

**SCHEDULE 6  
INDEPENDENT CERTIFIER AGREEMENT**

**THIS AGREEMENT** is made as of the 25th day of April, 2019

**BETWEEN:**

**THE CITY OF OTTAWA**

(“City”)

- and -

**EAST WEST CONNECTORS GP, [REDACTED]**

(“DB Co”)

- and -

**[REDACTED]**

(the “Independent Certifier”)

**WHEREAS:**

- (A) The City and DB Co (collectively, the “**PA Parties**” and each, a “**PA Party**”) have entered into the Project Agreement.
- (B) Pursuant to the terms of the Project Agreement, the PA Parties wish to appoint the Independent Certifier, and the Independent Certifier wishes to accept such appointment, to perform certain services in connection with the Project Agreement.
- (C) The PA Parties and the Independent Certifier wish to enter into this Independent Certifier Agreement in order to record the terms by which the Independent Certifier shall perform such services.

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

**1 DEFINITIONS**

**1.1 Definitions**

- (a) In this Independent Certifier Agreement, including the recitals and appendices, unless the context indicates a contrary intention, terms which are defined in the Project Agreement

(and not otherwise defined in this Independent Certifier Agreement) shall have meanings given to them in the Project Agreement and the following terms shall have the following meanings:

- (i) **“Certification Services”** means:
  - (A) all of the functions and obligations described in the Project Agreement as being the responsibility of the Independent Certifier;
  - (B) all of the functions and obligations conferred on the Independent Certifier under this Independent Certifier Agreement, including the functions described in Appendix A to this Independent Certifier Agreement; and
  - (C) all other functions or tasks which the Independent Certifier must do to comply with its obligations under this Independent Certifier Agreement.
- (ii) **“Certification Services Variation”** is any change to the Certification Services.
- (iii) **“Contract Material”** means all material:
  - (A) provided to the Independent Certifier or created or required to be created by either PA Party; and
  - (B) provided by or created or required to be created by the Independent Certifier as part of, or for the purpose of, performing the Certification Services, including documents, equipment, reports, technical information, plans, charts, drawings, calculations, tables, schedules and data (stored and recorded by any means).
- (iv) **“Contribution Agreement”** means either the agreement entered into by the City and the Government of Canada, represented by the Ministry of Infrastructure and Communities, or the agreement entered into by the City and the Government of Ontario, represented by the Ministry of Transportation, for the contribution of funding for the Project, and **“Contribution Agreements”** means both.
- (v) **“Contribution Agreement Party”** means either the Government of Canada, represented by the Ministry of Infrastructure and Communities, or the Government of Ontario, represented by the Ministry of Transportation, and **“Contribution Agreement Parties”** means both.
- (vi) **“Earned Value Measurement Techniques”** means the techniques used to measure Earned Value established by DB Co and agreed with the Independent Certifier in accordance with the “Practice Standard for Earned Value Management” (2nd Edition, published in 2011 by the Project Management Institute, Inc.).

- (vii) “**Fee**” means the fees payable by the City and DB Co to the Independent Certifier for the Certification Services, as such fees are specified and made payable in accordance with Appendix B to this Independent Certifier Agreement.
- (viii) “**IC Monthly Report**” has the meaning given in Appendix A to this Independent Certifier Agreement.
- (ix) “**IC Quarterly Report**” has the meaning given in Appendix A to this Independent Certifier Agreement.
- (x) “**Intellectual Property**” means any and all intellectual property rights, whether subsisting now or in the future, including rights of any kind in inventions, patents, copyright, trademarks, service marks, industrial designs, integrated circuit topography rights, applications for registration of any of the foregoing, and know-how, trade secrets, confidential information and trade or business names.
- (xi) “**PA Parties**” means both the City and DB Co, and “**PA Party**” means either the City or DB Co, as the context requires.
- (xii) “**Project Agreement**” means that certain project agreement made on or about the date hereof between the City and DB Co with respect to the design, construction and financing of the Confederation Line Extension Project.

## 2 INTERPRETATION

### 2.1 Interpretation

- (a) In this Independent Certifier Agreement, unless the context indicates a contrary intention:
  - (i) words denoting the singular number include the plural and vice versa;
  - (ii) words denoting individuals include corporations and vice versa;
  - (iii) headings are for convenience only and do not affect interpretation;
  - (iv) references to Clauses, Sections or Parts are references to Clauses, Sections or Parts of this Independent Certifier Agreement;
  - (v) references to this Independent Certifier Agreement or any contract, agreement or instrument are deemed to include references to this Independent Certifier Agreement or such other contract, agreement or instrument as amended, novated, supplemented, varied or replaced from time to time;
  - (vi) references to any party to this Independent Certifier Agreement includes its successors or permitted assigns;
  - (vii) words denoting any gender include all genders;

- (viii) references to any legislation or to any section or provision of any legislation include any statutory modification or re-enactment of any statutory provision substituted for legislation, section or provision, and ordinances, by laws, regulations and other statutory instruments issued under that legislation, section or provision;
- (ix) a reference to “\$” is to Canadian currency;
- (x) the terms “including” and “include” mean “including” or “include” (as applicable) without limitation;
- (xi) if a word or phrase is defined, then other parts of speech and grammatical forms of that word or phrase have a corresponding meaning; and
- (xii) unless otherwise indicated, all time periods will be strictly construed.

## **2.2 Obligations and Exercise of Rights by PA Parties**

- (a) The obligations of the PA Parties under this Independent Certifier Agreement shall be several.
- (b) Except as specifically provided for in this Independent Certifier Agreement or the Project Agreement, the rights of the PA Parties under this Independent Certifier Agreement shall be jointly exercised by the PA Parties.

## **3 ROLE OF THE INDEPENDENT CERTIFIER**

### **3.1 Engagement**

- (a) The PA Parties hereby appoint the Independent Certifier, and the Independent Certifier hereby accepts such appointment, to carry out the Certification Services in accordance with this Independent Certifier Agreement. The Independent Certifier shall perform the Certification Services in accordance with this Independent Certifier Agreement.
- (b) Nothing in this Independent Certifier Agreement will be interpreted as giving the Independent Certifier any responsibility for performance of the design or construction, or for the certifications of the professionals of record.
- (c) Neither PA Party shall, without the prior written consent of the other PA Party, enter into any separate agreement with the Independent Certifier in connection with the Project, and DB Co shall ensure that no DB Co Party enters into any separate agreement with the Independent Certifier in connection with the Project. The Independent Certifier shall not enter into any separate agreement with either PA Party in connection with the Project without the prior written consent of the other PA Party.
- (d) The Independent Certifier shall make such observations and evaluations of any Works pursuant to a Variation in order to certify any monthly progress payment to DB Co of the value of work performed, provided the Independent Certifier shall be entitled to a Certification Services Variation Order pursuant to Sections 9.4 and 9.5 of this Independent Certifier Agreement.

- (e) The PA Parties acknowledge and agree that the Independent Certifier may rely on the assessment report prepared by the Independent Safety Assessor with respect to the safety certification of the System Infrastructure. The Independent Certifier acknowledges and agrees that, in carrying out the Certification Services, it shall be bound to the assessment report and shall consider the Independent Safety Assessor's views with respect to the safety of the System Infrastructure in making its determination as to whether Project Co has satisfied the conditions of Substantial Completion.
- (f) The PA Parties acknowledge and agree that notwithstanding anything to the contrary in this Agreement the Certification Services described in paragraph (bb) of Appendix A do not, nor shall such Certification Services be construed so as to, change, modify or have any impact whatsoever on the PA Parties' respective rights, entitlements and obligations as against each other pursuant to the provisions of the Project Agreement.
- (g) In carrying out the Certification Services, the Independent Certifier may rely upon the reports, findings and determination of the Systems Integration Verifier, pertaining to the Systems Integration Works, provided in accordance with the terms of the Project Agreement.

### **3.2 Acknowledgement of Independent Certifier**

- (a) The Independent Certifier hereby acknowledges in favour of the PA Parties that it has received a copy of the Project Agreement.

### **3.3 Standard of Care**

- (a) The Independent Certifier must exercise the standard and skill, care and diligence in the performance of the Certification Services that would be expected of an expert professional experienced in providing services in the nature of the Certification Services for projects similar to the Project.

### **3.4 Duty of Independent Judgment**

- (a) In exercising its Certification Services, the Independent Certifier must:
  - (i) act impartially, honestly and independently in representing the interests of both PA Parties in accordance with the terms of the Project Agreement and this Independent Certifier Agreement;
  - (ii) act reasonably and professionally;
  - (iii) act in a timely manner:
    - (A) in accordance with the times prescribed in this Independent Certifier Agreement and the Project Agreement; or
    - (B) where no times are prescribed, within 10 days or such earlier time so as to enable the PA Parties to perform their respective obligations under the Project Agreement; and

- (iv) act in accordance with the joint directions of the PA Parties provided that the directions are not inconsistent with the other terms of this Independent Certifier Agreement or the terms of the Project Agreement and do not vary or prejudice the Independent Certifier's authority or responsibilities or the exercise by the Independent Certifier of its professional judgment under this Independent Certifier Agreement.
- (b) Although the Independent Certifier may take account of any opinions or representations made by the PA Parties, the Independent Certifier shall not be bound to comply with any opinions or representations made by either of them in connection with any matter on which the Independent Certifier is required to exercise its professional judgment.
- (c) The Independent Certifier acknowledges that the PA Parties may rely on the Certification Services, including determinations, findings and certifications made by the Independent Certifier, and accordingly, the Independent Certifier represents and warrants that will use its best skill and judgment in providing the Certification Services, and that information provided and/or submitted to the PA Parties in accordance with this Independent Certifier Agreement is true and accurate, and prepared in good faith to the best of the Independent Certifier's skill, judgment and knowledge.
- (d) The Independent Certifier acknowledges that all Certification Services, Contract Material and all determinations, findings, reports, certificates and other information delivered by the Independent Certifier to the City pursuant to the Project Agreement may be relied upon by the Contribution Agreement Parties, and that the Independent Certifier shall owe each an equal duty of care as is owed to the City hereunder, notwithstanding the fact that the Contribution Agreement Parties are not parties to this Independent Certifier Agreement or the Project Agreement. The Independent Certifier will confirm the foregoing directly to either Contribution Agreement Party, if requested by the City.

### **3.5 Authority to Act**

- (a) The Independent Certifier:
  - (i) is an independent consultant and is not, and must not purport to be, a partner, joint venturer or agent of either PA Party;
  - (ii) other than as expressly set out in this Independent Certifier Agreement or the Project Agreement, has no authority to give any directions to a PA Party or its officers, directors, members, employees, contractors, consultants or agents; and
  - (iii) has no authority to waive or alter any terms of the Project Agreement, nor to discharge or release a party from any of its obligations under the Project Agreement unless jointly agreed by the PA Parties in writing.
- (b) The Independent Certifier will confirm the foregoing directly to either Contribution Agreement Party, if requested by the City.

### **3.6 Knowledge of the PA Parties' Requirements**

- (a) The Independent Certifier warrants that:

- (i) it has informed and will be deemed to have informed itself fully of the requirements of the Project Agreement;
- (ii) it will inform itself fully of the requirements of such other documents and materials as may become relevant from time to time to the performance of the Certification Services;
- (iii) without limiting Sections 3.6(a)(i) or 3.6(a)(ii), it has and will be deemed to have informed itself fully of all time limits and other requirements for any Certification Service which the Independent Certifier carries out under the Project Agreement and this Independent Certifier Agreement;
- (iv) it has and will be deemed to have informed itself completely of the nature of the work necessary for the performance of the Certification Services and the means of access to and facilities at or on the Lands and Site including restrictions on any such access or protocols that are required; and
- (v) it has satisfied itself as to the correctness and sufficiency of its proposal for the Certification Services and that the Fee covers the cost of complying with all of the obligations under this Independent Certifier Agreement and of all matters and things necessary for the due and proper performance and completion of the Certification Services.

### **3.7 Co-ordination and Information by Independent Certifier**

- (a) The Independent Certifier must:
  - (i) fully cooperate with the PA Parties and their consultants and advisors;
  - (ii) carefully co-ordinate the Certification Services with the work and services performed by the PA Parties;
  - (iii) carefully co-ordinate the Certification Services with the safety assessment performed by the Independent Safety Assessor;
  - (iv) without limiting its obligations under Sections 3.4 and 3.7(a)(ii), perform the Certification Services so as to avoid unreasonably interfering with, disrupting or delaying the work and services performed by the PA Parties;
  - (v) include both PA Parties in all discussions, meetings, or any other communications regarding the Project;
  - (vi) provide copies to the PA Parties of all reports, communications, certificates and other documentation that it provides to either PA Party; and
  - (vii) provide a copy of the Contract Material to each of the Contribution Agreement Parties at the same time as it is provided to the PA Parties. In respect of such Contract Material, either Contribution Agreement Party may make inquiries of the Independent Certifier and request further investigation or clarification in connection with, and subject to, its contribution agreement.

### 3.8 Conflict of Interest

- (a) The Independent Certifier warrants that:
  - (i) at the date of this Independent Certifier Agreement, no conflict of interest exists or is likely to arise in the performance of its obligations under this Independent Certifier Agreement, and the Independent Certifier further warrants that it has not been retained as a technical advisor to the Lenders or as an advisor to either of the PA Parties or any of their respective related entities in respect of the Project Agreement (including, but not limited to, acting as a transaction advisor to either PA Party); and
  - (ii) if, during the term of this Independent Certifier Agreement, any such conflict or risk of conflict of interest arises, the Independent Certifier will notify the PA Parties immediately in writing of that conflict or risk of conflict and take such steps as may be required by either of the PA Parties to avoid or mitigate that conflict or risk.

### 3.9 Independent Certifier Personnel

- (a) The Independent Certifier shall make reasonable efforts to ensure that the individuals listed in Appendix C remain involved in the performance of the Certification Services and, in particular, will not, for the duration of this Independent Certifier Agreement, require or request any such person to be involved in any other project on behalf of the Independent Certifier if, in the reasonable opinion of the PA Parties, such involvement would have a material adverse effect on the performance of the Certification Services.
- (b) Any replacement of the individuals listed in Appendix C is subject to the PA Parties' prior written approval.
- (c) The Independent Certifier shall ensure that its personnel providing the Certification Services in respect of the Commissioning Tests, and the Testing & Commissioning Program shall:
  - (i) possess a current professional designation of not less than membership in Professional Engineers Ontario, The Ontario Association of Certified Engineering Technicians and Technologists or such similar professional designation recognized in North America;
  - (ii) have demonstrated competence in the commissioning of comparable facilities and in having completed or monitored the commissioning of a comparable light rail transit system;
  - (iii) have an understanding of the appropriate standards, guidelines and policies related to commissioning for light rail transit systems, as well as other applicable transit commissioning standards; and
  - (iv) have an understanding of the commissioning process and the reports to be provided pursuant to this Independent Certifier Agreement and the Project Agreement, including not only the start-up procedures but the pre-commissioning and post-commissioning activities.



- (d) The Independent Certifier shall furnish City with evidence satisfactory to City of any such personnel's compliance with the foregoing requirements within a reasonable time prior to the proposed commencement of the Certification Services in respect of the Commissioning Tests, the Outline Commissioning Program and the Final Commissioning Program.
- (e) The Independent Certifier shall ensure that its personnel who will prepare and evaluate construction and development information for Works measurements for payment possess a current professional designation of not less than Professional Quantity Surveyors (PQS).

### **3.10 Minimize Interference**

- (a) The Independent Certifier shall perform the Certification Services in such a way as to minimize any undue interference with the progress of the Works.

## **4 ROLE OF THE PA PARTIES**

### **4.1 Assistance**

- (a) The PA Parties agree to cooperate with and provide reasonable assistance to the Independent Certifier to familiarize the Independent Certifier with all necessary aspects of the Project to enable the Independent Certifier to carry out its obligations under this Independent Certifier Agreement.

### **4.2 Instructions in Writing**

- (a) Unless otherwise provided in this Independent Certifier Agreement or the Project Agreement, all instructions to the Independent Certifier by the PA Parties shall be given in writing and accepted or endorsed by both of the PA Parties.

### **4.3 Information and Services**

- (a) The PA Parties shall make available to the Independent Certifier, as soon as practicable from time to time, all information, documents and particulars necessary for the Independent Certifier to carry out the Certification Services, including such information, documents and particulars required in order for the Independent Certifier to certify Construction Period Payments and to determine whether any Substantial Completion and any Final Completion have occurred, and shall provide copies of all such information, documents and particulars to the other party hereto.

### **4.4 Additional Information**

- (a) If any information, documents or particulars are reasonably required to enable the Independent Certifier to perform the Certification Services and have not been provided by the PA Parties, then:
  - (i) the Independent Certifier must give notice in writing to the DB Co Representative or the City Representative, as the case may be, of the details of

the information, documents or particulars demonstrating the need and the reasons why they are required; and

- (ii) DB Co or the City, as the case may be, must arrange the provision of the required information, documents or particulars.

#### **4.5 Right to Enter and Inspect**

- (a) Upon giving reasonable notice to the DB Co Representative, the Independent Certifier (and any person authorized by it) may enter and inspect the Lands, the New City Infrastructure, the New MTO Infrastructure or Works at any reasonable time in connection with the exercise or proposed exercise of rights under this Independent Certifier Agreement, subject to:
  - (i) observance of the reasonable rules of DB Co as to safety and security for the Lands, the New City Infrastructure, the New MTO Infrastructure or Works;
  - (ii) not causing unreasonable delay to the carrying out of the Works by reason of its presence at the Lands, the New City Infrastructure, the New MTO Infrastructure or Works; and
  - (iii) not causing any damage to the Lands, the New City Infrastructure, the New MTO Infrastructure or Works.

#### **4.6 PA Parties Not Relieved**

- (a) Neither PA Party shall be relieved from performing or observing its obligations, or from any other liabilities, under the Project Agreement as a result of either the appointment of, or any act or omission by, the Independent Certifier.

#### **4.7 PA Parties not Liable**

- (a) On no account will a PA Party be liable to another PA Party for any act or omission by the Independent Certifier whether under or purportedly under a provision of the Project Agreement, this Independent Certifier Agreement or otherwise, provided that any such act or omission shall not extinguish, relieve, limit or qualify the nature or extent of any right or remedy of either PA Party against or any obligation or liability of either PA Party to the other PA Party which would have existed regardless of such act or omission.

### **5 CERTIFICATION QUALITY PLAN**

#### **5.1 Certification Quality Plan**

- (a) The Independent Certifier must:
  - (i) develop and implement a certification quality plan identifying the processes and outcomes of the Certification Services, including but not limited to timelines, deliverables and input required from the PA Parties, that complies with all requirements of the Independent Certifier's quality assurance accreditation, and is otherwise satisfactory to each of the City Representative and the DB Co Representative;

- (ii) within 14 days after the date of this Independent Certifier Agreement, provide such certification quality plan to each of the City Representative and the DB Co Representative;
- (iii) if satisfactory to each of the City Representative and the DB Co Representative, implement such certification quality plan; and
- (iv) if not satisfactory to each of the City Representative and the DB Co Representative, within 7 days after receiving notice thereof from either PA Party to that effect, revise and resubmit the certification quality plan to each of the City Representative and the DB Co Representative, and implement it if satisfactory to each of the City Representative and the DB Co Representative.

## **5.2 Certification Quality Plan not to Relieve Independent Certifier**

- (a) The Independent Certifier will not be relieved of any responsibilities or obligations in respect of the performance of the Certification Services and will remain solely responsible for them notwithstanding:
  - (i) the obligation of the Independent Certifier to develop and implement a certification quality plan; or
  - (ii) any comment or direction upon, review or acceptance of, approval to proceed with or request to vary any part of the certification quality plan by either the City Representative or the DB Co Representative.

## **6 SUSPENSION**

### **6.1 Notice**

- (a) The Certification Services (or any part) may be suspended at any time by the PA Parties:
  - (i) if the Independent Certifier fails to comply with its obligations under this Independent Certifier Agreement, immediately by the PA Parties giving joint notice in writing to the Independent Certifier; or
  - (ii) in any other case, by the PA Parties giving 7 days joint notice in writing to the Independent Certifier.

### **6.2 Costs of Suspension**

- (a) The Independent Certifier will:
  - (i) subject to the Independent Certifier complying with Article 9, be entitled to recover the extra costs incurred by the Independent Certifier by reason of a suspension directed under Section 6.1(a)(ii) valued as a Certification Services Variation under Article 9; and
  - (ii) have no entitlement to be paid any costs, expenses, losses or damages arising from a suspension under Sections 6.1(a)(i).

### **6.3 Recommencement**

The Independent Certifier must immediately recommence the carrying out of the Certification Services (or any part) on receipt of a joint written notice from the PA Parties requiring it to do so.

## **7 INSURANCE AND LIABILITY**

### **7.1 Independent Certifier’s Professional Indemnity Insurance**

- (a) The Independent Certifier must have in place at all times during the term of this Independent Certifier Agreement:
  - (i) professional liability insurance:
    - (A) in the amount of \$[REDACTED] per claim and \$[REDACTED] in the aggregate, a deductible of not more than \$[REDACTED] per claim and from an insurer and on terms satisfactory to each of the PA Parties; and
    - (B) covering liability which the Independent Certifier might incur as a result of a breach by it of its obligations owed by the Independent Certifier in a professional capacity to the PA Parties, or either of them, under or in connection with this Independent Certifier Agreement or the provision of the Certification Services; and
  - (ii) comprehensive general liability insurance in the amount of \$[REDACTED] per claim and in the aggregate, no deductible for personal injury or bodily injury, a deductible of not more than \$[REDACTED] per occurrence for property damage and from an insurer and on terms satisfactory to each of the PA Parties.
- (b) The Independent Certifier must provide copies of its insurance policies to each of the PA Parties upon execution of this Independent Certifier Agreement, and, at least 5 Business Days prior to the expiry date of any such insurance policy, the Independent Certifier must provide evidence of the renewal of any such insurance policy satisfactory to the PA Parties, acting reasonably.

### **7.2 Workers’ Compensation Insurance**

- (a) The Independent Certifier must, at its own cost and at all times during the term of this Independent Certifier Agreement, insure its liability (including its common law liability) as required under any applicable workers compensation statute or regulation in relation to its employees engaged in the Certification Services.

## **8 PAYMENT FOR SERVICES**

### **8.1 Payment of Fee**

- (a) In consideration of the Independent Certifier performing the Certification Services in accordance with this Independent Certifier Agreement, each PA Party shall pay [REDACTED] of the Fee to the Independent Certifier in accordance with the payment schedule specified in Appendix B.

- (b) The obligation of each PA Party to pay [REDACTED] of the Fee to the Independent Certifier is a several obligation, and neither PA Party shall have any liability in respect of the non- payment by the other PA Party of any fees or costs payable by such other PA Party under this Independent Certifier Agreement.
- (c) The Fee includes all taxes (except for HST), overheads and profit, all labour and materials, insurance costs, travel, hospitality, food and incidental expenses, and all other overhead including any fees or other charges required by law, to perform the Certification Services.
- (d) The PA Parties acknowledge and agree that if any approved amount due and payable by the PA Parties to the Independent Certifier in excess of \$[REDACTED] is outstanding for more than 60 days, the Independent Certifier shall not have any obligation to make any certification under the Project Agreement.

## **9 CERTIFICATION SERVICES VARIATIONS**

### **9.1 Notice of Certification Services Variation**

- (a) If the Independent Certifier believes, other than a “Certification Services Variation Order” under Section 9.4(c), that any direction by the PA Parties constitutes or involves a Certification Services Variation it must:
  - (i) within 7 days after receiving the direction and before commencing work on the subject matter of the direction, give notice to the PA Parties that it considers the direction constitutes or involves a Certification Services Variation; and
  - (ii) within 21 days after giving the notice under Section 9.1(a)(i), submit a written claim to each of the City Representative and the DB Co Representative which includes detailed particulars of the claim, the amount of the claim and how it was calculated.
- (b) Regardless of whether the Independent Certifier considers that such a direction constitutes or involves a Certification Services Variation, the Independent Certifier must continue to perform the Certification Services in accordance with this Independent Certifier Agreement and all directions, including any direction in respect of which notice has been given under this Section 9.1.

### **9.2 No Adjustment**

- (a) If the Independent Certifier fails to comply with Section 9.1, the Fee will not be adjusted as a result of the relevant direction.

### **9.3 External Services**

- (a) In the event that external personnel or consultants are required for expert opinion with respect to a Certification Services Variation, then, with the prior written approval of the PA Parties, any additional fees relating to such external personnel or consultants will be payable by the PA Parties at the agreed upon amount.

#### **9.4 Certification Services Variation Procedure**

- (a) The City Representative and the DB Co Representative may jointly issue a document titled “Certification Services Variation Price Request” to the Independent Certifier which will set out details of a proposed Certification Services Variation which the PA Parties are considering.
- (b) Within 7 days after the receipt of a “Certification Services Variation Price Request”, the Independent Certifier must provide each of the City Representative and the DB Co Representative with a written notice in which the Independent Certifier sets out the effect which the proposed Certification Services Variation will have on the Fee.
- (c) Each of the City Representative and the DB Co Representative may then jointly direct the Independent Certifier to carry out a Certification Services Variation by written document titled “Certification Services Variation Order” which will state either that:
  - (i) the Fee is adjusted as set out in the Independent Certifier’s notice; or
  - (ii) the adjustment (if any) to the Fee will be determined under Section 9.5.

#### **9.5 Cost of Certification Services Variation**

- (a) Subject to Section 9.2, the Fee will be adjusted for all Certification Services Variations or suspensions under Section 6.1(a)(ii) carried out by the Independent Certifier by:
  - (i) the amount (if any) stated in the “Certification Services Variation Order” in accordance with Section 9.4(c);
  - (ii) if Section 9.5(a)(i) is not applicable, an amount determined pursuant to the fee schedule in Appendix B; or
  - (iii) where such rates or prices are not applicable, a reasonable amount to be agreed between the PA Parties and the Independent Certifier or, failing agreement, determined by the City Representative and the DB Co Representative jointly.
- (b) Any reductions in the Fee shall be calculated on the same basis as any increases.

### **10 TERM AND TERMINATION**

#### **10.1 Term**

- (a) Subject to earlier termination, this Independent Certifier Agreement will commence on the date of the Project Agreement and continue in full force until:
  - (i) the latest Final Completion Date; or
  - (ii) such other date as may be mutually agreed between the PA Parties and the Independent Certifier.

## **10.2 Notice of Breach**

- (a) If the Independent Certifier commits a breach of this Independent Certifier Agreement, the PA Parties may give written notice to the Independent Certifier:
  - (i) specifying the breach; and
  - (ii) directing its rectification in the period specified in the notice being a period not less than 7 days from the date of service of the notice.

## **10.3 Termination for Breach**

- (a) If the Independent Certifier fails to rectify the breach within the period specified in the notice issued under Section 10.2, the PA Parties may, without prejudice to any other rights of the PA Parties or either of them, immediately terminate this Independent Certifier Agreement.

## **10.4 Termination for Financial Difficulty or Change in Control**

- (a) The PA Parties may, without prejudice to any other rights which the PA Parties or either of them may have, terminate this Independent Certifier Agreement immediately if:
  - (i) events have occurred or circumstances exist which, in the opinion of the PA Parties, may result in or have resulted in an insolvency or a Change in Control of the Independent Certifier; or
  - (ii) the Independent Certifier has communications with its creditors with a view to entering into, or enters into, any form of compromise, arrangement or moratorium of any debts whether formal or informal, with its creditors.

## **10.5 Termination for Convenience**

- (a) Notwithstanding anything to the contrary in this Independent Certifier Agreement, the PA Parties may, at any time, jointly terminate this Independent Certifier Agreement upon 30 days written notice to the Independent Certifier. The PA Parties and the Independent Certifier agree that, notwithstanding the 30 days' notice of termination, the Independent Certifier shall continue on a day-to-day basis thereafter until a new Independent Certifier is appointed.

## **10.6 Independent Certifier's Rights upon Termination for Convenience**

- (a) Upon a termination under Section 10.5, the Independent Certifier will:
  - (i) be entitled to be reimbursed by the PA Parties for the value of the Certification Services performed by it to the date of termination; and
  - (ii) not be entitled to any damages or other compensation in respect of the termination and (without limitation) any amount in respect of:
    - (A) the lost opportunity to earn a profit in respect of the Certification Services not performed at the date of termination; and

- (B) any lost opportunity to recover overheads from the turnover which would have been generated under this Independent Certifier Agreement but for it being terminated.

## 10.7 Procedure upon Termination

- (a) Upon completion of the Independent Certifier's engagement under this Independent Certifier Agreement or earlier termination of this Independent Certifier Agreement (whether under Section 10.3, 10.4 or 10.5 or otherwise), the Independent Certifier must:
  - (i) cooperate with the PA Parties with respect to the transition of the Certification Services to a replacement certifier;
  - (ii) deliver to the PA Parties all Contract Material and all other information concerning the Project held or prepared by the Independent Certifier during the execution of work under this Independent Certifier Agreement; and
  - (iii) as and when required by the PA Parties, meet with them and such other persons nominated by them with a view to providing them with sufficient information to enable the PA Parties to execute the Project or the persons nominated to provide the Certification Services.

## 10.8 Effect of Termination

- (a) Except as otherwise expressly provided in this Independent Certifier Agreement, termination of this Independent Certifier Agreement shall be without prejudice to any accrued rights and obligations under this Independent Certifier Agreement as at the date of termination (including the right of the PA Parties to recover damages from the Independent Certifier).

## 10.9 Survival

- (a) Termination of this Independent Certifier Agreement shall not affect the continuing rights and obligations of the PA Parties and the Independent Certifier under Sections 7, 8, 10.6, 10.7, 10.8, 11, 12.7, 12.8 and this Section 10.9 or under any other provision which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

## 11 INDEMNITY

### 11.1 PA Parties to Save Independent Certifier Harmless

- (a) The PA Parties hereby indemnify and save the Independent Certifier completely harmless from any actions, causes of action, suits, debts, costs, damages, expenses, claims and demands whatsoever, at law or in equity, arising directly or indirectly in whole or in part out of any action taken by the Independent Certifier within the scope of its duties or authority hereunder.
- (b) The indemnity provided under this Section 11.1 shall not extend:



- (i) to any breach of this Independent Certifier Agreement, or any part or parts hereof, by the Independent Certifier, its employees, servants, agents or persons for whom it is in law responsible, or any negligent or unlawful act or omission or willful misconduct of the Independent Certifier, its employees, servants or persons for whom it is in law responsible (in respect of which the Independent Certifier shall indemnify the PA Parties, as referred to in Section 11.2);
  - (ii) to any action taken by the Independent Certifier outside the scope of authority set forth in this Independent Certifier Agreement, or any part or parts hereof; or
  - (iii) to any debt, cost, expense, claim or demand for which insurance proceeds are recoverable by the Independent Certifier.
- (c) This indemnity shall survive the termination of this Independent Certifier Agreement.

### **11.2 Independent Certifier to Save PA Parties Harmless**

- (a) The Independent Certifier hereby indemnifies and saves the PA Parties, and their affiliated entities, subsidiaries and their respective directors, officers, employees, agents, permitted successors and assigns, completely harmless from any actions, causes of action, suits, debts, costs, damages, expenses, claims and demands whatsoever, at law or in equity, arising directly or indirectly in whole or in part out of any breach of this Independent Certifier Agreement, or any part or parts hereof, by the Independent Certifier, its employees, servants, agents or persons for whom it is in law responsible, or any negligent or unlawful act or omission or willful misconduct of the Independent Certifier, its employees, servants or persons for whom it is in law responsible.
- (b) The indemnity provided under this Section 11.2 to a PA Party shall not apply to the extent:
  - (i) any negligent or unlawful act or omission or willful misconduct of such PA Party, its employees, servants or persons for whom it is in law responsible (in respect of which such PA Parties shall indemnify the Independent Certifier, as referred to in Section 11.1) directly caused the losses described in Section 11.2(a); or
  - (ii) any insurance proceeds are recoverable by such PA Party in respect of the losses described in Section 11.2(a).
- (c) This indemnity shall survive the termination of this Independent Certifier Agreement.

### **11.3 Conduct of Claims**

- (a) Claims made by a third person against a party having, or claiming to have, the benefit of an indemnity pursuant to this Independent Certifier Agreement shall be conducted in accordance with the conduct of claims procedure described in Appendix D – Conduct of Claims to this Independent Certifier Agreement.

## **12 GENERAL**

### **12.1 Entire Agreement**



If to DB Co: East West Connectors GP

[REDACTED]

Attn.: [REDACTED]  
Email: [REDACTED]

with a copy to: [REDACTED]

[REDACTED]

Attn.: [REDACTED]  
Email: [REDACTED]

If to Independent Certifier: [REDACTED]

[REDACTED]

Fax: [REDACTED]  
Attn.: [REDACTED]  
Email: [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 12.4(b).
- (c) Any party to this Independent Certifier Agreement may, from time to time, change any of its contact information set forth in Section 12.4(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 12.4(e), 12.4(f) and 12.4(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 12.4.
- (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.

## **12.5 Transfer and Assignment**

- (a) The Independent Certifier:
  - (i) must not assign, transfer, mortgage, charge or encumber any right or obligation under this Independent Certifier Agreement without the prior written consent of the PA Parties, which each PA Party may give or withhold in its absolute discretion (including, in respect of the City, if so required pursuant to a Contribution Agreement); and
  - (ii) agrees that any assignment, transfer, mortgage, charge or encumbrance will not operate to release or discharge the Independent Certifier from any obligation or liability under this Independent Certifier Agreement.
- (b) For the purposes of this Section 12.5, an assignment will be deemed to have occurred where there is a Change in Control of the Independent Certifier after the date of this Independent Certifier Agreement.
- (c) Each of the PA Parties may assign, transfer, mortgage, charge or encumber any right or obligation under this Independent Certifier Agreement in accordance with the terms of the Project Agreement.

## **12.6 Governing Laws and Jurisdictions**

- (a) This Independent Certifier 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 PA Parties and the Independent Certifier 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 Independent Certifier Agreement and hereby irrevocably attorn to the exclusive jurisdiction of such courts.
- (c) Nothing in this Independent Certifier Agreement affects the rights, protections and immunities of the Crown under the *Proceedings Against the Crown Act* (Ontario).

## **12.7 Confidentiality**

- (a) The Independent Certifier must ensure that:
  - (i) neither it nor any of its officers, directors, members, employees, servants and agents disclose, or otherwise make public, any Contract Material or any other

information or material acquired in connection with or during the performance of the Certification Services without prior written approval of the PA Parties; and

- (ii) no Contract Material is used, copied, supplied or reproduced for any purpose other than for the performance of the Certification Services under this Independent Certifier Agreement.
- (b) The PA Parties may at any time require the Independent Certifier to give and to arrange for its officers, directors, members, employees, servants and agents engaged in the performance of the Certification Services to give written undertakings, in the form of confidentiality agreements on terms required by the PA Parties, relating to the non-disclosure of confidential information, in which case the Independent Certifier must promptly arrange for such agreements to be made.

## **12.8 Contract Material**

- (a) The PA Parties and the Independent Certifier agree that the Independent Certifier does not and will not have any rights, including any Intellectual Property, in any Contract Material provided to the Independent Certifier or created or required to be created by either PA Party.
- (b) As between the PA Parties and the Independent Certifier, all title and ownership, including all Intellectual Property, in and to the Contract Material created or required to be created by the Independent Certifier as part of, or for the purposes of performing the Certification Services, is hereby assigned jointly to the PA Parties on creation, or where such title, ownership and Intellectual Property cannot be assigned before creation of the Contract Material, it will be assigned to the PA Parties on creation. In addition, to the extent that copyright may subsist in such Contract Material so created by the Independent Certifier, the Independent Certifier hereby waives all past, present and future moral rights therein and the Independent Certifier shall ensure that any agent or employee of Independent Certifier shall have waived all such moral rights. The PA Parties acknowledge and agree that as between the PA Parties, title, ownership and other rights to the foregoing shall be governed by the Project Agreement.
- (c) The Independent Certifier will do all such things and execute all such documents as reasonably requested by either of the PA Parties in order to confirm or perfect the assignment of Intellectual Property in the Contract Material referred to in Section 12.8(b).

## **12.9 Amendment**

- (a) This Independent Certifier Agreement may not be varied, amended or supplemented except by an agreement in writing signed by duly authorized representatives of the PA Parties (provided that, in respect of the City, such agreement may be subject to its obligations under a Contribution Agreement and require the consent of a Contribution Agreement Party) and the Independent Certifier and stating on its face that it is intended to be an amendment, restatement or other modification, as the case may be, to this Independent Certifier Agreement.

## **12.10 Severability**

- (a) Each provision of this Independent Certifier Agreement shall be valid and enforceable to the fullest extent permitted by law. If the courts of a competent jurisdiction shall declare any provision of this Independent Certifier Agreement invalid, unenforceable or illegal, 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 Independent Certifier Agreement. If any such provision of this Independent Certifier 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 Independent Certifier Agreement as near as possible to its original intent and effect.

#### **12.11 Enurement**

- (a) This Independent Certifier Agreement shall enure to the benefit of, and be binding on, each of the parties and their respective successors and permitted transferees and assigns.

#### **12.12 Counterparts**

- (a) This Independent Certifier 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 Independent Certifier Agreement which was so faxed.

#### **12.13 Maintenance of Records**

- (a) The Independent Certifier shall retain and maintain in safe storage, at its expense, complete and accurate records related to all work performed under this Independent Certifier Agreement (i) for a minimum period of 7 years or such longer period as required by Applicable Law, or (ii) until delivery of such Contract Material to the PA Parties in accordance with Section 10.7(a)(ii), and such records will be made available to the PA Parties and/or Contribution Agreement Parties upon request.

**[EXECUTION PAGES IMMEDIATELY FOLLOW]**

**IN WITNESS WHEREOF** the parties have executed this Independent Certifier Agreement as of the date first above written.

**THE CITY OF OTTAWA**

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

Name: **[REDACTED]**

Title: **[REDACTED]**

**[EXECUTION PAGE FOR INDEPENDENT CERTIFIER AGREEMENT]**

**EAST WEST CONNECTORS GP**

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

Name: [REDACTED]

Title: [REDACTED]

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

Name: [REDACTED]

Title: [REDACTED]

I/We have the authority to bind the  
partnership

**[EXECUTION PAGE FOR INDEPENDENT CERTIFIER AGREEMENT]**



**[REDACTED]**

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

Name: **[REDACTED]**

Title: **[REDACTED]**

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

Name:

Title:

I/We have the authority to bind the  
corporation

**[EXECUTION PAGE FOR INDEPENDENT CERTIFIER AGREEMENT]**

**APPENDIX A**

**CERTIFICATION SERVICES**

Without limiting the other provisions of this Independent Certifier Agreement and the Project Agreement, the Independent Certifier shall provide the following:

- (a) Receive and monitor drawings and documents related to the development of the design as necessary for the Independent Certifier to be informed as to the progress of the Works and to provide an opinion in the event of a Dispute related to the development of the design.
- (b) Receive and monitor progress reports as necessary for the Independent Certifier to be informed as to the progress of the Works, including review of the Works Reports.
- (c) Review information relating to Construction Period Quality Failures, Delay Events and Compensation Events.
- (d) Review information relating to Variation Enquiries, DB Co Variation Notices, Variations, Estimates, claims for extension of time and compensation and consult with the relevant party.
- (e) In accordance with Section 14.1(b) of the Project Agreement, attend meetings and participate, as necessary, in the activities of the Works Committee.
- (f) In accordance with Section 11.15 of the Project Agreement, determine whether the manner in which DB Co Makes Good any Construction Defects is acceptable.
- (g) In accordance with Section 11.15 of the Project Agreement, identify when it is not expedient for DB Co to correct any Construction Defects, and, where the City and DB Co do not agree on the amount to be deducted from the amount of the Guaranteed Price, being the difference in value between the Works as performed and that called for by the Project Agreement, the Independent Certifier shall determine such amount.
- (h) Review the draft Testing & Commissioning Program and the detailed tests, test methodology and expected test results proposed by DB Co and provide comments, including to report on the effectiveness of the Testing & Commissioning Program, to identify any errors or omissions, and to report any risks.
- (i) Monitor the Commissioning Tests (as indicatively described in Schedule 14 – Testing & Commissioning to the Project Agreement) and other tests, including re-tests, to be performed as set out in the Final Commissioning Program or as otherwise required for DB Co to achieve any Substantial Completion and any Final Completion.
- (j) Monitor and report on, at a minimum on a monthly basis as part of the IC Monthly Report or more regularly as deemed necessary, the requirements, progress and results of all commissioning.
- (k) Prior to any certification, consider the views and comments of both DB Co and the City in relation to the satisfaction of the conditions for certification.

- (l) Conduct and report inspections of the Works as necessary for the Independent Certifier to be satisfied that the Works are proceeding in accordance with the requirements of the Project Agreement. Report on the observations, findings and potential risks to certification as a result of the regular inspections as part of the IC Monthly Report.
- (m) Review relevant documentation, including the final Design Development Submittals, Construction Document Submittals, design certificates, construction certificates and approvals, Permits, Licences and Approvals, certifications, third party acceptance, shop drawings, site instructions, mock ups, Record Drawings, all quality management plans, sustainability requirements, certifications, test results, quality assurance audits, letters of assurance from professionals, schedules (including the Works Schedule) and reports (including the Works Report) provided to the Independent Certifier pursuant to the Project Agreement.
- (n) Monitor the requirements, progress and results of all DB Co Commissioning.
- (o) [Intentionally Deleted].
- (p) Identify any errors or omissions made during the conduct of any such Commissioning Tests referenced in item (i) above and to advise DB Co and City with respect to the implications of those errors and omissions, to the extent that the Independent Certifier may reasonably be aware.
- (q) Upon receipt of notice from DB Co requesting the issuance of the Substantial Completion Certificates or the Final Completion Certificates, as applicable, consider such request and, within the time period set out in the Project Agreement and in accordance with the Project Agreement, either:
  - (i) issue the applicable certificate; or
  - (ii) issue a report detailing the matters that the Independent Certifier considers are required to be performed prior to issuing the applicable certificate.
- (r) Upon notice from DB Co that the matters required to be performed prior to issuing the applicable certificate have been completed, re-inspect the Works or re-consider the matters specified to be performed.
- (s) Prepare, in consultation with DB Co and City, as soon as reasonably practicable and, in any event within, the time period specified in Sections 25.10(e) to 25.10(f) and 25.12A of the Project Agreement, the Minor Deficiencies Lists, and Remaining Works Minor Deficiencies Lists, which Minor Deficiencies Lists and Remaining Works Minor Deficiencies List will include an estimate of the cost and the time for rectifying the Minor Deficiencies or Remaining Works Minor Deficiencies, as applicable, and a schedule for the completion and rectification of the Minor Deficiencies or Remaining Works Minor Deficiencies, as applicable.
- (t) Certify completion of:
  - (i) Utility Company Self-Performed Works that are the subject of a Request for Utility Works Payment in accordance with Section 11.29 the Project Agreement;

- (ii) Art Cash Allowance Items that are the subject of a Request for Art Payment in accordance with Section 11.30 the Project Agreement; and
- (iii) Nominated Signalling Subcontractor Works that are the subject of a Request for Nominated Signalling Subcontractor Works Payment in accordance with Section 11.31 the Project Agreement.
- (u) Prior to any Substantial Completion, review DB Co cash allowance expenditures against the installations in respect of the:
  - (i) Utility Company Self-Performed Works and the Utility Company Works Cash Allowance;
  - (ii) Art Cash Allowance Items and the Art Cash Allowance; and
  - (iii) Nominated Signalling Subcontractor Works and the Nominated Signalling Subcontractor Works Cash Allowance.
- (v) After any Substantial Completion, reconcile DB Co invoices for expenditure recovery against City budgets and the Utility Company Works Cash Allowance, Art Cash Allowance, and Nominated Signalling Subcontractor Works Cash Allowance.
- (w) Review and observe installation of all equipment, furniture, fixtures, information technology, communication equipment, telephone equipment and anything similar to the foregoing (collectively, the “**Installed Equipment**”) into or onto the Project by the City or any agent or contractor of the City either before or after any Substantial Completion and provide a report to the City and DB Co identifying any damage to the Project which has been caused as a result of the installation of such Installed Equipment into or onto the Project by City, its contractors and/or agents.
- (x) Provide any determinations contemplated in the Project Agreement, which determinations may be subject to final resolution between the PA Parties pursuant to Schedule 27 - Dispute Resolution Procedure to the Project Agreement.
- (y) Participate in and give the PA Parties and their counsel reasonable cooperation, access and assistance (including providing or making available documents, information and witnesses for attendance at hearings and other proceedings) in connection with any proceedings between the PA Parties that relate to the Certification Services.
- (z) Provide periodic reports to the PA Parties, as follows:
  - (i) a progress report on the progress of the Works no later than fifteen Business Days following the end of each month of the Construction Period in respect of the previous month or as otherwise agreed by the PA Parties (the “**IC Monthly Report**”); Commencing no less than 180 days prior to each Scheduled Substantial Completion Date, the IC Monthly Report shall contain specific reference to and listing of the work that needs to be done before such Substantial Completion Certificate or Final Completion Certificate can be issued; and,

- (ii) accompanying the IC Monthly Reports delivered for the months of May, August, November and February, a quarterly report (the “**IC Quarterly Report**”) for the quarters ending March 31st, June 30th, September 30th and December 31st respectively, that contains the following information certified in accordance with the standard of care set out in Section 3.3 of the Independent Certifier Agreement:
  - (A) the extent (expressed as a percentage) of completion of the Works as of the last day of the applicable quarter;
  - (B) the value of the Works completed as of the last day of the applicable quarter;
  - (C) the forecasted extent (expressed as a percentage) of completion of the Works as of the last day of the applicable quarter and for the next four quarters; and
  - (D) the forecasted value of the Works anticipated to be completed as of the last day of the applicable quarter and for the next four quarters.
- (aa) Provide the Certification Services with respect to Construction Period Payments set out in Schedule 21 – Construction Period Payments of the Project Agreement including cooperating with PA Parties (including their consultants and advisors) to establish the Earned Value Measurement Techniques to be used in the Certification Services, including review of the measurement methods proposed by DB Co for the purposes of measuring Earned Value, and agreement of any proposed changes to the Credit Rules, in accordance with Appendix E hereto (Attachment F to Schedule 21 of the Project Agreement).
- (bb) Provide advice on other matters that may arise that both PA Parties may jointly require.
- (cc) Review the reports and plans prepared by DB Co, and provide the determinations required from the Independent Certifier, pursuant to Article 13 of the Project Agreement.
- (dd) In implementing the Certification Services, identify any risks that may impede the issuance of a Substantial Completion Certificate or a Final Completion Certificate and inform the PA Parties thereof. Following the identification of any risks, monitor and report to the PA Parties on the progress as part of the IC Monthly Report until such risks are fully resolved.
- (ee) Develop and implement a certification quality plan identifying the processes and outcomes of the Certification Services including timelines, deliverables and a description of the input required from the PA Parties to carry out the Certification Services.
- (ff) Provide written opinions to the City and DB Co as to whether the City acted reasonably in delivering the Proceeding At Risk Notice pursuant to Section 14.6 of the Project Agreement.
- (gg) To the extent not already contemplated in the other Certification Services or otherwise in this Independent Certifier Agreement, review and certify the

determination of eligible costs under the Contribution Agreements to the Contribution Agreement Parties, including:

- (i) conducting a due diligence assessment of the schedule and cash flow forecast and certifying that this schedule and cash flow forecast is achievable, reviewing and certifying that eligible costs are reasonable and meet the eligible cost criteria in a Contribution Agreement, and reviewing and certifying the percentage of a Contribution Agreement Party's eligible costs of the total eligible costs under a Contribution Agreement;
- (ii) reviewing and certifying for each claim by the City under a Contribution Agreement, including interim claims, that all costs are eligible costs and that the work has been constructed and completed in accordance with the terms and conditions of the Contribution Agreement;
- (iii) confirming to the Contribution Agreement Parties that all information provided and/or submitted to the PA Parties and/or the Contribution Agreement Parties in accordance with this Agreement is true and accurate and prepared in good faith to the best of its skill, judgement and knowledge;
- (iv) Executing and delivering certificates in the form attached hereto as Appendix F when requested by the City.

**APPENDIX B**

**INDEPENDENT CERTIFIER FEE**

The Fee shall be invoiced by the Independent Certifier to each PA Party in accordance with Section 8 of this Agreement, using invoices in form and substance acceptable to the PA Parties, acting reasonably, on a monthly basis. The total fixed fee for all Certification Services described in Appendix A (other than item (bb) in Appendix A), shall be in the amount of **[\$[REDACTED]]**, plus HST. Such fixed fee shall not be subject to escalation or adjustment except by Certification Services Variation. Each monthly invoice shall also include, and separately identify, any amounts claimed for services performed pursuant to any Certification Services Variation, and/or Certification Services jointly required by the PA Parties in accordance with item (bb) in Appendix A, for such payment period, and shall set out as a separate line item the HST payable. Each PA Party shall pay its respective portion of the Fee within 30 days of receipt of a complete and valid invoice.

The following hourly rates shall apply for Certification Services jointly required by the PA Parties in accordance with item (bb) in Appendix A, and may apply to Certification Services Variations in accordance with Sections 9.4 and 9.5 of the Independent Certifier Agreement. Hourly rates set out below are all inclusive and include applicable taxes (other than HST), all labour and materials, insurance costs, disbursements (examples: duplicating, delivery and communications) and all other overhead including any fees or other charges required by law. The PA Parties will not reimburse the Independent Certifier for any costs or expenses for hospitality, food or other incidental expenses.

| <b><u>Independent Certifier Personnel</u></b> | <b><u>Hourly Rate</u></b> |
|---|---------------------------|
| Senior Partner                                | <b>[\$[REDACTED]]</b>     |
| Electrical QS Partner                         | <b>[\$[REDACTED]]</b>     |
| Architectural / Structural QS Partner         | <b>[\$[REDACTED]]</b>     |
| Sr. Construction Specialist                   | <b>[\$[REDACTED]]</b>     |
| Engineer                                      | <b>[\$[REDACTED]]</b>     |
| Mechanical Quantity Surveyor                  | <b>[\$[REDACTED]]</b>     |
| Senior Associate                              | <b>[\$[REDACTED]]</b>     |
| Associate                                     | <b>[\$[REDACTED]]</b>     |
| Senior Quantity Surveyor                      | <b>[\$[REDACTED]]</b>     |
| Intermediate Quantity Surveyor                | <b>[\$[REDACTED]]</b>     |
| Junior Quantity Surveyor                      | <b>[\$[REDACTED]]</b>     |
| Technical Support                             | <b>[\$[REDACTED]]</b>     |

**APPENDIX C**

**INDEPENDENT CERTIFIER PERSONNEL**

The following personnel shall be involved in the performance of the Certification Services:

| <b>Name</b> | <b>Position</b>  |
|-------------|--|
| [REDACTED]  | Team Lead  |
| [REDACTED]  | Back-up Team Lead                                      |
| [REDACTED]  | Project Manager / Schedule Advisor / Payment Certifier |
| [REDACTED]  | Chief Estimator  |
| [REDACTED]  | Lead Electrical & Commissioning                        |
| [REDACTED]  | Lead Mechanical & Commissioning                        |
| [REDACTED]  | Back-up Electrical & Commissioning                     |
| [REDACTED]  | Project Coordinator & Document Control                 |
| [REDACTED]  | Project Coordinator & Document Control                 |
| [REDACTED]  | Back-up Mechanical & Commissioning                     |
| [REDACTED]  | Engineering Advisory and Support                       |
| [REDACTED]  | Document Control                                       |



## APPENDIX D

### CONDUCT OF CLAIMS

This Appendix D shall apply to the conduct of claims, made by a third person against a party having, or claiming to have, the benefit of an indemnity pursuant to this Independent Certifier Agreement. The party having, or claiming to have, the benefit of the indemnity is referred to as the “**Beneficiary**” and a party giving the indemnity is referred to as an “**Indemnifier**”.

- (1) If the Beneficiary receives any notice, demand, letter or other document concerning any claim for which it appears that the Beneficiary is, or may become entitled to, indemnification under Section 11 of the Independent Certifier Agreement, the Beneficiary shall give written notice to each Indemnifier potentially obligated in respect thereof, as soon as reasonably practicable and in any event within 10 Business Days of receipt of the same. Such notice shall specify with reasonable particularity, to the extent that information is available, the factual basis for the claim and the amount of the claim.
- (2) Subject to Sections (3), (4) and (5) of this Appendix D, on the giving of such notice by the Beneficiary, where it appears that the Beneficiary is or may be entitled to indemnification from an Indemnifier in respect of all, but not part only, of the liability arising out of the claim, such Indemnifier shall (subject to providing the Beneficiary with a secured indemnity to the Beneficiary’s reasonable satisfaction against all costs and expenses that the Beneficiary may incur by reason of such action) be entitled to dispute the claim in the name of the Beneficiary at the Indemnifier’s own expense and take conduct of any defence, dispute, compromise, or appeal of the claim and of any incidental negotiations. The Beneficiary shall give such Indemnifier all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim. The Beneficiary shall have the right to employ separate counsel in respect of such claim and the reasonable fees and expenses of such counsel shall be to the account of the Indemnifier only where representation of both the Indemnifier and the Beneficiary by common counsel would be inappropriate due to any actual or potential conflicting interests between the Indemnifier and the Beneficiary. If and to the extent that both City and DB Co are given notice in respect of the same claim, they shall cooperate in the conduct of the claim and give each other such reasonable access and assistance as may be necessary or desirable for purposes of considering, resisting and defending such claim.
- (3) With respect to any claim conducted by an Indemnifier:
  - (i) the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;
  - (ii) the Indemnifier shall not bring the name or reputation of the Beneficiary into disrepute;
  - (iii) the Indemnifier shall not pay, compromise or settle such claims without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed;
  - (iv) the Indemnifier shall not admit liability or fault to any third party without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed; and

- (v) the Indemnifier shall use commercially reasonable efforts to have the Beneficiary named as a beneficiary under any release given by the persons bringing the claim to which this Section (3) relates.
- (4) The Beneficiary shall be free to pay or settle any such claim on such terms as it thinks fit and without prejudice to its rights and remedies under this Independent Certifier Agreement if:
  - (i) none of the Indemnifiers is entitled to take conduct of the claim in accordance with Section (2);
  - (ii) none of the Indemnifiers notifies the Beneficiary of its intention to take conduct of the relevant claim as soon as reasonably practicable and in any event within 10 Business Days of the notice from the Beneficiary under Section (1) or each of the Indemnifiers notifies the Beneficiary that it does not intend to take conduct of the claim; or
  - (iii) none of the Indemnifiers complies in any material respect with Section (3).
- (5) The Beneficiary shall be free at any time to give notice to the applicable Indemnifier that the Beneficiary is retaining or taking over, as the case may be, the conduct of any defence, dispute, compromise or appeal of any claim, or of any incidental negotiations, to which Section (2) applies. For greater certainty, the Independent Certifier acknowledges and agrees that where City is the Beneficiary, City may retain or take over such conduct in any matter involving Personal Information (as it is defined in the Project Agreement) or any matter involving public policy. On receipt of such notice the applicable Indemnifier shall promptly take all steps necessary to transfer the conduct of such claim to the Beneficiary, and shall provide to the Beneficiary all relevant documentation and all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim. If the Beneficiary gives any notice pursuant to this Section (5), then the applicable Indemnifier shall be released from any liabilities arising under the applicable indemnity hereunder in respect of the applicable claim.
- (6) If an Indemnifier pays to the Beneficiary an amount in respect of an indemnity and the Beneficiary subsequently recovers, whether by payment, discount, credit, saving, relief or other benefit or otherwise, a sum or anything else of value (the “Recovery Amount”) which is directly referable to the fact, matter, event or circumstances giving rise to the claim under the indemnity, the Beneficiary shall forthwith repay to that Indemnifier whichever is the lesser of:
  - (i) an amount equal to the Recovery Amount less any out-of-pocket costs and expenses properly incurred by the Beneficiary in recovering the same; and
  - (ii) the amount paid to the Beneficiary by such Indemnifier in respect of the claim under the relevant indemnity,

provided that there shall be no obligation on the Beneficiary to pursue any Recovery Amount and that the Indemnifier shall be repaid only to the extent that the Recovery Amount, aggregated with any sum recovered from the Indemnifier, exceeds the loss sustained by the Beneficiary except, however, that if the Beneficiary elects not to pursue a Recovery Amount, the Indemnifier shall be entitled to require an assignment to it of the right to do so.

- (7) Any person taking any of the steps contemplated by this Appendix D shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Independent Certifier Agreement.

## APPENDIX E

### CREDIT RULES

#### 1. CREDIT RULES FOR THE EVALUATION OF EARNED VALUE

##### 1.1 Purpose of Credit Rules

- (a) The Credit Rules set out requirements agreed between the City and DB Co for use and interpretation of the Earned Value Measurement Techniques, pursuant to Schedule 21 of the Project Agreement.

##### 1.2 Change of Credit Rules

- (a) In the event that DB Co or the City propose a change to the Credit Rules, the Independent Certifier may agree to such proposed change to the Credit Rule, provided that:
- (i) any proposed change to the Credit Rules will result in revised Credit Rules that:
    - (A) continue to meet the Earned Value Measurement Techniques; and
    - (B) follow the principles, guidance, and intent of the Credit Rules set out in this Attachment F, wherever possible;
  - (ii) any proposed change to the Credit Rules is subject to consultation with the City and DB Co at least three months prior to the first Construction Period that uses those revised Credit Rules;
  - (iii) the Independent Certifier considers any responses made by the City and DB Co to a proposed change to the Credit Rules and the Independent Certifier provides a report justifying its decision regarding acceptance or rejection of any proposal to change the Credit Rules; and
  - (iv) prior to the start of the first Construction Period that is to use the revised Credit Rules for the evaluation of Earned Value:
    - (A) the proposed changes to the Credit Rules are agreed to by the Independent Certifier; and
    - (B) both the City and DB Co receive the revised Credit Rules from the Independent Certifier.

##### 1.3 Selection of Measurement Methods

- (a) In principle, when selecting the appropriate measurement methods from the Earned Value Measurement Techniques, the following principles shall be applied:
- (i) for tangible work or tasks taking three Construction Period Months or more to perform, the measurement methods shall be considered in the following decreasing order of preference:

- (A) firstly, activity completion and physical measurement using the fixed formula 0/100 method; and
- (B) secondly, weighted milestone;
- (ii) for tangible work or tasks taking one or two Construction Period Months to perform, the measurement methods shall be considered in the following decreasing order of preference:
  - (A) activity completion and physical measurement using the fixed formula 0/100 method; and
- (iii) for intangible work or tasks, the measurement methods shall be considered in the following decreasing order of preference:
  - (A) firstly, apportioned effort; and
  - (B) secondly, only where apportioned effort is not possible, level of effort.
- (b) Table 1 sets out the measurement methods that shall be used from the Earned Value Measurement Techniques for specific cost categories, unless there are technical reasons preventing these measurement methods from being used. The specific cost categories in Table 1 are set out in ‘Standard Cost Codes for Capital Projects – Definitions’, US Federal Transportation Administration.

| <b>Table 1: Earned Value measurement methods for specific cost categories</b> |   |   |
|---|---|---|
| <b>Standard Cost Code</b>   | <b>Description</b>  | <b>Measurement Method from the Earned Value Measurement Techniques</b>            |
| <b>10</b>   | <b>Guideway</b>   |   |
| 10.01   | Guideway: at-grade exclusive right-of-way (including trackwork) | Activity completion and physical measurement using the fixed formula 0/100 method |
| 10.04   | Guideway: aerial structure (including trackwork)                | Activity completion and physical measurement using the fixed formula 0/100 method |
| 10.05   | Guideway: Built-up fill   | Activity completion and physical measurement using the fixed formula 0/100 method |
| 10.06   | Guideway: underground cut & cover (including trackwork)         | Activity completion and physical measurement using the fixed formula 0/100 method |
| 10.07   | Guideway: underground tunnel (including trackwork)              | Activity completion and physical measurement using the fixed formula 0/100 method |
| 10.09   | Track: Direct fixation  | Activity completion and physical measurement using the fixed formula 0/100 method |
| 10.10   | Track: Embedded   | Activity completion and physical measurement using the fixed formula 0/100 method |
| 10.11   | Track: Ballasted  | Activity completion and physical measurement using the fixed formula 0/100 method |

| <b>Table 1: Earned Value measurement methods for specific cost categories</b> |   |   |
|---|---|---|
| <b>Standard Cost Code</b>   | <b>Description</b>  | <b>Measurement Method from the Earned Value Measurement Techniques</b>            |
| 10.12   | Track: Special (switches, turnouts)   | Activity completion and physical measurement using the fixed formula 0/100 method |
| <b>20</b>   | <b>Stations, Stops, Terminals, Intermodals</b>                              |   |
| 20.01   | At-grade station; stop; shelter; mall; terminal; platform                   | Activity completion and physical measurement using the fixed formula 0/100 method |
| 20.03   | Underground station; stop; shelter; mall; terminal; platform                | Activity completion and physical measurement using the fixed formula 0/100 method |
| 20.05   | Joint development   | Activity completion and physical measurement using the fixed formula 0/100 method |
| <b>30</b>   | <b>Support Facilities: Yards, Shops and Admin Buildings</b>                 |   |
| 30.01   | Administration Building: Office, sales, storage, revenue counting           | Activity completion and physical measurement using the fixed formula 0/100 method |
| 30.03   | Heavy maintenance facility  | Activity completion and physical measurement using the fixed formula 0/100 method |
| 30.05   | Yard and Yard Track   | Activity completion and physical measurement using the fixed formula 0/100 method |
| <b>40</b>   | <b>Sitework and Special Conditions</b>                                      |   |
| 40.01   | Demolition; clearing; earthwork   | Activity completion and physical measurement using the fixed formula 0/100 method |
| 40.02   | Site utilities; utility relocation  | Activity completion and physical measurement using the fixed formula 0/100 method |
| 40.03   | Hazardous material; contaminated soil mitigation; ground water treatments   | Activity completion and physical measurement using the fixed formula 0/100 method |
| 40.04   | Environmental mitigation, e.g. wetlands, historic/archeologic, parks        | Activity completion and physical measurement using the fixed formula 0/100 method |
| 40.05   | Site structures including retaining walls; sound walls and other structures | Activity completion and physical measurement using the fixed formula 0/100 method |
| 40.06   | Pedestrian and bike access and accommodation; landscaping                   | Activity completion and physical measurement using the fixed formula 0/100 method |
| 40.07   | Automobile; bus; van access ways including roads; parking lots              | Activity completion and physical measurement using the fixed formula 0/100 method |
| 40.08   | Temporary facilities  | Activity completion and physical measurement using the fixed formula 0/100 method |
| <b>50</b>   | <b>Systems</b>  |   |
| 50.01   | Train control and signals   | Activity completion and physical measurement using the fixed formula 0/100 method |

| <b>Table 1: Earned Value measurement methods for specific cost categories</b> |   |   |
|---|---|---|
| <b>Standard Cost Code</b>   | <b>Description</b>  | <b>Measurement Method from the Earned Value Measurement Techniques</b>            |
| 50.02   | Traffic signals and crossing protection                       | Activity completion and physical measurement using the fixed formula 0/100 method |
| 50.03   | Traction power supply and substations                         | Activity completion and physical measurement using the fixed formula 0/100 method |
| 50.04   | Traction power distribution and catenary                      | Activity completion and physical measurement using the fixed formula 0/100 method |
| 50.05   | Communications  | Activity completion and physical measurement using the fixed formula 0/100 method |
| 50.06   | Fare collection system and equipment                          | Activity completion and physical measurement using the fixed formula 0/100 method |
| 50.07   | Central control   | Activity completion and physical measurement using the fixed formula 0/100 method |
| <b>80</b>   | <b>Professional Services and Agency Costs</b>                 |   |
| 80.01   | Preliminary design  | Weighted milestone  |
| 80.02   | Final design  | Weighted milestone  |
| 80.03   | Project management for design and construction                | Apportioned effort  |
| 80.04   | Construction administration and management                    | Apportioned effort  |
| 80.05   | Professional liability and other insurance costs              | Weighted milestone  |
| 80.06   | Legal; permits; review fees by other agencies, cities, etc;   | Weighted milestone  |
| 80.07   | Surveys, testing (quality related), investigation, inspection | Weighted milestone or apportioned effort  |
| 80.08   | Start up; testing and commissioning                           | Weighted milestone or apportioned effort  |

- (c) The measurement methods associated with procurement of materials shall be in accordance with the following principles:
- (i) except as set out in Section 1.3(c)(ii), the costs of materials used in construction shall be included in the cost of each construction task and shall be evaluated for the purposes of Earned Value as part of each construction task using physical measurement; and
  - (ii) the costs of rail and large long-lead equipment manufactured off-site before installation, such as transformers and packaged air conditioning units, shall be evaluated for the purposes of Earned Value using the fixed formula measurement method, based on the payment terms of the supply contract, except that [REDACTED]% of any payments made by DB Co to the supplier will not be credited for the purposes of Earned Value until the rail or large equipment manufactured off-site is delivered to the Lands or a bonded warehouse.
- (d) The measurement methods associated with procurement of plant, such as cranes and road vehicles, shall be in accordance with the following principles:

- (i) the costs of plant, such as cranes and road vehicles, shall be evaluated for the purposes of Earned Value using the fixed formula measurement method, based on the payment terms of the supply contract, except that [REDACTED]% of any payments made by DB Co to the supplier will not be credited for the purposes of Earned Value until the plant is delivered to the Lands or a bonded warehouse.
- (e) In order to make the measurement of Earned Value more efficient during mobilization, DB Co may choose to identify a tranche of its mobilization cost, the amount of which will be equal to the mobilization cost agreed to between DB Co and the Lenders or Lenders' Consultant of the Cost of the Works that shall be automatically credited for the purposes of measuring Earned Value at Financial Close (the "**Mobilization Credit**"), where:
  - (i) the sum of the costs identified to the Mobilization Credit and the costs identified to the cost codes from Table 1 shall remain equal to the Cost of the Works;
  - (ii) the scope of activity associated with the Mobilization Credit shall be documented by DB Co to the satisfaction of the Independent Certifier before the end of the second Construction Period Month in order to avoid double counting with the Earned Value for activities that are not included within the Mobilization Credit; and
  - (iii) the Earned Value for the activities included within the Mobilization Credit shall be credited as Earned Value without using a measurement method from the Earned Value Management Techniques.



**APPENDIX F**

**CONTRIBUTION AGREEMENT CERTIFICATES**

**[Federal and Provincial certificates to be appended.]**