

SCHEDULE 23  
COMPENSATION ON TERMINATION

1 DEFINITIONS

1.1 Definitions

- (a) All capitalized terms not otherwise defined in this Schedule shall have the meanings ascribed to them in the Project Agreement and unless the context otherwise requires:
- (b) “**City Default Termination Sum**” has the meaning given in Section 3.1(c) of this Schedule 23.
- (c) “**DB Co Amount**” means any amount payable to DB Co as a return and/or profit to DB Co shown in the Financial Model, including for greater certainty in respect of any loans made or capital contributed to DB Co by any Affiliate of DB Co or a DB Co Party, prorated by a fraction, the numerator of which is the period between the date of commencement of the Works and the Termination Date, and the denominator of which is the period between the date of commencement of the Works and the latest Scheduled Substantial Completion Date.
- (d) “**DB Co Default Termination Sum**” has the meaning given in Section 2.1(b) of this Schedule 23.
- (e) “**Debt Amount**” means, at any time, the then outstanding principal amount of debt funded under the terms of the Lending Agreements by the Lenders to DB Co, together with all interest accrued thereon at that time, provided that at any time where any portion of the interest payable to the Lenders is subject to the Hedging Agreement(s), accrued interest in respect of such portion of the interest payable to the Lenders shall be calculated based on the fixed rate payable by DB Co under the Hedging Agreement(s) without regard to whether such fixed rate is payable directly to a Lender or to the Hedge Provider(s) under the Hedging Agreement(s) and all references to interest payable to the Lenders under the Project Agreement shall be construed accordingly. For greater certainty, the Debt Amount excludes the Debt Makewhole.
- (f) “**Debt Makewhole**” means, (i) at any time, any amount (other than the Debt Amount) then due and payable to the Lenders under the Lending Agreements with respect to the Debt Amount, including any “make whole” payments, breakage costs (less any breakage benefits) and all other fees, costs and expenses reasonably and properly incurred which DB Co is obligated to pay to the Lenders pursuant to the Lending Agreements with respect to the Debt Amount; and (ii) any swap breakage costs (less breakage benefits), if any, then due and payable to the Hedge Provider(s) under the Hedging Agreement(s) entered into with respect to the Debt Amount.
- (g) “**Demobilization Costs**” means all reasonable costs of DB Co associated with the demobilization of the Works as a result of the termination of the Project Agreement.
- (h) “**Employee Termination Payments**” means termination payments which are required under Applicable Law to be made to employees of DB Co or any DB Co Party as a direct result of terminating the Project Agreement (provided that DB Co or the relevant DB Co Party shall take commercially reasonable steps to mitigate its loss) and provided that, in

calculating such amount, no account should be taken of any liabilities and obligations of DB Co or the relevant DB Co Party arising out of:

- (i) contracts of employment or other agreements or arrangements entered into by DB Co or the relevant DB Co Party to the extent that such contracts of employment, agreements or arrangements were not entered into in connection with the Project; or
  - (ii) contracts of employment or other agreements or arrangements entered into by DB Co or the relevant DB Co Party other than in the ordinary course of business and on commercial arm's length terms, save to the extent that amounts would have arisen if such contracts or other agreements or arrangements had been entered into in the ordinary course of business and on commercial arm's length terms.
- (i) **"Invoice Date"** means the date that is the later of:
- (i) the date on which the City receives an invoice from DB Co for the Non-Default Termination Sum or City Default Termination Sum, as the case may be; and
  - (ii) the date on which the City receives the supporting evidence required pursuant to Section 4.1(a) of this Schedule 23.
- (j) **"Non-Default Termination Sum"** has the meaning given in Section 3.1(c) of this Schedule 23.
- (k) **"Subcontractor Losses"** means, subject to DB Co's obligations under the Project Agreement to limit any compensation to Subcontractors, the amount reasonably and properly payable by DB Co to the Construction Contractor under the terms of the Design and Construction Contract as a direct result of the termination of the Project Agreement (including any reasonable commercial breakage fee), provided that such amount shall be reduced to the extent that DB Co or the Subcontractors fail to take commercially reasonable steps to mitigate such amount; provided that, no account should be taken of any liabilities and obligations of DB Co to the Subcontractors arising out of:
- (i) any loss of overhead or profit of such Subcontractor relating to any period or costs after the Termination Date (save to the extent the same are properly included in any reasonable commercial breakage fee set out in any of the Ancillary Documents);
  - (ii) agreements or arrangements entered into by DB Co or the Subcontractors to the extent that such agreements or arrangements were not entered into in connection with those parties' obligations in relation to the Project; or
  - (iii) agreements or arrangements entered into by DB Co or the Subcontractors other than in the ordinary course of business and on commercial arm's length terms, save to the extent that amounts would have arisen if such agreements or arrangements had been entered into in the ordinary course of business and on commercial arm's length terms.

## 2 COMPENSATION ON TERMINATION FOR DB CO DEFAULT

### 2.1 Compensation

- (a) If City terminates the Project Agreement pursuant to Section 36.3(a) of the Project Agreement, City shall pay the DB Co Default Termination Sum to DB Co.
- (b) The “**DB Co Default Termination Sum**” shall be an amount equal to the Guaranteed Price, as adjusted in accordance with the terms of the Project Agreement as of the Termination Date, less the aggregate, without duplication, of each of the following:
  - (i) all Construction Period Payments and Substantial Completion Payments paid by City on or before the Termination Date, plus all Construction Period Deductions and Lane Closure Adjustments (other than any Construction Period Deductions or Lane Closure Adjustments which, prior to the Termination Date, were set-off against a payment to DB Co by the City made on or before the Termination Date or which have otherwise been paid by or on behalf of DB Co on or before the Termination Date);
  - (ii) City’s estimate of the cost to complete the Works, including the cost to remedy any defective or deficient Works determined on a reasonable basis in consultation with the Independent Certifier and other consultants and including all reasonable and proper costs incurred by City in re-tendering the Works or any portion thereof;
  - (iii) City’s estimate of the aggregate of all Direct Losses suffered, sustained or incurred by City as a result of, in respect of, or arising out of the event or events which resulted in the termination of the Project Agreement and out of the termination together with all costs of entering into a new construction contract to complete the Works, including any warranty obligations for the Works in place and to be performed, on substantially the same terms and conditions as the Project Agreement;
  - (iv) any Completion Holdback as at the time the DB Co Default Termination Sum is required to be made; and
  - (v) the Legislative Holdback required to be maintained by City as at the time the DB Co Default Termination Sum is required to be made, which amount will be paid by City in accordance with the *Construction Act* (Ontario).
- (c) To the extent that any amounts that City has estimated or determined pursuant to Sections 2.1(b)(ii), 2.1(b)(iii) or 2.1(b)(iv) above, are in excess of what is required by City to complete the Works or compensate for Direct Losses, the Completion Holdback or the Legislative Holdback, as applicable the City shall promptly return such excess amounts to DB Co.
- (d) City shall pay the DB Co Default Termination Sum in accordance with Article 4 of this Schedule 23.

**3 COMPENSATION ON NON-DEFAULT TERMINATION OR TERMINATION FOR CITY DEFAULT**

**3.1 Compensation**

- (a) If DB Co terminates the Project Agreement pursuant to Sections 37.2(a)(ii) of the Project Agreement, the City shall pay to DB Co the City Default Termination Sum.
- (b) If the Project Agreement is terminated pursuant to Sections 38.1, 38.2 or 38.3 of the Project Agreement, the City shall pay to DB Co the Non-Default Termination Sum.
- (c) The “**Non-Default Termination Sum**” or “**City Default Termination Sum**”, as the case may be, shall be an amount equal to the aggregate, without duplication, of:
  - (i) all unpaid Construction Period Payments and Substantial Completion Payments properly due and payable under the Project Agreement to and including the Termination Date, any other amounts owing by the City to DB Co under the terms of the Project Agreement as of the Termination Date, and any Cost of the Financing directly related to such Construction Period Payments and Substantial Completion Payments, to the extent not funded under the Lending Agreements as part of the Debt Amount;
  - (ii) all Demobilization Costs, Employee Termination Payments and Subcontractor Losses;
  - (iii) the Debt Amount, plus the Debt Makewhole, each calculated as at the date of payment of the Non-Default Termination Sum or City Default Termination Sum, as the case may be;
  - (iv) the DB Co Amount calculated as at the date of payment of the Non-Default Termination Sum or City Default Termination Sum, as the case may be; and
  - (v) all other Direct Losses suffered, sustained or incurred by DB Co as a result of, or arising out of, the event or events which have resulted in the termination of the Project Agreement;less the aggregate of:
  - (vi) any Completion Holdback as at the time the Non-Default Termination Sum or City Default Termination Sum, as the case may be, is required to be made; and
  - (vii) any Legislative Holdback required to be maintained by City at the time the Non-Default Termination Sum or City Default Termination Sum, as the case may be, is required to be made.
- (d) To the extent that any amounts that City has determined pursuant to Section 3.1(c)(vi) or 3.1(c)(vii) above are in excess of what is required by City to holdback under the Project Agreement or maintain as Completion Holdback or Legislative Holdback, as applicable, City shall promptly return such excess amounts to DB Co.

- (e) City shall pay the Non-Default Termination Sum or City Default Termination Sum, as the case may be, in accordance with Article 4 of this Schedule 23.

## 4 GENERAL

### 4.1 Payment

- (a) In the event of a termination referred to in Section 3.1(a) or (b) of this Schedule 23, as soon as practicable, and in any event, within 60 days, after the Termination Date, DB Co shall give to City an invoice for the Non-Default Termination Sum or City Default Termination Sum, as the case may be, (reasonably estimated if not then known) and sufficient supporting evidence, reasonably satisfactory to City, justifying the amount of the Non-Default Termination Sum or City Default Termination Sum, as the case may be, including a detailed breakdown of each of the individual items comprising such sum. To the extent the Non-Default Termination Sum or City Default Termination Sum, as the case may be, is based on estimates of cost, the Parties will readjust as soon as such estimated costs can be determined.
- (b) City shall:
  - (i) pay to DB Co the Non-Default Termination Sum or City Default Termination Sum, as the case may be, within 60 days after the Invoice Date and so long as all demobilization of the Works has been completed; and
  - (ii) indemnify DB Co as provided in Section 46.2(c) of the Project Agreement in respect of any damages suffered or incurred as a result of the relevant termination sum (or any part of such sum that remains outstanding) not being received on the Termination Date:
    - (A) in an amount equivalent to the No Default Payment Compensation Amount for the period from (but excluding) the Termination Date to (and including) the date which is 60 days after the Invoice Date; and
    - (B) thereafter, in an amount equivalent to the Payment Compensation Amount until the date of payment.
- (c) In the event of a termination referred to in Section 2.1(a) of this Schedule 23, as soon as practicable, and in any event, within 120 days after the Termination Date, City shall calculate and notify DB Co of the DB Co Default Termination Sum under Section 2.1(b) of this Schedule 23, and shall deliver to DB Co sufficient supporting evidence reasonably satisfactory to DB Co.
- (d) City shall pay to DB Co the DB Co Default Termination Sum as soon as reasonably practicable, and in any event within 30 days after delivering the notice described in Section 4.1(c) of this Schedule 23.

### 4.2 Costs

The costs and expenses to be taken into account in the calculation of the Non-Default Termination Sum or City Default Termination Sum, as the case may be, due pursuant to this

Schedule 23 shall only be such costs and expenses that are reasonable and proper in quantum and that have been or will be reasonably and properly incurred.

#### **4.3 Undisputed Amounts**

Either City or DB Co may dispute the calculation of any Compensation Payment and in the event of a dispute, any undisputed amount shall be paid in accordance with this Schedule 23 and the disputed amount shall be dealt with in accordance with Schedule 27- Dispute Resolution Procedure.

#### **4.4 Outstanding Debt Amount**

- (a) Subject to Section 4.3 of this Schedule 23, the City shall be entitled to rely on a certificate of the Lenders' Agent as conclusive evidence as to the Debt Amount and Debt Makewhole, as applicable, outstanding at any relevant time.
- (b) If a receipt or other acknowledgement is given by the Lenders' Agent acknowledging or otherwise confirming receipt of payment or payments in respect of the Debt Amount or Debt Makewhole, as applicable, such receipt or other acknowledgement shall discharge City's obligation to pay such portion of compensation due to DB Co that is equal to the amount acknowledged or confirmed.

#### **4.5 Set-off**

City shall be entitled to set off against the Non-Default Termination Sum, the City Default Termination Sum, or the DB Co Default Termination Sum, such amounts not already taken into account in calculating the relevant Compensation Payment that City is entitled to set off or withhold pursuant to the Project Agreement, provided that the amount paid to DB Co on account of the Non-Default Termination Sum or City Default Termination Sum, as the case may be, shall never be less than the aggregate of the Debt Amount and the Debt Makewhole Amount.

#### **4.6 Full and Final Settlement**

- (a) Except as otherwise provided in Section 4.6(b) of this Schedule 23, any compensation paid pursuant to Section 2.1 or Section 3.1 of this Schedule 23 in the total amount owing thereunder shall be in full and final settlement of any claims, demands and proceedings of DB Co and the City and each shall be released from all liability to the other in relation to any breaches or other events leading to the termination of the Project Agreement and the circumstances leading to such breach or termination, and DB Co and the City shall be excluded from all other rights and remedies in respect of any such breach or termination, whether in contract, tort, restitution, statute, at common-law or otherwise.
- (b) Section 4.6(a) of this Schedule 23 shall be without prejudice to any liability, whether arising before, on or after the Termination Date, of either Party to the other, including under the indemnities contained in the Project Agreement that arose with respect to acts or omissions on or prior to the Termination Date (but not from termination itself or the events leading to such termination), to the extent such liability has not already been taken into account in calculating the relevant Compensation Payment under Section 4.5 of this Schedule 23.

(c) DB Co acknowledges that under the provisions of Section 4.5 of the Project Agreement, the City shall pay the Compensation Payment to DB Co and DB Co has irrevocably directed the City to make the Compensation Payment to the Lenders' Agent or as the Lenders' Agent may direct, as security for the Financing. The City acknowledges such direction and agrees to pay the Compensation Payment to the Lenders' Agent or as the Lenders' Agent may direct in accordance with such direction. DB Co acknowledges and agrees that payment by the City of the Compensation Payment in accordance with any such direction constitutes payment by the City to DB Co in satisfaction of the City's obligation to make:

- (i) the Compensation Payment under the Project Agreement; and
- (ii) any payment to DB Co under the Project Agreement, to the extent made in relation to the Guaranteed Price,

as the case may be, and in satisfaction of any trust obligation of the City in respect of such payments under Section 7 of the *Construction Act* (Ontario) pursuant to Section 10 of the *Construction Act* (Ontario).