

## memorandum

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**From** Geoffrey Gilbert and Martin Masse **Date** November 2, 2018

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**To** [Bid Evaluation Steering Committee](#)

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### Background

On November 1, 2018, the Bid Evaluation Steering Committee (BESC) received the consensus results of the Financial Evaluators. During the presentation, the Financial Evaluation Team Lead (Mohammed Mehany) drew our attention to the following conclusion reached by the Financial Evaluators:

*The FET members noted the non-standard approach used to source equity funding for the project which is in response to the novel financing approach utilized by the Sponsor on the project. The FET members have utilized their professional judgement in reviewing and evaluating the proposed financing plan to the best of their ability. However, a number of the issues that pose potential risks resulting from the proposed financing plan are legal in nature and would require further legal review in the event T-Next is selected as the First Ranked Negotiations Proponent or even earlier if the procurement process and timing permit.*

The BESC as part of its Due Diligence of the Financial Consensus Results directed that Norton Rose Fulbright Canada LLP should review the legal terms and conditions and the structure of the equity investment proposed by Trillium NEXT to ensure compliance and conformance with the RFP.

### Conclusion

Having reviewed the financial submission of Trillium NEXT with respect to the question set out above and consulted with the Financial Evaluation Team Lead (Mohammed Mehany) on certain financial questions as they relate to the financial model, we can confirm that the legal terms and conditions and the structure of the equity investment proposed by Trillium NEXT contain no material non-conformances.

### Rationale

The Financial Submission Requirements Schedule 3 Part 2 of the RFP in Section 1.0 requires that a Proponent provide:

*a description of each equity investor along with the amount of funds and timing of investment of these funds. This description should also include, but not be limited to, clearly defining the sources of funds, levels of commitments (e.g. underwritten, agency best efforts, 'club based')*

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*syndication etc.) and all necessary approvals required or received to commit/earmark the necessary funds by Financial Close. This must include clear identification of the identity and credit status of each investor as well as the amount to be provided by each investor*

and further in Section 1.1, each Proponent is to provide:

*A detailed plan of actions to eliminate or mitigate risks associated with equity funders terms and conditions that may impact the Proponent's ability to reach Financial Close, including among others: (i) conditions precedent to Financial Close, (ii) any material adverse condition clauses ("MAC"), (iii) the level of direct or indirect conditions that might conflict with or affect the existing Project Documents, (iv) any flex conditions, and (v) any other terms or conditions that might put the financing commitment at risk, whether at Financial Close or after*

Finally in Section 1.5, each Proponent is to confirm:

*If any equity or quasi-equity finance is to be raised from external sources, these sources are to be specified and written confirmation given by the providers as to their willingness to offer funding and the amount of funding available.*

This language clearly indicates that the nature of the equity to be injected into the project includes equity as described by Trillium NEXT in their financial submission and all of the submission requirements are clearly supported by the inclusion of what is labelled by Trillium NEXT in their Financial Submission in Appendix C – Commitment and Fee Letters and Term Sheet as the "Holdco Commitment and Fee Letter".

With respect to the actual terms and conditions set out in the Holdco Commitment and Fee Letter, we found them to be well thought out and consistent with the structuring requirements of the RFP and noted only one issue (which will be further discussed below) of a non-observable item at this stage of the process.

The Financial Evaluators presentation contained a note that:

*Lack of clarity was noted with regards to the funding organization structure, specifically with respect to Class A and Class B equity ownership interest. The FET was unable to ascertain the ownership relationship between SNC Lavalin Capital and the Project Co. Additional information was sought through an SME request (legal) and RFC issued to Proponent however responses received were non-conclusive.*

We found the organizational structure to be quite clear and having reviewed the response of Trillium NEXT to the request for clarification, found such response to be very helpful. The chart included at Appendix F in the Holdco Commitment and Fee Letter clearly illustrates the structure of Project Co as a general partnership, with two general partners, each of whom will be owned by an intermediate holding company. This is a typical structure we would see in the project finance market.

The Financial Evaluators presentation also noted the following risks:

*(a) Compensation to lenders in the event of cancellation to be included during preferred proponent stage,*

While this is accurate, this will not increase the liability of the City to Project Co, indeed the term sheet recognizes the paramountcy of the Compensation on Termination provisions of the Project Agreement. While the future cancellation provisions may impact the borrower, Holdco, this will be a liability of Holdco's itself and potentially its shareholders and not the Project.

*(b) term sheet includes mandated accounts structure and it remains unclear how those accounts will be managed without contradicting PA Schedule 4 requirements related to Project Co accounts and related reporting*

We agree that given the terms and conditions currently described in the Holdco Commitment and Fee Letter we cannot observe how Trillium NEXT will manage these account requirements with those outlined in Schedule 4 of the Project Agreement. However the drafting in Schedule 4 does permit certain flexibility that will potentially allow Project Co to discharge both obligations, for example Section 3.2 of Schedule 4 states that:

*For greater certainty, so long as a Project Co Event of Default is not continuing, Project Co shall be entitled to deal with amounts in the Proceeds Account in its sole discretion.*

Trillium NEXT may take the position that provided a Project Co Event of Default under the Project Agreement has not occurred Project Co can manage the account in the manner described in the Holdco Commitment and Fee Letter. These non-observables will be an important matter for future diligence should this Proponent proceed through the First Negotiations Proponent stage and on to Preferred Proponent and financial close.

*(c) term sheet includes restrictions on change of ownership and termination of maintenance provider that risk interference with City's rights under the PA*

The restrictions on changes of ownership contained in Appendix A of the Holdco Commitment and Fee Letter only contemplate a change in ownership at the Holdco level of Project Co and not Project Co itself. As a result they will not prohibit the exercise of the Equity Purchase Agreement in Schedule 38 of the Project Agreement. In fact the Holdco Commitment and Fee Letter also recognizes that the City will have a consent right as well on such transfer of shares at the Holdco level.

The restriction on the termination of the maintenance provider will not interfere with City's rights under the Project Agreement as the Holdco Commitment and Fee Letter makes it clear in Appendix D Part 2 sub paragraph (m):

*The Borrower shall not permit Project Co to terminate Maintenance and Rehabilitation Contract **other than for reason of a MR Contractor Event of Default (as defined therein) or a termination of the Project Agreement [Note emphasis added].***

Clearly the covenant preserves the right for the City to act without restriction as an MR Contractor Event of Default includes a Project Co Event of Default caused by the M&R Contractor under the Project Agreement and the potential termination by the City in such circumstances of the M&R Contract.

The above analysis and a thorough review of the financial submission of Trillium NEXT with respect to the legal terms and conditions and the structure of the equity investment proposed by Trillium NEXT, we can confirm that the legal terms and conditions and the structure of the equity investment proposed by Trillium NEXT contain no material non-conformances. Ongoing diligence will be an important matter should we proceed with this Proponent through the First Negotiations Proponent stage and on to Preferred Proponent and financial close.