

## SCHEDULE 5

### DESIGN AND PLAN CERTIFICATION PROCESS AND REVIEW PROCEDURE

#### 1. GENERAL

##### 1.1 Capitalized Terms and Section References

Capitalized terms used in this Schedule have the definitions as set out in the Agreement to Design, Build, Finance and Operate Northeast Stoney Trail, Calgary (the "DBFO Agreement") between Her Majesty the Queen in right of Alberta and the Contractor, as defined therein, unless expressed otherwise. Unless otherwise provided, references to section numbers are references to sections in this Schedule

##### 1.2 Definitions and Interpretation

In this Schedule, the following expressions have the following meanings:

**"Project Adjudicator"** means the person appointed pursuant to Section 2.4, which person will be independent, qualified and experienced in interpreting specifications and standards in relation to design or construction;

**"Project Adjudicator's Conclusion"** has the meaning given in Section 4.3.

##### 1.3 DBFO Agreement Reference

This Schedule is referenced in Sections 1.3, 5.5, and 5.9 of the DBFO Agreement.

#### 2. DESIGN AND PLAN CERTIFICATION PROCESS

##### 2.1 Designs and Plans comply with DBFO Agreement's Technical Requirements

Subject to any Change Orders, the Contractor shall prepare all of the detailed designs and plans necessary for the construction of the Project or the performance of the O&M in accordance with the Technical Requirements.

##### 2.2 Designer and Independent Reviewer Signatures

Without limitation, all engineering designs, environmental plans, and traffic management plans shall be independently reviewed prior to submission for the Province's review

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pursuant to Section 3 below. In addition to the relevant design or plan, the Contractor shall provide to the Province a certificate signed by both the designer and an independent reviewer certifying that the design or plan was prepared in accordance with the Project Requirements or the O&M Requirements, as the case may be.

**2.3 Deviation from Designs and Plans Prohibited**

Subject to any Change Order, designs and plans submitted to the Province in accordance with this Design and Plan Certification and Review Procedure and incorporated into either Schedule 3 or Schedule 4 to the DBFO Agreement shall not be departed from in the construction of the Project or the performance of the O&M. However, in the event that the Contractor proposes that a deviation from designs and plans forming either Schedule 3 or Schedule 4 is required due to unforeseen circumstances beyond the Contractor's control or that meet the Technical Requirements, then the parties shall first use reasonable commercial efforts to resolve the issue of the proposed deviation through negotiation, failing which either the Contractor or the Province may refer the matter to the Project Adjudicator pursuant to Section 4 below.

**2.4 Appointment of Project Adjudicator**

Within 60 days from signing of the DBFO Agreement, the Province and the Contractor will appoint and enter into a written agreement with a person acceptable to both as Project Adjudicator to whom interpretations of the Project Requirements in relation to design or construction may be referred for immediate interim resolution.

In the event that the parties cannot agree upon an acceptable person as the Project Adjudicator within the time period provided, the Project Adjudicator shall be determined by arbitration pursuant to section 2.5 of Schedule 7 (Dispute Resolution Procedure). The person appointed must be independent of the Province and the Contractor and qualified and experienced with respect to the design and construction of projects in the Province of Alberta similar to the Project.

The appointment of the Project Adjudicator will be deemed to be a joint appointment and will be irrevocable by each party without the consent of the other. The appointment of the Project Adjudicator will continue until the completion of the Project. If the Project Adjudicator resigns or dies before the completion of the Project, the parties shall immediately appoint a replacement.

The fees and expenses of the Project Adjudicator shall be set by the terms of the agreement between the parties and the Project Adjudicator. The Province and the Contractor will share the total costs of the Project Adjudicator equally. Each party shall bear its own costs and expenses in preparing submissions for and attending meetings with the Project Adjudicator.

In the event a disagreement requiring the Project Adjudicator to resolve arises prior to either the parties appointing a Project Adjudicator or the determination of the Project

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Adjudicator by arbitration, neither party's position nor access to either the Project Adjudicator's Procedure specified in Section 4 or to a remedy will be prejudiced. Upon the Project Adjudicator being appointed or named, as the case may be, the disagreement requiring the Project Adjudicator's participation, if still unresolved, will proceed in accordance with Section 4.

**2.5 Design and Plan Submission**

The Contractor shall not commence or permit the commencement of construction of any part of the Project or performing any O&M until five Business Days following the Province's receipt of all detailed designs, all relevant certificates, all the Contractor's Management Systems and Plans, and the Contractor's Construction Schedule required in respect of such part of the Project or the O&M. No comment or response (and no failure to provide comment or response) by the Province shall relieve against or excuse any failure by the Contractor to carry out the Project or perform the O&M in accordance with the Project Requirements or the O&M Requirements, as applicable.

If any submitted element of the design and construction does not comply with or satisfy the Technical Requirements or materially deviates from the subject matter of Schedules 2, 3, 4 or 16 of the DBFO Agreement, the Contractor shall notify the Province as soon as is reasonably practicable of any such failure to comply by making a written submission (the "Non-Compliance Submission") through the Review Procedure (Section 3 below).

The Non-Compliance Submission shall contain the following information:

- (a) the circumstances in which such non-compliance with the Technical Requirements or the material deviation from the subject matter of Schedules 2, 3, 4 or 16 to the DBFO Agreement occurred;
- (b) explanation of the causes for such non-compliance and, where applicable, for any delay in providing notification; and
- (c) the measures, if any, which the Contractor proposes to adopt in order to rectify such non-compliance.

**3. REVIEW PROCEDURE**

**3.1 Additional Documents Requiring Review**

The Contractor shall provide to the Province all detailed designs, Contractor's Management Systems and Plans, and Contractor's Construction Schedule not submitted as part of, or amended since, the Contractor's Proposal, and the following procedure shall apply.

### **3.2 The Province's Review Resources**

The Province may, in reviewing any matter, refer such matter to other Alberta government departments, or any of the Province's servants, agents, advisers, consultants, contractors or subcontractors.

### **3.3 Province's Responses to Contractor's Submission**

The Province shall, as soon as is practicable and in any event within five Business Days of receipt, return one copy of the relevant submission document endorsed "Received" or "Comments" or "Observations", as is appropriate.

### **3.4 Submission endorsed "Received"**

In the case of submission documents or proposed courses of action endorsed "Received" by the Province, the Contractor may proceed. A "Received" response (or a failure to provide comment or any response) by the Province shall not relieve the Contractor from exclusive responsibility for ensuring that the Project complies with the Project Requirements or that the O&M Requirements are met or estop the Province from asserting any non-compliance with the Project Requirements or the O&M Requirements, as the case may be.

### **3.5 Submission endorsed "Comments"**

Subject to Section 3.11, the Contractor shall revise and resubmit any documents or proposed courses of action to which an endorsement of "Comments" has been attached by the Province taking into account the substance of the "Comments" and indicating either:

- (a) how the Technical Requirements were met or Schedules 2, 3, 4 or 16 to the DBFO Agreement were materially complied with in the original submission;  
or
- (b) how the revised submission now meets the Technical Requirements or materially complies with Schedules 2, 3, 4 or 16 to the DBFO Agreement.

A "Comments" response (or a failure to provide comment or any response) by the Province shall not relieve against or excuse any failure by the Contractor to carry out the Project or perform the O&M in accordance with the Technical Requirements and Schedule 16 to the DBFO Agreement.

The Contractor shall not commence or permit the commencement of construction of that part of the Project or the performance of that portion of the O&M until five Business

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Days following the Contractor resubmission of any documents or proposed courses of action to which an endorsement of "Comments" has been attached by the Province except as may be agreed by the Province in writing.

**3.6 Scope of the Province's "Comments"**

When the Province provides "Comments" regarding any document or course of action submitted by the Contractor, such "Comments" may relate to the Contractor's proposed designs, construction activities, construction materials, O&M activities or O&M materials, not likely achieving compliance with the Technical Requirements or Schedule 16 to the DBFO Agreement and thus requiring the Contractor to revisit the document or course of action.

**3.7 Submission endorsed "Observations"**

Subject to Section 3.11, the Contractor shall revise and resubmit any documents or proposed courses of action or provide clarification or additional information to which an endorsement of "Observations" has been attached by the Province taking into account the substance of the "Observations" and confirming either:

- (a) how the Technical Requirements were met or Schedules 2, 3, 4 or 16 to the DBFO Agreement were materially complied with in the original submission; or
- (b) how the revised submission now meets the Technical Requirements or materially complies with Schedules 2, 3, 4 or 16 to the DBFO Agreement.

An "Observations" response (or a failure to provide comment or any response) by the Province shall not relieve against or excuse any failure by the Contractor to carry out the Project or perform the O&M in accordance with the Technical Requirements and Schedule 16 to the DBFO Agreement.

The Contractor shall be entitled to commence or permit the commencement of construction of that part of the Project or the performance of that portion of the O&M to which an endorsement of "Observations" has been attached by the Province.

**3.8 Scope of the Province's "Observations"**

When the Province provides "Observations" regarding any document or course of action submitted by the Contractor, such "Observations" may relate to the Contractor's proposed designs, construction activities, construction materials, O&M activities or O&M materials, likely achieving compliance with the Technical Requirements or Schedule 16 to the DBFO Agreement but requiring the Contractor to provide clarification or additional information.

**3.9 No Response by the Province**

If the Province does not return a Contractor's submission document (including any re-submitted submission document) within five Business Days of that document's actual receipt, then the Province shall be deemed to have returned that submission document to the Contractor marked "Received". No comment or response (or a failure to provide comment or response) by the Province shall relieve against or excuse any failure by the Contractor to carry out the Project or to perform the O&M in accordance with the Technical Requirements and Schedule 16 to the DBFO Agreement.

**3.10 Further Information Requested by the Province**

If the Province so requires, the Contractor shall submit any further or other information, data and documents (including without limitation, details of calculations and comments of the Contractor's design team members) that may be reasonably required for a full appreciation of any submission contemplated above and its implications. The Contractor shall take all such steps as may be reasonably required to satisfy the Province that the proposed document or proposed course of action complies with the DBFO Agreement or is appropriate in the circumstances.

**3.11 Disagreement over Comments**

Should the Contractor disagree with any such comment permitted by this Schedule, the parties shall first use reasonable commercial efforts to resolve their disagreement through negotiation, failing which either the Contractor or the Province may refer the matter to the Project Adjudicator pursuant to Section 4 below.

**4. PROJECT ADJUDICATOR'S PROCEDURE**

**4.1 Engaging the Project Adjudicator**

Pursuant to Section 2.3 or Section 3.11, failing the resolution by agreement of any dispute between the parties relating to or arising out of the designs or the Project Requirements, that dispute shall in the first instance be referred to the Project Adjudicator for the Project Adjudicator's interpretations of the Project Requirements in relation to design or construction for immediate interim resolution.

Failing a resolution by agreement, either party may request a meeting with the Project Adjudicator. As soon as is practicable after the Project Adjudicator receives a request for such a meeting but in any event no later than three Business Days after receiving the request, the Project Adjudicator shall call the representatives of the parties together at the Project site or any other place the Project Adjudicator determines most appropriate.

At such a meeting both parties will outline the issue or issues in dispute to the Project Adjudicator.

Should the Project Adjudicator fail to call such a meeting within the timeframes specified above, the party requesting the meeting, at its option and in accordance with the section 2.5 of Schedule 7 (Dispute Resolution Procedure), may initiate arbitration proceedings regarding the issues in dispute.

#### **4.2 Project Adjudicator's Actions**

Upon hearing the parties' issues and reviewing any written materials either party may have presented to the Project Adjudicator in support of its position, the Project Adjudicator shall immediately proceed to investigate the subject of the dispute with a view toward its resolution. The Project Adjudicator shall be entitled to visit worksites, to call for any further documentation required from the parties and after consultation with the parties, and with their agreement, to consult with any experts, technical or otherwise, that the Project Adjudicator considers necessary to assist in the resolution of the dispute. The Project Adjudicator shall conduct all such investigations and enquiries as a matter of urgency.

#### **4.3 The Project Adjudicator's Conclusion**

After giving due consideration to the points raised at the aforementioned meeting with the parties and to any additional investigations performed, and in any event no later than five Business Days after the date of the aforementioned meeting, the Project Adjudicator shall render a conclusion and shall deliver that conclusion to the parties (the "Project Adjudicator's Conclusion") verbally which shall specify:

- (a) the Project Adjudicator's conclusion as to the proper interpretations of the Project Requirements in relation to design or construction issues raised by the parties;
- (b) the Project Adjudicator's reasons for the conclusions drawn; and
- (c) the effect the Project Adjudicator's conclusions on the future work to be performed in the completion of the Project.

In making any such Project Adjudicator's Conclusion, the Project Adjudicator shall be deemed to be an expert and not an arbitrator.

At either party's request, the Project Adjudicator will provide duplicate copies of a written account of the Project Adjudicator's Conclusion to the parties as soon as is practicable after delivering the verbal Project Adjudicator's Conclusion.

Should the Project Adjudicator fail to render a Project Adjudicator's Conclusion within the timeframes specified above, the party requesting the meeting, at its option, in

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accordance with the section 2.5 of Schedule 7 (Dispute Resolution Procedure) may initiate arbitration proceedings regarding the issues in dispute.

**4.4 Project Adjudicator's Conclusion Disputed**

Subject to complying with any such Project Adjudicator's Conclusion, either party may, within five Business Days of receiving a Project Adjudicator's Conclusion and in accordance with the section 2.5 of Schedule 7 (Dispute Resolution Procedure), may initiate arbitration proceedings regarding the issues in dispute.

**4.5 Project Adjudicator not to Appear in Arbitration**

A Project Adjudicator who has issued a Project Adjudicator's Conclusion may not be retained by either party and may not be called by either party to give evidence with respect to the subject matter of the Project Adjudicator's Conclusion in any subsequent arbitration or court proceeding to resolve the subject matter of the Project Adjudicator's Conclusion, nor will either party refer to or enter into evidence a Project Adjudicator's Conclusion in such proceeding, unless required by law or by a court of competent jurisdiction.