

**SCHEDULE 5-1**

**CONSTRUCTION CONTRACTOR’S DIRECT AGREEMENT**

THIS AGREEMENT is made as of the 28<sup>th</sup> day of March, 2019

**BETWEEN:**

**CITY OF OTTAWA**

(the “City”)

- AND -

**TRANSIT NEXT GENERAL PARTNERSHIP, [REDACTED]**

(“Project Co”)

- AND -

**[REDACTED]**

(the “Construction Contractor”)

- AND -

**[REDACTED]**

(the “Construction Guarantor”)

**WHEREAS:**

- A. The City and Project Co have entered into the Project Agreement dated March 28, 2019, which requires Project Co to enter into, and to cause the Construction Contractor and the Construction Guarantor to enter into, this Construction Contractor’s Direct Agreement with the City.
- B. Project Co and the Construction Contractor have entered into the Construction Contract, which requires the Construction Contractor and the Construction Guarantor to enter into this Construction Contractor’s Direct Agreement with the City.
- C. In consideration of the City entering into the Project Agreement with Project Co, the Contractor agrees to enter into this 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 Construction Contractor’s Direct Agreement, unless the context otherwise requires:

- (a) “Applicable Law” has the meaning given in the Project Agreement.

- (b) “**Business Day**” has the meaning given in the Project Agreement.
- (c) “**Construction Contract**” has the meaning given in the Project Agreement.
- (d) “**Construction Contractor’s Direct Agreement**” means this Construction Contractor’s Direct Agreement.
- (e) “**Default Notice**” has the meaning given in Section 5(a).
- (f) “**Governmental Authority**” has the meaning given in the Project Agreement.
- (g) “**Lenders**” has the meaning given in the Project Agreement.
- (h) “**Lenders’ Direct Agreement**” has the meaning given in the Project Agreement.
- (i) “**Party**” means the City, the Construction Contractor, the Construction Guarantor or Project Co, and “**Parties**” means the City, the Construction Contractor, the Construction Guarantor and Project Co.
- (j) “**Project**” has the meaning given in the Project Agreement.
- (k) “**Project Agreement**” means the project agreement made on or about March 28, 2019 between the City and Project Co.
- (l) “**Step-In Notice**” has the meaning given in Section 6(a).
- (m) “**Substitute**” has the meaning given in Section 6(a).
- (n) “**Variation**” has the meaning given in the Project Agreement.

## 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, 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 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) Project Co and the Construction Contractor shall not amend, modify, or depart from the terms of the 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 Project Co 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. Project 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 Construction Contract.
- (c) If the Construction Contractor gives Project Co any notice of any default(s) under the Construction Contract that may give the Construction Contractor a right to terminate the Construction Contract or to treat it as having been repudiated by Project 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 Construction Contract or to treat it as having been repudiated by Project 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 Construction Contract or to treat it as having been repudiated by Project Co or to discontinue the Construction Contractor's performance thereunder; and
- (b) within a period of 5 Business Days of the City receiving the Default Notice:
  - (i) the default(s) on which the Construction Contractor intends to rely in terminating the Construction Contract or to treat it as having been repudiated by Project 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 5 Business Days, the City agrees to pay the Construction Contractor's reasonable costs of continued performance, such period of 5 Business Days shall be extended to 45 days.

## 6. STEP-IN RIGHTS

- (a) The City may at any time:

- (i) within 5 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 Project Co under the 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, to carry out the obligations of the Substitute under the Construction Contract.

- (b) Subject to Section 6(d), upon receipt by the Construction Contractor of a Step-In Notice:

- (i) Project Co and the Construction Contractor will be deemed to be released from their existing and future obligations under the Construction Contract to each other (except with respect to any and all indemnities from Project 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 Project Co against the Construction Contractor under the Construction Contract and vice versa will be deemed to be cancelled (except with respect to any and all indemnities from Project 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 Project 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 Construction Contract, except for the “Additional Letter of Credit” (as defined in the Construction Contract) provided in accordance with the 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 Project 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, covenant, letter of credit or similar performance security to the extent of any such obligations to Project Co shall be conditional on the satisfaction of those obligations to Project Co; and

- (iv) at the City’s request, the Construction Contractor shall enter into, and shall cause the Construction Guarantor 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 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 Construction Contract.
- (c) Subject to Section 6(d), Project Co shall, at its own cost, cooperate fully with the City and the Substitute in order to achieve a smooth transfer of the 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 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 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 the time provided hereunder at any time after the Construction Contractor has terminated the Construction Contract or treated it as having been repudiated by Project 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 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 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 Construction Contract or having treated it as being repudiated by Project 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 Construction Contractor shall have no greater liability to the City or any Substitute than it would have had to Project Co under the Construction Contract, and the Construction Contractor shall be entitled in any proceedings by the City or any Substitute to rely on any liability limitations in the Construction Contract.

**8. PROJECT CO AS PARTY**

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

**9. CONSTRUCTION GUARANTOR AS PARTY**

The Construction Guarantor agrees with the City that the Construction Guarantor has entered into a guarantee or covenant referred to in Section 6(b)(iii), 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 agrees that the Construction Guarantor 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 Guarantor enters into this Construction Contractor's Direct Agreement solely for the purposes of this Section 9.

**10. ASSIGNMENT**

- (a) Project 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.

- (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 its interest in the Project Agreement pursuant to Section 59.2 of the Project Agreement but only in conjunction therewith, and shall provide written notice to Project Co and the Construction Contractor of such assignment or disposition.
- (c) The Construction Contractor shall not, without the prior written consent of the City and Project 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 Construction Contract.

**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]  
Email: [REDACTED]

If to Project Co: TransitNEXT General Partnership  
[REDACTED]  
Email: [REDACTED]  
Attn: [REDACTED]

If to the Construction Contractor: [REDACTED]  
Fax: [REDACTED]  
Email: [REDACTED]  
Attn: [REDACTED]

If to the Construction Guarantor: [REDACTED]  
  
Attention: [REDACTED]  
Title: [REDACTED]  
Email: [REDACTED]  
With copy to: [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.

**19. [INTENTIONALLY DELETED]**

**20. 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.

**21. 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.

**22. 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 faxed form provided that any Party providing its signature in faxed form shall promptly forward to such Party an original signed copy of this Construction Contractor's Direct Agreement which was so faxed.

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

**THE CITY OF OTTAWA**

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

**TRANSITNEXT GENERAL PARTNERSHIP**

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

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

I/We have authority to bind the corporation.

**[REDACTED]**

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

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

I/We have authority to bind the corporation.

**[REDACTED]**

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

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

I/We have authority to bind the corporation.

**SCHEDULE 5-2**

**MAINTENANCE AND REHABILITATION CONTRACTOR'S DIRECT AGREEMENT**

THIS AGREEMENT is made as of the 28<sup>th</sup> day of March, 2019

**BETWEEN:**

**THE CITY OF OTTAWA**

(the "City")

- AND -

**TRANSIT NEXT GENERAL PARTNERSHIP, [REDACTED]**

("Project Co")

- AND -

**[REDACTED]**

(the "Maintenance and Rehabilitation Contractor")

- AND -

**[REDACTED]**

(the "Maintenance and Rehabilitation Guarantor")

**WHEREAS:**

- A. The City and Project Co have entered into the Project Agreement, which requires Project Co to enter into, and to cause the Maintenance and Rehabilitation Contractor and the Maintenance and Rehabilitation Guarantor to enter into, this Maintenance and Rehabilitation Contractor's Direct Agreement with the City.
- B. Project Co and the Maintenance and Rehabilitation Contractor have entered into the Maintenance and Rehabilitation Contract, which requires the Maintenance and Rehabilitation Contractor and the Maintenance and Rehabilitation Guarantor to enter into this Maintenance and Rehabilitation 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 Maintenance and Rehabilitation Contractor's Direct Agreement, unless the context otherwise requires:

- (a) "Applicable Law" has the meaning given in the Project Agreement.

- (b) “**Business Day**” has the meaning given in the Project Agreement.
- (c) “**Default Notice**” has the meaning given in Section 5(a).
- (d) “**Governmental Authority**” has the meaning given in the Project Agreement.
- (e) “**Maintenance and Rehabilitation Contract**” has the meaning given in the Project Agreement.
- (f) “**Maintenance and Rehabilitation Contractor’s Direct Agreement**” means this Maintenance and Rehabilitation Contractor’s Direct Agreement.
- (g) “**Party**” means the City, the Maintenance and Rehabilitation Contractor, the Maintenance and Rehabilitation Guarantor or Project Co, and “**Parties**” means the City, the Maintenance and Rehabilitation Contractor, the Maintenance and Rehabilitation Guarantor and Project Co.
- (h) “**Project**” has the meaning given in the Project Agreement.
- (i) “**Project Agreement**” means the project agreement made on or about March 28, 2019 between the City and Project Co.
- (j) “**Step-In Notice**” has the meaning given in Section 6(a).
- (k) “**Substitute**” has the meaning given in Section 6(a).
- (l) “**Variation**” has the meaning given in the Project Agreement.

## 2. INTERPRETATION

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

- (a) The headings in this Maintenance and Rehabilitation Contractor’s Direct Agreement are for convenience of reference only, shall not constitute a part of this Maintenance and Rehabilitation Contractor’s Direct Agreement, and shall not be taken into consideration in the interpretation of, or affect the meaning of, this Maintenance and Rehabilitation 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 Maintenance and Rehabilitation 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, 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 Maintenance and Rehabilitation 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 Maintenance and Rehabilitation 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 Maintenance and Rehabilitation 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 Maintenance and Rehabilitation 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 Maintenance and Rehabilitation 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 Maintenance and Rehabilitation 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 Maintenance and Rehabilitation 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 Maintenance and Rehabilitation 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 Maintenance and Rehabilitation Contractor’s Direct Agreement, the Project Agreement and the Maintenance and Rehabilitation Contract, this Maintenance and Rehabilitation Contractor’s Direct Agreement shall prevail.

### 4. AGREEMENTS

- (a) Project Co and the Maintenance and Rehabilitation Contractor shall not amend, modify, or depart from the terms of the Maintenance and Rehabilitation 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 Project Co to perform its obligations under this Maintenance and Rehabilitation Contractor’s Direct Agreement and does not have the effect of increasing any liability of the City, whether actual or potential. Project Co and the Maintenance and Rehabilitation Contractor shall provide 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 Maintenance and Rehabilitation Contract.
- (c) If the Maintenance and Rehabilitation Contractor gives Project Co any notice of any default(s) under the Maintenance and Rehabilitation Contract that may give the Maintenance and Rehabilitation Contractor a right to terminate the Maintenance and Rehabilitation Contract or to treat it as having been repudiated by Project Co or to discontinue the Maintenance and Rehabilitation Contractor’s performance thereunder, then the Maintenance and Rehabilitation 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 MAINTENANCE AND REHABILITATION CONTRACTOR WITHOUT DEFAULT NOTICE

The Maintenance and Rehabilitation Contractor shall not exercise any right it may have to terminate the Maintenance and Rehabilitation Contract or to treat it as having been repudiated by Project Co or to discontinue the Maintenance and Rehabilitation Contractor’s performance thereunder unless:

- (a) the Maintenance and Rehabilitation Contractor first delivers a written notice (a “**Default Notice**”) to the City setting out in reasonable detail the default(s) on which the Maintenance and Rehabilitation Contractor intends to rely in terminating the Maintenance and Rehabilitation Contract or to treat it as having been repudiated by Project Co or to discontinue the Maintenance and Rehabilitation Contractor’s performance thereunder; and

- (b) within the period ending 30 days after the Maintenance and Rehabilitation Contractor notifies the City of the expiry of any relevant period for the exercise of step-in or similar rights, then 30 days after the later of the City receiving Default Notice or the expiry of the applicable cure period under the Maintenance and Rehabilitation Contract:
  - (i) the default(s) on which the Maintenance and Rehabilitation Contractor intends to rely in terminating the Maintenance and Rehabilitation Contract or to treat it as having been repudiated by Project Co or to discontinue the Maintenance and Rehabilitation Contractor's performance thereunder have not been remedied; and
  - (ii) the Maintenance and Rehabilitation Contractor has not received a Step-In Notice from the City,

provided that, until such time as the City gives the Maintenance and Rehabilitation Contractor a notice that the City will not be exercising its step-in rights, the City shall pay the Maintenance and Rehabilitation Contractor's reasonable costs of continued performance.

## 6. STEP-IN RIGHTS

- (a) The City may at any time:
  - (i) within the period referred to in Section 5(b); 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 Project Co under the Maintenance and Rehabilitation 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 Maintenance and Rehabilitation Contractor, acting reasonably, that the Substitute shall have sufficient financial resources, or shall be supported by a satisfactory guarantee, to carry out the obligations of the Substitute under the Maintenance and Rehabilitation Contract.

- (b) Subject to Section 6(d), upon receipt by the Maintenance and Rehabilitation Contractor of a Step-In Notice:
  - (i) Project Co and the Maintenance and Rehabilitation Contractor will be deemed to be released from their existing and future obligations under the Maintenance and Rehabilitation Contract to each other (except with respect to any and all indemnities from Project Co or the Maintenance and Rehabilitation 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 Maintenance and Rehabilitation 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 Project Co against the Maintenance and Rehabilitation Contractor under the Maintenance and Rehabilitation Contract and vice versa will be deemed to be cancelled (except with respect to any and all

indemnities from Project Co or the Maintenance and Rehabilitation 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 Maintenance and Rehabilitation 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 Maintenance and Rehabilitation Contractor to the City if the City pays for the Maintenance and Rehabilitation 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 Project Co from any third party in respect of any term, provision, condition, obligation, undertaking or agreement on the part of the Maintenance and Rehabilitation Contractor to be performed, observed or carried out by the Maintenance and Rehabilitation Contractor as contained in, referred to, or inferred from the Maintenance and Rehabilitation Contract, except for the "Additional Letter of Credit" (as defined in the Maintenance and Rehabilitation Contract) provided in accordance with the Maintenance and Rehabilitation 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 Maintenance and Rehabilitation 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 Project Co shall continue to hold, or shall continue to be entitled to have rights under, such guarantee, bond, covenant, letter of credit or similar performance security as security for any obligations of the Maintenance and Rehabilitation Contractor, the assignment, novation or grant of the guarantee, bond, covenant, letter of credit or similar performance security to the extent of any such obligations to Project Co shall be conditional on the satisfaction of those obligations to Project Co; and
  - (iv) at the City's request, the Maintenance and Rehabilitation Contractor shall enter into, and shall cause the Maintenance and Rehabilitation Guarantor 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 an agreement between the City or the Substitute, as applicable, and the Maintenance and Rehabilitation Contractor, acceptable to the City and the Maintenance and Rehabilitation Contractor, each acting reasonably, on substantially the same terms as the Maintenance and Rehabilitation Contract.
- (c) Subject to Section 6(d), Project Co shall, at its own cost, cooperate fully with the City and the Substitute in order to achieve a smooth transfer of the Maintenance and Rehabilitation 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 Maintenance and Rehabilitation 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 Maintenance and Rehabilitation Contractor receives a Step-In Notice, the Maintenance and Rehabilitation Contractor has already received notice in writing from another entity entitled to the benefit of step-in rights relating to the Maintenance and Rehabilitation Contract that it is or has validly exercised those step-in rights. If the Maintenance and Rehabilitation Contractor receives any such notice on the same day as a Step-In Notice, the Step-In Notice shall be effective.
- (e) If the City gives a Step-In Notice within the time provided hereunder at any time after the Maintenance and Rehabilitation Contractor has terminated the Maintenance and Rehabilitation Contract or treated it as having been repudiated by Project Co or discontinued the Maintenance and Rehabilitation Contractor's performance thereunder in accordance with the terms of this Maintenance and Rehabilitation Contractor's Direct Agreement, the Maintenance and Rehabilitation Contractor agrees that the Maintenance and Rehabilitation Contract shall be reinstated and deemed to have continued despite any termination or treatment as having been repudiated, and the City shall pay the Maintenance and Rehabilitation Contractor's reasonable costs for re-commencing the obligations it has under the Maintenance and Rehabilitation Contract and the Maintenance and Rehabilitation 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 Maintenance and Rehabilitation Contract or having treated it as being repudiated by Project Co or having discontinued its performance thereunder.

## **7. MAINTENANCE AND REHABILITATION PROVIDER LIABILITY**

- (a) The liability of the Maintenance and Rehabilitation 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;
  - (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 Maintenance and Rehabilitation 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 Maintenance and Rehabilitation Contractor shall have no greater liability to the City or any Substitute than it would have had to Project Co under the Maintenance and Rehabilitation Contract, and the Maintenance and Rehabilitation Contractor shall be entitled in any proceedings by the City or any Substitute to rely on any liability limitations in the Maintenance and Rehabilitation Contract.

## **8. PROJECT CO AS PARTY**

Project Co acknowledges and agrees that the Maintenance and Rehabilitation Contractor shall not be in breach of the Maintenance and Rehabilitation Contract by complying with its obligations hereunder.

**9. MAINTENANCE AND REHABILITATION GUARANTOR AS PARTY**

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

**10. ASSIGNMENT**

- (a) Project Co shall not, without the prior written consent of the City, assign, transfer, charge, subcontract, subparticipate or otherwise dispose of any interest in this Maintenance and Rehabilitation Contractor's Direct Agreement except to the extent entitled to do so under the Project Agreement.
- (b) The City may assign or otherwise dispose of the benefit of the whole or part of this Maintenance and Rehabilitation Contractor's Direct Agreement to any person to whom the City may assign or otherwise dispose of its interest in the Project Agreement pursuant to Section 59.2 of the Project Agreement but only in conjunction therewith, and shall provide written notice to Project Co and the Maintenance and Rehabilitation Contractor of such assignment or disposition.
- (c) The Maintenance and Rehabilitation Contractor shall not, without the prior written consent of the City and Project Co, assign, transfer, charge, subcontract, subparticipate or otherwise dispose of any interest in this Maintenance and Rehabilitation Contractor's Direct Agreement, except as may be permitted under the Maintenance and Rehabilitation Contract.

**11. NOTICES**

- (a) All notices, requests, demands, instructions, certificates, consents and other communications required or permitted under this Maintenance and Rehabilitation 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 Maintenance and Rehabilitation 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]

- If to Project Co:
- Attention: [REDACTED]  
Email: [REDACTED]
- TransitNEXT General Partnership  
[REDACTED]
- Email: [REDACTED]  
Attn: [REDACTED]
- If to the Maintenance and Rehabilitation Contractor:
- [REDACTED]
- Attention: [REDACTED]  
Fax: [REDACTED]  
Email: [REDACTED]  
Copy to: [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]
- If to the Maintenance and Rehabilitation Guarantor:
- [REDACTED]
- Attention: [REDACTED]  
Title: [REDACTED]  
Email: [REDACTED]  
With copy to: [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 Maintenance and Rehabilitation 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 Maintenance and Rehabilitation 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 Maintenance and Rehabilitation Contractor's Direct Agreement.

## **13. WAIVER**

- (a) No waiver made or given by a Party under or in connection with this Maintenance and Rehabilitation 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 Maintenance and Rehabilitation 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 Maintenance and Rehabilitation Contractor's Direct Agreement, of principal and agent.

## **15. ENTIRE AGREEMENT**

Except where provided otherwise in this Maintenance and Rehabilitation Contractor's Direct Agreement, this Maintenance and Rehabilitation 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 Maintenance and Rehabilitation Contractor's Direct

Agreement.

**16. SEVERABILITY**

Each provision of this Maintenance and Rehabilitation Contractor's Direct Agreement shall be valid and enforceable to the fullest extent permitted by law. If any provision of this Maintenance and Rehabilitation 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 Maintenance and Rehabilitation Contractor's Direct Agreement. If any such provision of this Maintenance and Rehabilitation 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 Maintenance and Rehabilitation Contractor's Direct Agreement as near as possible to its original intent and effect.

**17. ENUREMENT**

This Maintenance and Rehabilitation 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 Maintenance and Rehabilitation 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 Maintenance and Rehabilitation Contractor's Direct Agreement and hereby irrevocably attorn to the exclusive jurisdiction of such courts.

**19. [INTENTIONALLY DELETED]**

**20. FURTHER ASSURANCE**

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

**21. LANGUAGE OF AGREEMENT**

Each Party acknowledges having requested and being satisfied that this Maintenance and Rehabilitation 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.

**22. COUNTERPARTS**



This Maintenance and Rehabilitation 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 faxed form provided that any Party providing its signature in faxed form shall promptly forward to such Party an original signed copy of this Maintenance and Rehabilitation Contractor's Direct Agreement which was so faxed.

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

**THE CITY OF OTTAWA**

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

**TRANSITNEXT GENERAL PARTNERSHIP**

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

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

I/We have authority to bind the corporation.

[REDACTED]

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

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

I/We have authority to bind the corporation.

**[REDACTED]**

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

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

I/We have authority to bind the corporation.