

SCHEDULE 29

FORM OF PERFORMANCE GUARANTEE OF CONSTRUCTION GUARANTOR

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

BETWEEN:

THE CITY OF OTTAWA (“City”)

- AND -

EAST WEST CONNECTORS GP, [REDACTED] (“DB Co”)

- AND -

[•], a corporation incorporated under the laws of [•] (“**Construction Guarantor**”)

WHEREAS:

- A. City and DB Co have entered into a project agreement dated as of the [•] day of [•], 20[•] (which agreement, including the schedules thereto, as the same may be amended, modified, restated, supplemented or replaced, from time to time, is hereinafter called the “**Project Agreement**”).
- B. DB Co and [REDACTED] (“**Construction Contractor**”) have entered into a design and construction contract dated as of the [•] day of [•], 20[•] (which agreement, including the schedules thereto, as the same may be amended, modified, restated, supplemented or replaced, from time to time, is hereinafter called the “**Design and Construction Contract**”), which requires the Construction Guarantor to provide a guarantee of the obligations of Construction Contractor in favor of DB Co.
- C. As an inducement to City to enter the Project Agreement with DB Co, Construction Guarantor has agreed to absolutely, unconditionally and irrevocably guarantee to City, as a direct obligation, the full and prompt performance and observance by Construction Contractor of its obligations in the Design and Construction Contract, and in furtherance thereof has agreed to enter into this Guarantee.
- D. On or about the date hereof, (i) the City, DB Co and [REDACTED], acting as agent for and behalf of the Lenders (the “**Lenders’ Agent**”) intend to enter into a direct lender agreement (the “**Lenders’ Direct Agreement**”) to provide for, inter alia, certain rights in favor of the Lenders’ Agent with respect to the Project Agreement Design, and (ii) the Construction Contractor, the Lenders’ Agent and DB Co intend to enter into a direct lender agreement on or about the date hereof (the “**Construction Contractor Direct Agreement**”) to provide for, inter alia, certain rights in favor of the Lenders’ Agent with respect to the Design and Construction Contract.

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

- (a) Unless otherwise defined herein, all capitalized terms will have the meanings ascribed to them in the Project Agreement.
- (b) Unless otherwise expressly provided herein, this Guarantee shall be interpreted in accordance with Schedule 1 – Definitions and Interpretation of the Project Agreement.
- (c) For the purpose of this Guarantee, the term “**Guaranteed Obligations**” has the meaning given in Section 2.1(a).

1.2 Survival and Term

This Guarantee shall survive the termination or other expiry of the Project Agreement. The obligations under this Guarantee shall commence on Financial Close and the liability of the Guarantor hereunder shall terminate concurrently with the expiration of the Latent Defect Warranty Period, except with respect to any claims existing and for which notice has been given prior to such expiry date, in which case this Guarantee shall not terminate with respect to such claims until such claims have been satisfied in full.

2. GUARANTEE

2.1 Guarantee

- (a) Construction Guarantor does hereby absolutely, unconditionally and irrevocably guarantee jointly to each of City and DB Co (each a “**Guaranteed Party**” and collectively, the “**Guaranteed Parties**”), as a direct obligation, the full and prompt performance and observance by Construction Contractor of each and every covenant, agreement, undertaking and obligation of Construction Contractor contained in the Design and Construction Contract (collectively, the “**Guaranteed Obligations**”),
- (b) Notwithstanding any other provision of this Guarantee:
 - (i) Construction Guarantor’s undertakings and obligations are derivative of and not in excess of Construction Contractor’s obligations under the Design and Construction Contract and Construction Guarantor retains all rights, claims, defences and limitations of liability possessed by Construction Contractor under the terms of the Design and Construction Contract or arising from the parties’ performance or failure to perform thereunder and shall be entitled to assert any contractual defences that would have been available to Construction Contractor, including, for greater certainty, that the alleged non-performance or non-observance by Construction Contractor of the Guaranteed Obligations arises out of or is a result of either a City Event of Default as set out in section 37.1(a) of the Project Agreement or a DB Co event of default under the Design and Construction Contract that is triggered by a City Event of Default; and
 - (ii) in no event shall the aggregate liability of the Construction Guarantor, and any of its affiliates, employees, officers and directors, under this Guarantee exceed an amount equal

to [REDACTED]% of the Contract Price, but this limit of liability shall not extend to interest and enforcement costs payable under this Guarantee.

2.2 General Provisions Relating to the Guarantee

- (a) Each and every default in performance or observance of any of the Guaranteed Obligations by Construction Contractor shall give rise to a separate claim and cause of action hereunder, and separate claims or suits may be made and brought, as the case may be, hereunder as each such default occurs.
- (b) The Guarantee herein provided for shall be a continuing, absolute and unconditional guarantee of performance and observance of the Guaranteed Obligations and shall remain in full force and effect until each and all of the Guaranteed Obligations shall have been fully and satisfactorily discharged in accordance with the terms and provisions of the Design and Construction Contract and Construction Guarantor shall have fully and satisfactorily discharged all of its obligations under this Guarantee.
- (c) The liability of Construction Guarantor hereunder shall remain in full force and effect irrespective of and shall in no way be affected or impaired by (and no notice to Construction Guarantor shall be required in respect of):
 - (i) any compromise, waiver, renewal, extension, indulgence, amendment, addition, deletion, change in, modification of, or release of any security (including any other guarantee, letter of credit or bond) for or in respect of any of the Guaranteed Obligations;
 - (ii) any amalgamation, merger or consolidation of Construction Contractor or Construction Guarantor or any sale, lease or transfer of any of the assets of DB Co or Construction Guarantor;
 - (iii) any Change in Ownership of Construction Contractor or Construction Guarantor;
 - (iv) the termination or other expiry of the Project Agreement or the Design and Construction Contract;
 - (v) any Delay Event (it being acknowledged, however, that the performance of the Guaranteed Obligations shall be extended accordingly);
 - (vi) any change in the financial condition of Construction Contractor or Construction Guarantor;
 - (vii) any DB Co Event of Default described in Section 36.1(a)(i) of the Project Agreement or the equivalent Construction Contractor event of default under the Design and Construction Contract, or any resulting release, stay or discharge of any Guaranteed Obligation;
 - (viii) any lack or limitation of power, incapacity or disability on the part of Construction Contractor or any other irregularity, defect or informality on the part of Construction Contractor with respect to the Guaranteed Obligations;

- (ix) any provision of any laws, statutes, rules or regulations of general application in relation to suretyship or any other circumstance that might constitute, under law generally applicable to suretyship, a defence available to, or a discharge of, Construction Guarantor in respect of the Guaranteed Obligations or this Guarantee;
- (x) the exercise of any rights under the Lending Agreements, including the right of Lenders (A) to cure either: (x) any DB Co Event of Default by or on behalf of DB Co under the Project Agreement or (y) any Construction Contractor event of default by or on behalf of Construction Contractor under the Design and Construction Contractor and/or (B) to assume the obligations of DB Co and complete the Guaranteed Obligations in the manner provided in the Design and Construction Contract;
- (xi) the assignment by City in accordance with the provisions of Section 49.2 of the Project Agreement; or
- (xii) any other occurrence or circumstance whatsoever, whether similar or dissimilar to the foregoing that, under law generally applicable to suretyship, might otherwise constitute a legal or equitable defence or discharge of the liabilities of a guarantor or surety that might otherwise limit recourse against Construction Guarantor.

For the avoidance of doubt, to the extent that the occurrence of any of the circumstances described in Section 2.2(c)(v), Section 2.2(c)(x) or Section 2.2(c)(xi) above results in a modification to the scope or extent of the Guaranteed Obligations, then the Guarantor's obligations under this Guarantee shall apply in relation to the Guaranteed Obligations as so modified.

- (d) The obligations and liabilities of Construction Guarantor hereunder shall not be impaired, diminished, abated or otherwise affected by the commencement by or against Construction Contractor or Construction Guarantor of any proceedings under any bankruptcy or insolvency law or laws relating to the relief of debtors, readjustment of indebtedness, reorganizations, arrangements, compositions or extension or other similar laws.
- (e) The Guaranteed Parties shall not be bound to exhaust their recourse against Construction Contractor or others or any securities or other guarantees either Guaranteed Party may at any time hold before being entitled to performance of the Guaranteed Obligations by the Construction Guarantor and Construction Guarantor renounces all benefits of discussion and division.
- (f) It is the intent and purpose hereof that Construction Guarantor shall not be entitled to and does hereby waive any and all defences which are, under law generally applicable to suretyship, available to a guarantor, sureties and other secondary parties at law or in equity. Without limiting the generality of the foregoing, Construction Guarantor hereby waives notice of acceptance of this Guarantee and of the non-performance by Construction Contractor, diligence, presentment, protest, dishonour, demand for performance from either Guaranteed Party and notice of non-performance or failure to perform on the part of Construction Contractor and all other notices whatsoever. The Guarantee hereunder is a guarantee of performance and compliance. In order to hold Construction Guarantor liable hereunder, there shall be no obligation on the part of either Guaranteed Party at any time to demand or resort for performance to Construction Contractor, its properties or assets or to any security, property or other rights or remedies whatsoever, nor shall there be any requirement that Construction Contractor be joined as a party to any proceeding for the enforcement of any provision of this Guarantee and each Guaranteed Party shall have the

right to enforce the provisions of this Guarantee irrespective of whether or not legal proceedings or other enforcement efforts against Construction Contractor are pending, seeking resort to or realization upon or from any of the foregoing. Without limiting the foregoing, it is understood that repeated and successive demands may be made and recoveries may be had hereunder as and when from time to time, Construction Contractor shall default under or with respect to any of the Guaranteed Obligations, and that, notwithstanding recovery hereunder for or in respect of any such default, the Guarantee herein shall remain in full force and effect unamended and shall apply to each and every subsequent default.

- (g) Without prejudice to and without releasing, discharging, limiting or otherwise affecting in whole or in part the obligations and liabilities of Construction Guarantor under this Guarantee and without in any way requiring the consent of or giving notice to Construction Guarantor, the Guaranteed Parties may grant time, renewals, extensions, indulgences, releases and discharges to and accept compositions from or otherwise deal with Construction Contractor and/or Construction Guarantor or others, including any other guarantor, as the Guaranteed Parties may see fit and the Guaranteed Parties may take, abstain from taking or perfecting, vary, exchange, renew, discharge, give up, realize on or otherwise deal with security and guarantees in such manner as the Guaranteed Parties may see fit.
- (h) Neither an action or proceeding brought under this Guarantee regarding the Guaranteed Obligations nor any judgment or recovery in consequence of that action or proceeding operates as a bar or defence action or defence to any further action that may be brought under this Guarantee. Construction Guarantor acknowledges that, if judgment is granted on an action or proceeding commenced under this Guarantee, the obligations of Construction Guarantor to City do not merge with or end Construction Guarantor's obligations hereunder.
- (i) The liability of Construction Guarantor under this Guarantee shall arise forthwith after demand has been made in writing on Construction Guarantor.

3. REPRESENTATIONS AND WARRANTIES

3.1 Construction Guarantor Representations and Warranties

- (a) Construction Guarantor represents and warrants to City that as of the date of this Guarantee: **[REPRESENTATIONS TO BE UPDATED PER GUARANTOR BASED ON JURISDICTION OF INCORPORATION]**
 - (i) Construction Guarantor is a corporation incorporated and validly existing under the laws of the jurisdiction of its organization, is in good standing with the Ministry of Government and Consumer Services of Ontario with respect to the filing of annual returns, and has all the requisite corporate power and authority to own, lease and operate its properties and assets, to carry on its business as it is currently being conducted, to enter into this Guarantee and the Ancillary Documents to which it is a party and to perform its obligations hereunder and thereunder;
 - (ii) Construction Guarantor has the requisite power, authority and capacity to execute and deliver and perform this Guarantee and the Ancillary Documents to which it is a party, and to do all acts and things, and execute, deliver and perform all other agreements, instruments, undertakings and documents as are required by this Guarantee and the Ancillary Documents to which it is a party to be done, executed, delivered or performed;

- (iii) no steps or proceedings have been taken or are pending to supersede, repeal or amend its constating documents, articles or by-laws or any shareholders agreement in a manner that would materially impair or limit its ability to perform its obligations under this Guarantee or any of the Ancillary Documents to which it is party and such documents and agreements are in full force and effect as of the date hereof;
- (iv) this Guarantee and the Ancillary Documents (when executed and delivered) to which Construction Guarantor is a party, have been duly authorized, executed, and delivered by Construction Guarantor and constitute legal, valid, and binding obligations of Construction Guarantor, enforceable against Construction Guarantor in accordance with their respective 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;
- (v) the authorization, execution, delivery and performance by Construction Guarantor of this Guarantee and the Ancillary Documents to which it is a party do not violate or conflict with, or constitute a default under:
 - (A) its constating or organizational documents or any unanimous shareholders agreement or similar rights agreement binding on Construction Guarantor;
 - (B) any Applicable Law; or
 - (C) any covenant, contract, instrument, agreement or understanding to which it is a party or by which it or any of its properties or assets is bound or affected;
- (vi) Construction Contractor is **[an indirect wholly-owned subsidiary]** of the Construction Guarantor;

[Note to Proponents: To be updated to reflect DB Co's final structure.]
- (vii) there are, to the knowledge of its senior management, no actions, suits, proceedings, or investigations pending or threatened against Construction Guarantor, 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 Construction Guarantor or in any impairment of its ability to perform its obligations under this Guarantee or any Ancillary Documents to which it is a party, and Construction Guarantor 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 would result in any such material adverse effect or impairment; and
- (viii) Construction Guarantor is able to meet its obligations as they generally become due.

4. NOTICES

4.1 Notices to Parties

All notices, requests, demands, instructions, certificates, consents and other communications (each being a “**Notice**”) required or permitted under this Guarantee shall be in writing (whether or not “written notice” or “notice in writing” is specifically required by the applicable provision of this Guarantee). Notices shall be 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 City:

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

Attention: [REDACTED]
Email: [REDACTED]

If to DB Co:

East West Connectors GP
[REDACTED]

Fax No.: [REDACTED]
Attn.: [REDACTED]

With a copy to:

[REDACTED]

Fax No.: [REDACTED]
Attn.: [REDACTED]

Email: [REDACTED]

If to Construction Guarantor:

[Address]

Fax No.: [•]
Attn.: [•]

With a copy to:

[Address]

Fax No.: [•]

Attn.: [•]

4.2 Facsimile

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 4.2.

4.3 Change of Address

Any party to this Guarantee may, from time to time, change any of its contact information set forth in Section 4.1 by prior Notice to the other parties, and such change shall be effective on the Business Day that next follows the recipient parties' receipt of such Notice unless a later effective date is given in such Notice.

4.4 Deemed Receipt of Notices

(a) Subject to Sections 4.4(b), (c) and (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; and
- (iii) a Notice given by facsimile shall be deemed to have been received on the day it is transmitted by facsimile.

(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 Article 4.

(c) 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.

(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.

4.5 Service on City

Where any Notice is required to be served on the Guaranteed Parties, the obligation to serve such Notice shall be fulfilled by serving it on the Guaranteed Parties in accordance with the provisions of this Article 4.

5. GENERAL

5.1 Amendments

This Guarantee 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 Guarantee.

5.2 No Double Recovery.

5.3 Neither the City, nor DB Co, nor the Lenders' Agent shall be entitled to recover compensation or make a claim pursuant to this Guarantee in respect of any loss that the City, DB Co or the Lenders' Agent has incurred, or any failure to perform on the part of the Construction Contractor or any other guarantor, or in respect of any interest or enforcement costs, in each case to the extent that the City, DB Co or the Lenders' Agent has already been compensated in respect of such loss, failure, interest or enforcement costs (including through insurance proceeds, application of any security held by the City, DB Co or the Lenders' Agent towards satisfaction of the Guaranteed Obligations or from any third party).

5.4 Waiver

- (a) No waiver made or given by a party under or in connection with this Guarantee 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.

5.5 Entire Agreement

Except where provided otherwise in this Guarantee, this Guarantee, together with the Project Agreement, and the Ancillary Documents to which it is party, constitute 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 Guarantee, including the Request for Proposals.

5.6 Severability

Each provision of this Guarantee shall be valid and enforceable to the fullest extent permitted by law. If any provision of this Guarantee 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 Guarantee. If any such provision of this Guarantee 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 Guarantee as near as possible to its original intent and effect.

5.7 Enurement

This Guarantee shall enure to the benefit of, and be binding on, the Guaranteed Parties and Construction Guarantor and their respective permitted successors and assigns. DB Co has concurrently with the execution and delivery of this Guarantee assigned to and in favour of the Lenders' Agent, and granted to the Lenders' Agent a security interest in (inter alia), all of its right, title and interest in and to this Guarantee. The Construction Guarantor acknowledges and, to the extent necessary, consents to such grant of a security interest and assignment and any further assignment or novation by the Lenders' Agent to a person who acquires any interest in the Design and Construction Contract from the Lenders' Agent. To the extent not already provided under the Lenders' Construction Contractor Direct Agreement, the Lenders' Agent shall provide notice thereof to the Guarantor. This Guarantee may not be assigned by the Construction Guarantor without the prior written consent of the Guaranteed Parties, such consent not to be unreasonably withheld.

5.8 Acknowledgement of Lenders' Construction Contractor Direct Agreement & Lender's Direct Agreement

The Construction Guarantor acknowledges the provisions of (i) the Lenders' Construction Contractor Agreement and agrees that the Lenders' Agent shall be entitled to the rights of DB Co under this Guarantee when and if the Lenders' Agent enforces the security interest referred to in Section 5.6 and (ii) the Lenders' Direct Agreement pursuant to which the City undertakes to exercise any and all rights it may have under this Guarantee only in accordance with the provisions of the Lenders' Direct Agreement.

5.9 Governing Law and Jurisdiction

- (a) This Guarantee 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 Section 5.9(c) below, 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) The Parties agree that the dispute resolution procedure provided for in Schedule 27 – Dispute Resolution Procedure to the Project Agreement shall apply to any dispute under this Guarantee.

5.10 Cumulative Remedies

Except as otherwise set forth in this Guarantee, the rights, powers and remedies of each party set forth in this Guarantee 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 Guarantee or the Project Agreement, or Ancillary Documents.

5.11 Further Assurance

Each party shall do all reasonable things, from time to time, and execute all reasonable further documents necessary to give full effect to this Guarantee.

5.12 Costs

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 Guarantee.

5.13 Language of Agreement

- (a) Each of the parties acknowledges having requested and being satisfied that this Guarantee 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, operating 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 Guarantee shall be in English.

5.14 Proof of Authority

The Guaranteed Parties and Construction Guarantor each reserve the right to require any person executing this Guarantee on behalf of another party to provide proof, in a form acceptable to the Guaranteed Parties or Construction Guarantor, as applicable, that they have the requisite authority to execute this Guarantee on behalf of and to bind either Guaranteed Party or Construction Guarantor, as applicable.

5.15 Counterparts

This Guarantee may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by both 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 Guarantee which was so faxed.

5.16 Joint and Several

If Construction Guarantor is comprised of more than one person, then each such person shall be jointly and severally liable for the obligations and liabilities of Construction Guarantor hereunder.

[SIGNATURE PAGES IMMEDIATELY FOLLOW]

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

THE CITY OF OTTAWA

Per:

Name: [REDACTED]

Title: [REDACTED]

EAST WEST CONNECTORS GP

Per:

Name: [REDACTED]

Title: [REDACTED]

Per:

Name: [REDACTED]

Title: [REDACTED]

I/We have authority to bind the corporation

[CONSTRUCTION GUARANTOR]

Per:

Name:

Title:

Per:

Name:

Title:

I/We have authority to bind the corporation