

**SCHEDULE 5**  
**CONTRACTOR'S DIRECT AGREEMENT**

**THIS AGREEMENT** made as of the 12<sup>th</sup> day of February, 2013

**BETWEEN:**

**CITY OF OTTAWA**

(the “City”)

**AND**

**[If for the Maintenance Contractor: “RIDEAU TRANSIT MAINTENANCE GENERAL PARTNERSHIP, a general partnership consisting of ACS RT MAINTENANCE PARTNER INC. (“ACS”), a corporation organized under the laws of British Columbia, ELLISDON RT MAINTENANCE PARTNER INC. (“EllisDon”), a corporation organized under the laws of Ontario, and PROTRANS RT MAINTENANCE PARTNER INC. (“SNC”), a corporation organized under the laws of Canada (each a “Contractor Member” and together the “Contractor”)]**

**[If for the Construction Contractor:**

**DRAGADOS CANADA, INC. (“Dragados”), a corporation organized under the laws of Canada,**

**AND**

**ELLISDON CORPORATION (“EllisDon”), a corporation organized under the laws of Ontario,**

**AND**

**SNC-LAVALIN CONSTRUCTORS (PACIFIC) INC. (“SNC”), a corporation organized under the laws of Canada,**

**(each of Dragados, EllisDon and SNC being a “Contractor Member” and together being the “Contractor”)]**

**AND**

**RIDEAU TRANSIT GROUP GENERAL PARTNERSHIP, a general partnership formed under the laws of the Province of Ontario**

**(“Project Co”)**

**RECITALS:**

**WHEREAS** the City and Project Co have entered into an agreement dated February 12, 2013, with respect to the System (the “**Project Agreement**”).

**AND WHEREAS** Project Co and the Contractor have entered into an agreement dated February 12, 2013 (the “**Contract**”) with respect to the [if for the Maintenance Contract: “**MC Activities**”, and if for the Construction Contract: “**CC Activities**”] in accordance with the Contract (the “**Contract Scope**”) as such agreement may be amended in writing, solely in conformity with Section 7.2(a) of the Project Agreement;

**AND WHEREAS** in consideration of the City entering into the Project Agreement with Project Co, the Contractor agrees to enter into this agreement with the City;

**AND WHEREAS** all terms used herein and not defined shall have the meaning ascribed to them in the Project Agreement.

**NOW THEREFORE**, in consideration of the mutual covenants and agreements set forth in this Agreement and the sum of Ten Dollars paid by each of the parties hereto to the other for good and other valuable consideration (the receipt and sufficiency of which is hereby acknowledged), the parties hereto covenant and agree as follows:

**1. INTERPRETATION**

This Agreement shall be interpreted according to the following provisions, unless the context requires a different meaning:

- (a) The headings in this Agreement are for convenience of reference only, shall not constitute a part of this Agreement, and shall not be taken into consideration in the interpretation of, or affect the meaning of, this 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 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, 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 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 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 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 Agreement, the rule known as the *eiusdem generis* rule shall not apply nor shall any similar rule or approach to the construction of this 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 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 Agreement states that an obligation shall be performed “on” a stipulated date, the latest time for performance shall be 5:00 p.m. on that day, or, if that day is not a Business Day, 5:00 p.m. on the next Business Day.
- (k) Any reference to time of day or date means the local time or date in Toronto, Ontario
- (l) Unless otherwise indicated, time periods will be strictly construed.
- (m) Whenever the terms “will” or “shall” are used in this Agreement they shall be construed and interpreted as synonymous and to read “shall”.

## 2. CONFLICT IN DOCUMENTS

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

### 3. REPRESENTATIONS AND WARRANTIES

- (a) The Contractor represents and warrants to the City that as of Commercial Close:
  - (i) **[If for the Construction Contractor: “the Construction Contractor is an unincorporated joint venture comprised of the Contractor Members and:**
    - (A) **Dragados is a duly incorporated and validly existing company under the laws of Canada, and has all the requisite power and authority to own its properties and assets, to carry on its business as it is currently being conducted and to enter into this Agreement and to duly observe and perform its obligations hereunder;**
    - (B) **SNC is a duly incorporated and validly existing company under the laws of Canada, and has all the requisite power and authority to own its properties and assets, to carry on its business as it is currently being conducted and to enter into this Agreement and to duly observe and perform its obligations hereunder;**
    - (C) **EllisDon is a duly incorporated and validly existing company under the laws of Ontario, and has all the requisite power and authority to own its properties and assets, to carry on its business as it is currently being conducted and to enter into this Agreement and to duly observe and perform its obligations hereunder;”**

**If for the Maintenance Contractor: “the Maintenance Contractor is a general partnership comprised of the Contractor Members; and**

- (A) **ACS is a duly incorporated and validly existing company under the laws of British Columbia, and has all the requisite power and authority to own its properties and assets, to carry on its business as it is currently being conducted and to enter into this Agreement and to duly observe and perform its obligations hereunder.**

- (B) **SNC is a duly incorporated and validly existing company under the laws of Canada, and has all the requisite power and authority to own its properties and assets, to carry on its business as it is currently being conducted and to enter into this Agreement and to duly observe and perform its obligations hereunder.**
- (C) **EllisDon is a duly incorporated and validly existing company under the laws of Ontario, and has all the requisite power and authority to own its properties and assets, to carry on its business as it is currently being conducted and to enter into this Agreement and to duly observe and perform its obligations hereunder;”]**
- (ii) the Contractor has the required ability, experience, skill and capacity to perform the activities contemplated by the Contract in a timely and professional manner;
- (iii) the Contractor has the requisite power, authority and capacity to execute, deliver and perform and to do all acts and things, and execute, deliver and perform all other agreements and undertakings as required by the Contract to be done, executed, delivered or performed;
- (iv) no steps or proceedings have been taken or are pending to supersede or amend the constating documents, articles or bylaws of the Contractor in a manner that would impair or limit the ability of the Contractor to perform the obligations of the Contractor under this Agreement or the Contract;
- (v) this Agreement and the Contract have been duly authorized, executed and delivered on behalf of the Contractor and constitute binding legal obligations of the Contractor in accordance with each of their 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;
- (vi) the execution, delivery and performance by the Contractor of this Agreement and the Contract do not and will not violate or conflict with, or constitute a default under:

- (A) the constating, formation or organizational documents, including any bylaws of the Contractor Members;
  - (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;
- (vii) there are no actions, suits, proceedings, or investigations pending or threatened against the Contractor or, to the Contractor's knowledge, 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 reasonably be expected (if determined adversely) to have any material adverse effect on the business, properties, or assets, or the condition, financial or otherwise, of the Contractor or in any impairment of the Contractor's ability to perform its obligations under this agreement, and the Contractor 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; and
- (viii) there has been no material change to any of the information including the financial information provided by the Contractor to the City as provided in the Response and there is no Change in Control with respect to the Contractor.
- (b) The City represents and warrants to the Contractor that as of Commercial Close:
- (i) the execution and delivery of this Agreement and all documents, instruments and agreements required to be executed and delivered by the City pursuant to this Agreement, and the completion of the transactions contemplated by this Agreement, have been duly authorized, and this Agreement has been duly executed and delivered by the City and constitutes a legal, valid and binding obligation of the City enforceable in accordance with its terms, except as may be limited by laws of general application affecting the enforceability of remedies and rights of creditors and except that equitable remedies such as specific performance and injunction are in the discretion of a court and except as may be subject to the special jurisdiction and powers of the Ontario Municipal Board over defaulting municipalities under the *Municipal Affairs Act*, R.S.O. 1990c. M.46, as amended;
  - (ii) the City has full power and capacity to enter into and carry out the transactions contemplated by and duly observe and perform all of its obligations contained in this Agreement;

- (iii) there are no third party consents required for the execution by the City of, and performance of its obligations under this Agreement; and
- (iv) other than any proceeding under the *Expropriations Act*, (Ontario) which could delay the acquisition by the City of the Lands and/or the After Acquired Lands and/or Real Property Interests, Construction Easements and/or Permanent Easements therein, there are no current and, to the Knowledge of the City, there are no pending or threatened actions, claims, demands, lawsuits, assessments, arbitrations, judgments, awards, decrees, orders, injunctions, prosecutions, or other proceedings of, by, against, or relating to, the City which could have a material adverse effect on the ability of the City to perform its obligations under this Agreements and the City does not have Knowledge of any basis for any such action, claim, demand, lawsuit, assessment, arbitration, judgment, award, decree, order, injunction, prosecution or other proceeding.

#### 4. EVENTS OF DEFAULT

The Contractor confirms that the Contract contains provisions respecting events of default (the “**Contractor Events of Default**”) and cure periods (the “**Cure Periods**”) substantially the same as the events of default and cure periods contained in the Project Agreement respecting Project Co, with such amendments, deletions or substitutions as shall be reasonable to reflect the circumstances and obligations of the Contract and corresponding rights and remedies in favour of Project Co substantially similar to the rights and remedies in favour of the City against Project Co in the Project Agreement, with such amendments, deletions, additions and substitutions as reasonable in the context of the Contract between Project Co and the Contractor (the “**Contract Remedies**”).

#### 5. NOTICE OF DEFAULT

Following a Project Co Event of Default with respect to obligations in the Project Agreement included within the Contract Scope (the “**Relevant Default**”), the City shall contemporaneously provide the Contractor with a copy of the notice delivered to Project Co pursuant to Section 45.2 of the Project Agreement (the “**Notice of Default**”).

#### 6. CITY’S RIGHTS ON DEFAULT

- (a) For the purposes of this Agreement:
  - (i) “**Default Enforcement Date**” means the last to occur of:
    - (A) the expiry of the Notice Period and any Step-In-Period (as defined in the Lender’s Direct Agreement) respecting the Relevant Default;
    - (B) the expiry of the Contractor Cure Period respecting the Relevant Default; and

- (C) Project Co having failed to cure or cause the Contractor to cure the Relevant Default prior to the expiry of the Contractor Cure Period contained in the Contract with respect to the Relevant Default;
- (ii) “**Contractor Cure Period**” means the later of:
  - (A) the expiry of the 30 day period following the Notice of Default;
  - (B) the expiry of all cure periods regarding the Relevant Default provided for under the Contract; and
  - (C) the expiry of such greater period as shall be reasonable to cure the Relevant Default as shall be reasonable in the circumstances, such greater period to be agreed to by the City acting reasonably.
- (b) Following the Default Enforcement Date and provided that the Relevant Default is continuing, the City may by notice in writing to the Contractor, no later than 45 days following the Default Enforcement Date, (the “**Enforcement Notice**”), thereupon enforce against the Contractor the obligations and liabilities of the Contractor whether outstanding, current or future, under the Contract as if the City were the original party thereto by notice in writing to the Contractor. In the event that the City elects to send the Enforcement Notice, the City shall thereafter be responsible for obligations subject to the provisions of Subsection 6(c) hereof, and shall be entitled to the rights and benefits of Project Co under the Contract arising following the Enforcement Notice.
- (c) In addition, following the Enforcement Notice, the City shall make payments to the Contractor on account of the work performed by the Contractor within the Contract Scope with respect to (i) the period prior to the Enforcement Notice (the “**Pre-Notice Work**”); and (ii) the period following the Enforcement Notice (the “**Post-Notice Work**”) pursuant to the Contract as follows:
  - (i) the City shall make payments with respect to Post-Notice Work to the Contractor in accordance with the provisions of the Contract;
  - (ii) subject to Subsection (iii) the City shall make a payment to the Contractor for any amount due and owing and unpaid with respect to Pre-Notice Work (the “**Pre-Notice Arrears**”);
  - (iii) notwithstanding Subsection (ii) the payment by the City on account of the Pre-Notice Arrears shall be reduced by the amount, if any, previously paid by the City to Project Co with respect to the work done by the Contractor for which the Pre-Notice Arrears, or a portion thereof, is owing to the Contractor;
  - (iv) any payments made to the Contractor by the City pursuant to this Subsection 6(c) shall be taken into account to reduce any future Milestone



Payments otherwise payable by the City with respect to a Milestone that includes the Contract Scope;

- (v) notwithstanding anything herein before contained, payments made to the Contractor pursuant to the provisions of this Subsection 6(c) with respect to the Contract Scope within any Milestone shall not exceed the amount of the Milestone Payment with respect to such Milestone; and
- (vi) all information and deliveries required to be delivered to the Contractor's lender by the Contractor under any financing and/or security agreements with respect to the work being done under the Contract, shall contemporaneously be delivered to the City.

## 7. PAST DUE OBLIGATIONS

If, as at the date of the Enforcement Notice (the "**Trigger Date**"), there are any monies owing or any other outstanding unfulfilled obligations required to have been performed by the City to Project Co relating directly to the Contract Scope (the "**Relevant Past Due Obligations**"), the Contractor shall be entitled to receive the benefit of the satisfaction by the City of such Relevant Past Due Obligations, and Project Co shall thereupon no longer be entitled to directly receive any benefit with respect to the Relevant Past Due Obligations. For greater certainty, at the Trigger Date, where there are any monies owing or any other outstanding unfulfilled obligations required to have been performed by Project Co to the Contractor under the Contract ("**Unfulfilled Drop-Down Obligations**"), but the corresponding monies owing or corresponding other obligations have been performed by the City to Project Co under the Project Agreement, the Contractor shall not have any claim against the City in respect of the Unfulfilled Drop-Down Obligations. The foregoing shall not be construed as a release of Project Co from any claims against it by the Contractor for such Unfulfilled Drop-Down Obligations.

## 8. FUTURE OBLIGATIONS

From and after the Trigger Date:

- (a) if, there are any future obligations required to be performed by the City to Project Co pursuant to the Project Agreement relating directly to the Contract Scope (the "**Relevant Future Obligations**"), the Contractor shall be entitled to receive directly the benefit of the satisfaction by the City of such Relevant Future Obligations and Project Co shall thereupon no longer be entitled to receive any benefit with respect to the Relevant Future Obligations;
- (b) Project Co and the Contractor will be deemed to be released from their existing and future obligations under the Contract to each other (except with respect to any and all indemnities from Project Co or the Contractor to the other in respect of the period prior to the Trigger Date), and the City and the Contractor will be deemed to assume those same existing and future obligations towards each other, subject to the provisions of Subsection 6(c), (except in respect of the aforesaid indemnities); and

- (c) The existing and future rights of Project Co against the Contractor under the Contract and vice versa will be deemed to be cancelled (except with respect to any and all indemnities from Project Co or the Contractor to the other in respect of the period prior to the Trigger Date), and the City and the Contractor will be deemed to acquire those same existing and future rights against each other (except in respect of the aforesaid indemnities and subject to the provisions of Subsection 6(c)).

## 9. ENFORCEABILITY OF OBLIGATIONS

The liability of the Contractor to the City under this Agreement to perform all of its obligations contained in the Contract shall be absolute and unconditional irrespective of:

- (a) the invalidity, unenforceability, illegality or termination in whole or in part of the Contract by Project Co or any agreements relating thereto (other than a termination of the Contract resulting from a valid termination of the Project Agreement by Project Co);
- (b) any defence, counterclaim or right of set off available to Project Co under the Project Agreement except those to which Project Co is entitled to under the Project Agreement with respect to the Contract Scope. For greater certainty nothing contained in this Section 9 shall preclude the Contractor from claiming any defence, counterclaim or right of set off available to the Contractor under the Contract, where an equivalent defence, counterclaim or right of set off is available to Project Co as against the City under the Project Agreement with respect to the Contract Scope;
- (c) any change in the name, objects, capital, constating documents or by-laws of Project Co;
- (d) any act or omission of either the Contractor or Project Co under the Contract; or
- (e) any other circumstances which might otherwise constitute, in whole or in part, a defence available to or a discharge of the Contractor, except (subject to the provisions of Section 7 of this Agreement) those expressly set out in the Contract as of the date of execution of the Contract.

## 10. AMENDMENTS TO CONTRACT

Without the prior express written consent of the City (to the extent required under the Project Agreement):

- (a) no amendment, modification, restatement or replacement (in whole or in part) of the Contract shall be valid, effective or binding upon the City for the purposes of this Agreement;
- (b) no termination by Project Co of the Contract shall be valid, effective or binding upon the City; and

- (c) no waiver of any of Project Co's rights pursuant to the Contract shall be effective for the purposes of this Agreement.

## **11. EXERCISING REMEDIES**

- (a) Subject to the Default Enforcement Date having occurred, the City shall not be bound to seek or exhaust its recourse against Project Co, or any other Person, before being entitled to enforce performance of the Contractor's obligations under the Contract, and the Contractor renounces all benefit of discussion or division.
- (b) Each of the Contractor Members shall be jointly and severally liable for all obligations under this Agreement.

## **12. GRANTING EXTENSIONS**

The City may, in consultation with the Contractor, where these matters relate to the Contract Scope, grant extensions of time and other indulgences, release any undertaking, property or assets of Project Co, and otherwise deal or fail to deal with Project Co, all as the City may see fit, without prejudice to or in any way discharging or diminishing the liability of the Contractor.

## **13. CONTINUING RIGHTS TO ENTER**

No invalidity, irregularity or unenforceability by reason of any bankruptcy, insolvency or reorganization of Project Co or similar law or any law or order of any government or agency thereof purporting to reduce, amend or otherwise affect the liability of Project Co to the City shall affect or impair the obligations of the Contractor to the City hereunder. If one or more of the provisions contained herein shall be invalid, illegal or unenforceable in any respect, such provision shall be deemed to be severable and the validity, legality and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby.

## **14. PRIORITY OF CLAIMS**

In the event of any liquidation, winding up or bankruptcy of Project Co (whether voluntary or compulsory) or in the event that Project Co shall make a bulk sale of any of its assets within the bulk transfer provisions of any applicable legislation or any composition with creditors or scheme of arrangement, the City shall have the right to rank in priority to the Contractor for its claims in respect of the obligations of Project Co contained in the Project Agreement, and to receive payments in respect thereof until its claim has been paid in full or without prejudice to its claim against the Contractor who shall continue to be liable for any remaining obligations contained herein or pursuant to the Contract.

## **15. AMENDMENTS TO PROJECT AGREEMENT**

The City may modify, extend, amend the Project Agreement and any other agreements between the City and Project Co which amendments and extensions may be agreed upon directly between the City and Project Co without notice to the Contractor and without the requirement of any concurrence from the Contractor.

**16. REMEDIES**

The City shall be deemed to have the same right to enforce the Contract Remedies against the Contractor as are available to Project Co under the Contract, provided that:

- (a) the Default Enforcement Date shall have occurred and the City having first delivered an Enforcement Notice in accordance with Section 5;
- (b) the City shall have such other rights and remedies as contained in this Agreement; and
- (c) in the event that the Contract is terminated in breach of Section 10 hereof or otherwise, the City shall, notwithstanding such termination, be deemed to have the same rights and remedies as are available to Project Co by virtue of the Contract Remedies against the Contractor, subject to Subsection (a) of this Section 16.

**17. ASSIGNMENT BY CONTRACTOR**

This Agreement may not be assigned by the Contractor without the prior written consent of the City, which consent shall be in the Discretion of the City.

**18. ASSIGNMENT BY CITY**

The City may, without the consent of the Contractor, assign this Agreement to a permitted assignee of the City's rights under the Project Agreement in accordance with the terms thereof.

**19. CONTRACTOR INDEMNITIES TO CITY**

- (a) Following the delivery of the Enforcement Notice to the Contractor, the Contractor shall indemnify and save harmless the City, each City Party 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 physical loss of or damage to all or any part of the Site and the System, or to any equipment, assets or other property related thereto;
  - (ii) the death or personal injury of any person;
  - (iii) any physical loss of or damage to property or assets of any third party; or
  - (iv) any other loss or damage of any third party, including injurious affection arising from or in consequence of any act or omission of the Contractor in respect of the Design and Construction Works that are not in compliance with the requirements set out in the Construction Contract and in the Applicable Law including the City's by-laws;

in each case, arising, directly or indirectly, out of, or in consequence of, or involving or relating to, the performance or breach of this Agreement or the Contract by the Contractor or any act or omission of the Contractor, except to the extent caused, or contributed to, by:

- (i) the breach of the Project Agreement by the City; or
- (ii) any deliberate or negligent act or omission of the City or any City Party; or
- (iii) a deliberate or negligent act or omission of a System User that results in undue interference with the Contractor's performance of the Contract Scope and the Contractor has been unable to take commercially reasonable steps necessary to prevent, negate or mitigate the undue interference due to acting in accordance with a recommendation or instruction of the City or an appropriate City Party, except to the extent the System User is acting in accordance with a direction, recommendation or instruction of the Contractor;
- (iv) the performance by the City under the Project Agreement not in accordance with or in breach of the requirements of any Permits, Licences and Approvals, Applicable Law or requirements of Governmental Authorities, or the failure of the City to obtain any necessary Contractor Permits, Licences and Approvals in accordance with its obligations under the Project Agreement,

except to the extent that such Direct Losses are caused, or contributed to, by the breach of the Project Agreement or this Agreement by the City or by any act or omission of the City or any the City Party.

- (b) Notwithstanding anything contained in Subsection 19(a) to the contrary, the indemnification by the Contractor of the City under this Agreement inclusive of applicable insurance proceeds received by the City under the terms of any insurance policy under the Project Agreement or the Contract shall be limited to the amount of \$50 million Adjusted by Inflation, less any amounts previously paid by Project Co to the City on account of the provisions of Section 56.1 of the Project Agreement.
- (c) Notwithstanding anything contained in Subsection 19(a) to the contrary, the indemnities under this Agreement shall not apply and there shall be no right to claim damages for breach of this Agreement, in tort or on any other basis whatsoever, to the extent that any loss claimed by either Party is an Indirect Loss.

## 20. CITY INDEMNITIES TO CONTRACTOR

- (a) Following the delivery of the Enforcement Notice to the Contractor, the City shall indemnify and save harmless the Contractor, its Subcontractors and its directors,

officers, employees, agents and representatives (collectively, the “**Contractor Indemnified Parties**”) 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 the 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 the Project Agreement by Project Co or the Contract by the Contractor;
- (ii) any physical loss of or damage to all or any part of any property or assets of the Contractor, 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 the Project Agreement or the Contract by the Contractor or by any act or omission of the Contractor; and
- (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 the 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 the Project Agreement or this Agreement by the Contractor or by any act or omission of the Contractor,

provided that there shall be excluded from the indemnity given by the City any liability for the occurrence of risks against which Project 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 Project Co to comply with its obligations to properly insure under this Project Agreement.

- (b) The obligations of the City to indemnify the Contractor Indemnified Parties provided in Subsection 20(a) shall be reduced with respect to any Claim:
  - (i) to the extent that insurance proceeds are paid to the Contractor under the terms of any insurance policy under the Project Agreement or the Contract;
  - (ii) by the percentage at fault that the Claim was attributable to any negligence or wilful misconduct of any of the Contractor Indemnified Parties, or any Subcontractor of the Contractor; or
  - (iii) by the percentage at fault that the Claim related to a breach by the Contractor or omission of any Contractor Indemnified Party or any

Subcontractor of the Contractor of any of the obligations of the Contractor under the Contract.

- (c) Notwithstanding anything contained in this Agreement to the contrary the total liability of the City to the Contractor with respect to indemnification, Direct Losses or other liability shall be limited to the amount of \$50,000,000, less any insurance proceeds paid to the Contractor under the terms of any insurance policy and less any amounts previously paid by the City to Project Co on account of the provisions of Section 56.2 of the Project Agreement.

## 21. CLAIMS

- (a) Notwithstanding any other provision of this Agreement, neither Party will be entitled to recover Compensation or make a Claim for Compensation under the Contract, this 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 it has already been compensated in respect of that loss or failure pursuant to the Contract, this Agreement, the Project Agreement or otherwise (including, without limitation, pursuant to an indemnity from another party).
- (b) The City acknowledges that it holds substantially identical indemnities from Project Co and the Contractor with respect to the Work (as such term is defined in the Contract) by the Contractor as Subcontractor to Project Co. To the extent that a Claim by the City against the Contractor in accordance with Section 19 (a “**City Direct Claim**”) is substantially the same as any equivalent Claim by the City against Project Co under the Project Agreement or by Project Co against or the Contractor under the Contract (such Claim by the City or Project Co being a “**City Equivalent Claim**”), any payment by the Contractor in or towards settlement of such City Direct Claim shall be deemed to equally settle the City Equivalent Claim, provided that no admission of liability, settlement, compromise, waiver, release or other agreement (a “**Settlement**”) by the Contractor in relation to such City Direct Claim shall bind Project Co in respect of its City Equivalent Claim against the Contractor unless the Settlement is approved in writing by Project Co (however, Project Co shall not be entitled to recover from the Contractor under Project Co’s City Equivalent Claim against the Contractor an amount equal to the Direct Losses paid by the Contractor to the City to the extent that such Direct Losses relate to the same Claim by Project Co against the Contractor under the City Equivalent Claim).
- (c) To the extent that a Claim by the Contractor against the City in accordance with Section 20 (a “**Contractor Direct Claim**”) is substantially the same as any equivalent Claim by the Contractor against Project Co under the Contract or by Project Co against the City under the Project Agreement (such Claim by the Contractor or Project Co being a “**Contractor Equivalent Claim**”), any payment by the City in or towards settlement of such Contractor Direct Claim shall be deemed to equally settle the Contractor Equivalent Claim (in the case of a Claim by the Contractor against Project Co, only to the extent of the amount of Direct

Losses recovered by the Contractor from the City), provided that no Settlement by the City in relation to such Contractor Direct Claim shall bind Project Co in respect of its Contractor Equivalent Claims against the City unless the Settlement is approved in writing by Project Co.

## 22. CONDUCT OF CLAIMS

The conduct of any Claims under this Agreement shall be conducted in the same manner, mutatis mutandis as provided for in Section 56.3 of the Project Agreement.

## 23. RELATIONSHIP OF THE PARTIES

The parties expressly disclaim any intention to create a partnership or joint venture or to constitute the other party as its agent. Nothing in this Agreement shall constitute the parties, partners or joint venturers, nor constitute one party, the agent of the other party.

## 24. CONTRACTOR RELATIONSHIP TO PROJECT CO

Nothing contained in this Agreement shall constitute the Contractor as the guarantor, surety, co-debtor, partner or joint venturer of Project Co and the liability and obligations of the Contractor to the City hereunder shall, save to the extent provided in this Agreement not be greater than the Contractor's liability and obligations to Project Co in accordance with the Contract.

## 25. NOTICES

Any notice, approval, election, demand, direction, consent, designation, request, agreement, instrument, certificate, report or other communication required or permitted to be given or made under this Agreement (each, a "Notice") to a party must be given in writing. A Notice may be given by delivery to an individual or by electronically by fax or electronic mail, and will be validly given if delivered on a Business Day at the following address, or, if transmitted on a Business Day by fax addressed to the following party:

If to the City:

City of Ottawa  
Finance Department, Supply Branch  
100 Constellation Crescent  
4<sup>th</sup> Floor West Tower  
Ottawa, ON K2G 6J8

Fax: (613) 580-9688

Attn.: Director, Rail Implementation



With a copy to: Ontario Infrastructure and Lands Corporation  
777 Bay Street, 6<sup>th</sup> Floor  
Toronto, ON M5G 2C8

Fax: (416) 327-6387

Attn.: Vice President, Civil Infrastructure

If to Project Co: Rideau Transit Group General Partnership  
1 First Canadian Place, Suite 6000  
P.O. Box 367, 100 King Street West  
Toronto, ON M5X 1E2

Fax: (416) 365-7886

Attn.: Eusebio Corregel

With a copy to: ACS RTG Partner Inc.  
c/o ACS Infrastructure Canada Inc.  
155 University Avenue, Suite 1800  
Toronto, ON M5H 3B7

Fax: (786) 272-7992

Attn.: Nuria Haltiwanger

With a copy to: EllisDon RTG Partner Inc.  
c/o 800-89 Queensway Avenue  
Mississauga, ON L5B 2V2

Fax: (905) 803-3059

Attn.: Jody K. Becker

With a copy to: SNC RTG Partner Inc.  
c/o 455 René-Lévesque Blvd. West  
Montreal, QC H2Z 1Z3

Fax: (514) 866-0795

Attn.: Gerry Grigoropoulos

If to the [Construction/Maintenance] [●]  
Contractor:

Fax: [●]

Attn.: [●]

With a copy to:

[●]

Fax: [●]

Attn.: [●]

**26. WAIVER**

No waiver of any provision of this Agreement is binding unless it is in writing and signed by all the parties to this Agreement except that any provision which does not give rights or benefits to particular parties may be waived in writing, signed only by those parties who have rights under, or hold the benefit of, the provision being waived if those parties promptly send a copy of the executed waiver to all other parties. No failure to exercise, and no delay in exercising, any right or remedy under this Agreement will be deemed to be a waiver of that right or remedy. No waiver of any breach of any provision of this Agreement will be deemed to be a waiver of any subsequent breach of that provision or of any similar provision.

**27. FURTHER ASSURANCES**

Each party will promptly execute and deliver all further documents and take all further action reasonably necessary or appropriate to give effect to the provisions and intent of this Agreement and to complete the transactions contemplated by this Agreement.

**28. COUNTERPARTS**

This Agreement and all documents contemplated by or delivered under or in connection with this Agreement may be executed and delivered in any number of counterparts with the same effect as if all parties had all signed and delivered the same document and all counterparts will be construed together to be an original and will constitute one and the same agreement.

**29. DELIVERY BY FACSIMILE**

Any party may deliver an executed copy of this Agreement by fax but that party will immediately dispatch by delivery in person to the other party an originally executed copy of this Agreement.

**30. AMENDMENTS**

No amendment, supplement, restatement or termination of any provision of this Agreement is binding unless it is in writing and signed by each party to this Agreement at the time of the amendment, supplement, restatement or termination.

### **31. DISPUTE RESOLUTION PROCEDURE**

The Parties hereby incorporate by reference the provisions of Schedule 27 (Dispute Resolution Procedure) to the Project Agreement. Except as aforesaid, each of the parties irrevocably submits to the exclusive jurisdiction of the courts of Ontario in any suit, action, or other proceeding in any way related to or arising out of this Agreement commenced in the courts of Ontario and all courts having appellate jurisdiction over those courts, by any party to this Agreement against any other party to this Agreement (a “**Permitted Action**”) and each party to this Agreement waives, and will not assert by way of motion, as a defence, or otherwise, in any Permitted Action, any Claim that:

- (a) that party is not subject to the jurisdiction of the courts of Ontario;
- (b) the Permitted Action is brought in an inconvenient forum;
- (c) the venue of the Permitted Action is improper; or
- (d) any subject matter of the Permitted Action may not be enforced in or by the courts of Ontario.

In any suit or action brought to obtain a judgment for the recognition or enforcement of any final judgment rendered in a Permitted Action, no party to this Agreement will seek any review with respect to the merits of any Permitted Action, whether or not that party appears in or defends the Permitted Action.

### **32. ENTIRE AGREEMENT**

This Agreement and all documents contemplated by or delivered under or in connection with this Agreement or referred to in this Agreement, constitute the entire agreement between the parties with respect to the subject matter of this Agreement and supersede all prior agreements, negotiations, discussions, undertakings, representations, warranties and understandings, whether written or oral, express or implied, statutory or otherwise.

### **33. PROJECT CO CONFIRMATION**

The parties acknowledge and agree that Project Co is executing and delivering this Agreement solely for the purpose of confirming its agreement to be bound by the provisions contained in Sections 5 and 6 of this Agreement.

### **34. ENUREMENT**

This Agreement enures to the benefit of and binds the parties and their respective successors and permitted assigns.

*[Signature pages follow]*

IN WITNESS WHEREOF the parties have executed this Agreement as of the day and year first above written.

**CITY OF OTTAWA**

Per: \_\_\_\_\_  
Name: Kent Kirkpatrick  
Title: City Manager

Per: \_\_\_\_\_  
Name:  
Title:

I/We have authority to bind the corporation.

**RIDEAU TRANSIT GROUP GENERAL PARTNERSHIP, by its partners, ACS RTG PARTNER INC., SNC RTG PARTNER INC. and ELLISDON RTG PARTNER INC.**

**ACS RTG PARTNER INC.**

Per: \_\_\_\_\_

Name:

Title:

I have authority to bind the corporation.

**SNC RTG PARTNER INC.**

Per: \_\_\_\_\_

Name:

Title:

Per: \_\_\_\_\_

Name:

Title:

I/We have authority to bind the corporation.

**ELLISDON RTG PARTNER INC.**

Per: \_\_\_\_\_

Name:

Title:

I have authority to bind the corporation.

**[CONTRACTOR]**

By: \_\_\_\_\_

Name:

Title:

By: \_\_\_\_\_

Name:

Title:

I/We have authority to bind the corporation.