

SCHEDULE 21

VARIATION PROCEDURE

1. VARIATIONS

1.1 Definitions

- (a) Any capitalized term not defined in this Schedule 21 shall have the meaning given to such term in the Project Agreement. The following terms shall have the following meanings:
- (i) “**City Work**” has the meaning given in Section 1.7(a).
 - (ii) “**Direct Cost**” has the meaning given in Appendix A.
 - (iii) “**Estimate**” has the meaning given in Section 1.4(a).
 - (iv) “**Overhead and Profit**” has the meaning given in Appendix B of this Schedule 21.
 - (v) “**Project Co Variation Notice**” has the meaning given in Section 2.1(a).
 - (vi) “**Variation**” means a variation, addition, reduction, substitution, omission, modification, deletion, removal or other change to the whole or any part of the Project Operations, including in relation to the whole or any part of the Works or the Maintenance and Rehabilitation Services.
 - (vii) “**Variation Confirmation**” has the meaning given in Section 1.8(a)(ii).
 - (viii) “**Variation Directive**” means a written instruction which is issued on a form designated as a “Variation Directive Form” and signed by the City Representative directing Project Co to immediately proceed with a Variation pending the finalization and issuance of a Variation Confirmation for that Variation.
 - (ix) “**Variation Enquiry**” has the meaning given in Section 1.3(a).
 - (x) “**Variation Procedure Meeting**” has the meaning given in Section 1.2(d) of this Schedule 21.

1.2 General

- (a) The City has the right from time to time to propose and require Project Co to carry out and implement a Variation, and any such Variation shall be subject to the provisions of this Schedule 21, provided that the City shall not be permitted to withdraw a Variation Enquiry (nor will a Variation Enquiry be deemed to have been withdrawn) with respect to those circumstances specified in the Project Agreement for which the City is obligated to proceed with a Variation.
- (b) The City shall be obligated to proceed with a Variation in certain circumstances specified in the Project Agreement, and any such Variation shall be subject to the provisions of this Schedule 21.

- (c) The total compensation or payment to which Project Co is entitled with any Variation shall be limited to, and shall only be, the Direct Costs and Overhead and Profit in respect of such Variation as calculated and substantiated in accordance with this Schedule 21. Project Co will not be entitled to any payment, compensation or extension of time for a Variation except to the extent provided in a Variation Confirmation or Variation Directive in accordance with this Schedule 21.
- (d) The Parties shall:
- (i) within 30 days following Financial Close;
 - (ii) within 30 days following the Substantial Completion Date; and
 - (iii) within 10 days following written notice being given by the City to Project Co at any time during the Project Term, which notice may be given at any time by the City, acting reasonably,
- hold a meeting (the “**Variation Procedure Meeting**”) to assist the Parties by promoting cooperative and effective communication with respect to matters related to Variations.
- (e) Attendance at the Variation Procedure Meeting shall consist of:
- (i) 3 representatives appointed by the City, including the City Representative and 2 other representatives appointed by the City;
 - (ii) prior to the Substantial Completion Date, 3 representatives appointed by Project Co, including the Project Co Representative, 1 representative of the Construction Contractor, and 1 representative of the Maintenance and Rehabilitation Contractor; and
 - (iii) after the Substantial Completion Date, 2 representatives appointed by Project Co, including the Project Co Representative and 1 representative of the Maintenance and Rehabilitation Contractor.
- (f) The Independent Certifier shall be entitled to, but not required to, attend the Variation Procedure Meeting.
- (g) The purpose of the Variation Procedure Meeting shall be to:
- (i) provide the Parties with a general overview of the Variation Procedure and to promote cooperative and effective communication with respect to matters related to Variations;
 - (ii) review the Estimate requirements as outlined in Section 1.6 and the expectations of the City to promote timely completion of the Variation processes defined in this Schedule 21; and
 - (iii) review the City’s proposed form of template for the Estimate with Project Co.

1.3 Variation Enquiry

- (a) If the City proposes or is obligated pursuant to the terms of the Project Agreement or Applicable Law to initiate a Variation it shall deliver to Project Co a written Notice of the proposed Variation (a “**Variation Enquiry**”).
- (b) A Variation Enquiry shall:
 - (i) describe the proposed Variation with sufficient detail to enable Project Co to prepare a detailed Estimate;
 - (ii) in the event that the proposed Variation will require a Capital Expenditure, state whether the City intends to pay for the Variation by way of lump sum payment or payments, adjustment to the Monthly Service Payments (and, if applicable, with a request for Project Co to obtain financing for all or part of the Variation), or a combination thereof; and
 - (iii) provide a preliminary indication of any provisions of the Project Agreement (including the Output Specifications or the Project Co Proposal Extracts) that will be affected by the proposed Variation, as well as the amendments to the Project Agreement (including the Output Specifications or the Project Co Proposal Extracts) that may be necessary to accommodate the Variation.

1.4 Delivery of Estimate

- (a) As soon as practicable and in any event within 15 Business Days after receipt of a Variation Enquiry, or such longer period as the Parties agree acting reasonably, Project Co shall deliver its detailed breakdown, estimate and other information (an “**Estimate**”) prepared in accordance with and meeting the requirements of Section 1.6.

1.5 Project Co Grounds for Objection

- (a) Project Co may only refuse to deliver an Estimate if Project Co can demonstrate to the City’s satisfaction, acting reasonably, within the period for delivery of an Estimate specified or agreed pursuant to Section 1.4(a), that:
 - (i) the implementation of the Variation would materially and adversely affect the health and safety of any person;
 - (ii) the implementation of the Variation would:
 - (A) infringe Applicable Law;
 - (B) cause to be revoked any of the existing Permits, Licenses, Approvals and Authorizations required by Project Co to perform the Project Operations, and any such Permit, License, Approval and Authorization is not, using commercially reasonable efforts, capable of amendment or renewal; or

- (C) require any new Permits, Licenses, Approvals or Authorizations for Project Co to perform the Project Operations, any of which will not, using commercially reasonable efforts by Project Co or the City, as applicable, be obtainable;
 - (iii) the proposed Variation would have a material and adverse effect on performance of the Project Operations (except those Project Operations which have been specified as requiring amendment in the Variation Enquiry) in a manner not compensated pursuant to this Schedule 21;
 - (iv) the implementation of the Variation would be a departure from Good Industry Practice;
 - (v) the City does not have the legal power or capacity to require the Variation to be implemented or to do anything envisaged by this Schedule 21 in respect of or in connection with the Variation;
 - (vi) the Variation would, if implemented, result in a change in the essential nature of the Project;
 - (vii) the Variation Enquiry does not comply with the requirements of Section 1.3 (including a failure to include adequate information therein to enable Project Co to prepare an Estimate in respect thereof);
 - (viii) in the case of a Variation relating to the Works, the time specified for commencement and/or completion of such Variation cannot be achieved by Project Co despite commercially reasonable efforts; or
 - (ix) in the case of a Variation relating to the Maintenance and Rehabilitation Services, the time specified for implementation of such Variation cannot be achieved by Project Co despite commercially reasonable efforts.
- (b) If Project Co refuses to provide an Estimate on the grounds set out in Section 1.5(a), Project Co shall, within the period for delivery of an Estimate specified or agreed pursuant to Section 1.4(a), deliver to the City a written Notice specifying the grounds upon which Project Co rejects the Variation and the details thereof.

1.6 Estimate Requirements

- (a) Unless the City in a Variation Enquiry requires only specified limited information, each Estimate shall include the following information, sufficient to demonstrate to the City's reasonable satisfaction:
- (i) the steps Project Co will take to implement the Variation, in such detail as is reasonable and appropriate in the circumstances;
 - (ii) any impact on the Construction Period Payments, or the Scheduled Substantial Completion Date, and any other schedule impact on the provision of the System Infrastructure and completion of the Works (including for certainty, any impact of the proposed Variation after taking into consideration other Variations);

- (iii) any impact on the performance of the Project Operations and any other impact on the Project Agreement (including for certainty, any impact of the proposed Variation after taking into consideration other Variations);
- (iv) any impact on expected usage of utilities, including those identified in Schedule 19 – Payment Mechanism, for the current Contract Year and subsequent Contract Years;
- (v) any amendments to the Project Agreement (including Schedule 19 – Payment Mechanism) or any Project Document required as a consequence of the Variation, the objective of such amendments being to ensure that (save for the obligation of the City to make payments or altered payments in respect of the Variation) the Parties are in no better and no worse position in relation to the Project than they would have been in if the Variation had not been implemented and, in particular, that there will be no material adverse change to the risk profile of the Project as a result of the Variation;
- (vi) any impact on the Direct Costs of Project Co and each Subcontractor, including:
 - (A) any Capital Expenditure and costs relating to or associated with the Maintenance and Rehabilitation Services that will be incurred, reduced or avoided and the impact on Project Co's cash flows from incurring, reducing or avoiding such costs (whether financed by Project Co or the City); and
 - (B) any other costs that will be incurred, reduced or avoided and the impact on Project Co's cash flows from incurring, reducing or avoiding such costs;with the presentation of impact on Project Co's cash flows from incurring, reducing or avoiding such Direct Costs contemplated Sections 1.6(a)(vi)(A) and 1.6(a)(vi)(B) being made on a nominal cash flow and real cash flow basis;
- (vii) either, subject to Section 1.9:
 - (A) a confirmation that the proposed Variation will not affect Project Co's existing financing or that Project Co's existing financing is adequate to implement the Variation; or
 - (B) if new or additional financing is required to implement the Variation, an indication as to the availability of such new or additional financing and the cost and terms of such new or additional financing;
- (viii) Project Co's confirmation that the projected internal rate of return on any additional equity capital required to finance the Variation will be the Base Case Equity IRR;
- (ix) Project Co's preliminary indication of the potential increase or decrease, if any, of the Monthly Service Payments, with such amount calculated by reference to the relevant parts of the Financial Model to demonstrate the impact of the proposed Variation;
- (x) any Permits, Licenses and Approvals that must be obtained or amended for the Variation to be implemented, and the latest date by which Project Co must receive a Variation

Confirmation and Project Co or the City, as applicable, must obtain or amend such Permits, Licenses and Approvals for the Estimate to remain valid; and

- (xi) the proposed methods of certification of any construction or operational aspect of the Project Operations required by the Variation if not covered by the provisions of the Project Agreement;

in each case, together with such supporting information and justification as is reasonably required.

- (b) In preparing its Estimate, Project Co shall include sufficient information to demonstrate to the City's satisfaction, acting reasonably, that:
 - (i) Project Co has used or has obliged each Subcontractor (or will oblige any Subcontractor not yet selected) to use commercially reasonable efforts, including the use of competitive quotes or tenders (if appropriate or required by Sections 1.6(c) and 1.6(e)), to minimize any increase in costs and to maximize any reduction in costs;
 - (ii) except as otherwise set out herein, all costs of Project Co and each Subcontractor are limited to Direct Costs;
 - (iii) Project Co, the Construction Contractor and the Maintenance and Rehabilitation Contractor shall charge overhead and profit as set out in Appendix B hereto (such amounts calculated on the basis of the applicable Direct Costs so that no mark-up of Project Co, the Construction Contractor or the Maintenance and Rehabilitation Contractor is calculated on any other mark-up of Project Co, the Construction Contractor or the Maintenance and Rehabilitation Contractor), and Project Co, the Construction Contractor and the Maintenance and Rehabilitation Contractor, as applicable, shall not charge any other amounts, margins or mark-ups;
 - (iv) the overhead and profit as set out in Appendix B hereto as applicable to Project Co's Direct Costs shall only be chargeable on Direct Costs of Project Co, such that Project Co shall not charge any mark-ups on any amounts charged by any Subcontractor;
 - (v) all costs of providing Project Operations, including Capital Expenditures, reflect:
 - (A) labour rates applying in the open market to providers of services similar to those required by the Variation;
 - (B) any and all changes in the Output Specifications arising out of the proposed Variation; and
 - (C) any and all changes in risk allocation;
 - (vi) the full amount of any and all expenditures that have been reduced or avoided (including for any Capital Expenditure) and that all such expenditures, including all applicable Overhead and Profit anticipated to be incurred but for the Variation, have been taken into account and applied in total to reduce the amount of all costs;

- (vii) Project Co has mitigated or will mitigate the impact of the Variation, including on the Works Schedule, the performance of the Project Operations, the expected usage of utilities, and the Direct Costs to be incurred;
 - (viii) any impact of the Variation on the Maintenance and Rehabilitation Services has been detailed through an updated staffing plan, updated Maintenance Plan and updated versions of any other documentation reasonably requested by the City; and
 - (ix) if applicable, the Variation can be completed without any adjustment to the Monthly Service Payments.
- (c) Project Co will use commercially reasonable efforts to obtain the best value for money when procuring any work, services, supplies, materials or equipment required by the Variation and will comply with all Good Industry Practice in relation to any such procurement, to a standard no less than Project Co would apply if all costs incurred were to its own account without recourse to the City, including using commercially reasonable efforts to mitigate such costs.
 - (d) As soon as practicable, and in any event not more than 15 Business Days after the City receives an Estimate, Project Co and the City shall discuss and seek to agree on the Estimate, including any amendments to the Estimate agreed to by the Parties.
 - (e) If the City would be required by Applicable Law or any policy applicable to the City to competitively tender any contract in relation to the proposed Variation, the City may require Project Co to seek and evaluate competitive tenders for the proposed Variation in accordance with such Applicable Law or policy.
 - (f) The City may modify a Variation Enquiry in writing at any time for any matter relating to the Estimate or the discussions in relation thereto, in which case Project Co shall, as soon as practicable and in any event not more than 10 Business Days after receipt of such modification, notify the City in writing of any consequential changes to the Estimate.
 - (g) If the Parties cannot agree on an Estimate pursuant to Section 1.6(d), then any Dispute will be determined in accordance with Schedule 26 – Dispute Resolution Procedure.

1.7 City's Right to Perform

- (a) In respect of the System Infrastructure, after Substantial Completion, the City shall have the right to perform the subject matter of a proposed Variation (“**City Work**”) itself, or through others contracting directly with the City, without compensation to Project Co, except as specifically stated in this Project Agreement.
- (b) The City shall indemnify and save Project Co harmless from and against any and all loss or expense which may be suffered, sustained or incurred by Project Co as a direct result of, in respect of, or arising out of the performance by the City, or any third party, of City Work, including any loss or expense related to any adverse impacts on the Project Operations.

1.8 Variation Confirmation

- (a) As soon as practicable, and in any event within 15 Business Days after the later of the date the Estimate was delivered and the date the Estimate was either agreed to or any Dispute in respect thereof was determined in accordance with Schedule 26 – Dispute Resolution Procedure, the City shall either:
- (i) subject to Section 1.2(b) and Section 1.8(e), withdraw the Variation Enquiry by written Notice to Project Co; or
 - (ii) issue a written confirmation (the “**Variation Confirmation**”) of the Estimate, including any agreed modifications thereto or any modifications resulting for the determination of a Dispute in respect thereof, which Variation Confirmation may be subject to Project Co obtaining financing pursuant to Section 1.9.
- (b) If the City does not issue a Variation Confirmation within such 15 Business Days, then, subject to Section 1.2(b) and Section 1.8(e), the Variation Enquiry shall be deemed to have been withdrawn.
- (c) Upon the Variation Confirmation being issued, and if applicable upon Project Co obtaining financing pursuant to Section 1.9:
- (i) the Parties shall as soon as practicable thereafter do all acts and execute all documents to amend the Project Agreement necessary to implement the Variation, including in respect of any required extension of time and including provision for payment to Project Co as provided in Section 1.10;
 - (ii) Project Co shall implement the Variation as provided for in the Variation Confirmation, and subject to amendments pursuant to Section 1.8(c)(i), all provisions of the Project Agreement applicable to the Project Operations shall apply to the Project Operations as thereby changed and no additional claim with respect to the Variation or Variation Confirmation will be considered; and
 - (iii) payment in relation to the Variation shall be as provided for in Section 1.10 and pursuant to any amendments pursuant to Section 1.8(c)(i).
- (d) If a Variation Confirmation is subject to Project Co obtaining financing pursuant to Section 1.9, then the Variation Confirmation shall not be effective until:
- (i) Project Co obtains such financing acceptable to the City in its sole discretion; or
 - (ii) the City in its sole discretion waives such requirement.
- (e) Except as hereinafter provided, until a Variation Confirmation has been issued:
- (i) the determination of whether or not to proceed with a Variation shall at all times be at the City’s sole discretion, despite any Dispute or any other matter in relation to a Variation being referred to or determined in accordance with Schedule 26 – Dispute Resolution Procedure; and

- (ii) the City may at any time withdraw a Variation Enquiry and, subject to Section 1.8(f), the City shall not be obligated to Project Co in respect of a Variation until such time as the City in its sole discretion issues a Variation Confirmation and, if applicable, Project Co has obtained the financing requested by the City or the City has waived such requirement,

provided that the City may not withdraw (or be deemed to have withdrawn) a Variation Enquiry in circumstances where the City is obligated pursuant to the terms of the Project Agreement to proceed with a Variation. In such circumstances Schedule 26 – Dispute Resolution Procedure shall be employed to finalize any aspects of the Variation which cannot otherwise be agreed to in accordance with the terms of this Schedule 21.

- (f) If a Variation Confirmation is not issued for any Variation Enquiry in respect of which Project Co has used commercially reasonable efforts to produce a fair and accurate Estimate, the City shall reimburse Project Co for all Direct Costs reasonably and properly incurred by Project Co in connection with preparing the Estimate.

1.9 Financing

- (a) If Project Co in its Estimate confirms that existing financing is not available to pay for the proposed Variation and if the City requests Project Co to obtain financing for a Variation, then a Variation Confirmation may be issued subject to Project Co obtaining financing. In such event, Project Co shall use commercially reasonable efforts to obtain the requested financing on terms satisfactory to Project Co, the Lenders and the City, provided that, prior to the Substantial Completion Date, Project Co shall not be required to seek financing from any source other than the Lenders.
- (b) If Project Co has used commercially reasonable efforts to obtain the requested financing but has been unable to obtain an offer of financing on terms reasonably satisfactory to Project Co and the City within 60 days of the date that the City issues the Variation Confirmation, then Project Co shall have no further obligation to obtain financing for the Variation and any Variation Confirmation subject to financing shall no longer have any effect unless the City, in its sole discretion, waives the requirement for financing or unless the City is obligated to proceed with the Variation pursuant to the terms of the Project Agreement.
- (c) If Project Co obtains an offer of financing on terms reasonably satisfactory to Project Co, Project Co shall provide the City with details of such financing, and the City shall, in its sole discretion, determine whether Project Co should proceed with such financing. If the City determines that Project Co should not proceed with such financing, then Project Co shall have no further obligation to obtain financing for the Variation and any Variation Confirmation subject to financing shall no longer have any effect unless the City, in its sole discretion, waives the requirement for financing or unless the City is obligated to proceed with the Variation pursuant to the terms of the Project Agreement.
- (d) The City may at any time withdraw the requirement for Project Co to use commercially reasonable efforts to obtain financing, after which Project Co shall have no further obligation to obtain financing for the Variation and any Variation Confirmation subject to financing shall no longer have any effect unless the City in its sole discretion waives the requirement for financing or unless the City is obligated to proceed with the Variation pursuant to the terms of the Project Agreement.

- (e) If the City waives the requirement for financing or if Project Co has no further obligation to obtain financing for the Variation pursuant to Sections 1.9(b), 1.9(c) or 1.9(d) then Project Co shall proceed with the Variation as set out in the Variation Confirmation and the City shall pay for the Variation as provided for in Section 1.10(a)(ii).

1.10 Payment

- (a) If a Variation Confirmation has been issued and is not subject to financing, or if the requirement for financing has been satisfied by Project Co or has been waived by the City, a price adjustment for the Variation, as set out in the Estimate and as adjusted and confirmed by the Variation Confirmation, shall be made as follows:
- (i) the Monthly Service Payments shall be adjusted as set out in the Variation Confirmation; and
 - (ii) payment for Capital Expenditures as set out in the Variation Confirmation and not financed by Project Co shall be paid as follows:
 - (A) the City shall pay such Capital Expenditures plus applicable HST in lump sum payments based on a payment schedule agreed by the City and Project Co, acting reasonably, to reflect the amount and timing of the Capital Expenditures to be incurred by Project Co in carrying out the Variation to the extent borne by the City; and
 - (B) where payment for part of the Variation reflects the carrying out of, or specific progress towards, an element within the Variation, Project Co shall provide satisfactory evidence confirming that the part of the Variation corresponding to each occasion when payment is due under the payment schedule has been duly carried out.

In the event the City and Project Co fail to agree as to the terms of the payment schedule, the payment schedule shall be determined in accordance with Schedule 26 – Dispute Resolution Procedure, provided that, where all or any part of the Variation is being carried out by a third party under a contract with Project Co, subject to the terms of any contract between Project Co and that third party in relation to the implementation of the Variation having been approved by the City (such approval not to be unreasonably withheld or delayed), the process under Schedule 26 – Dispute Resolution Procedure shall determine a payment schedule which would enable Project Co to be funded by the City in time to make payments to that third party in accordance with its contract with Project Co.

- (b) The City shall make payment to Project Co within 20 Business Days of receipt by the City of invoices presented to the City in accordance with the agreed payment schedule accompanied (where applicable) by the relevant evidence that the relevant part of the Variation has been carried out.
- (c) Payments by the City in respect of a Variation shall be subject to applicable holdback provisions of the *Construction Lien Act* (Ontario), as applicable.

- (d) Project Co shall not be entitled to any amount in excess of the amount of the Estimate confirmed in the Variation Confirmation.
- (e) Upon request by Project Co, the City shall provide to Project Co copies of any consent or approval issued by the City in connection with a proposed Variation.

1.11 Reduction in Project Operations

- (a) If a Variation involves any reduction in Project Operations which results in savings in Direct Costs to Project Co, such savings shall result in a reduction in the compensation payable to Project Co under the Project Agreement in an amount equal to such reduction in Direct Costs, and Project Co shall compensate the City by way of a reduction in the Monthly Service Payments (expressed in Inflation Base Date dollar amounts using the Escalation Factor as the discount rate) so as to place Project Co in no better no worse position that it would have been in had such Variation not occurred.

1.12 Variation Directive

- (a) If an Estimate is not promptly agreed upon by the City and Project Co or if there is a Dispute in relation thereto or if the City, in its sole discretion, requires a Variation to be implemented prior to issuing a Variation Confirmation, then the City may issue a Variation Directive and, following receipt of the Variation Directive:
 - (i) Project Co shall promptly proceed with the Variation;
 - (ii) the determination of the valuation and time extensions, if any, required in connection with such Variation, shall be made as soon as reasonably possible after commencement of the implementation of the Variation; and
 - (iii) pending final determination of the valuation and time extensions, if any, required in connection with such Variation, the Independent Certifier (if such Variation is in respect of matters prior to Final Completion), acting reasonably, shall determine the valuation in accordance with Appendices A and B hereto, with any Dispute to be determined in accordance with Schedule 26 – Dispute Resolution Procedure,

provided that, the City shall fund all Variations implemented by way of a Variation Directive as provided for in Section 1.10(a)(ii).

2. PROJECT CO VARIATIONS

2.1 General

- (a) Project Co shall deliver to the City a written Notice (a “**Project Co Variation Notice**”) for each Variation proposed by Project Co.

2.2 Project Co Variation Notice

- (a) A Project Co Variation Notice shall:

- (i) set out details of the proposed Variation in sufficient detail to enable the City to evaluate it in full;
 - (ii) specify Project Co's reasons for proposing the Variation;
 - (iii) indicate all reasonably foreseeable implications of the Variation, including:
 - (A) costs or cost savings to the City;
 - (B) adjustments to any payments under the Project Agreement, including the Monthly Service Payments;
 - (C) schedule impact on the provision of any phase of the Works, or completion of the Works;
 - (D) any impact on the performance of the Project Operations; and
 - (iv) indicate the latest date by which a Variation Enquiry must be issued.
- (b) If the City, in its sole discretion, elects to consider the Variation proposed by Project Co, the City may issue to Project Co a Variation Enquiry and the procedure set out in Section 1 will apply.
- (c) Project Co shall, promptly upon demand, reimburse the City for all out-of-pocket costs and expenses reasonably incurred by the City in connection with the City's consideration of any Variation proposed by Project Co pursuant to Section 2 of this Schedule 21, including, without limitation, legal and consulting fees and disbursements, regardless of whether (i) a Variation Enquiry or Estimate is issued in connection therewith or (ii) such Variation is implemented.

3. SMALL WORKS

3.1 General

- (a) After the Substantial Completion Date, with respect to the System Infrastructure, Project Co shall carry out all Small Works requested by the City.
- (b) If Small Works are requested by the City, Project Co shall, within 10 Business Days of each such request and prior to carrying out the Small Works, provide the City with a price for carrying out the Small Works.
- (c) If Project Co's price is accepted by the City, in its sole discretion, Project Co shall carry out the Small Works for such price.
- (d) The City may at any time, in its sole discretion, including if the City does not accept the price proposed by Project Co pursuant to Section 3.1(b), issue a Variation Enquiry or Variation Directive in respect of such Small Works, in which event the provisions of this Schedule 21, other than this Section 3, shall apply.
- (e) Project Co's price shall include only its Direct Costs, as calculated in accordance with Appendix A, together with applicable margins as set out in Appendix B.

3.2 Project Co to Minimize Inconvenience

- (a) Project Co shall notify the City of the estimated duration of any Small Works so that the City and Project Co can agree upon a convenient time for carrying out the same, so as to minimize and mitigate inconvenience and disruption to the City. Project Co shall use commercially reasonable efforts to minimize the duration of any Small Works.

APPENDIX A

1. CALCULATION OF DIRECT COSTS

1.1 Subject to Section 1.2 of this Appendix A, the term “Direct Cost” means the cumulative total, without duplication, of only the following amounts, as paid or incurred by Project Co or each Subcontractor, as applicable, to the extent that they specifically relate to, and are attributable to, the Variation under which Project Co is expressly entitled to its Direct Cost and would not otherwise have been incurred by Project Co or the Subcontractors, as applicable, in respect of or in relation to the Project:

- (i) wages and benefits paid for labour in the direct employ of Project Co or each Subcontractor while performing that part of the Project Operations on the Lands;
- (ii) salaries, wages and benefits of Project Co’s or each Subcontractor’s personnel when stationed at the office on the Lands in whatever capacity employed, or personnel engaged at shops or on the road, in expediting the production or transportation of materials or equipment;
- (iii) salaries, wages and benefits of Project Co’s or each Subcontractor’s office personnel engaged in a technical capacity;
- (iv) without limiting Sections 1.1(i), 1.1(ii) and 1.1(iii) of this Appendix A, contributions, assessments or taxes incurred for such items as employment insurance, provincial health insurance, workers’ compensation, and Canada Pension Plan, insofar as such costs are based on the wages, salaries, or other remuneration paid to Project Co or any Subcontractor, as applicable, for employees pursuant to Sections 1.1(i), 1.1(ii) and 1.1(iii) of this Appendix A, but excluding for certainty all income taxes on such wages, salaries and other remuneration;
- (v) the cost of materials, products, supplies and equipment that are consumed in the performance of the Variation;
- (vi) the rental costs of all tools (excluding hand tools which have a retail value of \$[REDACTED] or less), machinery, and equipment used in the performance of the Variation, whether rented from or provided by Project Co or others, including installation, minor repair and replacement, dismantling, removal, transportation and delivery costs thereof;
- (vii) deposits lost;
- (viii) except as otherwise set out in this Schedule 21, a reasonable amount of profit consistent with prevailing market rates that is charged by any Subcontractor, other than the Construction Contractor, the Maintenance Contractor and any entity not at arms-length from Project Co or any Equity Provider;
- (ix) the amount paid for any design services;
- (x) the cost of third party quality assurance required by the City, such as independent inspection and testing services;

- (xi) charges levied by Governmental Authorities, but excluding fines or penalties not related to the implementation of the Variation;
- (xii) subject to Section 1.1(iv) of this Appendix A, Taxes (and without limiting the obligation of the City to pay HST payable by it under the Project Agreement), but excluding:
 - (A) HST;
 - (B) taxes imposed on Project Co or a Subcontractor based on or measured by income or profit or otherwise imposed under the *Income Tax Act* (Canada), the *Income Tax Act* (Ontario) or any similar statute in any other jurisdiction;
 - (C) capital taxes based on or measured by the capital of Project Co or a Subcontractor;
 - (D) taxes relating to withholdings on any payments by Project Co or a Subcontractor; and
 - (E) taxes relating to any business or activity other than the business or activities related to, and conducted for, the purposes of the Project Operations;
- (xiii) the cost of removal and disposal of contaminants, hazardous substances, waste products and debris for which Project Co is not responsible under the Project Agreement;
- (xiv) termination payments which are required under Applicable Law to be made to employees of Project Co, Maintenance and Rehabilitation Contractor or Construction Contractor reasonably and properly incurred by Project Co, Maintenance and Rehabilitation Contractor or Construction Contractor arising as a direct result of any Variation reducing the scope of the Project Operations, except to the extent that such termination payments are provided for in contracts of employment, agreements or arrangements that were not entered into in the ordinary course of business and on commercial arm's length terms;
- (xv) the cost of Project Co obtaining financing in respect of the subject Variation as determined pursuant to Section 1.9, including additional financing costs related to any delay caused by the implementation of such Variation;
- (xvi) the cost of any additional insurance or performance security required or approved by the City;
- (xvii) the cost of obtaining all Project Co Permits, Licenses and Approvals;
- (xviii) the costs associated with the changes in the Project Co Services as identified in the updated staffing plan, updated Maintenance Plan and other documentation reasonably requested by the City;
- (xix) the cost of competitively tendering any contract in relation to the proposed Variation that is required by Contracting Authority, including as a result of any Applicable Law or any policy applicable to Contracting Authority; and

- (xx) except as specified in Section 1.2(vii), reasonable fees and disbursements of Project Co's legal advisors.

1.2 The Direct Cost otherwise payable shall be subject to and limited by the following:

- (i) the Direct Cost shall be net of all discounts, rebates and other price reductions and benefits, which relate to the Direct Cost incurred;
- (ii) the amount paid for materials, products, supplies and equipment incorporated into the Project Operations as a result of the Variation shall not exceed commercially competitive rates available in the Province of Ontario for such materials, products, supplies and equipment from arms-length third party suppliers;
- (iii) the amount paid for any design services included in the Direct Cost, whether provided by Project Co's personnel, consultants, manufacturers or manufacturers' consultants, for hourly paid personnel shall not exceed two times the actual salary received by those personnel (actual salary to be inclusive of all benefits, statutory remittances and holidays), and for salaried personnel, the actual salary per hour shall be calculated by dividing the annual salary (inclusive of all benefits, statutory remittances and holidays) by [REDACTED] hours;
- (iv) the amount paid for machinery and equipment rental costs shall not exceed the prevailing competitive commercial rate for which such equipment or machinery can be obtained in the City of Ottawa;
- (v) the amount paid for wages, salaries and Subcontracts with Subcontractors shall generally reflect commercially competitive rates available in the City of Ottawa;
- (vi) the Direct Cost shall not include any cost incurred due to the failure on the part of Project Co or any Project Co Party to exercise reasonable care and diligence in its attention to the execution of that part of the Project Operations (including any cost due to any negligence, improper work, deficiencies or breaches of contract by Project Co and/or any Project Co Party);
- (vii) the Direct Cost shall not include any reasonable fees and disbursements of Project Co's legal advisors incurred in connection with Small Works or the preparation of the Estimate; and
- (viii) Direct Costs shall be quantifiable and supported by evidence and proper documentation such as invoices, proof of payments, and detailed hourly rate information as required by the City. Any Direct Cost item claimed as a percentage of other Direct Costs will not be permissible, unless approved by the City in writing.

APPENDIX B

APPLICABLE MARGINS

Party	Total Overhead and Profit Margin (as % of Direct Cost)		
	For Variations under \$[REDACTED]	For Variations between \$[REDACTED] and \$[REDACTED]	For Variations over \$[REDACTED]
Project Co (Own Work)	[REDACTED]%	[REDACTED]%	[REDACTED]%
Construction Contractor (Own Work)	[REDACTED]%	[REDACTED]%	[REDACTED]%
Construction Contractor (Subcontracted Work)	[REDACTED]%	[REDACTED]%	[REDACTED]%
Maintenance and Rehabilitation Contractor (Own Work)	[REDACTED]%	[REDACTED]%	[REDACTED]%
Maintenance and Rehabilitation Contractor (Subcontracted Work)	[REDACTED]%	[REDACTED]%	[REDACTED]%
Project Co and Construction Contractor re: Cash Allowance Items	[REDACTED]%	[REDACTED]%	[REDACTED]%