novation or grant of the guarantee, bond or covenant, letter of credit or similar performance security to the extent of any such obligations to DB Co shall be conditional on the satisfaction of those obligations to DB Co; and

- (iv) at the City's request, the Construction Contractor shall enter into, and shall cause the Construction Guarantors and any other guarantor, covenantor or surety under any guarantee, bond or covenant referred to in Section 6(b)(iii) to enter into, and the City shall or shall cause the Substitute to enter into, as applicable, all such agreements or other documents as reasonably necessary to give effect to the foregoing, including, without limitation, an agreement between the City or the Substitute, as applicable, and the Construction Contractor, acceptable to the City and the Construction Contractor, each acting reasonably, on substantially the same terms as the Design and Construction Contract.
- (c) Subject to Section 6(d), DB Co shall, at its own cost, cooperate fully with the City and the Substitute in order to achieve a smooth transfer of the Design and Construction Contract to the City or the Substitute, as applicable, and to avoid or mitigate in so far as reasonably practicable any inconvenience, including the administration of the Design and Construction Contract, ongoing supervisory activities and scheduling.
- (d) The rights granted by Sections 6(b) and 6(c) shall be of no force or effect if, at any time the Construction Contractor receives a Step-In Notice, the Construction Contractor has already received notice in writing from another entity entitled to the benefit of step-in rights relating to the Design and Construction Contract that it is or has validly exercised those step-in rights. If the Construction Contractor receives any such notice on the same day as a Step-In Notice, the Step-In Notice shall be effective, except where the other notice is given by the Lenders, in which case such other notice and not the Step-In Notice shall be effective.
- (e) If the City gives a Step-In Notice within 60 days after the Construction Contractor has terminated the Design and Construction Contract or treated it as having been repudiated by DB Co or discontinued the Construction Contractor's performance thereunder in accordance with the terms of this Construction Contractor's Direct Agreement, the Construction Contractor agrees that the Design and Construction Contract shall be reinstated and deemed to have continued despite any termination or treatment as having been repudiated, and the City shall pay the Construction Contractor's reasonable costs for re-commencing the obligations it has under the Design and Construction Contract and the Construction Contractor shall be entitled to reasonable compensation and/or relief for re-commencing such obligations, having regard to the additional costs and delays incurred as a result of having terminated the Design and Construction Contract or having treated it as being repudiated by DB Co or having discontinued its performance thereunder.

7. CONSTRUCTION CONTRACTOR LIABILITY

- (a) The liability of the Construction Contractor hereunder shall not be modified, released, diminished or in any way affected by:
 - (i) any independent inspection, investigation or enquiry into any matter which may be made or carried out by or for the City, or by any failure or omission to carry out any such inspection, investigation or enquiry; or
 - (ii) the appointment by the City of any other person to review the progress of or otherwise report to the City in respect of the Project, or by any action or omission

of such person whether or not such action or omission might give rise to any independent liability of such person to the City,

provided always that nothing in this Section 7 shall modify or affect any rights which the Construction Contractor might have otherwise had to claim contribution from any other person whether under statute or common law.

- (b) In the event the City delivers a Step-In Notice, the City or any Substitute rights shall be subject to all of the rights and remedies available to the Construction Contractor under the Design and Construction Contract and the Construction Contractor shall have no greater liability to the City or any Substitute than it would have had to DB Co under the Design and Construction Contract, and the Construction Contractor shall be entitled in any dispute or proceedings involving the City or any Substitute to raise, enforce or rely on any defenses, conditions and liability limitations in the Design and Construction Contract.

8. DB CO AS PARTY

DB Co acknowledges and agrees that the Construction Contractor shall not be in breach of the Design and Construction Contract by complying with its obligations hereunder.

9. CONSTRUCTION GUARANTORS AS PARTY

The Construction Guarantors agree with the City that the Construction Guarantors have entered into a guarantee or covenant referred to in Section 6(b)(iii) and, subject to Sections 6(a) and (d), hereby consents to the assignment, novation or grant (including any conditional assignment, novation or grant) as provided herein immediately upon receipt by the Construction Contractor of a Step-In Notice and without the requirement of any further action on the part of the City, and agree that the Construction Guarantors shall in accordance with Section 6 enter into all such agreements or other documents as reasonably necessary to give effect to the foregoing. The Construction Guarantors enter into this Construction Contractor's Direct Agreement solely for the purposes of this Section 9.

10. ASSIGNMENT

- (a) DB Co shall not, without the prior written consent of the City, assign, transfer, charge, subcontract, subparticipate or otherwise dispose of any interest in this Construction Contractor's Direct Agreement except to the extent entitled to do so under the Project Agreement. Any permitted assignee of DB Co, as a condition precedent to any such assignment, transfer or other disposition, shall assume the obligations and acquire the rights of DB Co under this Construction Contractor's Direct Agreement pursuant to an assumption agreement with, and in a form and substance satisfactory to City and the Construction Contractor, each acting reasonably. City and the Construction Contractor shall, at DB Co's cost and expense, do all things and execute all further documents as may be necessary in connection therewith.
- (b) The City may assign or otherwise dispose of the benefit of the whole or part of this Construction Contractor's Direct Agreement to any person to whom the City may assign or otherwise dispose of their interest in the Project Agreement pursuant to Section 49.2 of the Project Agreement but only in conjunction therewith, and shall provide written notice to DB Co and the Construction Contractor of such assignment or disposition. Such

assignee, as a condition precedent to any such assignment or other disposition, shall assume the obligations and acquire the rights of City under this Construction Contractor's Direct Agreement pursuant to an assumption agreement with, and in form and substance satisfactory to, DB Co and the Construction Contractor, each acting reasonably. DB Co and the Construction Contractor shall, at City's cost and expense, do all things and execute all further documents as may be necessary in connection therewith.

- (c) The Construction Contractor shall not, without the prior written consent of the City and DB Co, assign, transfer, charge, subcontract, subparticipate or otherwise dispose of any interest in this Construction Contractor's Direct Agreement except as may be permitted under the Design and Construction Contract. Such assignee, as a condition precedent to any such assignment, transfer, charge, subcontract, subparticipate or other disposition, shall assume the obligations and acquire the rights of the Construction Contractor under this Construction Contractor's Direct Agreement pursuant to an assumption agreement with, and in a form and substance satisfactory to the City and DB Co, each acting reasonably. The City and DB Co shall, at the Construction Contractor's cost and expense, do all things and execute all further documents as may be necessary in connection therewith.

11. NOTICES

- (a) All notices, requests, demands, instructions, certificates, consents and other communications required or permitted under this Construction Contractor's Direct Agreement shall be in writing (whether or not "written notice" or "notice in writing" is specifically required by the applicable provision of this Construction Contractor's Direct Agreement) and served by sending the same by registered mail, facsimile or by hand (in each case, with a copy by electronic transmission), as follows:

If to the City :

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

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

If to DB Co:

East West Connectors GP
[REDACTED]

Attn.: [REDACTED]
Email: [REDACTED]
[REDACTED]

with a copy to:

[REDACTED]

Attn: [REDACTED]

Email: [REDACTED]

If to the Construction Contractor:

[REDACTED]

Attn: [REDACTED]

Email: [REDACTED]

If to the Construction Guarantors:

[REDACTED]

Fax No: [REDACTED]

Attn: [REDACTED]

and

[REDACTED]

Fax No: [REDACTED]

Attn: [REDACTED]

with a copy to:

[REDACTED]

Fax No: [REDACTED]

Attn: [REDACTED]

and

[REDACTED]

Fax No: [REDACTED]

Attn: [REDACTED]

- (b) Where any notice is provided or submitted to a Party via facsimile an original of the notice sent via facsimile shall promptly be sent by regular mail or registered mail. For greater certainty, a notice given via facsimile shall not be invalid by reason only of a Party's failure to comply with this Section 11(b).
- (c) Any Party to this Construction Contractor's Direct Agreement may, from time to time, change any of its contact information set forth in Section 11(a) by prior notice to the other Parties, and such change shall be effective on the Business Day that next follows

the recipient Party's receipt of such notice unless a later effective date is given in such notice.

- (d) Subject to Sections 11(e), 11(f) and 11(g):
 - (i) a notice given by registered mail shall be deemed to have been received on the third Business Day after mailing;
 - (ii) a notice given by hand delivery shall be deemed to have been received on the day it is delivered; and
 - (iii) a notice given by facsimile shall be deemed to have been received on the day it is transmitted by facsimile.
- (e) If the Party giving the notice knows or ought reasonably to know of difficulties with the postal system which might affect negatively the delivery of mail, any such notice shall not be mailed but shall be made or given by personal delivery or by facsimile transmission in accordance with this Section 11.
- (f) If any notice delivered by hand or transmitted by facsimile is so delivered or transmitted, as the case may be, either on a day that is not a Business Day or on a Business Day after 4:00 p.m. (recipient's local time), then such notice shall be deemed to have been received by such recipient on the next Business Day.
- (g) A notice given by facsimile shall be deemed to have been received by the recipient on the day it is transmitted only if a facsimile transmission report (maintained by the sender) indicates that the transmission of such notice was successful.

12. AMENDMENTS

This Construction Contractor's Direct Agreement may not be varied, amended or supplemented except by an agreement in writing signed by duly authorized representatives of the Parties and stating on its face that it is intended to be an amendment, restatement or other modification, as the case may be, to this Construction Contractor's Direct Agreement.

13. WAIVER

- (a) No waiver made or given by a Party under or in connection with this Construction Contractor's Direct Agreement shall be binding or effective unless the waiver is in writing, signed by an authorized representative of the Party giving such waiver, and delivered by such Party to the other Parties. No waiver made with respect to any right, power or remedy in one instance will be deemed to be a waiver with respect to any other instance involving the exercise of such right, power, or remedy or with respect to any other right, power, or remedy.
- (b) Failure by any Party to exercise any of its rights, powers or remedies hereunder or its delay to do so shall not constitute a waiver of those rights, powers or remedies. The single or partial exercise of a right, power or remedy shall not prevent its subsequent exercise or the exercise of any other right, power or remedy.

14. RELATIONSHIP BETWEEN THE PARTIES

The Parties are independent contractors. This Construction Contractor's Direct Agreement is not intended to and does not create or establish between the Parties any relationship as partners, joint venturers, employer and employee, master and servant, or, except as provided in this Construction Contractor's Direct Agreement, of principal and agent.

15. ENTIRE AGREEMENT

Except where provided otherwise in this Construction Contractor's Direct Agreement, this Construction Contractor's Direct Agreement constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings, whether oral, written, express or implied, concerning the subject matter of this Construction Contractor's Direct Agreement.

16. SEVERABILITY

Each provision of this Construction Contractor's Direct Agreement shall be valid and enforceable to the fullest extent permitted by law. If any provision of this Construction Contractor's Direct Agreement is declared invalid, unenforceable or illegal by the courts of a competent jurisdiction, such provision may be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Construction Contractor's Direct Agreement. If any such provision of this Construction Contractor's Direct Agreement is invalid, unenforceable or illegal, the Parties shall, acting in good faith, promptly negotiate new provisions to eliminate such invalidity, unenforceability or illegality and to restore this Construction Contractor's Direct Agreement as near as possible to its original intent and effect.

17. ENUREMENT

This Construction Contractor's Direct Agreement shall enure to the benefit of, and be binding on, each of the Parties and their respective successors and permitted transferees and assigns.

18. GOVERNING LAW AND JURISDICTION

- (a) This Construction Contractor's Direct Agreement shall be governed by and construed in accordance with the laws of Ontario and the laws of Canada applicable therein and shall be treated in all respects as an Ontario contract, without regard to conflict of laws principles.
- (b) The Parties agree that the courts of the Province of Ontario and all courts competent to hear appeals therefrom shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Construction Contractor's Direct Agreement and hereby irrevocably attorn to the exclusive jurisdiction of such courts.
- (c) Nothing in this Construction Contractor's Direct Agreement affects the rights, protections and immunities of the Crown under the *Proceedings Against the Crown Act* (Ontario).

19. FURTHER ASSURANCE

Each Party shall do all things, from time to time, and execute all further documents necessary to give full effect to this Construction Contractor's Direct Agreement.

20. LANGUAGE OF AGREEMENT

Each Party acknowledges having requested and being satisfied that this Construction Contractor's Direct Agreement and related documents be drawn in English. Chacune des parties reconnaît avoir demandé que ce document et ses annexes soient rédigés en anglais et s'en déclare satisfaite.

21. COUNTERPARTS

This Construction Contractor's Direct Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the Parties shall constitute a full, original and binding agreement for all purposes. Counterparts may be executed either in original or electronic form provided that any Party providing its signature in electronic form shall promptly forward to such Party an original signed copy of this Construction Contractor's Direct Agreement which was so faxed.

[SIGNATURE PAGES IMMEDIATELY FOLLOW]

IN WITNESS WHEREOF the Parties have executed this Construction Contractor's Direct Agreement as of the date first above written.

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.

[REDACTED]

Per: _____
Name: [REDACTED]
Title: [REDACTED]

We have authority to bind the partnership

[REDACTED]

Per: _____

Name: [REDACTED]

Title: [REDACTED]

I/We have authority to bind the Corporation

[REDACTED]

Per: _____

Name: [REDACTED]

Title: [REDACTED]

I/We have authority to bind the Corporation

[REDACTED]

Per: _____

Name: [REDACTED]

Title: [REDACTED]

I/We have authority to bind the Corporation