

**AGREEMENT TO DESIGN, BUILD, FINANCE
AND OPERATE**

**EVAN-THOMAS WATER AND WASTEWATER
TREATMENT FACILITIES UPGRADE
KANANASKIS COUNTRY
ALBERTA, CANADA**

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

and

EPCOR WATER SERVICES INC.

October 2, 2012

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AGREEMENT TO DESIGN, BUILD, FINANCE AND OPERATE

**EVAN-THOMAS WATER AND WASTEWATER FACILITIES UPGRADE
KANANASKIS COUNTRY
ALBERTA, CANADA**

made this 2nd day of October, 2012

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA,
as represented by the Minister of Infrastructure
(the “**Province**”)

AND:

EPCOR Water Services Inc.
(the “**Contractor**”)

PREAMBLE:

Pursuant to an RFQ and RFP process, the Province has selected the Contractor to design, build and partially finance, and for a 10 year term commencing on the earlier of availability of the facilities or July 2, 2014, to operate, maintain and renew, the Evan-Thomas Water and Wastewater Treatment Facilities Upgrade in Kananaskis Country, Alberta.

The Province and the Contractor therefore agree as follows:

1. INTERPRETATION

1.1 Defined Terms

In this Agreement (including, except where a contrary meaning is clearly intended, in the Schedules), the following expressions have the following meanings (and where applicable their plurals have corresponding meanings):

“**Availability**” means the date when the Infrastructure has met the Availability

Criteria, which occurs on the date that the Certificate of Availability is issued under Section 5.14;

“Availability Criteria” means all of the criteria set out in Schedule 8 (Availability Criteria);

“Availability Target Date” means July 2, 2014;

“Business Day” means a day other than a Saturday, Sunday or statutory holiday in Alberta;

“Capital Payment” means the component of the monthly payment to be made by the Province to the Contractor under Section 9.2 that is described as the Capital Payment in Schedule 14 (Payment Schedule);

“Certificate of Availability” has the meaning indicated in Section 5.14;

“Change Order” has the meaning indicated in Schedule 1 (Change Orders), and for greater clarity includes a Change Order designated as a Change Order Directive;

“Change Order Confirmation” has the meaning indicated in Schedule 1 (Change Orders);

“Change Order Directive” has the meaning indicated in Schedule 1 (Change Orders);

“Construction Completion” means full completion of all aspects of the Project in accordance with the Project Requirements, as evidenced by a certificate issued by the Province or the Independent Certifier, as applicable, under Section 5.15;

“Construction Period” means the time between Execution of this Agreement and Availability (but excluding the day when Availability is achieved);

“Contractor’s Construction Schedule” means the Contractor’s schedule for construction of the Project, set out in Schedule 2 (Contractor’s Construction Schedule), and including any amendments made from time to time in accordance with Section 5.5 (Contractor’s Designs, Plans and Schedule);

“Contractor’s Contact Organization” means the Contact Organization named in the response to the RFP that culminated in the Contractor’s Proposal;

“Contractor’s Designs” means the Contractor’s design drawings and design reports for the Infrastructure, set out in Schedule 3 (Contractor’s Designs), and including any amendments made from time to time in accordance with Section 5.5 (Contractor’s Designs, Plans and Schedule);

“Contractor’s Management Systems and Plans” means all of the Contractor’s systems and plans presented in the Contractor’s Proposal and set out in Schedule 4 (Contractor’s Management Systems and Plans), and including any amendments made from time to time in accordance with Section 5.5 (Contractor’s Designs, Plans and Schedule);

“Contractor’s Proposal” means the final (SR2B and SR3) proposal submitted by a consortium of which the Contractor was the Contractor’s Contact Organization, submitted in response to the RFP, and includes all amendments made by the Contractor in accordance with the RFP;

“Court” means a court of law of competent jurisdiction;

“Dispute Resolution Procedure” means the procedure set out in Schedule 6 (Dispute Resolution Procedure);

“Environmental Damage or Degradation” means the presence of contamination in water, soil or air, in violation of applicable environmental laws (including, without limitation, environmental laws enacted after the time at which the Hazardous Substance causing the contamination is first present), caused by any Hazardous Substance, and includes death or injury to plants, animals or human beings resulting in whole or in part from such contamination;

“Execution” of this Agreement means the signing and delivery of this Agreement by both the Province and the Contractor;

“Existing Facilities” means the infrastructure described in Schedule 7 (Existing Facilities);

“Existing Facilities O&M” means the operation and maintenance of the Existing Facilities during the Construction Period;

“Financing and Initial Performance Letter of Credit” means the letter of credit to be delivered by the Contractor to the Province under Section 3.3 and has the meaning indicated in Section 3.2;

“FOIP” means the *Freedom of Information and Protection of Privacy Act* (Alberta), as amended or replaced from time to time;

“Force Majeure Event” means any war, invasion, insurrection, armed conflict, act of foreign enemy, revolution, terrorist act, interference by military authorities, nuclear explosion, contamination by ionizing radiation, epidemic, or quarantine restriction that prevents, delays or interrupts the performance of any obligation under this Agreement, other than any obligation to pay any money, and provided such event does not occur by reason of:

- (a) the negligence of the party relying on the Force Majeure Event (or those for whom it is in law responsible); or
- (b) any act or omission of the party relying on the Force Majeure Event (or those for whom it is in law responsible) that is in breach of the provisions of this Agreement;

“Handback Requirements” means the Contractor’s obligations to hand back the Infrastructure at the end of the Term in the condition required by Schedule 18 (Technical Requirements);

“Hazardous Substance” means any solid, liquid, gas, odor, heat, sound, vibration, radiation or other substance or emission that is a contaminant, pollutant, dangerous substance, toxic substance, hazardous waste, hazardous material or hazardous substance that is or becomes regulated by or under any applicable environmental law or that is or becomes classified as hazardous or toxic by or under any applicable environmental law;

“Identified Encumbrances” means:

- (a) all encumbrances and interests that as of May 23, 2012 are registered against any of the titles listed in section 2 of Schedule 12 (Lands); and
- (b) all unregistered utility rights of way, easements, leases and other similar interests that are:
 - (i) specifically identified in Appendix A to Schedule 12;
 - (ii) specifically identified in Appendix C to Schedule 12;
 - (iii) known to the Contractor as of May 23, 2012, or would have been disclosed to the Contractor on that date had the Contractor made inquiry through Alberta One-Call Corporation;

“Independent Certifier” means the Independent Certifier contemplated by Section 5.12 whose certificate constitutes certification of Availability under Section 5.14;

“Infrastructure” means the infrastructure described in Schedule 13 (Infrastructure), and subject to the foregoing generally means the Evan-Thomas Water and Wastewater Treatment Facilities Upgrade in Kananaskis Country, Alberta;

“Lands” means the lands described in Schedule 12 as the Lands;

“**Lessees**” means those lessees identified in Appendix D to Schedule 12 (Lands);

“**Local Authority**” means the Kananaskis Improvement District;

“**Modifications**” means renovations, alterations, improvements or expansions of the Infrastructure;

“**O&M**” means the operation, maintenance, and renewal of the Infrastructure, as contemplated by the O&M Requirements and the actions required in order for the Contractor to fulfill the Handback Requirements;

“**O&M Payment**” means the component of the Payment that is other than the Capital Payment;

“**O&M Requirements**” means the Province’s requirements and technical specifications for:

- (a) all aspects of the operation and maintenance of the Infrastructure; and
- (b) renewal of the Infrastructure;

all as set out in Schedule 18 (Technical Requirements), and including any amendments made from time to time pursuant to Section 7.2;

“**Operating Period**” means the time from Availability (including the day Availability is achieved) until the end of the Term;

“**Payment**” means the total monthly payment to be paid by the Province to the Contractor under Section 9.2;

“**Payment Adjustment**” means an adjustment to the Payment authorized under Section 10.2 and Schedule 18 (Technical Requirements) and summarized in Schedule 15 (Payment Adjustments Summary);

“**Prime**” means the rate of interest from time to time declared by the Canadian Imperial Bank of Commerce (or its successor, in the event of a merger or amalgamation) as its prime rate for Canadian dollar commercial loans in Canada;

“**Progress Payments**” means the payments that become due to the Contractor under Section 9.1 in relation to the Provincial Funding;

“**Project**” means the design and build of the Infrastructure in accordance with the Project Requirements;

“**Project Financing**” means financing, of whatever nature, arranged by or on behalf of the Contractor sufficient (having regard to the Provincial Funding) to

carry out and complete the Project; but not in any event exceeding the amount of Project Financing indicated in or by the Contractor's Proposal;

"Project Requirements" means the Province's specifications and requirements for the Project and for the Existing Facilities O&M, as set out in Schedule 18 (Technical Requirements), and including any amendments made or deemed to be made from time to time pursuant to any provision of this Agreement;

"Provincial Funding" means funding for the Project in the amount of [amount redacted] that will be provided by the Province via progress payments contemplated by Section 9.1 and Schedule 9 (Provincial Funding Progress Payments);

"Relief Event" has the meaning set out in Section 13.2, and subject to the foregoing generally means an event the risk of which is for some purposes allocated to the Province by Section 13;

"Renewal Payment" means the component of the O&M Payment that is designated in Schedule 14 (Payment Schedule) as the Renewal Payment;

"RFP" means the request for proposals issued by the Province in respect of the Project, the Existing Facilities O&M and the O&M;

"Technical Requirements" means all requirements set out in Schedule 18 (Technical Requirements), including but not limited to the Project Requirements, the O&M Requirements and the Handback Requirements, including any amendments made pursuant to Section 7.1 or Section 7.2;

"Term" means the period from and including the day Availability is achieved to and including the day immediately preceding the earlier of (i) 10 years from the day Availability is achieved, and (ii) 10 years from the Availability Target Date;

"Termination Event" means any event described in Section 16.8, and subject to the foregoing, generally means an event or circumstance entitling the Province to terminate this Agreement; and

"Termination Payment" means the applicable payment specified in Section 18 required to be made by the Province to the Contractor upon termination of this Agreement.

1.2 Section References

References in this Agreement to Sections of this Agreement are to the correspondingly numbered provisions of this Agreement. References to Schedules are to the correspondingly numbered Schedules listed in Section 1.3.

1.3 Schedules

The following Schedules delivered with this Agreement at the time of Execution of this Agreement are for every purpose to be considered as part of this Agreement (and provisions of the Schedules are to be considered as provisions of this Agreement):

Schedule 1 - Change Orders

Schedule 2 - Contractor's Construction Schedule

Schedule 3 - Contractor's Designs

Schedule 4 - Contractor's Management Systems and Plans

Schedule 5 - Design and Plan Certification Process and Review Procedure

Schedule 6 - Dispute Resolution Procedure

Schedule 7 - Existing Facilities

Schedule 8 - Availability Criteria

Schedule 9 - Provincial Funding Progress Payments

Schedule 10 - Index Factor

Schedule 11 - Insurance Requirements

Schedule 12 - Lands

Schedule 13 - Infrastructure

Schedule 14 - Payment Schedule

Schedule 15 - Payment Adjustments Summary

Schedule 16 - Safety Requirements

Schedule 17 - Subcontractors

Schedule 18 - Technical Requirements

1.4 Order of Precedence

In the event of any conflict or inconsistency between the provisions in the body of this Agreement and the provisions of any Schedule, the provisions in the body of this

Agreement shall govern.

1.5 Entire Agreement

This Agreement is the entire agreement between the Province and the Contractor regarding the subject matter of this Agreement, and supersedes any previous agreements, negotiations and understandings. There are no agreements, representations, warranties, terms, conditions or commitments regarding the subject matter of this Agreement except as expressed in this Agreement.

1.6 Currency

In this Agreement, all references to dollar amounts are in Canadian currency.

1.7 Liquidated Damages

Where any provision of this Agreement specifies or otherwise indicates an amount as liquidated damages, both the Province and the Contractor agree that such amount represents their genuine mutual pre-estimate of the particular damages arising from the particular event.

1.8 No Agency, Joint Venture, Partnership, Lease or Loan

This Agreement is not intended to and does not:

- (a) constitute either party as the agent of the other for any purpose, or otherwise create any relationship of agency;
- (b) constitute or create any joint venture;
- (c) constitute or create any partnership;
- (d) constitute the relationship of landlord and tenant; or
- (e) constitute the relationship of lender and borrower;

and neither party shall allege or assert for any purpose that this Agreement constitutes or creates a relationship of agency, joint venture, partnership, landlord and tenant, or lender and borrower.

1.9 Contractor's Knowledge

Where any provision of this Agreement refers to the knowledge of or matters known to the Contractor, then:

- (a) prior to Execution of this Agreement, knowledge on the part of any personnel

- having direct involvement in the preparation of the Contractor's Proposal on behalf of any consortium member named in the Contractor's Proposal shall be deemed to have been knowledge of the Contractor, even if the Contractor had not yet been incorporated or created;
- (b) during the Construction Period, knowledge on the part of personnel of the Contractor's principal design subcontractor, principal construction subcontractor, or principal subcontractor carrying out the Existing Facilities O&M, provided such personnel are directly involved in the design or construction of the Project or in the carrying out of the Existing Facilities O&M, shall be deemed to be knowledge of the Contractor; and
 - (c) during the Operating Period, knowledge on the part of personnel of the Contractor's principal O&M subcontractor, provided such personnel are directly involved in the O&M, shall be deemed to be knowledge of the Contractor.

1.10 Restated Schedules

Where any provision of this Agreement contemplates amendment of a Schedule, the party initiating the amendment or the course of action that results in the amendment shall as soon as practicable after the amendment comes into effect prepare a restated Schedule reflecting the amendment and deliver it to the other party.

2. DESIGN, BUILD, FINANCE, OPERATE AND MAINTAIN

2.1 Project Financing

The Contractor undertakes to arrange the Project Financing, as more particularly contemplated in Section 3.

2.2 Design and Build of Infrastructure and Existing Facilities O&M

The Contractor undertakes to design and build the Infrastructure in accordance with the Project Requirements and as more particularly set out in Section 5. The Contractor undertakes to operate and maintain the Existing Facilities during the Construction Period in accordance with the Project Requirements and as more particularly set out in Section 5.

2.3 Operation and Maintenance

The Contractor agrees to operate and maintain the Infrastructure in accordance with the O&M Requirements and as more particularly set out in Section 6.

2.4 Handback

The Contractor undertakes that upon expiry of the Term, the Infrastructure shall be in accordance with the Handback Requirements and as more particularly set out in Section 8.

2.5 Assumption of Risk

Except to the extent otherwise expressly allocated to the Province by the provisions of this Agreement, all risks, costs and expenses in relation to the performance by the Contractor of its obligations under this Agreement are allocated to, and as between the Province and the Contractor are the exclusive responsibility of, the Contractor.

3. FINANCING

3.1 Project Financing

The arranging of the Project Financing is the sole responsibility of the Contractor.

3.2 Condition Precedent

The Contractor must, as a condition precedent to this Agreement, deliver to the Province within five Business Days after Execution of this Agreement an irrevocable, unconditional, on sight letter of credit (the “**Financing and Initial Performance Letter of Credit**”) in the amount of \$3 million, presentable for payment at a bank in Canada and issued by a bank authorized under the *Bank Act* (Canada) to do business in Canada (or issued by such other financial institution approved in advance for the purposes of this Section by the Province, who may grant or decline such approval in its absolute discretion), and having a senior, unsecured long-term credit rating of not less than A+ (with a stable outlook) or equivalent from one of (and no rating less than A+ (with a stable outlook) or equivalent from any other of) Standard & Poor’s, DBRS (formerly known as Dominion Bond Rating Service) or Fitch Ratings (or any other major credit rating agency approved for the purposes of this Section by the Province, who may grant or decline such approval in its absolute discretion), failing which this Agreement shall not come into effect and shall not create legal obligations.

3.3 Financing and Initial Performance Letter of Credit

The Financing and Initial Performance Letter of Credit shall be held by the Province as security for the obligations of the Contractor to obtain the Project Financing and to design and build the Project.

3.4 Release of Financing and Initial Performance Letter of Credit

The Financing and Initial Performance Letter of Credit must be maintained in effect by

the Contractor until the Contractor has satisfied the Province, acting reasonably, that the Contractor has incurred in furtherance of the Project direct out of pocket expenditures of not less than \$3 million, exclusive of:

- (a) the cost of legal and financial advisors;
- (b) any costs incurred in connection with preparation of the Contractor's Proposal;
- (c) design costs;
- (d) financing costs;
- (e) mobilization costs;
- (f) any prepaid management or service fees; and
- (g) the cost of any materials that have not been incorporated into the Project as fixtures;

and upon such event, the Province shall immediately surrender the Financing and Initial Performance Letter of Credit to the Contractor. The Province will also as soon as reasonably practicable surrender to the Contractor the Financing and Initial Performance Letter of Credit if this Agreement is terminated in accordance with this Agreement other than under Section 17.1(a).

3.5 Presentation of Financing and Initial Performance Letter of Credit

The Province may present the Financing and Initial Performance Letter of Credit for payment only if:

- (a) this Agreement is terminated by the Province under Section 17.1(a);
- (b) the Financing and Initial Performance Letter of Credit has an expiry date and the Contractor fails to deliver a renewal of the Financing and Initial Performance Letter of Credit at least 20 days before the expiry date specified in the Financing and Initial Performance Letter of Credit; or
- (c) any of the senior, unsecured long-term credit ratings of the issuer of the Financing and Initial Performance Letter of Credit becomes less than A+ (with a stable outlook) or equivalent and the Contractor fails to deliver a replacement of the Financing and Initial Performance Letter of Credit no later than 21 days after being so requested by the Province;

and only if the condition in Section 3.4 for release of the Financing and Initial Performance Letter of Credit has not been achieved prior to the occurrence of the event described in clause (a) or clause (b) or clause (c), as the case may be.

Upon presenting the Financing and Initial Performance Letter of Credit for payment, the Province may, subject to the obligations of the Province under Section 3.6, retain the proceeds therefrom as liquidated damages.

3.6 Repayment of Proceeds

If the Province presents the Financing and Initial Performance Letter of Credit under Section 3.5(b) or (c), and if thereafter, but prior to termination of this Agreement, the Contractor meets the conditions in Section 3.4 for release of the Financing and Initial Performance Letter of Credit, then the Province shall within five Business Days thereafter repay to the Contractor, without interest (excepting only interest accruing pursuant to Section 9.9 after such repayment becomes due), the proceeds from presenting the Financing and Initial Performance Letter of Credit.

4. THE LANDS

4.1 Access and Use

Subject to the provisions of this Section 4.1, the Province hereby provides the Contractor with non-exclusive access to and use of, for the purpose of performing its obligations under this Agreement, all of the Lands including all fixtures and improvements constructed thereon under this Agreement, and to the Infrastructure and to the Existing Facilities.

Additionally, the Contractor may, in furtherance of the Project, the Existing Facilities O&M and the O&M, provide to its subcontractors, agents and employees, a right of access to and use of the Lands, the Infrastructure, and the Existing Facilities, but no such right of access and use shall have effect beyond the expiry of the Term or sooner termination of this Agreement.

The Contractor acknowledges that the Province may, without compensation to the Contractor except under Section 4.6(f) or as follows from the existence of a Relief Event under Section 13.2(k), grant utility rights of way, easements, leases or similar interests in land over the Lands.

The Contractor acknowledges that portions of the Lands are leased by the Province to the Lessees. The Contractor shall, at its own expense and while complying with the requirements for access to portions of the Lands that are leased set out in Schedule 18 (Technical Requirements), provide notice to and coordinate with the Lessees, to access and make use of the portions of the Lands that are leased for the purposes of carrying out the Project, the Existing Facilities O&M and the O&M.

4.2 Status of Lands and the Existing Facilities

Except as expressly set out in this Agreement:

- (a) access to and use of the Lands and the Existing Facilities are being provided to the Contractor on an “as is” basis; and
- (b) the Province provides no representations or warranties with respect to the Lands or the Existing Facilities.

4.3 Commencement and Duration

Subject to Section 4.14, the Contractor’s right to non-exclusive access to and use of the Lands, the Infrastructure, and the Existing Facilities comes into effect upon Execution of this Agreement and, unless otherwise provided in Schedule 18 (Technical Requirements), continues until the expiry of the Term or sooner termination of this Agreement. Such right to non-exclusive access and use (together with any right of access and use granted by the Contractor pursuant to Section 4.1) automatically terminates upon any termination of this Agreement.

4.4 No Access Fee

No fee or other amount shall be payable by the Contractor to the Province for its right of access to and use of the Lands.

4.5 Lands Outside of the Lands

The Contractor shall be responsible for and shall rectify any damage to the lands outside of the Lands caused by the Contractor, its agents, subcontractors or others for whom the Contractor is legally responsible in carrying out the Project, the Existing Facilities O&M or the O&M.

4.6 Utility Agreements

Subject only to the Province’s obligations under Section 15.4 and as otherwise set out in this Section 4.6, the Contractor shall negotiate and arrange all agreements required in respect of utilities in order to carry out the Project and the O&M (the “**Utility Agreements**”), on the following basis:

- (a) the Utility Agreements shall be in a form acceptable to the Province, acting reasonably;
- (b) to the extent practicable, the Contractor shall enter into the Utility Agreements in its own right, in which case:
 - (i) the Utility Agreements shall be expressly assignable to the Province

(including the automatic assignment contemplated by subclause (ii)) upon expiry of the Term or sooner termination of this Agreement or upon written request of the Province;

- (ii) the Contractor shall be deemed to have assigned the Utility Agreements to the Province upon expiry of the Term or sooner termination of this Agreement; and
 - (iii) the Contractor shall execute and deliver any other documentation as may from time to time be required to give full effect to the assignment contemplated by subclause (ii);
- (c) where required by a utility, the Province will be a party to the Utility Agreements and, if the utility requires the Province to be a party to the Utility Agreements, then the Contractor shall keep the Province informed to a reasonable extent and in a reasonable manner on an ongoing basis as to the negotiations with such utility and in any event shall keep the Province informed to the extent and in the manner as requested by the Province, acting reasonably; and
- (d) regardless of whether the Province is a party to the Utility Agreements, the Contractor shall until the end of the Term or sooner termination of this Agreement duly perform and carry out the Utility Agreements, and indemnify the Province against any failure by the Contractor to perform them, except only to the extent that such failure was caused or contributed to by the Province or those for whom the Province is legally responsible or caused by any person (other than a party to the applicable Utility Agreement) exercising rights under an Identified Encumbrance, a grant contemplated by the third paragraph of Section 4.1, Future Utilities (as defined in Section 4.6), or a consent contemplated by the last sentence of Section 4.12.

The Contractor acknowledges the probability that additional utility and other authorized uses beyond those identified in the Identified Encumbrances (“**Future Utilities**”) will, subsequent to the Contractor’s Proposal and throughout the Term, be approved by the Province as contemplated by Section 4.1. The Contractor undertakes to provide all reasonable cooperation in order to reasonably accommodate the Future Utilities, provided however that the Contractor shall be entitled to recover its direct out-of-pocket expenses incurred as a result (excluding any reimbursement for the internal cost of providing reasonable cooperation in order to reasonably accommodate the Future Utilities):

- (e) directly from the owners of such Future Utilities to the extent that the Province’s approval given in respect of those Future Utilities enable the Contractor to require payment from the owners of such Future Utilities of those expenses; and
- (f) from the Province, to the extent that the Province’s approval given in respect of those Future Utilities do not enable the Contractor to require payment from the owners of such Future Utilities of those expenses.

As soon as absolutely reasonably possible upon the Contractor becoming aware of any actual difficulties or any reasonably anticipated difficulties in relation to Future Utilities that have potential to result in a claim by the Contractor against the Province under clause (f) of this Section 4.6, the Contractor shall provide to the Province notice, including reasonable details of those difficulties, and shall thereafter work cooperatively with the Province to mitigate the possibility of and the amount of any claim under clause (f).

4.7 Condition of the Lands

Subject to Sections 11.6, 11.7 and 13.2(d), and subject to the Contractor's obligations under this Agreement to carry out the Project, the Contractor shall maintain the Lands in good and proper order and repair throughout the duration of this Agreement, and shall:

- (a) subject to clause (e) below, be responsible for repairing all damage to the Lands, however caused, excepting only damage caused by a Force Majeure Event or damage to the extent caused directly by the Province or its agents or contractors (except the Contractor but including, without limitation, those contractors other than the Contractor engaged by the Province under Sections 7.3 or 11.7) or those for whom the Province is legally responsible or caused directly by any person exercising rights under an Identified Encumbrance, a grant contemplated by the third paragraph of Section 4.1, Future Utilities (as defined in Section 4.6), or a consent contemplated by the last sentence of Section 4.12;
- (b) dispose of garbage from the Lands, in accordance with the requirements more particularly set out in the Technical Requirements;
- (c) not stockpile any material on the Lands except during the Construction Period or during and for the purpose of doing renewal or otherwise carrying out construction, maintenance or repair activities under this Agreement;
- (d) not commit or permit by the Contractor's agents or subcontractors or those for whom the Contractor is legally responsible, any waste or nuisance on the Lands; and
- (e) promptly deal with any Environmental Damage or Degradation to the Lands as required by applicable laws (which dealing with may require excavation and removal or may permit implementation of a risk management plan depending upon the applicable laws), with the exception only of:
 - (i) Environmental Damage or Degradation (including, without limitation, the presence of any Hazardous Substance) pre-existing as of the date of Execution of this Agreement provided that if such pre-existing Environmental Damage or Degradation is required to be dealt with in order to carry out the Project or the O&M, the Contractor shall do so and claim relief arising in connection therewith under Section 13.2(d); and

- (ii) Environmental Damage or Degradation (including, without limitation, the presence of any Hazardous Substance) caused after the date of Execution of this Agreement by the Province or its agents or contractors (except the Contractor but including, without limitation, those contractors other than the Contractor engaged by the Province under Section 7.3 or 11.7) or those for whom the Province is legally responsible or caused by any person exercising rights under an Identified Encumbrance, a grant contemplated by the third paragraph of Section 4.1, Future Utilities (as defined in Section 4.6), or a consent contemplated by the last sentence of Section 4.12;

which excepted Environmental Damage or Degradation shall be remediated by the Province in such manner and upon such timetable as the Province may determine, provided however that the Province shall ensure that neither the remediation nor any failure or delay by the Province to carry out the remediation interferes with or disrupts or delays the carrying out by the Contractor of the Project or the O&M, as the case may be.

The Province acknowledges and agrees that neither the Project itself nor the observing and carrying out of the Technical Requirements by the Contractor shall of itself constitute a breach of the Contractor's obligations to maintain the Lands in good and proper order or its obligations under clauses (a) or (d) of this Section 4.7 nor shall it constitute Environmental Damage or Degradation that the Contractor is obligated to rectify under clause (e) of this Section.

4.8 Permitted Use

The Contractor covenants that it (and others for whom it is legally responsible):

- (a) will use the Lands and the Infrastructure to be constructed thereon and the Existing Facilities only for the purposes of the Project, the Existing Facilities O&M and the O&M and, from and after Availability, only as a water and wastewater treatment, water distribution and sewer collection system and not for any commercial purposes other than the Project, the Existing Facilities O&M and the O&M; and
- (b) will not, from and after Availability, interfere with the Infrastructure being continuously in operation excepting only such closures or partial closures as are expressly contemplated and authorized by the Technical Requirements.

4.9 No Encumbrances On Lands

The Province represents that it has not granted or permitted to be granted, and covenants that it will not grant or permit to be granted, any mortgage or other security interest in the Lands. The Province covenants that it will not grant or permit to be granted any

encumbrance that can be registered against title to the Lands that results in the Province being in breach of its obligations set out in Section 4.12 (Uninterrupted Access and Use).

4.10 Liens

The Contractor shall promptly pay all proper accounts for work done or materials furnished under all contracts it enters into relating to the Project, to the Existing Facilities O&M or to the O&M, excepting those sums required to be retained under the provisions of any applicable statute of Alberta, and shall not by any act or omission cause, encourage, suffer or allow any lien or claim under any such statute or in equity to be made against the Province or filed or registered against the Lands, the Existing Facilities or the Infrastructure by reason of work, services or materials supplied or claimed to have been supplied to the Contractor or anyone holding any interest through or under the Contractor except where such lien or claim is caused by the Province withholding any amount payable under this Agreement except to the extent disputed by the Province in good faith. The Contractor shall at its own expense promptly take all steps required to effect a discharge of any lien or deal with any claim so filed or registered.

4.11 Ownership of Improvements

The Contractor acknowledges that the Infrastructure and all other fixed improvements that the Contractor may from time to time construct upon the Lands shall be the property of the Province.

4.12 Uninterrupted Access and Use

The Province covenants that the Contractor's access to and use of the Lands, the Infrastructure, and the Existing Facilities pursuant to Section 4.1 shall be uninterrupted during the duration of this Agreement, shall be without any disturbance or interference from the Province or any person claiming a right of access to or use of the Lands, the Infrastructure and the Existing Facilities from or under the Province, and shall be adequate to enable the Contractor to carry out the Project and the Existing Facilities O&M throughout the Construction Period and to carry out the O&M throughout the Operating Period, in each case subject to the following:

- (a) the Identified Encumbrances and the Future Utilities as defined in Section 4.6 (but subject in each case to the obligations of the Province under Section 15.4);
- (b) the exercise by the Province of any express right under and in accordance with this Agreement, including without limitation the Province's right under Section 5.10 to direct the Contractor to cease construction, the Province's rights under Section 7.3 to undertake additional improvements or to accommodate additional utilities, the Province's right under Section 14.4 to access to and use of the Lands for inspection purposes, and the Province's step-in rights under Section 16.6;
- (c) any interference including, without limitation, an injunction issued by a Court or

action by protesters, to the extent attributable to a negligent or wrongful act or omission by the Contractor or those for whom the Contractor is legally responsible.

The Province shall defend its title to the Lands against any person (including, without limiting the generality of the foregoing, any person claiming aboriginal title or treaty rights) claiming any interest adverse to the Province in the Lands, except where such adverse interest arises as a result of a negligent or wrongful act or omission of the Contractor or those for whom it is legally responsible. Unless expressly otherwise stated by the Province, any entry upon the Lands by the Province in accordance with the provisions of this Agreement or by any third party through written consent of the Province or the Department of Tourism, Parks and Recreation shall not constitute a breach of this covenant of uninterrupted access to and use of the Lands, provided that such entry does not (having regard to and subject to the provisions of Sections 4.6 and 13.2(k) regarding Future Utilities) materially adversely interfere with or disturb the Contractor's carrying out of the Project, the Existing Facilities O&M or the O&M.

4.13 Payment of Taxes on Lands

The Province will directly pay all property taxes, special taxes, local improvement taxes and requisitions that may be imposed on the Lands by a municipality pursuant to the *Municipal Government Act* (Alberta) or any successor legislation.

4.14 Access and Use Rights to Cease

Upon any termination of this Agreement, the Contractor shall cease to have any right of access to and use of the Lands other than as is available to any member of the public, and if the Contractor fails to comply with this Section 4.14, then it shall indemnify the Province against any damages, losses or costs incurred by the Province in consequence of such failure.

Notwithstanding the foregoing sentence, if termination of this Agreement occurs during the Construction Period, the Province shall permit the Contractor reasonable access and use of the Lands to, as soon as reasonably practical and in any event no later than one month following termination of this Agreement, demobilize and remove any of the Contractor's equipment and materials from the Lands, and the Contractor shall indemnify the Province against any damages, losses or costs incurred by the Province in consequence of the Contractor accessing and using the Lands after termination of this Agreement pursuant to this sentence.

4.15 Hold Harmless

Without limitation to the applicability of the general indemnity in Section 16.1, but subject to the last sentence of Sections 5.2 and 6.2 and subject to Sections 5.7(c) and 6.4(c) and subject to the exceptions set out in Section 4.7(e) and in the last paragraph of Section 4.7, the Contractor shall hold harmless and indemnify the Province (and as such

Section 20.3 applies) from any and all third party claims for which the Contractor is legally responsible and arising in relation to the Lands, including without limiting the generality of the foregoing:

- (a) any claims for occupier's liability in respect of the Lands, including any claims for which the Province has liability solely as a result of being the registered owner of the Lands, except to the extent that a Court has determined that such liability was caused or contributed to by the Province or its agents or contractors (excluding the Contractor), those for whom the Province is legally responsible or caused by any person exercising rights under an Identified Encumbrance, a grant contemplated by the third paragraph of Section 4.1, Future Utilities (as defined in Section 4.6), or a consent contemplated by the last sentence of Section 4.12;
- (b) any claims arising out of negligence or willful acts by the Contractor or the Contractor's agents or subcontractors or those for whom the Contractor is legally responsible; and
- (c) any claims arising under or in relation to any Environmental Damage or Degradation (except for claims arising in relation to the Environmental Damage or Degradation set out in clauses (i) and (ii) of Section 4.7(e)) or any nuisance.

4.16 Permits and Approvals

Subject only to the Province's obligations under Section 15.4 and as otherwise set out in this Section 4.16, the Contractor shall arrange all permits and approvals required to carry out the Project, the Existing Facilities O&M and the O&M (the "**Permits and Approvals**"), on the following basis:

- (a) to the extent practicable, the Contractor shall apply for the Permits and Approvals in its own right, in which case:
 - (i) the Permits and Approvals shall be expressly assignable to the Province (including the automatic assignment contemplated by subclause (ii)) upon expiry of the Term or sooner termination of this Agreement;
 - (ii) the Contractor shall be deemed to have assigned the Permits and Approvals to the Province upon expiry of the Term or sooner termination of this Agreement; and
 - (iii) the Contractor shall execute and deliver any other documentation as may from time to time be required to give full effect to the assignment contemplated by subclause (ii);
- (b) where required by a regulator, the Province will be the applicant for the Permits and Approvals. If the regulator requires the Province to be the applicant for the Permits and Approvals, then the Contractor shall keep the Province informed to a

reasonable extent and in a reasonable manner on an ongoing basis as to the discussions with such regulator and in any event shall keep the Province informed to the extent and in the manner as requested by the Province, acting reasonably; and

- (c) regardless of whether the Province is the applicant for the Permits and Approvals, the Contractor shall until the end of the Term or sooner termination of this Agreement duly perform and carry out on behalf of the Province all obligations of the Province under the Permits and Approvals, and shall, subject to Section 16.2, indemnify the Province against any liability under or in relation to the Permits and Approvals arising from the Contractor's failure to perform all such obligations on behalf of the Province, except only to the extent that such failure was caused or contributed to by the Province or those for whom the Province is legally responsible or caused by any person exercising rights under an Identified Encumbrance, a grant contemplated by the third paragraph of Section 4.1, Future Utilities (as defined in Section 4.6), or a consent contemplated by the last sentence of Section 4.12.

The Province holds a licence to divert and use water issued by Alberta Environment (file number 14552) pursuant to the *Water Resources Act* (Alberta) (predecessor act to the *Water Act* (Alberta)) (the "**Water Diversion Licence**"). The Contractor shall not make any alterations to or applications in respect of the Water Diversion Licence. The Contractor shall until the end of the Term or sooner termination of this Agreement duly perform and carry out on behalf of the Province all obligations of the Province under the Water Diversion Licence and shall, subject to Section 16.2, indemnify the Province against any liability under or in relation to the Water Diversion Licence arising from the Contractor's failure to perform all such obligations on behalf of the Province, except only to the extent that such failure was caused or contributed to by the Province or those for whom the Province is legally responsible or caused by any person exercising rights under an Identified Encumbrance, a grant contemplated by the third paragraph of Section 4.1, Future Utilities (as defined in Section 4.6), or a consent contemplated by the last sentence of Section 4.12.

The Contractor shall duly perform and carry out on behalf of the Province all obligations of the Province under the Existing Facilities Licenses (as defined in Schedule 18) and shall, subject to Section 16.2, indemnify the Province against any liability under or in relation to the Existing Facilities Licenses (as defined in Schedule 18) arising from the Contractor's failure to perform all such obligations on behalf of the Province, except only to the extent that such failure was caused or contributed to by the Province or those for whom the Province is legally responsible or caused by any person exercising rights under an Identified Encumbrance, a grant contemplated by the third paragraph of Section 4.1, Future Utilities (as defined in Section 4.6), or a consent contemplated by the last sentence of Section 4.12.

4.17 Lessees

The Contractor acknowledges that portions of the Lands and lands adjacent to the Lands are leased by the Province to the Lessees.

The Contractor shall not commit any act or omit to carry out any act in the context of carrying out the Project or performing the Existing Facilities O&M or the O&M that would cause the Province to be in breach of any obligation of the Province under the Province's agreements (as identified in Appendix D to Schedule 12 (Lands)) with Lessees. The Contractor shall carry out its obligations under this Agreement in a manner that does not cause the Province to be in breach of its obligations under its agreements (as identified in Appendix D to Schedule 12 (Lands)) with each Lessee.

5. DESIGN AND BUILD OF THE INFRASTRUCTURE AND EXISTING FACILITIES O&M

5.1 Contractor's Obligations

The Contractor agrees to design and build the Infrastructure and to perform the Existing Facilities O&M (subject to the Province terminating any existing contracts for the operation and maintenance of the Existing Facilities) in accordance with the Project Requirements, the Contractor's Designs and the Contractor's Management Systems and Plans, and to use reasonable endeavors to comply with the Contractor's Construction Schedule. In the event of any inconsistency among the Project Requirements, the Contractor's Designs and the Contractor's Management Systems and Plans, the higher standard or specification shall apply; but in no event shall anything in the Contractor's Designs or the Contractor's Management Systems and Plans detract from the Contractor's absolute obligation to design and build the Infrastructure and to operate and maintain the Existing Facilities in accordance with the Project Requirements.

5.2 Project Requirements

Subject only to Section 5.4 and notwithstanding any other provision of this Agreement, the Contractor's obligation to design and build the Infrastructure and to operate and maintain the Existing Facilities in accordance with the Project Requirements is absolute, and cannot be modified or waived except by amendment of the Project Requirements made in accordance with Section 7.1. If the Contractor asserts that any aspect of the Project Requirements is uncertain or ambiguous, either party may require that the interpretation of that aspect of the Project Requirements be determined pursuant to the Dispute Resolution Procedure. The Province acknowledges that it is responsible for the adequacy and suitability of the Project Requirements, and shall indemnify the Contractor against any claims by third parties (including the reasonable cost of defending such third party claims, on a solicitor and client basis) for personal injuries or property damage to the extent that the Province has agreed with the Contractor, or a Court has determined that such injury or damage was caused or contributed to by a failure of the Project

Requirements to be adequate and suitable.

5.3 Contractor's Responsibility to Carry Out Project Requirements

Subject to Section 5.4 or as expressly stated otherwise in this Agreement, no consultation with or inspection or test or approval or comment (whether under the procedure contemplated by Section 5.9 or otherwise) or purported direction by or on behalf of the Province, and no information of any kind or nature whatsoever furnished by the Province, shall relieve the Contractor from its exclusive responsibility for ensuring that the Project and the Existing Facilities O&M comply with the Project Requirements or shall estop the Province from asserting any non-compliance with the Project Requirements. In the event of any failure by the Contractor to comply with the Project Requirements, the Contractor shall not assert any duty of care or contributory negligence on the part of the Province in relation to such failure, and shall indemnify and hold harmless the Province against any claims by third parties arising as a result of such failure.

5.4 Request for Clarification

The Contractor may request that the Province agree that a particular design element or construction specification complies with the Project Requirements, and if the Province so agrees (the Province will endeavor to determine its position on the request within 10 days of receiving the request), then such design element or construction specification shall be deemed to comply with the Project Requirements. However, the Province must consider such a request only where:

- (a) the request is in relation to a specific design element or construction specification;
- (b) the pertinent Project Requirements are capable of differing interpretations in relation to the specific design element or construction specification;
- (c) the Contractor has established that it would be exposed to significant risk of material expense or delay if its interpretation of the pertinent Project Requirements ultimately proved to be incorrect; and
- (d) the Contractor has not made multiple or generalized requests under this Section such that, in the reasonable opinion of the Province, the Contractor is attempting to use this Section to transfer to the Province all or partial responsibility for ensuring that the Project meets the Project Requirements.

5.5 Contractor's Designs, Plans and Schedule

The Contractor may, in accordance with the procedures set out in Schedule 5 (Design and Plan Certification Process and Review Procedure), amend the Contractor's Designs, the Contractor's Management Systems and Plans or the Contractor's Construction Schedule with the Province's prior consent, such consent not to be unreasonably withheld (it being reasonable for the Province to withhold consent to any amendment that would result in a

material reduction in quality, safety, durability, functionality or aesthetics; in which context “material” means that the Province could reasonably have declined the design on a pass-fail basis had the proposed amendment been submitted during the SR2 phase of the RFP). If the Contractor asserts that the Province has unreasonably withheld consent, either party may require that the matter be determined by the Dispute Resolution Procedure.

Notwithstanding the foregoing paragraph, the Contractor may make amendments to non-critical path items in the Contractor’s Construction Schedule without obtaining the Province’s consent, provided that the Contractor provides the Province with advance notice of each such amendment.

5.6 Contractor Solely Responsible for Project and Existing Facilities O&M

Except for the obligations of the Province specifically set out in this Agreement, the Contractor is solely responsible for doing all things of any nature whatsoever required to complete the Project and to carry out the Existing Facilities O&M, including without limiting the generality of the foregoing:

- (a) subject to the obligations of the Province set out in Section 15.4:
 - (i) the obtaining of all required permits;
 - (ii) all required arrangements, as more particularly contemplated by Section 4.6, relating to utilities;
 - (iii) all required arrangements with the Local Authority; and
 - (iv) all required arrangements, as set out in Schedule 18 (Technical Requirements), relating to the Lessees; and
- (b) complying with all applicable laws.

5.7 Contractor Solely Responsible for Costs

Except as expressly set out in this Agreement, the Contractor is solely responsible for paying all costs, fees and charges of any nature whatsoever required to complete the Project and the Existing Facilities O&M, excepting only:

- (a) the costs, fees and charges of the Province’s own personnel, consultants and professional advisors;
- (b) the costs, fees and charges of any mediation or arbitration pursuant to the Dispute Resolution Procedure, which are specifically provided for in Schedule 6 (Dispute Resolution Procedure); and

- (c) any claims by third parties asserting a right to damages as a result of the Project being carried out as contemplated by and in accordance with this Agreement, provided such claims are not founded on any negligent act or omission by the Contractor or any of its subcontractors or a failure by the Contractor to comply with this Agreement. The Province shall indemnify the Contractor against such third party claims set out in the foregoing portion of this clause (c) (including the reasonable cost of defending such third party claims, on a solicitor and client basis); and
- (d) any costs, fees, charges or payments expressly to be made by the Province under the provisions of this Agreement.

The Province shall not be obligated to pay any costs, fees or charges in relation to the Project except as expressly set out in Section 9 or elsewhere in this Agreement.

5.8 Construction Within the Lands

Except to the extent expressly required otherwise in the Technical Requirements, the Contractor agrees to construct the Project entirely within the Lands and acknowledges that it has fully familiarized itself with the Project and the Lands and has satisfied itself that no other land outside the Lands will be required for the Project.

5.9 Detailed Designs

The Contractor shall, in accordance with the procedures set out in Schedule 5 (Design and Plan Certification Process and Review Procedure), provide the Province with copies of all detailed designs (including, but not limited to, design reports, detailed design drawings, shop drawings, and construction specifications, and for express clarity, including any changes to detailed designs previously provided to the Province in accordance with this Section 5.9) for the Project or any renewal carried out during the Term as they are prepared, and invite comment from the Province on the detailed designs, all in accordance with the procedures set out in Schedule 5. The Contractor shall not commence work on any component of the Project if such work has not been addressed in detailed designs provided to the Province in accordance with this Section 5.9. The parties expressly intend and agree that neither comment by the Province nor failure by the Province to comment or otherwise participate in any manner in respect of the procedure prescribed by Schedule 5 shall shift or detract from the Contractor's absolute responsibility under Section 5.3 to carry out the Project or any renewal in accordance with the Technical Requirements.

5.10 Stop Work Order

The Province may at any time direct the Contractor to cease any construction that it considers to be not in accordance with the Project Requirements. If it is subsequently determined that the work was in accordance with the Project Requirements, then such direction shall, subject to Section 13.2, constitute a Relief Event under Section 13.2(b).

5.11 Construction Delays

If the progress of the Project falls materially behind the Contractor's Construction Schedule, the Contractor shall immediately so advise the Province and shall in a timely manner advise the Province of its remedial plan for bringing the Project back on schedule. If the Contractor fails to achieve Availability by the Availability Target Date, the Contractor shall (subject to adjustment of the dates in clauses (a) and (b) below pursuant to Section 11.6, Section 12.1(b) or Section 13.3(b)) provide the Province with:

- (a) by July 31, 2014, the Contractor's plan for achieving Availability no later than March 31, 2015; and
- (b) from and after August 1, 2014, weekly progress and activity reports, including a statement of the Contractor's current expectation of when Availability will be achieved and all contingencies to which that expectation is subject.

5.12 Independent Certifier

At least 100 days prior to the date the Contractor anticipates that the Project will satisfy the Availability Criteria, the Contractor and the Province must jointly retain an Independent Certifier acceptable to both acting reasonably to perform an assessment of the Project to determine if the Availability Criteria have been met. The Independent Certifier shall be retained in accordance with the following:

- (a) the Independent Certifier must be an engineering consultant having strong expertise in water/wastewater projects;
- (b) the Independent Certifier must agree to carry out and discharge the responsibilities contemplated by this Section 5.12, and Sections 5.13, 5.14, 5.15 and 5.16, as the case may be, and be available to carry out and discharge such responsibilities promptly and within the timelines contemplated in this Agreement;
- (c) the Independent Certifier must carry professional liability insurance with errors and omissions coverage of not less than \$1,000,000 per claim;
- (d) all fees and expenses of the Independent Certifier are to be shared equally by the Contractor and the Province;
- (e) the agreement among the Independent Certifier, the Province and the Contractor will require that the Independent Certifier provide to PPP Canada Inc. copies of all reports and certificates prepared by the Independent Certifier under the agreement and make available to PPP Canada Inc., upon request and with reasonable prior notice, the records of the Independent Certifier relating to the work performed by the Independent Certifier pursuant to the agreement;

- (f) the agreement among the Independent Certifier, the Province and the Contractor will provide that PPP Canada Inc. may rely on the reports and certificates issued by the Independent Certifier under the agreement;
- (g) the Independent Certifier shall be impartial to the Province and the Contractor when required to make any recommendation, determination or assessment; and
- (h) the agreement among the Independent Certifier, the Province, and the Contractor shall, in addition to complying with the requirements of this Section 5.12, be in form and substance satisfactory to the Province and the Contractor, each acting reasonably.

5.13 Anticipated Availability

When the Contractor anticipates that in approximately 20 Business Days the Project will satisfy the Availability Criteria, the Contractor shall notify the Province, including an indication of the work still intended to be completed by the Contractor for the Project to achieve Availability.

The Contractor shall request an inspection by the Independent Certifier and shall provide the Province with the results of that inspection. The Province may, within five Business Days after receiving the results of the Independent Certifier's inspection, (i) perform its own inspection, and (ii) notify (the "**Availability Items Notice**") the Contractor and the Independent Certifier of any items that, in the opinion of the Province, prevent the Project from satisfying the Availability Criteria. The Contractor may within five Business Days of receipt of the Availability Items Notice, communicate to the Province and the Independent Certifier its opinion on the items that prevent the Project from satisfying the Availability Criteria.

5.14 Certification of Availability

When the Independent Certifier, having considered any items noted by the Province in accordance with the process contemplated in Section 5.13, the Contractor's response to such items, and all remedial action, if any, taken by the Contractor in response to the inspection contemplated in Section 5.13, is satisfied that the Project has satisfied the Availability Criteria, the Independent Certifier shall promptly issue to the Contractor and to the Province a certificate certifying that Availability has been achieved ("**Certificate of Availability**"). Availability shall be the date on which the Certificate of Availability is issued and the Province shall make payments at the times and in accordance with the terms of this Agreement and the Contractor shall commence performing the O&M.

If the Independent Certifier, having completed the inspection referred to in Section 5.13 and having considered any items noted by the Province in accordance with the process contemplated in Section 5.13, the Contractor's response to such items, and all remedial action, if any, taken by the Contractor in response to the inspection contemplated in

Section 5.13, determines that the Project has not satisfied the Availability Criteria, then the Independent Certifier shall issue to the Contractor and to the Province a notice stating that the Certificate of Availability has not been issued and specifying any outstanding matters that must be attended to before the Certificate of Availability can be issued (the “**Notice of Failure to Achieve Availability Criteria**”). After receiving a Notice of Failure to Achieve Availability Criteria, when the Contractor anticipates that the Project will satisfy the Availability Criteria, the Contractor shall again engage the process set out in Sections 5.13 and 5.14, with the exception that the time periods contemplated in Section 5.13 shall in each case be reduced to three Business Days.

5.15 Construction Completion

Upon issuing the Certificate of Availability, the Independent Certifier shall also issue to the Contractor and to the Province a list of deficiencies (the “**Deficiency List**”) required to be rectified for Construction Completion and the Independent Certifier’s estimate of the cost to achieve Construction Completion. The Province may, within five Business Days of receipt of the Deficiency List, notify (the “**Additional Items Notice**”) the Contractor and the Independent Certifier of any additional items that in the opinion of the Province are required to be rectified for Construction Completion. The Contractor may, within five Business Days of receipt of the Additional Items Notice, communicate to the Province and the Independent Certifier its opinion on the additional items required to be rectified for Construction Completion. The Independent Certifier will consider the Additional Items Notice and the Contractor’s response thereto and, to the extent that it agrees with the Province, adjust the Deficiency List and its estimate of the cost to achieve Construction Completion accordingly.

Following achievement of Availability, the Contractor shall diligently proceed to Construction Completion. When the Contractor has advised the Province in writing that Construction Completion has been achieved and requested that the Province inspect for Construction Completion, the Province will, within five Business Days after receiving the Contractor’s request, carry out an inspection (which shall be carried out jointly with the Contractor if so requested by the Contractor). Following the inspection the Province will, if all items on the Deficiency List have been rectified, issue a certificate confirming Construction Completion. If the Province is of the view that certain items on the Deficiency List have not been rectified, then the Province will advise the Contractor and the Independent Certifier in writing of those outstanding items. In that case, the Independent Certifier will conduct subsequent inspections and will issue a certificate confirming Construction Completion when the Independent Certifier is satisfied that all items on the Deficiency List have been rectified.

5.16 Construction Completion Holdbacks

If upon Availability the Contractor has not achieved Construction Completion the Contractor shall within 30 days thereafter prepare and deliver to the Province a comprehensive workplan and schedule acceptable to the Province, acting reasonably, designed to achieve Construction Completion within a reasonable time thereafter.

Following delivery and acceptance of such workplan and schedule, the Contractor shall keep the Province fully advised of all activity and progress in carrying out the workplan. If the Contractor fails to deliver an acceptable workplan and schedule within such 30 day period or, having delivered it, fails in any material respect to diligently carry out the workplan in accordance with the schedule, then the Province may hold back from any Payment an amount of up to twice the amount of the Independent Certifier's estimate provided (and if applicable, adjusted) in accordance with Section 5.15 of the cost of achieving Construction Completion. The holdback shall be released to the Contractor, without interest, when Construction Completion is achieved. However, if Construction Completion is not achieved within 60 days after Availability (or such longer period as may be agreed by the Province, acting reasonably, but in any event not exceeding 12 months after Availability), the Province shall request that the Independent Certifier provide an estimate of the cost of achieving Construction Completion based on the work that the Contractor has not completed by the date of such request. The Province may by notice to the Contractor elect to do the remaining work required to achieve Construction Completion and in that event may retain as liquidated damages an amount of up to twice the amount of the Independent Certifier's estimate of the cost to complete the work remaining to be done to achieve Construction Completion and the balance of the holdback shall be released to the Contractor without interest.

5.17 Province Disputes Achievement of Availability Criteria

If the Certificate of Availability has been issued, but the Province considers that the Project has not satisfied the Availability Criteria, the Province may notify the Contractor (which notice must set out the outstanding matters that, in the Province's opinion, must be attended to before the Project will satisfy the Availability Criteria) (the "**Province's Section 5.17 Notice**") and in that event:

- (a) the Province and the Contractor will work cooperatively together to arrive at a mutually agreeable plan for the Contractor to promptly rectify the Province's concerns;
- (b) the difference of opinion and the question of whether and on what date the Project achieved the Availability Criteria shall be resolved pursuant to the Dispute Resolution Procedure;
- (c) if it should be determined pursuant to the Dispute Resolution Procedure that by reason of the concerns identified by the Province in the Province's Section 5.17 Notice the Project had not achieved the Availability Criteria on the date of issuance of the Certificate of Availability, then:
 - (i) the arbitrator making that determination shall determine the date on which the Project achieved the Availability Criteria and award a credit to the Province, to be applied against the Payment next coming due, of amounts, calculated for the period starting from the later of the Availability Target Date and the date of issuance of the Certificate of Availability to the date

that the arbitrator determines that the Project achieved the Availability Criteria, that the Province would not have paid to the Contractor had the Certificate of Availability been issued on the date that the arbitrator determines the Project achieved the Availability Criteria; and

- (ii) the Contractor shall as soon as practicable and at its expense rectify such of the Province's concerns as have not yet been rectified in order to ensure that the Project satisfies the Availability Criteria.

In the event that the Contractor notifies the Province that it disputes the concerns identified by the Province but intends to address such concerns as requested by the Province while reserving the right to dispute such concerns, then the Contractor may thereafter through the Dispute Resolution Procedure seek a determination that the work done by the Contractor in response to the Province's concerns shall be deemed to be work done pursuant to a Change Order Directive.

5.18 Contractor Disputes Notice of Failure to Achieve Availability Criteria

In circumstances where the Independent Certifier has issued a Notice of Failure to Achieve Availability Criteria (as defined in Section 5.14), the Contractor may, if the Contractor considers that the Project satisfied the Availability Criteria on the date of issuance of the Notice of Failure to Achieve Availability Criteria, notify the Province (which notice must reference the outstanding matters listed in the Notice of Failure to Achieve Availability Criteria and set out how the Project satisfies those items) and in that event:

- (a) the Contractor shall as soon as practicable address the matters listed in the Notice of Failure to Achieve Availability Criteria and work to achieve Availability in accordance with the process set out in Sections 5.13 and 5.14;
- (b) the difference of opinion and the question of whether and on what date the Project achieved the Availability Criteria shall be resolved pursuant to the Dispute Resolution Procedure;
- (c) if it should be determined pursuant to the Dispute Resolution Procedure that the Project satisfied the Availability Criteria prior to the date of issuance of the Certificate of Availability, then:
 - (i) the arbitrator making that determination shall determine the date on which the Project achieved the Availability Criteria and award a credit to the Contractor of amounts, calculated for the period starting from the later of the Availability Target Date and the date that the arbitrator determines that the Project achieved the Availability Criteria to the date of issuance of the Certificate of Availability, that the Contractor would have received from the Province in accordance with the terms of this Agreement if the Certificate of Availability had been issued on the date that the arbitrator

determines that the Project had achieved the Availability Criteria, excepting all amounts paid to the Contractor by the Province in respect of the Project subsequent to the issuance of the Certificate of Availability; and

- (ii) the Contractor may seek through the Dispute Resolution Procedure a determination that the work done by the Contractor to address the matters listed in the Notice of Failure to Achieve Availability Criteria shall be deemed to be work done pursuant to a Change Order Directive.

6. OPERATION AND MAINTENANCE

6.1 Commencement of O&M

The Contractor shall perform and carry out the O&M in accordance with the O&M Requirements and in accordance with such of the Contractor's Management Systems and Plans (as amended from time to time as contemplated by Section 5.5) for the Infrastructure from Availability until the end of the Term or the sooner termination of this Agreement in accordance with its provisions.

6.2 O&M Requirements

The O&M Requirements may be modified only by amendment of the O&M Requirements made in accordance with Section 7.2. If the Contractor asserts that any aspect of the O&M Requirements is uncertain or ambiguous, either party may require that the interpretation of that aspect of the O&M Requirements be determined by the Dispute Resolution Procedure. The Province acknowledges that it is responsible for the adequacy and suitability of the O&M Requirements, and shall indemnify the Contractor against any claims by third parties (including the reasonable cost of defending such third party claims, on a solicitor and client basis) for personal injuries or property damage to the extent that the Province has agreed with the Contractor, or a Court has determined, that such injury or damage was caused or contributed to by a failure of the O&M Requirements to be adequate and suitable.

6.3 Contractor Solely Responsible for O&M

Except for the obligations of the Province specifically set out in this Agreement, the Contractor is solely responsible for doing all things of any nature whatsoever required to carry out the O&M and the O&M Requirements, including without limiting the generality of the foregoing:

- (a) all required arrangements, as set out in Schedule 18 (Technical Requirements), relating to the Lessees; and
- (b) complying with all applicable laws.

6.4 Contractor Solely Responsible for O&M Costs

Except as expressly set out in this Agreement, the Contractor is solely responsible for paying all costs, fees and charges of any nature whatsoever required to perform the O&M, excepting only:

- (a) the costs, fees and charges of the Province's own personnel, consultants and professional advisors;
- (b) the costs, fees and charges of any mediation or arbitration pursuant to the Dispute Resolution Procedure, which are specifically provided for in Schedule 6 (Dispute Resolution Procedure);
- (c) any claims by third parties asserting a right to damages as a result of the O&M being carried out as contemplated by and in accordance with this Agreement, to the extent such claims are not founded on any negligent act or omission by the Contractor or any of its subcontractors or a failure by the Contractor to comply with this Agreement. The Province shall indemnify the Contractor against such third party claims set out in the foregoing portion of this clause (c) (including the reasonable cost of defending such third party claims, on a solicitor and client basis); and
- (d) any costs, fees, charges or payments expressly to be made by the Province under the provisions of this Agreement.

7. MODIFICATIONS AND CHANGE ORDERS

7.1 Modification of Project Requirements

If, during the Construction Period, the Province wishes to modify the Project, the Existing Facilities O&M or the Project Requirements, it shall proceed in accordance with Schedule 1 (Change Orders). If the Contractor wishes to recommend modification of the Project, the Existing Facilities O&M or the Project Requirements, it may invite the Province to proceed in accordance with Schedule 1. Upon a Change Order Confirmation or a Change Order Directive being issued by the Province pursuant to Schedule 1 in respect of the Project, the Existing Facilities O&M or the Project Requirements:

- (a) Schedule 18 (Technical Requirements) or any other affected Schedule (other than Schedule 14, which is addressed in (d) below) shall be amended accordingly;
- (b) except as otherwise agreed between the Province and the Contractor (including without limitation any arrangement proposed by the Contractor under clause (c) and agreed to by the Province), the Contractor shall be entitled to payment from the Province on a progress basis, invoiced and paid on a monthly basis, of the

reasonable incremental costs, if any, of carrying out the Project, the Existing Facilities O&M or the Project Requirements, including, if the Change Order will delay Availability, any costs to the Contractor occasioned by the delay in Availability, which payment shall be made following the Availability Target Date for these incurred costs;

- (c) if the Contractor anticipates that the Change Order will delay Availability, but is of the opinion the delay can be avoided or mitigated through extraordinary measures, the Contractor may propose to the Province that such extraordinary measures be taken by the Contractor at the Province's expense; and
- (d) except as otherwise agreed between the Province and the Contractor, if the Change Order will increase or decrease the cost to the Contractor of carrying out the O&M or the O&M Requirements, then the O&M Payments in Schedule 14 (Payment Schedule) shall be adjusted commensurately.

The Province shall not, without the prior consent of the Contractor, pursue any Change Orders that singularly or in the aggregate involve an alteration in the scope of the Project of such magnitude that it could reasonably be expected to materially impact the Project Financing or the Contractor's ability to achieve Availability by the Availability Target Date or otherwise materially and adversely alter the risk profile of the Project (including, without limitation, increased exposure to Payment Adjustments).

7.2 Modification of O&M Requirements

If the Province wishes to modify the O&M or the O&M Requirements, it shall proceed as provided in Schedule 1 (Change Orders). If the Contractor wishes to recommend modification of the O&M or the O&M Requirements, it may invite the Province to proceed under Schedule 1. Upon a Change Order Confirmation or a Change Order Directive being issued by the Province pursuant to Schedule 1 in respect of the O&M or the O&M Requirements:

- (a) Schedule 18 (Technical Requirements) or any other affected Schedule (other than Schedule 14 which is addressed in (b) below) shall be amended accordingly; and
- (b) except as otherwise agreed between the Province and the Contractor, if the Change Order will increase or decrease the cost to the Contractor of carrying out the O&M or the O&M Requirements, then the O&M Payments in Schedule 14 (Payment Schedule) shall thereafter be adjusted commensurately.

The Province shall not, without the prior consent of the Contractor, pursue any Change Orders that singularly or in the aggregate would: (i) effect a reduction in the O&M or the O&M Requirements of such magnitude as could reasonably be expected to materially and adversely affect the Contractor; or (ii) involve an alteration in the scope of the O&M of such magnitude that it could reasonably be expected to materially and adversely alter the risk profile of the O&M (including, without limitation, increased exposure to Payment Adjustments).

7.3 Other Work by Province

The Province shall be at liberty, both during the Construction Period and the Operating Period, to undertake additional improvements or accommodate additional utilities within the Lands and within lands adjacent to the Lands but in that event:

- (a) the Province shall take all commercially reasonable measures to minimize interference with or disruption to the Contractor's carrying out of the Project, the Existing Facilities O&M, the Project Requirements, the O&M and the O&M Requirements; and
- (b) if the activities of the Province or its contractors in carrying out the additional improvements do interfere with or disrupt the Contractor's carrying out of the Project, the Existing Facilities O&M, the Project Requirements, the O&M and the O&M Requirements (including without limitation as a result of damage caused to the Infrastructure or as a result of any defect in the additional improvements), such interference or disruption shall, subject to Section 13.2, constitute a Relief Event under Section 13.2(h).

The Contractor shall provide all reasonable cooperation (but without obligation to incur material expense unless underwritten by the Province) to facilitate the Province's carrying out of the additional improvements or to accommodate the additional utilities.

7.4 Modifications to Infrastructure

The Province shall be at liberty during the Operating Period, to undertake Modifications to the Infrastructure. The Province shall direct only the Contractor to carry out any such Modification pursuant to Schedule 1 (Change Orders). Upon a Change Order Confirmation or a Change Order Directive being issued by the Province pursuant to Schedule 1 in respect of a Modification:

- (a) Schedule 18 (Technical Requirements) or any other affected Schedule (other than Schedule 14 (Payment Schedule) which is addressed in clause (c) below) shall be amended accordingly;
- (b) except as otherwise agreed between the Province and the Contractor, the Contractor shall be entitled to payment from the Province on a progress basis, invoiced and paid on a monthly basis, of the reasonable costs, calculated in accordance with Schedule 1 (Change Orders), of carrying out the Modification; and
- (c) except as otherwise agreed between the Province and the Contractor, if a Modification will increase or decrease the cost to the Contractor of carrying out the O&M or the O&M Requirements, then the O&M Payments in Schedule 14 (Payment Schedule) shall thereafter be adjusted commensurately.

7.5 Determination of Costs

All payments on account of Change Orders under Sections 7.1, 7.2 or 7.4 and adjustments of Schedule 14 (Payment Schedule) shall be calculated in accordance with the provisions of Schedule 1 (Change Orders).

8. HANDBACK UPON EXPIRY

8.1 Handback Requirements

Upon expiry of the Term, the Contractor shall leave the Infrastructure in the condition required by the Handback Requirements.

8.2 Handback Inspections

The Contractor and the Province shall jointly carry out the following handback inspections (consisting of all appropriate examinations and tests, carried out in accordance with all applicable Technical Requirements) in order to assess what work (including renewal work as required) is likely to be required in order to achieve the Handback Requirements:

- (a) the first handback inspection shall take place at a time, specified by the Province following consultation with the Contractor, that is at least 24 months prior to expiry of the Term;
- (b) the second handback inspection shall take place at a time, specified by the Province following consultation with the Contractor, that is at least 6 months and not more than 12 months prior to expiry of the Term; and
- (c) the third handback inspection shall take place at a time, specified by the Province following consultation with the Contractor, that is not more than one month prior to the expiry of the Term.

8.3 Procedure Following Inspections

Following each handback inspection under Section 8.2, the Contractor shall within:

- (a) 60 days of the first handback inspection;
- (b) 30 days of the second handback inspection; and
- (c) 7 days of the third handback inspection,

prepare and deliver to the Province a comprehensive workplan and schedule acceptable to the Province, acting reasonably, designed to ensure that the Infrastructure will meet the Handback Requirements upon expiry of the Term. Following delivery and acceptance of

such workplan and schedule, the Contractor shall keep the Province fully advised of all activity and progress in carrying out the workplan.

8.4 Holdbacks

If the Contractor fails to deliver a workplan and schedule in accordance with Section 8.3 or, having delivered it, fails in any material respect to diligently carry out the workplan in accordance with the schedule, then the Province may hold back (without duplication) from any amounts thereafter becoming payable to the Contractor under this Agreement an aggregate amount (the “**Holdback**”) that the Province, acting reasonably and following consultation with the Contractor and having regard to the amounts of the O&M Payments remaining to be made during the remainder of the Term, considers sufficient to achieve the Handback Requirements at the end of the Term in the event that the Contractor were to fail to do so.

The Holdback shall be released to the Contractor, without interest, as the work to achieve the Handback Requirements is done by the Contractor (but not more frequently than monthly). If the Handback Requirements are not achieved by the expiry of the Term, the Province may release the Contractor from its obligation to achieve the Handback Requirements and in that event may retain the remaining balance of the Holdback as liquidated damages.

8.5 Substitution of Letter of Credit

The Contractor may at any time call for release of the remaining balance of the Holdback upon delivering to the Province an irrevocable, unconditional, on sight letter of credit in the amount of the remaining balance of the Holdback, presentable for payment at a bank in Canada and issued by a bank authorized under the *Bank Act* (Canada) to do business in Canada (or issued by such other financial institution approved in advance for the purposes of this Section by the Province, who may grant or decline such approval in its absolute discretion), and having a senior, unsecured long-term issuer credit rating of not less than A+ (with a stable outlook) or equivalent from one of (and no rating less than A+ (with a stable outlook) or equivalent from any other of) Standard & Poor’s, DBRS (formerly known as Dominion Bond Rating Service) or Fitch Ratings (or any other major credit rating agency approved for the purposes of this Section by the Province, who may grant or decline such approval in its absolute discretion). The Province may present the letter of credit for payment if:

- (a) upon expiry of the Term, the Handback Requirements are not met;
- (b) the letter of credit has an expiry date and the Contractor fails to deliver a renewal letter of credit at least 20 days in advance of the expiry of the letter of credit; or
- (c) any of the senior, unsecured long-term credit ratings of the issuer of the letter of credit becomes less than A+ (with a stable outlook) or equivalent and the Contractor fails to deliver a replacement of the letter of credit no later than 21 days after being so requested by the Province;

and in either case the amount received by the Province upon presentation of the letter of credit shall be dealt with by the Province in the same manner as the Holdback under Section 8.4.

Subject to Section 8.4, as the work referenced in the second paragraph of Section 8.4 is done by the Contractor, the Province shall permit (but not more frequently than monthly), on written application by the Contractor, a corresponding reduction in the amount of the letter of credit.

8.6 Disagreements

If the Contractor disputes the appropriateness of the amount of the Holdback or disagrees with the Province's assessment of whether any of the Handback Requirements have been achieved, the Contractor may refer the matter to the Dispute Resolution Procedure.

9. PAYMENT

9.1 Payment of Provincial Funding

The Province will make payment of the Progress Payments to the Contractor at the times and in the amounts and subject to the conditions specified in Schedule 9 (Provincial Funding Progress Payments).

9.2 Payment Mechanism

Apart from the Progress Payments, payments by the Province to the Contractor under this Agreement shall be in the form of a single monthly payment (the "**Payment**") comprised of the amounts described below in clauses (a) and (b) less the amounts described below in clauses (c), (d) and (e):

- (a) the amount of the Capital Payment as set out in Schedule 14 (Payment Schedule) as amended and adjusted under Sections 9.4 through 9.6, as applicable; plus
- (b) the amount of the O&M Payment as set out in Schedule 14 (Payment Schedule) as amended and adjusted:
 - (i) under Sections 9.4 through 9.6, as applicable; and
 - (ii) from time to time in accordance with the Index Factor, in accordance with Section 10.1;

less:

- (c) the amount of any holdback made by the Province in accordance with Section 5.16 or Section 8.4;

- (d) the amount of any Payment Adjustments made by the Province in accordance with Section 10.2; and
- (e) any amount set off by the Province in accordance with Section 9.8.

In the event that the above calculation produces a negative amount for any month, such amount may be set off by the Province against the Payment for the next following month (or, if necessary, months).

The Province's obligation to make the Payment each month until expiry of the Term (or earlier termination of this Agreement in accordance with its provisions) shall not be interrupted, abated or adjusted except as expressly set out in this Agreement.

9.3 Payment Procedure

The first Payment shall be on the first Business Day of the month following the month in which Availability is achieved, and each subsequent Payment shall be made by the Province on the first Business Day of each month thereafter. The Contractor shall, at least five Business Days prior to the first Business Day of each month, submit in the form specified by Schedule 14 (Payment Schedule), details of the Contractor's proposed calculation of the Payment next falling due, including details of all applicable Payment Adjustments and having regard to the categories enumerated in Section 9.2. The Province shall, on or before making each Payment, provide to the Contractor in the form specified by Schedule 14, the Province's calculation (similarly enumerated by category) of that Payment. In the event that the Contractor disputes the amount of any Payment made by the Province, the Contractor shall bring such dispute to the attention of the Province within 90 days after the date the Payment is received.

9.4 Adjustment of the Payment Schedule

The Payment Schedule is premised upon Availability being achieved on the Availability Target Date. Upon Availability, the Payment Schedule shall be proportionately adjusted and amended so that:

- (a) the first Payment (that is, both the Capital Payment and the O&M Payment) is for the number of days, from and including the day Availability is achieved, remaining in that month and the final payment (that is, both the Capital Payment and the O&M Payment) is for the number of days, from and including the first day of the month in which the Term expires to and including the date the Term expires; and
- (b) the timing of all other Payments, and the amount of the final Payment, are adjusted accordingly.

9.5 Early Completion

In the event that Availability is achieved prior to the Availability Target Date, then:

- (a) the Term shall expire 10 years from the day Availability is achieved, that is, the Operating Period shall be 10 years; and
- (b) the Payment Schedule shall be adjusted and amended accordingly.

9.6 Late Completion

In the event that Availability is not achieved until after the Availability Target Date, then:

- (a) the Term shall expire 10 years from the Availability Target Date, that is, so that the Operating Period is less than 10 years; and
- (b) Schedule 14 (Payment Schedule) shall not be adjusted or amended, except that:
 - (i) the Contractor is not entitled to any payment for any month prior to the month in which Availability is achieved but subject to the provisions of Sections 7.1(b), 11.6(d), 12.1(d), and 13.3(d); and
 - (ii) the Contractor is entitled to payment for the month in which Availability is achieved, based on the number of days from and including the day Availability is achieved until the end of that month;

it being the mutual intent of the parties that in such event, both the Operating Period and the aggregate amounts of Capital Payments and O&M Payments payable over the Term shall be reduced in accordance with the foregoing.

9.7 No GST

The Province represents and warrants that it is not, and will not become, obligated to pay the goods and services tax or a harmonized sales tax (“**GST**”) under Part IX of the *Excise Tax Act* (Canada), and that its GST registration number is 124072513RT0001, and as a result no amount payable by the Province under this Agreement is subject to GST.

In the event that the Province is or becomes obligated, in connection with this Agreement and in respect of any period during the Construction Period or the Term, to collect from the Contractor and remit any amounts in respect of GST or any successor goods and services tax or harmonized sales tax pursuant to Part IX of the *Excise Tax Act* (Canada) or any successor legislation, then the Contractor shall pay such amounts to the Province within 30 days of receipt by the Contractor of an invoice for such amounts containing the information required by the applicable legislation. The Contractor acknowledges and agrees that any amounts paid by the Contractor to the Province pursuant to this

Agreement (including payments in kind in the form of property or services) are exclusive of GST.

9.8 Set-off

The Province is entitled to set off against any Payment or any Progress Payment only an amount:

- (a) finally determined (that is, no longer subject to the Dispute Resolution Procedure) to be payable by the Contractor to the Province under this Agreement; or
- (b) paid by the Province under and in accordance with any statute in respect of any lien or claim arising from any act or omission of the Contractor, or those for whom it is legally responsible, in relation to the Project, the Existing Facilities O&M or the O&M.

The Province, upon becoming aware that it is or may become obligated to pay and before paying an amount contemplated by clause (b) such that a right of set-off may arise under clause (b), shall give the Contractor such advance notice as may be practicable in the circumstances (without exposing the Province to any risk of being obliged to pay the same amount twice), with a view to affording the Contractor an opportunity to dispute (provided the Province is satisfied the dispute is bona fide), or make arrangements to remove or eliminate, the lien or claim.

9.9 Interest on Overdue Payments

Any amount payable under this Agreement and not paid when it becomes due shall bear interest at Prime plus 2%, without compounding, from the due date of the amount payable until the date (or dates) of payment. Where pursuant to the Dispute Resolution Procedure a disputed amount is determined to have been payable, then subject to any contrary determination pursuant to the Dispute Resolution Procedure, interest at Prime plus 2%, without compounding, shall be payable from the date when such amount ought to have been paid until the date (or dates) of payment.

10. INDEXING AND PAYMENT ADJUSTMENTS

10.1 Indexing of O&M Payment

The O&M Payment component of the Payment (but not the Capital Payment component of the Payment) is subject to annual indexing for inflation in the manner and at the times set out in Schedule 10 (Index Factor).

10.2 Payment Adjustments

The Payment and the Progress Payments are subject to Payment Adjustments on the basis

set out in Schedule 18 (Technical Requirements) and as summarized in Schedule 15 (Payment Adjustments Summary), applied at the times and in the manner set out in Schedule 18. In the event of any inconsistency between the criteria for and descriptions of the Payment Adjustments set out in Schedule 18 and the summaries of such criteria and such descriptions included in Schedule 15, the more detailed provisions of Schedule 18 shall govern. All Payment Adjustments shall be subject to annual indexing for inflation in the manner and at the times set out in Schedule 10 (Index Factor).

10.3 Notification of Payment Adjustments

Each of the Contractor and the Province shall notify the other in a timely manner upon becoming aware of circumstances that give rise to a Payment Adjustment. Failure by either party to give such notice in a timely manner shall not in any event disqualify the Province from claiming the Payment Adjustment, but either party may assert against the other a claim for any damages resulting from the failure to give notice in a timely manner.

10.4 Replacement of Subcontractor

The Province acknowledges that where it becomes necessary for the Contractor to replace the subcontractor performing the O&M (the “**O&M Subcontractor**”), a replacement O&M Subcontractor can most efficiently be procured only if the consequences of future Payment Adjustments are “reset” to zero. Accordingly, where the O&M Subcontractor is replaced by the Contractor, then provided that:

- (a) the replacement O&M Subcontractor is at arm’s length from the replaced O&M Subcontractor; and
- (b) the O&M Subcontractor has not previously been replaced more than once in the immediately preceding five year period;

the first circumstance thereafter giving rise to a Payment Adjustment shall be deemed to be the first Payment Adjustment under this Agreement. Nothing in this Section shall operate to relieve the Contractor against any Payment Adjustments arising prior to the replacement of the O&M Subcontractor.

11. INSURANCE, DAMAGE AND DESTRUCTION

11.1 Insurance Requirements

The Contractor shall:

- (a) maintain in place all of the insurance specified in section 3.1 of Schedule 11 (Insurance Requirements); and

(b) require and ensure that its subcontractors maintain and provide evidence as reasonably requested by the Province of the insurance required in section 4.1 of Schedule 11, as applicable.

11.2 Other Requirements

All insurance required under Section 11.1:

- (a) shall be primary and shall not require the pro rata sharing of any loss by any insurer of the Province; and
- (b) shall be endorsed to provide the Province with 30 days advance written notice of:
 - (i) material change restricting coverage (with the exception of the automobile insurance coverage required under sections 3.1(f) and 4.1(a) of Schedule 11 (Insurance Requirements)); or
 - (ii) cancellation.

11.3 Intentionally Deleted

11.4 Evidence of Insurance

The Contractor shall deliver or cause to be delivered to the Province:

- (a) in relation to the insurance required for the Construction Period, evidence satisfactory to the Province acting reasonably (which evidence may include but not be limited to detailed insurance cover notes and detailed certificates of insurance and written confirmation from the Contractor's insurance broker that all insurance required by this Section 11 is in effect and complies with each of the insurance requirements in Section 11 and Schedule 11) of all insurance policies required to be obtained and maintained by the Contractor, the subcontractors identified in Schedule 17 (Subcontractors), and those other subcontractors identified by notice from the Province by this Section 11 at least 5 days prior to the Contractor making any entry upon the Lands for the purpose of commencing construction. The Contractor shall deliver or cause to be delivered to the Province certified copies of all insurance policies evidencing the insurance required to be obtained and maintained by the Contractor, the subcontractors identified in Schedule 17 (Subcontractors), and those other subcontractors identified by notice from the Province for the Construction Period by this Section 11 as soon as reasonably practicable, and in any event within 30 days after Execution of this Agreement; and
- (b) in relation to the insurance required for the Operating Period, certified copies of all insurance policies evidencing the insurance required to be obtained and maintained by the Contractor, the subcontractors identified in Schedule 17

(Subcontractors), and those other subcontractors identified by notice from the Province by this Section 11 prior to and as a precondition to Availability;

and shall provide or cause to be provided, not less than 10 days prior to expiration of any then current policy documentation evidencing to the satisfaction of the Province (acting reasonably) the renewal, extension or replacement of such insurance and as soon as reasonably practicable, and in any event within 30 days after expiration of any then current policy, certified copies of policies evidencing to the satisfaction of the Province (acting reasonably) the renewal, extension or replacement of such insurance. Delivery to and examination by the Province of any policy of insurance or certificate or other form of documentation evidencing such insurance shall not relieve the Contractor of any of its obligations pursuant to the provisions of this Section 11 and shall not operate as a waiver by the Province of any rights.

11.5 Province May Insure

If the Contractor at any time fails to furnish the Province with evidence of all required insurance in the manner specified by Section 11.4, or if subsequent to providing evidence of all required insurance the Contractor's insurance is subject to a material change restricting coverage or is cancelled, the Province may upon five Business Days' notice to the Contractor, obtain the required insurance not so evidenced or so restricted or cancelled, and may set off the cost of the insurance so obtained against any amount payable to the Contractor under this Agreement.

11.6 Repair of Damage - Construction Period

The Contractor shall repair all damage to the Existing Facilities and to the Infrastructure during the Construction Period, of whatever nature and however caused, excepting only: damage caused by a Force Majeure Event (in which case Sections 12.1 and 12.3 apply); Environmental Damage or Degradation described in Section 4.7(e)(i) or (ii) (in which case Section 4.7(e) applies); or damage caused by the Province or its agents or contractors or subcontractors (except the Contractor and its subcontractors), those for whom the Province is legally responsible or caused by any person exercising rights under an Identified Encumbrance, a grant contemplated by the third paragraph of Section 4.1, Future Utilities (as defined in Section 4.6), or a consent contemplated by the last sentence of Section 4.12. If damage to the Infrastructure or to the Existing Facilities during the Construction Period causes Availability to be delayed beyond the Availability Target Date, then if:

- (a) the damage was not caused by the Contractor or its agents or subcontractors or others for whom the Contractor is legally responsible;
- (b) the Contractor takes all reasonable action to diligently repair the damage and mitigate the delay; and
- (c) the Contractor maintained any insurance required by Section 11.1 that is relevant

to the damage;

the Contractor's Construction Schedule and the dates in Sections 5.11 and clauses (g), (h) and (i) of Section 16.8 shall be adjusted commensurately to the period during which the Contractor is taking all reasonable action to diligently repair the damage and mitigate the delay, and the Province will, to the extent the damages occasioned to the Contractor by the delay is not insured against, compensate the Contractor for the damages occasioned by Availability being delayed beyond the Availability Target Date, in which event:

- (d) the Availability Target Date shall not be adjusted, but the Province shall upon Availability pay to the Contractor its damages resulting from Availability being delayed beyond the Availability Target Date (and shall, from and after the Availability Target Date, make advance payment to the Contractor on account of such damages, to the extent such damages can reasonably be determined prior to Availability, it being mutually anticipated by the parties that such damages and such advance payment will include at least an amount equal to each Capital Payment that would have been payable had Availability been achieved). Notwithstanding that advance payment to the Contractor of such damages will not start until the Availability Target Date, if prior to the Availability Target Date the Contractor incurs direct out of pocket expenditures as part of such damages and such out of pocket expenditures cannot reasonably be financed until the Availability Target Date by the Project Financing, then the Province shall make advance payment to the Contractor on account of such out of pocket expenditures as soon as reasonably practicable following notification by the Contractor to the Province that such out of pocket expenditures have been incurred by the Contractor.

11.7 Repair of Damage - Operating Period

The Contractor shall repair all damage to the Infrastructure during the Operating Period, of whatever nature and however caused, excepting only:

- (a) damage caused by risks that are Primary Exclusions (as defined in section 3.1(j) of Schedule 11 (Insurance Requirements));
- (b) damage caused by Force Majeure Events (in which case Sections 12.2 and 12.3 apply); and
- (c) damage which is expressly, specifically, and in accordance with section 3.1(j) of Schedule 11, excluded from coverage in the property insurance policy the Contractor is required to maintain pursuant to section 3.1(j) of Schedule 11 and which is caused directly by the Province or its agents or contractors or subcontractors (except the Contractor or its subcontractors), those for whom the Province is legally responsible, or caused by any other person exercising rights under an Identified Encumbrance, a grant contemplated by the third paragraph of Section 4.1, Future Utilities (as

defined in Section 4.6), or a consent contemplated by the last sentence of Section 4.12.

In the case of insured damage caused directly by the Province or its agents or contractors or subcontractors (except the Contractor or its subcontractors) or those for whom the Province is legally responsible, the Province will, provided that the Contractor has made a claim under the Contractor's property insurance required under Schedule 11 (Insurance Requirements) and the amount of the property damage claim accepted by the insurer exceeds \$25,000 (subject to annual indexing for inflation in the manner and at the times set out in Schedule 10 (Index Factor)), pay the Contractor the lesser of \$25,000 (subject to annual indexing for inflation in the manner and at the times set out in Schedule 10 (Index Factor)) and the actual deductible applicable to the claim pursuant to the Contractor's property insurance.

All proceeds from the Contractor's property insurance required under Schedule 11 (Insurance Requirements), except for the proceeds of any business interruption insurance or similar insurance protecting against lost revenues that the Contractor may choose to carry and that may be associated with the Contractor's property insurance required under Schedule 11, in respect of any damage to the Infrastructure must be applied by the Contractor to repair, reinstate and replace each part or parts of the Infrastructure in respect of which the proceeds are payable.

Upon the occurrence of damage contemplated under (a) to (c) of the first paragraph of this Section 11.7 ("**Damage Event**"), the Province is obligated to repair the damage, and to that end the Province shall direct the Contractor to repair the damage, and the Contractor shall repair the damage and invoice the Province the amount to which the Contractor would be entitled if the work were a Change Order Directive governed by Schedule 1 (Change Orders), provided that if the Province anticipates that the cost of repairs necessitated by a particular Damage Event will exceed \$30,000, the Province may instead tender the repair work, in which case:

(d) the Province shall ensure that the person contracted to repair the damage takes all commercially reasonable measures to minimize interference with or disruption to the Contractor's carrying out of the O&M or the O&M Requirements; and if the repair work causes damage to the Lands or any other part of the Infrastructure or if the repair work interferes with or disrupts the Contractor's carrying out of the O&M or the O&M Requirements, such interference or disruption shall, subject to Section 13.2, constitute a Relief Event under Section 13.2(h);

(e) for all purposes related to the Handback Requirements, the Contractor shall not be obligated to make good any deficiency or defect in the repair work; and

(f) if the repair work materially and adversely alters the risk profile of the O&M (including, without limitation, increased exposure to Payment Adjustments) or materially and adversely alters the risk profile of the Handback Requirements as applied to the repair work, the Contractor is entitled to reasonable compensation

(on an ongoing basis) therefor from the Province. For greater clarity, if the repair work by others results in changes to the O&M, then Section 7.2 (Modifications of O&M Requirements) shall apply.

11.8 Review and Benchmarking of Insurance

At any time during the Operating Period but not more frequently than annually, at the request of either the Contractor or the Province, the Contractor and the Province shall jointly review Schedule 11 (Insurance Requirements), and shall:

- (a) amend that Schedule as necessary to maintain reasonably appropriate coverage in light of any changes in applicable industry standards since the date of Execution of this Agreement or the date of the last review, as the case may be; and
- (b) adjust, upwards or downwards, the O&M Payments coming due from and after the first anniversary of the Execution of this Agreement to follow the review so as to reflect generally applicable changes to insurance premiums payable by water/wastewater treatment facility operators in Alberta (having regard to any changes in coverage arising under clause (a) and otherwise having regard only to the insurance required by section 3.1 (g), (h), (i) and (j) of Schedule 11 and not to any other insurance required by Schedule 11 or any additional insurance the Contractor chooses to carry), determined as of such anniversary on the basis of industry standard insurance premiums for services in Alberta approximating the O&M Requirements (the “**Benchmark Insurance Premium**”), which adjustment shall be calculated in accordance with cost increases indicated by the Benchmark Insurance Premium but subject to the following:
 - (i) the calculation shall take into account the application of the indexing factor in Section 10.1, so as to avoid double-counting; and
 - (ii) no upwards adjustment shall exceed the increase in the Contractor's actual cost of the insurance required by section 3.1 (g), (h), (i) and (j) of Schedule 11.

In the event of disagreement regarding currently applicable industry standards or the insurance coverage appropriate in light of those standards, or the calculation or application of the Benchmark Insurance Premium, either party may refer the matter to the Dispute Resolution Procedure.

11.9 Uninsurability

Notwithstanding Section 11.1(a), the Contractor shall not be obligated during the Operating Period to maintain insurance against a risk that has become uninsurable. A risk shall be considered to have become uninsurable only if:

- (a) insurance against that risk is generally not available to Canadian water/wastewater

treatment facility operators with reputable insurers in good standing; or

- (b) the terms and conditions generally required by insurers for insuring such risk are such that the risk is generally not being insured against by Canadian water/wastewater treatment facility operators;

and shall only be considered an uninsurable risk during such period when the Contractor has not obtained insurance against the risk. Upon the Contractor becoming aware of an uninsurable risk, the Contractor shall in a timely manner give the Province notice of the uninsurable risk, including any details as may be reasonably requested by the Province.

For so long as a risk is uninsurable, the O&M Payment shall abate by the amount of any reduction in the insurance premiums paid by the Contractor (or that would have been paid by the Contractor had the Contractor obtained insurance in accordance with Schedule 11) as a result of no longer being required to insure against such risk.

In the event that, subsequent to the date of the Contractor's Proposal, a risk becomes an uninsurable risk, and if the Contractor would have been required under Section 11.1(a) to insure against that risk but for the risk having become an uninsurable risk during the Operating Period, and if a loss occurs in respect of that risk, then the Province shall, at its option and upon notice to the Contractor, either:

- (c) assume responsibility for the loss, to the extent of the insurance proceeds that would have been payable if the insurance specified in sections 3.1(g), (h), (i) or (j) of Schedule 11 had been available to and was obtained by the Contractor (having regard to the coverage limits specified in sections 3.1(g), (h), (i) and (j) of Schedule 11 and any applicable deductibles) and in the event that the loss includes damage to the Infrastructure, then the Contractor shall proceed as if the repairs necessitated by the loss were requested by the Province pursuant to a Change Order Directive under Schedule 1 (Change Orders); or
- (d) declare a Force Majeure Termination, pay the Termination Payment required by Section 18.5 and, if applicable, assume responsibility for the loss arising from the occurrence to the extent of the insurance proceeds that would have been payable if the insurance specified in sections 3.1(g), (h), (i) or (j) of Schedule 11 had been available to and was obtained by the Contractor (having regard to the coverage limits specified in sections 3.1(g), (h), (i) and (j) of Schedule 11 and any applicable deductibles);

provided that the Province shall not declare a Force Majeure Termination under clause (d) unless:

- (e) the Province has incurred a liability under this Section 11.9 of at least \$5,000,000 in any calendar year or at least \$10,000,000 in aggregate at any time during the Operating Period; and

- (f) the Province has first afforded the Contractor a reasonable opportunity to meet with the Province to discuss alternative ways to address risks that have become uninsurable.

12. FORCE MAJEURE

12.1 Force Majeure During Construction Period

If a Force Majeure Event occurs during the Construction Period, then notwithstanding any other provision of this Agreement:

- (a) to the extent that and for so long as either party is prevented by the Force Majeure Event from performing any obligation under this Agreement, that party is relieved from any liability or consequence under this Agreement (including Payment Adjustments) arising from its inability to perform or delay in performing that obligation;
- (b) if the Force Majeure Event wholly or substantially prevents the Contractor from proceeding with the Project for a period of at least twenty-one days, then the Contractor's Construction Schedule and the dates in Section 5.11 and clauses (g), (h) and (i) of Section 16.8 shall be adjusted commensurately to the period during which the Contractor is prevented by the Force Majeure Event from proceeding with the Project;
- (c) no non-performance of any obligation under this Agreement shall give rise to a Termination Event, to the extent that and for so long as performance of the obligation is prevented by the Force Majeure Event;
- (d) the Availability Target Date shall not be adjusted, but if by reason of the Force Majeure Event, Availability is delayed until beyond the Availability Target Date, then the Province shall upon Availability pay to the Contractor its damages resulting from Availability being delayed beyond the Availability Target Date by the Force Majeure Event (and shall, from and after the Availability Target Date, make advance payment to the Contractor on account of such damages, to the extent such damages can reasonably be determined prior to Availability, it being mutually anticipated by the parties that such damages and such advance payment will include at least an amount equal to each Capital Payment that would have been payable had Availability been achieved), subject to the Contractor's obligation to take reasonable steps to mitigate the delay and to mitigate its damages. Notwithstanding that advance payment to the Contractor of such damages will not start until the Availability Target Date, if prior to the Availability Target Date the Contractor incurs direct out of pocket expenditures as part of such damages and such out of pocket expenditures cannot reasonably be financed until the Availability Target Date by the Project Financing, then the Province shall make advance payment to the Contractor on account of such out of

- pocket expenditures as soon as reasonably practicable following notification by the Contractor to the Province that such out of pocket expenditures have been incurred by the Contractor;
- (e) no damages are payable under clause (d) to the extent that the damages are covered (or would have been covered but for the Contractor's failure to comply with Section 11) by insurance maintained by or for the benefit of the Contractor;
 - (f) if one or more Force Majeure Events results in the Contractor being wholly or substantially prevented from proceeding with the Project for an aggregate period of at least 120 days, then the Payment Schedule shall be adjusted and amended by postponing all Renewal Payments by:
 - (i) one year, if the aggregate period is up to and including 240 days; and
 - (ii) two years, if the aggregate period is over 240 days;

provided that in no event shall Renewal Payments be postponed beyond the end of the Term; and
 - (g) if the Contractor anticipates that the Force Majeure Event will delay Availability, but is of the opinion the delay can be avoided or mitigated through extraordinary measures, the Contractor may propose to the Province that such extraordinary measures be taken by the Contractor at the Province's expense.

12.2 Force Majeure During Operating Period

If a Force Majeure Event occurs during the Operating Period, then notwithstanding any other provision of this Agreement:

- (a) to the extent that and for so long as either party is prevented by the Force Majeure Event from performing any obligation under this Agreement, that party is relieved from any liability or consequence under this Agreement arising from its inability to perform or delay in performing that obligation;
- (b) no Payment Adjustment shall be applicable, to the extent that and for so long as the relevant performance was prevented by the Force Majeure Event;
- (c) no non-performance of any obligation under this Agreement shall give rise to a Termination Event, to the extent that and for so long as performance of the obligation is prevented by the Force Majeure Event; and
- (d) if and for so long as all or any portion of the Infrastructure is inoperable as a result of the Force Majeure Event, then the O&M Payment, exclusive of the Renewal Payment, shall abate proportionately during the period of closure due to the Force Majeure Event, and in that event:

- (i) subject to subclause (ii), the proportionate abatement shall be based on the portion of the Infrastructure that is not operable; and
- (ii) if the Contractor demonstrates to the satisfaction of the Province, acting reasonably, that the actual reduction in the Contractor's costs of performing the O&M is other than in proportion to the portion of the Infrastructure rendered inoperable, then the proportionate abatement shall be the actual reduction in costs as demonstrated by the Contractor to the satisfaction of the Province, acting reasonably.

12.3 Procedure on Force Majeure Event

Upon either party becoming aware of the occurrence of a Force Majeure Event that may prevent that party from performing any obligation under this Agreement, that party shall in a timely manner give the other party notice of the Force Majeure Event, including reasonable details of the anticipated effect of the Force Majeure Event upon performance of this Agreement, and thereafter the parties shall on an ongoing basis consult with each other with a view to remedying or mitigating the Force Majeure Event and, if applicable, rebuilding the Infrastructure or otherwise addressing the consequences of the Force Majeure Event.

Except to the extent that damage caused to the Infrastructure by a Force Majeure Event is insured against or required to be insured against by the Contractor, the Province shall be responsible for repairing the damage, provided that:

- (a) the Province may in its discretion, having regard to the nature and extent of the damage and acting reasonably, decline to repair the damage and upon such decision being taken shall promptly notify the Contractor; and
- (b) if the Province, pursuant to clause (a), declines to repair the damage, that shall, subject to Section 13.2, constitute a Relief Event under Section 13.2(o) (but without prejudice to any termination right arising under Section 17.3).

13. RELIEF EVENTS

13.1 Definitions

In Section 13.2, the following expressions have the following meanings:

- (a) “**Designated Change in Law**” means the following and no other changes in any applicable statute, regulation or other subordinate legislation or other law (whether federal, provincial or municipal, and including common law), including any change in binding judicial interpretation of any applicable law:

- (i) a change directed specifically at the water/wastewater facilities construction or maintenance/operation industries in Alberta or Canada or directed specifically at the Contractor, the Project, the Existing Facilities O&M, the O&M, the Existing Facilities, the Infrastructure or public-private arrangements of the nature of this Agreement;
 - (ii) a change of a standard incorporated by reference in the Technical Requirements, or any other change that is tantamount to a modification of the Technical Requirements;
 - (iii) changes in applicable laws enacted by the Province in relation to environmental approvals required or not required, as the case may be, for the Project, the Existing Facilities O&M, or the O&M, including related administrative practices and policies pursuant to such laws that are material to the requirement or absence thereof to obtain environmental approvals for the Project, the Existing Facilities O&M, or the O&M; or
 - (iv) the enactment of a general consumer goods and services sales tax in Alberta which is applied to any good or service ultimately consumed, used or supplied, or to be ultimately consumed, used or supplied, by the Contractor in the course of carrying out the Project, the Existing Facilities O&M, or O&M, to the extent that the Contractor is unable to recover or be credited with input tax credits, refunds, rebates or exemptions for taxes payable by the Contractor under such sales tax; and
- (b) “**Heritage Find**” means property of archaeological, palaeontological or heritage significance or historical resources located in, under or on the Lands.

13.2 Relief Event Defined

In this Agreement, “**Relief Event**” means any of the following events that prevents, delays, interrupts or renders more expensive to the Contractor the performance of any obligation of the Contractor under this Agreement:

- (a) breach of any provision of this Agreement by the Province;
- (b) in the circumstances specified in Section 5.10, a stop work order issued by the Province;
- (c) a Designated Change in Law coming into effect after submission of the Contractor’s Proposal;
- (d) any Environmental Damage or Degradation in, on under or around the Lands that was unknown to the Contractor at the time of submission of the Contractor’s Proposal or was subsequently caused by parties other than the Contractor or its agents or subcontractors or those for whom the Contractor is legally responsible;

- (e) the presence in, under or on the Lands, of Heritage Finds, which presence was unknown to the Contractor at the time of submission of the Contractor's Proposal;
- (f) an order granted by a Court directly resulting from:
 - (i) a challenge to the selection process under which the Contractor was awarded the opportunity to enter into this Agreement;
 - (ii) a third party claim of an interest in the Lands or a portion thereof;
 - (iii) any other proceeding brought against the Province or to which the Province is a party;
 - (iv) any proceeding brought against the Contractor or its principal subcontractor engaged to construct the Project identified in Schedule 17 (Subcontractors), provided the proceeding relates to the nature of the Project and not to any wrongful or negligent act of the Contractor or such subcontractor or those for whom either of them is legally responsible;
- (g) a general strike or other labour disruption in Alberta that is applicable broadly to the water/wastewater facilities construction or maintenance/operation industries in Alberta or is directed at the Province;
- (h) in the circumstances specified in Section 7.3(b), interference with or disruption of the Contractor's carrying out of the Project, the Existing Facilities O&M, the O&M, the Project Requirements, or the O&M Requirements; and in the circumstances specified in Section 11.7(d), interference with or disruption of the Contractor's carrying out of the O&M or the O&M Requirements;
- (i) any interference with the Project, the Existing Facilities O&M, or the O&M by persons claiming aboriginal title or treaty rights in respect of all or any part of the Lands;
- (j) in the circumstances specified in Section 16.6(f), any Remedial Action (as defined in Section 16.6) taken by the Province;
- (k) if, above and beyond the reasonable cooperation required of the Contractor by Section 4.6 in relation to the "Future Utilities" described therein and despite the Contractor taking all commercially reasonable measures to mitigate any delay or inconvenience arising from its obligation to accommodate Future Utilities, the Contractor's activities in carrying out the Project, the Existing Facilities O&M, or the O&M are unreasonably delayed or interfered with as a result of Future Utilities;
- (l) if, despite the Contractor taking all commercially reasonable measures to mitigate

- any cost, delay or inconvenience (including providing the Province with timely notice of the cost, delay or inconvenience encountered), the Contractor incurs increased costs, or the Contractor's activities in carrying out the Project, the Existing Facilities O&M, or the O&M are delayed or prevented as a result of any encumbrances, other than Identified Encumbrances, that pertain to the Lands;
- (m) protest actions by persons protesting the construction of the Project or any other protest action on the Lands;
 - (n) the presence on or around the Lands of animal or plant species protected by applicable environmental laws, which presence was unknown to the Contractor at the time of submission of the Contractor's Proposal;
 - (o) in the circumstances specified in Section 12.3, a failure by the Province to repair, within a timeframe that is reasonable having regard to the circumstances, damage caused by a Force Majeure Event;
 - (p) any environmental assessment process or environmental impact assessment report directed under sections 44 or 47 of the *Environmental Protection and Enhancement Act* (Alberta) (as may be amended, supplemented, or replaced from time to time), except where such direction arises as a result of activities or actions (whether planned or actually carried out) by the Contractor (or those for whom it is in law responsible) in circumstances where:
 - (i) it was reasonably foreseeable that such activities or actions could lead to such assessment process or report being directed; and
 - (ii) having regard to the Contractor's Designs generally, the Contractor could reasonably have carried out the Project without such activities or actions;
 - (q) a change in the CDWQG (as defined in Schedule 18) after submission of the Contractor's Proposal that was not reasonably anticipated at the time of submission of the Contractor's Proposal and that the Contractor is required to comply with pursuant to this Agreement;
 - (r) if the Contractor has not obtained permission from a Lessee for access to the Lessee's premises necessary to carry out the Project, the Existing Facilities O&M, or the O&M within 15 days after having taken all reasonable steps for obtaining such permission, provided the Contractor has, immediately upon encountering any difficulties in obtaining permission, requested the assistance of the Province under Section 15.4 in relation to the permission;
 - (s) the cancellation or suspension of the Alberta Environment filtration exemption for the PWTP (as defined in Schedule 18) the details of which exemption are set out in the letter dated September 3, 2010 from Alberta Environment to Alberta Infrastructure (a copy of which letter the Contractor hereby acknowledges as

- having received);
- (t) the willful or accidental discrete addition of contaminants to the Raw Water (as defined in Schedule 18) or the influent wastewater, by any person (other than the Contractor, its employees, agents, or subcontractors or those for whom the Contractor is legally responsible) such that the condition of the Raw Water or influent wastewater creates a serious and imminent threat of damage to the PWTP (as defined in Schedule 18) or the WWTP (as defined in Schedule 18) or would render the continued supply of Treated Water (as defined in Schedule 18) or the continued discharge of Treated Wastewater (as defined in Schedule 18) a threat to the public health, the public interest or the environment, provided any such condition is not in respect of the general deterioration of the quality of the Raw Water or general deterioration of the quality of the influent wastewater;
 - (u) an amendment or replacement of the Alberta Environment license for the WWTP (as defined in Schedule 18) required as a direct result of a sustained increase in the influent wastewater flows or loads set out in Table 4.6.1.5 in Schedule 18;
 - (v) any failure of the Treated Wastewater (as defined in Schedule 18) to meet the quality parameters set out in Table 5.6.2.5 in Schedule 18 or any violation or contravention of the requirements of the Infrastructure Licenses (as defined in Schedule 18) for the WWTP (as defined in Schedule 18) caused as a direct result of influent wastewater arriving at the WWTP in a Septic Condition (where "**Septic Condition**" means wastewater with an oxidation-reduction potential of less than - 150 mV caused by the retention of wastewater for an extended period in the absence of oxygen) that inhibits the normal operation of the WWTP, provided that the Septic Condition has not been caused by an Infrastructure Performance Failure (as defined in Schedule 18) or otherwise caused by the Contractor, its employees, agents, or subcontractors or those for whom the Contractor is legally responsible, and provided that the Contractor provides to the Province WWTP monitoring data (as set out in Section 5.6.2.7 in Schedule 18) and sampling and analysis data which demonstrates to the satisfaction of the Province, acting reasonably, the presence of septicity in the influent wastewater and the impact of septicity on the normal operation of the WWTP or the Treated Wastewater quality;
 - (w) the breach by a party (other than the Province) of its obligations under a Utility Agreement to which the Contractor is not a party due to Section 4.6(c) being applicable; or
 - (x) any failure of the Treated Water (as defined in Schedule 18) to meet the potable water quantity and fire flow requirements for the PWTP (as defined in Schedule 18) set out in Tables 4.5.2.1.B and 4.5.2.1.C in Schedule 18 caused as a direct result of inadequate capacity of the two existing raw water wells located adjacent to the existing Evan-Thomas water treatment plant to provide Raw Water (as defined in Schedule 18) pursuant to the Alberta Environment Licence

to Divert and Use Water No. 11148 that inhibits the normal operation of the PWTP, provided that the inadequate capacity of the two existing raw water wells to provide Raw Water has not been caused by an Infrastructure Performance Failure (as defined in Schedule 18) or otherwise caused by the Contractor, its employees, agents, or subcontractors or those for whom the Contractor is legally responsible, and provided that the Contractor provides to the Province PWTP monitoring data (as set out in Section 5.6.2.2.1 in Schedule 18) which demonstrates to the satisfaction of the Province, acting reasonably, the inadequacy of Raw Water volume input to the PWTP,

but excluding in any case any event to the extent caused by the negligence or unlawful act of the Contractor (or those for whom it is in law responsible) or any act or omission of the Contractor in breach of the provisions of this Agreement.

13.3 Relief Event During Construction Period

If a Relief Event occurs during the Construction Period, then notwithstanding any other provision of this Agreement:

- (a) to the extent that and for so long as the Contractor is prevented by the Relief Event from performing any obligation under this Agreement, the Contractor is relieved from any liability or consequence under this Agreement (including Payment Adjustments) arising from its delay in performing that obligation;
- (b) if the Relief Event wholly or substantially prevents the Contractor from proceeding with the Project for a period of at least 10 days, or if multiple Relief Events when taken together wholly or substantially prevent the Contractor from proceeding with the Project for a period of at least 10 days and each such Relief Event wholly or substantially prevents the Contractor from proceeding with the Project for a period of at least two days, then the Contractor's Construction Schedule and the dates in Section 5.11 and clauses (g), (h) and (i) of Section 16.8 shall be adjusted commensurately to the period during which the Contractor is prevented by the Relief Event from proceeding with the Project;
- (c) no non-performance of any obligation of the Contractor under this Agreement shall give rise to a Termination Event, to the extent that and for so long as performance of the obligation is prevented by the Relief Event;
- (d) the Availability Target Date shall not be adjusted, but if by reason of the Relief Event, Availability is delayed until beyond the Availability Target Date, then the Province shall upon Availability pay to the Contractor its damages resulting from Availability being delayed beyond the Availability Target Date by the Relief Event (and shall, from and after the Availability Target Date, make advance payment on account of such damages, to the extent such damages can reasonably be determined prior to Availability, it being mutually anticipated by the parties that such damages and such advance payment will include at least an amount equal to each Capital

Payment that would have been payable had Availability been achieved), subject to the Contractor's obligation to take reasonable steps to mitigate the delay and to mitigate its damages. Notwithstanding that advance payment to the Contractor of such damages will not start until the Availability Target Date, if prior to the Availability Target Date the Contractor incurs direct out of pocket expenditures as part of such damages and such out of pocket expenditures cannot reasonably be financed until the Availability Target Date by the Project Financing, then the Province shall make advance payment to the Contractor on account of such out of pocket expenditures as soon as reasonably practicable following notification by the Contractor to the Province that such out of pocket expenditures have been incurred by the Contractor;

- (e) if the Contractor anticipates that the Relief Event will delay Availability, but is of the opinion the delay can be avoided or mitigated through extraordinary measures, the Contractor may propose to the Province that such extraordinary measures be taken by the Contractor at the Province's expense;
- (f) if the Relief Event, when aggregated with the effect of any other Relief Event or Relief Events occurring in the same Construction Year (where "**Construction Year**" means the 12 month period following the date of Execution of this Agreement or the 12 month periods following each anniversary date of Execution of this Agreement, as applicable) and not previously claimed for by the Contractor increases the Contractor's cost of carrying out the Project by at least \$25,000, then subject to Section 13.5 and subject in every case to the Contractor's obligation to take reasonable steps to mitigate the increase in its costs, and without duplicating any amount payable under clause (d), the Province shall, as soon as practicable following receipt from the Contractor of appropriate documentation establishing the amount payable, pay to the Contractor, without duplication:
 - (i) if the Relief Event is a breach by the Province of any of its obligations under this Agreement, the amount payable under the indemnity in Section 16.2;
 - (ii) if the effect of the Relief Event is tantamount to a change in the Project Requirements, the amount that would have been payable by the Province if the change in the Project Requirements had been a Change Order governed by Section 7.1 and requested by the Province pursuant to a Change Order Directive; and
 - (iii) in any other case, the Contractor's reasonable damages;
- (g) no damages are payable under this Section 13.3 to the extent that the damages are covered (or would have been covered but for the Contractor's failure to comply with Section 11) by insurance maintained by or for the benefit of the Contractor; and

- (h) if one or more Relief Events results in the Contractor being wholly or substantially prevented from proceeding with the Project for an aggregate period of at least 120 days, then the Payment Schedule shall be adjusted and amended by postponing all Renewal Payments by:
 - (i) one year, if the aggregate period is up to and including 240 days; and
 - (ii) two years, if the aggregate period is over 240 days;

provided that in no event shall Renewal Payments be postponed beyond the end of the Term.

13.4 Relief Event During Operating Period

If a Relief Event occurs during the Operating Period, then notwithstanding any other provision of this Agreement:

- (a) to the extent that and for so long as the Contractor is prevented by the Relief Event from performing any obligation under this Agreement, the Contractor is relieved from any liability or consequence under this Agreement arising from its delay in performing that obligation;
- (b) no Payment Adjustment shall be applicable, to the extent that and for so long as the relevant performance was prevented by the Relief Event;
- (c) no non-performance of any obligation of the Contractor under this Agreement shall give rise to a Termination Event, to the extent that and for so long as performance of the obligation is prevented by the Relief Event; and
- (d) if the Relief Event, when aggregated with the effect of any other Relief Event occurring in the same Term Year (where “**Term Year**” means the 12 month period following Availability or the 12 month periods following each anniversary date of Availability, as applicable) and not previously claimed for by the Contractor, will increase the Contractor’s net cost of carrying out the O&M Requirements by at least \$10,000 over the remainder of the Term, then subject to Section 13.5 and subject in every case to the Contractor’s obligation to take reasonable steps to mitigate the increase in its costs, and without duplication:
 - (i) if the Relief Event is a breach by the Province of any of its obligations under this Agreement, the Province shall pay to the Contractor the amount payable under the indemnity in Section 16.2;
 - (ii) if the effect of the Relief Event is tantamount to a change in the O&M Requirements, then the O&M Payments in the Payment Schedule shall be adjusted as if the change in the O&M Requirements had been a Change Order governed by Section 7.2 and requested by the Province pursuant to

a Change Order Directive; and

- (iii) in any other case, the Province shall pay to the Contractor the Contractor's reasonable damages arising from the Relief Event.

13.5 Procedure on Relief Event

Immediately upon the Contractor becoming aware of the occurrence of an event that is or may be or is likely to become a Relief Event, it shall give the Province notice of the Relief Event, including reasonable details of the anticipated effect of the Relief Event upon the Contractor's performance of this Agreement, and thereafter the parties shall on an ongoing basis communicate and consult with each other with a view to monitoring, remedying, mitigating or otherwise addressing the consequences of the Relief Event. Failure by the Contractor to provide such notice in such manner shall not thereafter disqualify the Contractor from providing notice of and claiming relief under the Relief Event, but the Province may in that event assert a claim for damages arising from such failure.

14. CONTRACTOR'S REPRESENTATIONS AND OBLIGATIONS

14.1 Contractor's Representations

The Contractor represents and warrants to the Province that, as of the date of Execution of this Agreement:

- (a) the Contractor is duly organized, validly existing, in good standing, and registered and otherwise lawfully authorized to do business under the laws of Alberta, and has the corporate capacity, power and authority to enter into and perform its obligations under this Agreement;
- (b) this Agreement has been duly authorized on behalf of the Contractor, and upon its execution and delivery constitutes a legal, valid and binding obligation of the Contractor;
- (c) Intentionally Deleted;
- (d) all shareholdings in the Contractor and in the ultimate parent corporation of the Contractor at the time of Execution of this Agreement have been disclosed to the Province;
- (e) the Contractor is relying only on its own investigation and due diligence in relation to the risks assumed by it under the provisions of this Agreement and is not relying on any information received from or representation made by the Province, with the exception only of the Province's representations in Section 15.1;

- (f) the Contractor's Proposal, to the extent it consists of statements of fact, is at the time of Execution of this Agreement in every material respect true and not misleading (except as has been disclosed in writing to and accepted in writing by the Province prior to Execution of this Agreement); and
- (g) the Contractor, either in the Contractor's Proposal or in formal communications with the Province under the RFP, has made plain and true disclosure to the Province of all facts and circumstances regarding the Contractor its shareholders, its intended subcontractors, and the Project Financing that might reasonably be material to the willingness of the Province to enter into this Agreement with the Contractor having regard to the information requested by the Province in the RFP.

14.2 Reporting Requirements

In addition to all specific reports and notices required by the Technical Requirements, the Contractor shall provide the following reporting to the Province:

- (a) during the Construction Period, a monthly report on the progress of the Project, including but not limited to a report of any material events, developments or circumstances arising in relation to the Project since the last monthly report, all in a form and format prescribed or approved from time to time by the Province, acting reasonably;
- (b) throughout both the Construction Period and the Operating Period, a monthly report noting all circumstances known to the Contractor that trigger or, if continued, will trigger a Payment Adjustment and any other events, developments or circumstances material to the Contractor's performance of the Existing Facilities O&M, O&M and the O&M Requirements, and during the Operating Period an annual report summarizing the Contractor's expenditures on renewal of the Infrastructure, all in a form and format prescribed or approved from time to time by the Province, acting reasonably;
- (c) throughout both the Construction Period and the Operating Period, copies of its quarterly financial statements and annual financial statements (each of which may be delivered in confidence), in each case prepared in accordance with generally accepted accounting principles;
- (d) copies of all financial reporting (in addition to the reporting under clause (c)) provided from time to time to any arm's-length lender;
- (e) such other periodic reports as the Province may from time to time reasonably require; and
- (f) throughout both the Construction Period and the Operating Period, a response delivered in a timely manner to any inquiry reasonably made by the Province in

relation to any aspect of the Project, the Existing Facilities O&M, the O&M, the Project Requirements, the O&M Requirements, this Agreement or the business of the Contractor to the extent directly related to the Project, the Existing Facilities O&M, the O&M, the Project Requirements, the O&M Requirements or this Agreement;

provided that, to the extent that such reporting includes commercially sensitive information, it may be delivered to the Province expressly in confidence and marked as confidential.

14.3 Records

The Contractor shall, following Execution of this Agreement and for a period of two years following expiry of the Term or earlier termination of this Agreement, (i) maintain in an appropriate form full accounting and other records in respect of performance by it of its obligations under this Agreement, and (ii) keep those records available for inspection by the Province (including the Auditor General of the Province or any other representative designated by the Province for that purpose) at all reasonable times upon reasonable notice, for the purpose of determining the Contractor's compliance with this Agreement. Apart from this right of inspection and the obligation of the Contractor under Section 17.4(c) upon termination of this Agreement, the records of the Contractor shall be in the exclusive custody and control of the Contractor, and the Province shall have no general right to access or obtain copies of such files and records. Upon expiry of the Term, the Contractor shall, upon request by the Province and at no cost to the Province, hand over to the Province copies of all records that relate to the Contractor's performance of the O&M that are of a kind or nature that the Province, acting reasonably, indicates will be of utility to the Province or its contractors assuming responsibility for performing the O&M. The Contractor shall not be required to hand over to the Province copies of any records that constitute proprietary information in the nature of trade secrets.

14.4 Access, Inspection and Testing

The Contractor acknowledges and agrees that, at all times until the end of the Term, the Province shall have full and free access to:

- (a) the Lands; and
- (b) on reasonable prior notice, any site occupied by the Contractor or to which the Contractor has access, where materials to be used in the Project, the Existing Facilities O&M or the O&M are fabricated or stored;

for the purpose of inspecting the Lands or materials to be used in the Project, the Existing Facilities O&M or the O&M so as to be able to determine compliance by the Contractor with the terms of this Agreement; and such access shall not of itself be construed as constituting disturbance or interference with the Contractor's uninterrupted access to the Lands; provided however that the Contractor may exercise reasonable control over such

access for reasons of safety and operational efficiency. For the purpose of such inspection, the Province may at all reasonable times and subject to the reasonable requirements of third party suppliers, perform any measurement, test or other observation or investigation. The Contractor shall provide reasonable cooperation (but without obligation to incur material expense) to facilitate any such measurements, tests or other observations or investigations. The Province shall conduct all such measurements, tests, observations and investigations in a manner that will not materially disturb, interfere with or disrupt the Project, the Existing Facilities O&M or the O&M.

14.5 Safety

The Contractor shall observe all safety requirements specifically set out in Schedule 16 (Safety Requirements) or in the Technical Requirements, and shall in all respects and at all times carry out the Project Requirements and the O&M Requirements with due regard for public safety.

14.6 Contractor's Other Obligations

The Contractor covenants to do all things specified in the Schedules to this Agreement to be done by the Contractor, in such manner and at such times as specified in the Schedules to this Agreement. The Contractor shall take all such actions in the context of the Project, the Existing Facilities O&M and the O&M as are from time to time required in order to allow the Province, other governmental authorities, police services, park administrative officers and conservation officers and emergency response services to carry out their respective statutory duties in relation to the Infrastructure and the Existing Facilities.

14.7 Application of the Public Works Act (Alberta)

The *Public Works Act* (Alberta) applies to the Project. For the purposes of interpreting the "Notice of Claim" provisions under section 14 of the *Public Works Act*, the claim shall be deemed to be a claim under section 14(3) in which the notice of claim shall be sent by registered mail not later than 45 days after the last day on which the labour, equipment, material or services were provided. The Contractor shall post, at its project field office or other conspicuous location accessible to employees, subcontractors, truckers and material suppliers, among others, copies of the following:

- (a) Standard Claim Form;
- (b) Bond Notice;
- (c) Section 14 of the *Public Works Act* regarding Notice of Claim; and
- (d) the notice entitled "Notice to Claimants",

which shall be protected in a legible condition for the Construction Period.

15. PROVINCE'S REPRESENTATIONS AND OBLIGATIONS

15.1 Province's Representations

The Province represents and warrants to the Contractor, as of the date of Execution of this Agreement, that:

- (a) the Province has all requisite capacity, power and authority to enter into and perform its obligations under this Agreement;
- (b) this Agreement has been duly authorized on behalf of the Province, and upon execution and delivery constitutes a legal, valid and binding obligation of the Province;
- (c) officials of the Province's Infrastructure Department have no actual knowledge of any material inaccuracies or materially misleading statements in any reports, studies or other information formally made available by the Province to the Contractor in relation to the preparation and submission of the Contractor's Proposal, except as expressly identified in written communications between the Province and the Contractor (including any written communications, prior to incorporation or other legal creation of the Contractor, between the Province and the Contractor's Contact Organization);
- (d) the Province is the owner of an estate in fee simple of all of the Lands;
- (e) the Province has not granted any leases that are outstanding in respect of the Lands, except for the leases forming part of the Identified Encumbrances and the leases described in Appendix D of Schedule 12 (Lands); and
- (f) the Province has the legal authority to use the Lands for the Project, the Existing Facilities O&M and the O&M.

15.2 Province's General Obligation

The Province covenants to do all things specified in the Schedules to this Agreement to be done by the Province, in such manner and at such times as specified in the Schedules to this Agreement.

15.3 Contractor's Reliance on Information

The representation by the Province in Section 15.1(c) (Province's Representations) shall not be construed as importing any duty of care to the Contractor on the part of the Province in relation to the accuracy of such reports, studies or other information, it being mutually understood and agreed that the Contractor will perform its own research, investigation and due diligence. However, the Contractor may rely on the accuracy and completeness for its intended purpose of the clearance letter for archeological and

historical resources dated August 30, 2010 issued by Alberta Culture and Community Spirit - Historic Resources Management.

15.4 Assistance with Permits, Utility Agreements and Lessees

The Contractor shall provide the Province with prompt notice of each application that the Contractor makes to a regulator for a permit or approval in respect of the Project, the Existing Facilities O&M and the O&M.

Without derogating from the Contractor's responsibilities under Sections 5.6 and 6.3 to obtain all permits and approvals required for the Project, the Existing Facilities O&M, and the O&M to make all required arrangements relating to utilities, and to make all required arrangements with the Lessees, the Province shall, in response to any reasonable request by the Contractor in relation to such permits and approvals and required arrangements, provide the Contractor with such reasonable assistance as the Province is able to offer or arrange without unduly fettering its executive discretion or pursuing amendment of any legislation or subordinate legislation, but otherwise including taking any action required to obtain a permit or approval which only the Province can take and which cannot be taken by the Contractor on the Province's behalf, and in any case where the Province concludes that a third party is acting unreasonably in relation to the negotiation or issuance of such permits, approvals or required arrangements, the exercise by the Province of all legal rights and remedies available to it in relation to such third party, to the extent it is reasonable in the circumstances for the Province to exercise such legal rights and remedies.

The Contractor shall provide notice to the Province of unreasonable delay experienced by the Contractor in obtaining permits and approvals required for the Project, the Existing Facilities O&M, and the O&M or in making required arrangements with utilities or the Lessees as soon as practicable after becoming aware of the delay, including details of the cause or perceived cause of the delay and the efforts to date and anticipated further efforts of the Contractor to prevent or minimize the duration of the delay.

16. DEFAULT, REMEDIES AND TERMINATION EVENTS

16.1 Contractor's Indemnity

Subject to Section 16.3, the Contractor shall indemnify and hold harmless the Province and its officials and employees against all damages, losses and costs, including third party claims (and including the reasonable cost of defending third party claims, on a solicitor and client basis), arising from:

- (a) the Contractor's breach of any provision of this Agreement;
- (b) the negligence or other tortious conduct of the Contractor or any director, officer, employee, agent or subcontractor of the Contractor in relation to the Project, the

Existing Facilities O&M or the O&M; or

- (c) any third party claim alleging infringement by the Contractor or its subcontractors, in relation to the Project, the Existing Facilities O&M or the O&M, of any intellectual property rights of third parties.

16.2 Province's Indemnity

Subject to Section 16.3, the Province shall indemnify and hold harmless the Contractor and its directors, officers, and employees against all damages, losses and costs, including third party claims (and including the reasonable cost of defending third party claims, on a solicitor and client basis), arising from the Province's breach of any provision of this Agreement or arising from the negligence or other tortious conduct of the Province or any official, employee or agent of the Province in relation to the subject matter of this Agreement.

16.3 Calculation of and Limitation on Claims

Where any provision of this Agreement entitles the Contractor to recover damages or losses from the Province upon the occurrence of a specified event, then except as otherwise expressly indicated, the intent is to afford the Contractor the equivalent of the ordinary contractual measure of damages, that is, that such recovery will place the Contractor (and by extension, the subcontractors of the Contractor and persons contracting with the Contractor in relation to the Project Financing) in the same position it would have been in but for the occurrence of the specified event, having regard to the following circumstances and limitations but otherwise without limiting the generality of the foregoing:

- (a) the obligations and arrangements contemplated by the Contractor's Proposal (including obligations to and arrangements with parties specified in the Contractor's Proposal, but also including corresponding obligations to and arrangements with replacement parties), including but not limited to the Contractor's obligations to its subcontractors, but in each case premised upon break fees payable to the Contractor's subcontractors and others contracting with the Contractor must be commercially reasonable, having regard to customarily negotiated break fees between parties at arm's-length from one another, and subject in every case to a duty on the part of the subcontractor or other contracting party to mitigate its damages;
- (b) participation by the Contractor directly, or indirectly by arrangement with the holders of the Project Financing (if under such arrangement the risks and benefits of the hedging flow through to the Contractor), in hedging arrangements specifically in relation to changes in Canadian dollar interest rates (and specifically excluding any foreign exchange transactions), provided:
 - (i) the hedging arrangements are entered into on an arm's-length basis or else

are on commercial terms equivalent to those that would have been available on an arm's-length basis;

- (ii) particulars of the hedging arrangements are communicated to the Province within five Business Days after the hedging arrangements are entered into; and
 - (iii) the hedging arrangements are not entered into in anticipation of an imminent termination of this Agreement; and
- (c) the Contractor's duty in every instance to take all commercially reasonable measures to mitigate its damages or losses (and the Contractor's corresponding right to include in its damages or losses the reasonable costs of such measures).

Subject to the foregoing, no claim by either party arising from any breach of this Agreement or under any indemnity given by this Agreement, shall include any claim by such party against the other for punitive or exemplary damages, indirect or consequential damages, or any claim for pure economic loss, whether or not the other party has been advised of the possibility of pure economic loss, and regardless of whether the action is framed in contract or in negligence; except nothing in this paragraph shall preclude the Contractor from claiming for lost profits as part of a recovery of damages that the Contractor is entitled to under any provision of this Agreement, including without limitation a claim by the Contractor for damages under Section 18.5(b).

The Province and the Contractor acknowledge that the Contractor will not be precluded from advancing any claim or seeking any relief under this Agreement solely by the reason that the Contractor is not liable to the applicable subcontractor identified in Schedule 17 (Subcontractors) under the applicable agreement between the Contractor and such subcontractor identified in Schedule 17 until such claim or relief is granted by the Province to the Contractor under this Agreement. Nothing in this paragraph creates any contract or obligation directly between the Province, the Contractor and the applicable subcontractor identified in Schedule 17.

16.4 Exclusivity of Specified Remedies

The Province shall not be entitled to claim damages or indemnification in respect of specific events or circumstances which constitute (or would constitute, if the applicable threshold set out in the Technical Requirements were met) grounds for a Payment Adjustment.

The Contractor shall not be entitled to damages or indemnification in respect of any breach by the Province under this Agreement that would duplicate compensation to the Contractor under Section 13 arising from a Relief Event.

Every right to claim damages or indemnification or reimbursement or to set off or holdback any amount under this Agreement shall be construed so that recovery is without

duplication to any other amount recoverable under this Agreement, and shall not be construed in such manner as would allow a party to recover the same loss or amount twice.

16.5 Exclusivity of Termination Provisions

Neither party shall have any right to terminate this Agreement except as expressly set out in Sections 17.1, 17.2 or 17.3; and without limiting the generality of the foregoing neither party shall in any event be entitled to terminate this Agreement on the basis of fundamental breach.

16.6 Province's Step-in Rights

If at any time during either the Construction Period or the Operating Period the Province reasonably believes that it needs to take action in relation to the Project, the Existing Facilities O&M or the O&M:

- (a) because a serious risk exists to public safety or to the environment;
- (b) in order to discharge a statutory duty or enable performance by any other person of a statutory duty;
- (c) if necessary in order to prevent the Contractor or its subcontractors from limiting operation of the Existing Facilities or the Infrastructure (other than for purposes expressly contemplated by the Technical Requirements);
- (d) because a Default (as defined in Section 16.7) has occurred of which the Contractor is aware or has been given notice thereof and the Province has given the Contractor notice that in the Province's opinion, acting reasonably, the Contractor is not diligently pursuing a cure of the Default, or because an Incurable Default (as defined in Section 16.7) has occurred of which the Contractor is aware or has been given notice thereof and the Province has given the Contractor notice that in the Province's opinion, acting reasonably, the Contractor is not diligently pursuing a course of action designed to mitigate the consequences of the Incurable Default,

then the Province may, upon notice to the Contractor (which notice shall specify all pertinent details of the intended action) take such action (the "**Remedial Action**") in relation to the Project or to the operation and maintenance of the Existing Facilities or the Infrastructure as the Province reasonably considers necessary to mitigate the risk or discharge the statutory duty or keep the Existing Facilities or Infrastructure, as the case may be, in operation, or address the Default or the Incurable Default, and in that event:

- (e) the Province shall carry out the Remedial Action as quickly as is practicable, and in such manner as will minimize interference with the Contractor's performance of its obligations under this Agreement;

- (f) if the need for the Remedial Action does not arise as a result of any breach by the Contractor of its obligations under this Agreement, then the Remedial Action shall, subject to Section 13.2, constitute a Relief Event under Section 13.2(j); and
- (g) to the extent that the need for the Remedial Action arises as a result of any breach by the Contractor of its obligations under this Agreement, then the Contractor shall indemnify the Province against all costs and expenses reasonably incurred by the Province in carrying out the Remedial Action.

16.7 Termination Event Defined Terms

In Section 16.8(m), the following expressions have the following meanings:

“Default” means any breach by the Contractor of any provision of this Agreement, including the material inaccuracy, when made, of any representation given by the Contractor in Section 14.1;

“Incurable Default” means a Default that is by its nature or by reason of prevailing circumstances incapable of being cured in all material respects, but does not include any Default that is a failure to carry out a particular obligation by a particular date or within a particular period where it is possible to subsequently perform that obligation, albeit not by or within the relevant date or period;

“Material Adverse Effect” occurs when a Default:

- (i) creates a material risk to public security and safety or to the environment;
- (ii) creates a material risk of significant liability to third parties on the part of the Province; or
- (iii) demonstrates a marked or persistent inability or unwillingness on the part of the Contractor to adhere to its obligations under this Agreement;

and includes any material breach by the Contractor of the Technical Requirements relating to the Existing Facilities O&M, or any material breach by the Contractor of the requirements under the Existing Facilities Licenses or the Infrastructure Licenses (as both capitalized terms are defined in Schedule 18) and includes any material breach by the Contractor of:

- (iv) its insurance obligations under Sections 11.1 through 11.4;
- (v) its reporting obligations under Section 14.2 (provided, to the extent the Province knows the Contractor is in breach of such reporting obligations, the Province shall give the Contractor notice of such breach); or

- (vi) its obligations under Section 14.3; and

“**Notice of Default**” means a notice from the Province to the Contractor specifying a Default.

16.8 Termination Events

The following shall constitute Termination Events, except where caused directly and specifically by the Province withholding any amount payable under this Agreement except to the extent disputed by the Province in good faith:

- (a) if the Contractor is declared or adjudged a bankrupt, makes a general assignment for the benefit of creditors, or takes the benefit of any legislation in force for (i) protection against creditors, (ii) orderly payment of debts, or (iii) winding up or liquidation;
- (b) if a receiver or receiver-manager is appointed for the business of the Contractor, unless the appointment is canceled within 21 days;
- (c) if any material part of the property of the Contractor is seized or attached and such seizure or attachment is not successfully contested by the Contractor within 21 days;
- (d) if the Contractor ceases active business operations;
- (e) Intentionally Deleted;
- (f) if, during the Construction Period, the Contractor (by its own actions, and not merely by the actions of the subcontractor retained by the Contractor in respect of the Project and the Existing Facilities O&M unless the Contractor fails to diligently take action in response to abandonment of the Project or the Existing Facilities O&M by the subcontractor) abandons the Project or the business of carrying out the Existing Facilities O&M;
- (g) if it is determined by arbitration pursuant to the Dispute Resolution Procedure and on a basis consistent with section 2.1 of Schedule 9 that the Contractor has failed to achieve by July 31, 2013 15% completion of the Project;
- (h) if the Contractor fails to achieve Availability by March 31, 2015;
- (i) if at any time after the date that is four months before the Availability Target Date, it is determined by arbitration pursuant to the Dispute Resolution Procedure that there is no reasonable possibility of the Contractor achieving Availability by March 31, 2015;
- (j) if during the Operating Period the Contractor (by its own actions, and not merely

by the actions of the subcontractor retained by the Contractor in respect of the O&M unless the Contractor fails to diligently take action in response to abandonment of the O&M by the subcontractor) abandons the business of carrying out the O&M;

- (k) if the Contractor, having become subject to Payment Adjustments in any 12 month period that in aggregate exceed 75% of the aggregate O&M Payment (exclusive of any Renewal Payment) during that 12 month period, fails to within 10 days of receiving notification from the Province to do so submit to the Province a reasonable remedial plan for achieving due future performance of the O&M, or fails thereafter to diligently implement and carry out such remedial plan;
- (l) if after Availability the Contractor, other than:
 - (i) for purposes expressly contemplated by Schedule 18 (Technical Requirements); or
 - (ii) for reasons of public safety, exercised on a temporary basis;

takes any steps to prevent or reduce operation of the Infrastructure or to prevent the performance by the Province of any statutory duty; or

- (m) if the Contractor, upon receiving a Notice of Default from the Province where the specified Default has a Material Adverse Effect (regardless of whether the Notice of Default so indicates), fails to:
 - (i) cure the Default within 21 days; or
 - (ii) where the Default cannot by reasonable commercial efforts be cured within 21 days, communicate to the Province and initiate within that 21 days a commercially reasonable course of action designed to cure the Default, and thereafter diligently pursue that course of action until the Default is cured; or
 - (iii) where the Default is an Incurable Default, within 21 days communicate to the Province and initiate a commercially reasonable course of action designed to mitigate the consequences of the Incurable Default to the maximum extent practicable, and thereafter diligently pursue that course of action until the consequences of the Incurable Default have been so mitigated.

17. TERMINATION

17.1 Termination by Province

The Province may terminate this Agreement by notice to the Contractor:

- (a) upon or within a reasonable time (having regard to Section 21.3) after the Province becomes aware of the occurrence of a Termination Event; or
- (b) at any time, in the absolute and unfettered discretion of the Province and for any reason whatsoever or for no reason at all, and at the convenience of the Province.

No notice of termination under this Section 17.1 shall be effective unless, in the case of a notice under clause (a), it specifies the Termination Event relied on, or in the case of a notice under clause (b), it states that the termination is for convenience.

17.2 Termination by Contractor

Subject to Section 17.3, the Contractor may terminate this Agreement by notice to the Province only if:

- (a) the Province has failed to pay any amount due to the Contractor under this Agreement (except to the extent that such amount is disputed in good faith through the Dispute Resolution Procedure) and does not remedy such failure within 21 days of the Contractor providing the Province with notice to do so;
- (b) during the Construction Period, a Relief Event has occurred and continues for a continuous period in excess of 360 days and has wholly or substantially prevented the Contractor from proceeding with the Project during that period; or
- (c) the Province is in breach of Section 22.4.

17.3 Termination Upon Force Majeure

Either party may by notice to the other terminate this Agreement if:

- (a) during the Construction Period, as a result of a Force Majeure Event, it has become impossible or impractical for the Contractor to proceed with the Project, and such status persists or is highly likely to persist for at least in aggregate 120 days; or
- (b) during the Operating Period, as a result of a Force Majeure Event, performance of all or a substantial portion of the O&M Requirements by the Contractor has become impossible or impractical, and such status persists or is highly likely to persist for at least 180 days.

17.4 Consequences of Termination

Upon any termination of this Agreement under Sections 17.1, 17.2 or 17.3:

- (a) the Payment for the month during which the termination occurs shall be pro-rated according to the number of days in that month up to and including the day when termination occurs;
- (b) if a Termination Payment is payable by the Province in accordance with Section 18, then the Province shall as soon as practicable pay to the Contractor the amount of the Termination Payment, together with interest thereon in accordance with Section 9.9; and
- (c) the Contractor shall, upon request by the Province and at no cost to the Province, hand over to the Province copies of all records of any kind whatsoever that pertain to the Contractor's performance of, or may otherwise facilitate the Province or its contractors assuming responsibility for performing the Existing Facilities O&M and the Project Requirements (if the termination is prior to Availability) or the O&M and the O&M Requirements (if termination is after Availability); provided that the Contractor shall have no obligation to hand over copies of records that constitute proprietary information in the nature of trade secrets.

17.5 Survival of Obligations

All obligations under this Agreement that necessarily extend beyond termination of this Agreement in order to fully achieve their intended purpose shall survive termination of this Agreement, including without limiting the generality of the foregoing:

- (a) all indemnification and hold harmless obligations, insofar as they apply to events that occurred prior to termination of this Agreement;
- (b) the obligations of the Contractor under Section 17.4(c);
- (c) the obligation of the Province to make the Termination Payment specified in Section 18;
- (d) the obligations in relation to Confidential Information set out in Sections 19.4, 19.5, 19.6 and 19.7; and
- (e) the obligations in relation to the Dispute Resolution Procedure set out in Section 21.

18. TERMINATION PAYMENTS

18.1 Termination Payments Defined Terms

In this Section 18, the following expressions have the following meanings:

“Construction Period Termination” means termination of this Agreement by the Province under Section 17.1(a) prior to Availability;

“Contractor’s Weighted Average Cost of Capital” means the Contractor’s weighted average cost of capital for the Project Financing calculated as an effective annual rate as at the time of submission of the Contractor’s Proposal and having regard to the financial model included in the Contractor’s Proposal and, if applicable, the interest rate adjustment contemplated by the RFP and elected by the Contractor at the time of submitting the Contractor’s Proposal;

“Force Majeure Termination” means termination of this Agreement by either party under Section 17.3 on account of a Force Majeure Event;

“Operating Period Termination” means termination of this Agreement by the Province under Section 17.1(a) on or after Availability;

“Termination by Contractor” means termination of this Agreement by the Contractor under Section 17.2; and

“Termination for Convenience” means termination of this Agreement by the Province under Section 17.1(b).

18.2 Construction Period Termination

Subject to Section 18.3, upon a Construction Period Termination, the Province shall pay to the Contractor a Termination Payment equal to the net present value of the aggregate Capital Payments, calculated as of the date of the Construction Period Termination and using as a discount rate the Contractor’s Weighted Average Cost of Capital, but not in any event exceeding the total amount of Project Financing anticipated by the Contractor’s Proposal; plus the amount of the Provincial Funding, less:

- (a) such portion of the Provincial Funding as the Contractor has received through Progress Payments;
- (b) the reasonable cost to the Province (as determined by the Province acting reasonably) to complete the Project and to carry out the Existing Facilities O&M premised on a duty on the part of the Province to mitigate the cost of completing the Project and carrying out the Existing Facilities O&M and thereby minimizing the amount deductible under this clause (b); and

- (c) liquidated damages of \$4 million to compensate the Province for loss of its bargain.

18.3 Termination While Province Holds Financing and Initial Performance Letter of Credit

Notwithstanding Section 18.2, if Construction Period Termination occurs while the Province continues to hold the Financing and Initial Performance Letter of Credit and the condition for release set out in Section 3.4 has not occurred, then the Province shall not make a Termination Payment to the Contractor.

18.4 Operating Period Termination

Upon an Operating Period Termination, the Province shall pay to the Contractor a Termination Payment equal to:

- (a) the net present value of the Capital Payments that, as of the date of the Operating Period Termination, have not yet come due, calculated as of the date of the Operating Period Termination and using as a discount rate the Contractor's Weighted Average Cost of Capital; less
- (b) liquidated damages of \$2 million to compensate the Province for loss of its bargain.

18.5 Force Majeure Termination, Termination for Convenience or Termination by Contractor

Upon a Force Majeure Termination, a Termination for Convenience or a Termination by Contractor, the Province shall pay to the Contractor a Termination Payment calculated as follows:

- (a) the amount actually required to redeem the debt financing arranged by the Contractor to carry out and complete the Project (including prepayment penalties that are commercially reasonable in the circumstances of the financing and are not unreasonably punitive); plus (without duplication)
- (b) the Contractor's reasonable damages (including for loss of its bargain) calculated having regard to the principles set out in Section 16.3; less
- (c) if the termination occurs during the Construction Period, any amount of the Project Financing that has been drawn, whether or not available to the Contractor, but not yet expended on the Project; and less
- (d) all insurance proceeds, if any, claimable by the Contractor as a result of events occurring prior to the termination.

18.6 Set-off Against Termination Payments

The Province may set off against any Termination Payment the amounts of any set off under Section 9.8 triggered prior to the termination and not set off against a Progress Payment or a Payment.

18.7 Negative Amounts

If the amount of the Termination Payment calculated under any of Sections 18.2 or 18.4 is a negative number, the Province shall be entitled to claim that amount (stated as a positive number) from the Contractor.

19. COMMUNICATIONS

19.1 Notices

Any notice, consent, approval or other communication under any provision of this Agreement must be in writing to be effective, and is effective when delivered by any means, including fax transmission or e-mail, to the following respective addresses:

(a) if to the Province:

Alberta Infrastructure
3rd floor, 6950 – 113 Street
Edmonton, Alberta
T6H 5V7
Attention: Ray Gilmour, Deputy Minister
fax: (780) 427-3835
e-mail: ray.gilmour@gov.ab.ca

(b) if to the Contractor:

EPCOR Water Services Inc.
2000, 10423 – 101 Street
Edmonton, Alberta
T5H 0E8
Attention: Lee Ward
fax: (780) 969-7057
e-mail: lward@epcor.com

Either party may change its address information by giving notice to the other in the above manner.

19.2 Authority to Give Notices

The parties designate for the time being the following individuals as having authority to

communicate to the other any notice, approval, consent, waiver or other communication under this Agreement:

- (a) in the case of the Province:

Deputy Minister, Alberta Infrastructure

- (b) in the case of the Contractor:

Lee Ward, Senior Manager

In the absence of any further designation or limitation communicated with reference to this Section 19.2, each party may assume that any notice, approval, consent, waiver or other communication under this Agreement given by the above individual has been duly authorized and is binding upon the other party.

19.3 Public Announcements

The Contractor shall not make, and shall not cause or permit, any entity not at arms-length with the Contractor to make any public announcement relating to this Agreement except as approved in advance by the Province, acting reasonably.

19.4 Confidential Information

Each party shall, upon delivering any information to the other that includes information delivered in confidence, identify the information delivered in confidence (the “**Confidential Information**”). The receiving party shall maintain (and shall ensure that its officers, employees, consultants, advisors and contractors maintain) the confidentiality of the Confidential Information, with the exception of information that:

- (a) at the time of the disclosure to the receiving party, was in the public domain;
- (b) after disclosure to the receiving party became part of the public domain through no fault of the receiving party or those for whom it is responsible at law;
- (c) was in the possession of the receiving party at the time of disclosure to it, as demonstrated by written records; or
- (d) was received by the receiving party from a third party who had a lawful right to disclose the information.

19.5 Disclosure of Confidential Information

Neither party shall disclose Confidential Information delivered by the other except:

- (a) to such of its affiliates, officers, employees, consultants, advisors and contractors

(including, in the case of the Contractor, its lenders and potential lenders, investors and potential investors, and rating agencies, surety companies and prospective guarantors) who reasonably require access to the Confidential Information for the due performance of this Agreement or to further the purposes of this Agreement;

- (b) as required by FOIP or any other applicable law; or
- (c) where the disclosure is consented to by the other.

19.6 Public Disclosure of Agreement

Notwithstanding the above Sections 19.4 and 19.5, the Contractor agrees that the Province will be at liberty to disclose all information contained in this Agreement, excepting only any Schedules or portions thereof that the Contractor has, prior to signing of this Agreement, established to the satisfaction of the Province, acting reasonably, contain information that:

- (a) would reveal trade secrets, or commercial, financial, labour relations, scientific or technical information of the Contractor;
- (b) is being supplied in confidence to the Province; and
- (c) if disclosed, could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of the Contractor,

(the “**Sensitive Information**”). In the event of a request under FOIP for access to any of the Sensitive Information, the Contractor will be given notice of the request pursuant to FOIP and will be given an opportunity to make representations as to why the information should not be disclosed.

The Province acknowledges that the financial, commercial and technical information contained in the Contractor’s Proposal (including without limitation the financial model contained therein) has been submitted to the Province in confidence.

19.7 Collection, Use and Disclosure of Personal Information

For the purposes of this Section, “**personal information**” has the same definition as that which is found in FOIP.

The Contractor acknowledges that FOIP applies to information obtained, related, generated, collected or provided for the Province under this Agreement and agrees to adhere to FOIP.

The Contractor shall not collect, use or disclose any personal information under this Agreement except that which is reasonably required to fulfil its obligations under this

Agreement, or as otherwise authorized by the Province.

The Contractor shall protect the personal information it collects under this Agreement and shall make reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or destruction.

Upon request, the Contractor shall provide to the Province, within seven days, any records that are requested under the access provisions of FOIP that are in the custody or under the control of the Contractor. Should the Contractor receive an access request under FOIP, the Contractor shall not respond to it, but shall immediately forward the access request to the Province for further handling.

The Contractor shall ensure that its employees, agents, and subcontractors comply with this Section 19.7.

19.8 Naming Rights

The Contractor acknowledges that the Province, as owner of the Lands, the Existing Facilities and the Infrastructure, has the exclusive right to name and re-name (subject to Sections 7.1 and 7.2) the Existing Facilities and the Infrastructure and all related improvements. The Contractor shall not name nor purport to name the Project, Existing Facilities, the Infrastructure, or any portions thereof. Where the Province has named the Existing Facilities or the Infrastructure, the Contractor shall not publicly refer to the Existing Facilities or the Infrastructure except as so named by the Province.

20. CONTRACT ADMINISTRATION

20.1 Contract Administration Representatives

Immediately following Execution of this Agreement, the Province and the Contractor will each designate a representative or representatives to establish protocols and procedures, including but not limited to lines of communication additional to those expressly contemplated by this Agreement, designed to facilitate the effective, efficient and cooperative administration of this Agreement and avoidance of disputes.

20.2 Mutual Cooperation

In administering, interpreting and carrying out their respective obligations under this Agreement, the parties mutually undertake to deal fairly and in good faith, and to act at all times in a spirit of mutual cooperation.

20.3 Conduct of Indemnified Claims

Where either party to this Agreement is entitled to indemnification under this Agreement (“**Indemnified Party**”) and determines that an event has occurred giving rise or that may

give rise to a right of indemnification in favor of the Indemnified Party (an “**Indemnity Claim**”), the Indemnified Party shall promptly notify the party obligated to provide indemnification (the “**Indemnifying Party**”) of such Indemnity Claim (a “**Claim Notice**”) describing in reasonable detail the facts giving rise to the claim for indemnification, and shall include in such Claim Notice (if then known) the amount or the method of computation of the amount of such Indemnity Claim; provided that the failure of an Indemnified Party to give timely notice thereof shall not affect any of its rights to indemnification nor relieve the Indemnifying Party from any of its indemnification obligations except to the extent the Indemnifying Party is materially prejudiced by such failure.

Any obligation to provide indemnification under this Agreement shall be subject to the following terms and conditions:

- (a) upon receipt of a Claim Notice the Indemnifying Party shall, at its cost and expense and upon notice to the Indemnified Party within 30 days of its receipt of such Claim Notice (or such shorter time period as the circumstances warrant), assume and control the defence, investigation, compromise and settlement of such Indemnity Claim, including the management of any proceeding relating thereto, and shall employ and engage legal counsel reasonably acceptable to the Indemnified Party; provided that if there exists a material conflict of interest (other than one of a monetary nature) or if the Indemnified Party has been advised by counsel that there may be one or more legal or equitable defences available to it that are different from or additional to those available to the Indemnifying Party that in either case, would make it inappropriate for the same counsel to represent both the Indemnifying Party and the Indemnified Party, then the Indemnified Party shall be entitled to retain its own counsel at the cost and expense of the Indemnifying Party (except that the Indemnifying Party shall not be obligated to pay the fees and expenses of more than one separate counsel, other than local counsel, for all Indemnified Parties, taken together);
- (b) the Indemnified Party may, at its own cost and expense, participate in the defence of the Indemnity Claim, and shall cooperate with the Indemnifying Party in such efforts and make available to the Indemnifying Party all witnesses, records, materials and information in the Indemnified Party’s possession, under its control or to which it may have access as may be reasonably required by the Indemnifying Party. The Indemnifying Party will keep the Indemnified Party reasonably informed of the progress of the defence of the Indemnity Claim. If the Indemnifying Party, contrary to clause (a), fails to assume the defence and investigation of the Indemnity Claim, then:
 - (i) the Indemnified Party shall have the right to undertake the defence, investigation, compromise and settlement of the Indemnity Claim on behalf of, and at the cost and expense of and for the account and risk of the Indemnifying Party;

- (ii) the Indemnifying Party shall cooperate with the Indemnified Party in such efforts; and
- (iii) the Indemnified Party will keep the Indemnifying Party reasonably informed of the progress of the defence of the Indemnity Claim.

The Indemnifying Party shall not, without the written consent of the Indemnified Party:

- (c) settle or compromise any Indemnity Claim or consent to any final judgment that does not include as an unconditional term thereof the delivery by the claimant or plaintiff of a written release or releases from all liability in respect of such Indemnity Claim of all Indemnified Parties affected by such Indemnity Claim; or
- (d) settle or compromise any Indemnity Claim if the settlement imposes equitable remedies or material obligations on the Indemnified Party other than financial obligations for which such Indemnified Party will be indemnified hereunder. No Indemnity Claim that is being defended in good faith by the Indemnifying Party shall be settled or compromised by the Indemnified Party without the written consent of the Indemnifying Party.

21. DISPUTE RESOLUTION

21.1 Dispute Resolution Procedure

Unless otherwise agreed to in writing between the Province and the Contractor, all disputes in respect of the application or interpretation of any provision of this Agreement shall be determined in accordance with the Dispute Resolution Procedure. Either party may at any time by notice to the other refer any question in respect of the application or interpretation of any provision of this Agreement to the Dispute Resolution Procedure. The right to refer disagreements to the Dispute Resolution Procedure shall not be limited to provisions of this Agreement that expressly refer to the Dispute Resolution Procedure, and all such express provisions shall be construed as having been included only for greater certainty.

21.2 Exception

Where under the provisions of this Agreement a party has an unfettered discretion to exercise a right or take an action, the decision of that party to exercise the right or take the action is not subject to review under the Dispute Resolution Procedure; but where any decision or discretion is expressly required to be made or exercised reasonably (or is otherwise qualified), then the reasonableness (or other qualification) of the decision made or the discretion exercised may be referred to the Dispute Resolution Procedure for determination.

21.3 Termination and Dispute Resolution Procedure

A party may refer to the Dispute Resolution Procedure for advance determination the question of whether it has grounds for terminating this Agreement (including, without limitation, whether the circumstances described in Section 16.8(g) or (i) have occurred). However, the submission of that question to the Dispute Resolution Procedure shall not prevent either party from terminating this Agreement in accordance with its provisions prior to determination of that question by the Dispute Resolution Procedure. If either party has purported to terminate this Agreement in accordance with its provisions, the other party may submit to the Dispute Resolution Procedure the question of whether such termination was made in accordance with this Agreement, and request either:

- (a) a ruling that this Agreement has not been terminated; or
- (b) an award of damages for wrongful repudiation of this Agreement.

21.4 No Court Proceedings

Neither party shall, except as may be otherwise expressly permitted by this Agreement or permitted by the *Arbitration Act* (Alberta) or with the prior approval of the other, initiate in any Court any proceedings against the other (including but not limited to any application for an injunction) in respect of the application or interpretation of any provision of this Agreement.

21.5 Payments Where Amount in Dispute

Where the amount of any payment required to be made under this Agreement (including without limiting the generality of the foregoing the amount of any Termination Payment) is in dispute, the party required to make the payment shall pay such portion of the payment as it does not dispute in good faith.

22. GENERAL PROVISIONS

22.1 Assignment by Contractor

The Contractor may not, without the prior consent of the Province, which consent shall not be unreasonably withheld, assign this Agreement or any right or benefit under this Agreement. Nothing in this Agreement restricts the Contractor from granting security interests (including any security interest that is nominally structured as an “assignment” but is in essence a security agreement) in its assets as it sees fit. For greater certainty, the Province shall not withhold or delay its consent where the Contractor has satisfied the Province, acting reasonably, that:

- (a) the proposed transferee is of good reputation and has suitable technical, commercial and financial resources; and

- (b) the proposed transferee is not involved in a business or activity incompatible with or inappropriate in relation to the Project, the Existing Facilities O&M, or the O&M or the business relationship between the Province and the Contractor.

22.2 Subcontracting by Contractor

The Contractor may subcontract its obligation to carry out the Project and its obligations to perform the Existing Facilities O&M and the O&M only to:

- (a) the respective subcontractors identified in Schedule 17 (Subcontractors); and
- (b) any additional subcontractors approved in advance by the Province.

The Contractor may replace a subcontractor or engage additional subcontractors only with the prior consent of the Province, such consent not to be unreasonably withheld (having regard to the reputation of and the technical, commercial and financial resources available to the proposed subcontractor). For greater certainty, in this Section 22.2, “subcontractors” means parties having a direct contractual relationship with the Contractor, and excludes subcontractors of such parties.

22.3 Change in Ownership

The Contractor shall not, prior to one year after Availability, allow or suffer any material change in its ownership (direct or indirect) unless such change has been consented to in advance by the Province, such consent not to be unreasonably withheld or delayed. For greater certainty, the Province shall not withhold or delay its consent where the Contractor has satisfied the Province, acting reasonably, that:

- (a) the proposed owner is of good reputation and has suitable technical, commercial and financial resources; and
- (b) the proposed owner is not involved in a business or activity incompatible with or inappropriate in relation to the Project, the Existing Facilities O&M, the O&M or the business relationship between the Province and the Contractor.

For the purposes of this Section: (i) the issuance by the Contractor of non-voting preferred shares or any similar transaction entered into for tax-planning purposes that does not involve voting shares in the Contractor; (ii) internal reorganizations, which do not have the effect of changing the ultimate ownership of the Contractor; or (iii) the initial public offering or the trading of publicly traded securities of an entity that directly or indirectly holds an interest in the Contractor, shall not be considered to be a material change in the ownership of the Contractor.

22.4 Assignment by Province

The Province may assign and transfer all its rights and obligations under this Agreement only to a “Provincial corporation” (as that term is defined by the *Financial Administration Act* (Alberta)) that is a Crown agent such that the Province, as principal to that Crown agent, retains full legal responsibility for all obligations stated as obligations of the Province in this Agreement.

22.5 Intellectual Property

All intellectual property created by the Contractor or its subcontractors, including but not limited to copyright, patents and industrial designs, and including without limiting the generality of the foregoing the Contractor’s Designs and all other plans, drawings and designs created by the Contractor or its subcontractors in relation to the Project, the Existing Facilities O&M and the O&M, created or invented in the course of the Contractor’s carrying out of the Project, the Existing Facilities O&M and the O&M (collectively, the “**Assigned Intellectual Property**”), shall be owned by the Province, and the Province shall be granted a non-exclusive, irrevocable, perpetual, royalty-free license in and to all rights to use intellectual property belonging to third parties, the Contractor or its subcontractors necessary for the use of the intellectual property created by the Contractor or its subcontractors or necessary for the carrying out of the Project, the Existing Facilities O&M, or the O&M in accordance with this Agreement (the “**Licensed Intellectual Property**”), subject to and in accordance with the following:

- (a) the Province hereby grants to the Contractor an irrevocable, perpetual, royalty-free license to use any of the Assigned Intellectual Property (including a right to grant sub-licenses or otherwise commercialize the Assigned Intellectual Property). The Contractor shall as soon as reasonably practicable give the Province notice of each time the Contractor intends to grant sub-licenses or otherwise commercialize the Assigned Intellectual Property; and
- (b) the Contractor shall ensure that its employees, subcontractors and agents waive all moral rights in respect of the Assigned Intellectual Property.

Notwithstanding Section 22.5(a), the Contractor may without notice to the Province grant to its subcontractors such permissions and, if applicable, sub-licenses in respect of the Assigned Intellectual Property as are reasonably required for:

- (c) the carrying out of the Project, the Existing Facilities O&M and the O&M; or
- (d) the use by a third party, other than in furtherance of the Project, the Existing Facilities O&M or the O&M, of a design or invention or process developed by that third party in its capacity as a subcontractor to the Contractor in respect of the Project, the Existing Facilities O&M or the O&M.

22.6 Applicable Law and Jurisdiction

This Agreement shall be governed by the laws in force in Alberta, including the federal laws of Canada applicable therein. Subject to Section 21.4, Alberta courts shall have exclusive jurisdiction over all matters arising in relation to this Agreement, and each party accepts the jurisdiction of Alberta courts.

22.7 Amendment and Waiver

No amendment of this Agreement is effective unless made in writing and signed by a duly authorized representative of each of the Province and the Contractor. No waiver of any provision of this Agreement is effective unless made in writing, and any such waiver has effect only in respect of the particular provision or circumstance stated in the waiver. No representation by either of the parties with respect to the performance of any obligation under this Agreement is capable of giving rise to an estoppel unless the representation is made in writing.

22.8 Additional Assurances

The Province and the Contractor each agree to from time to time do all such acts and provide such further assurances and instruments as may reasonably be required in order to carry out the provisions of this Agreement according to their spirit and intent; but this Section 22.8 shall not in any event be construed as obligating the Province to amend or enact any statute or regulation.

22.9 Counterparts

This Agreement may be executed in counterparts, in which case (i) the counterparts together shall constitute one agreement, and (ii) communication of execution by fax or electronic transmission shall constitute good delivery.

22.10 Joint and Several

Where two or more persons execute this Agreement as the Contractor, the liability under this Agreement of such persons executing this Agreement shall be joint and several.

The parties have therefore signed this Agreement, by their respective duly authorized officers, on the respective dates shown below.

**HER MAJESTY THE QUEEN IN
RIGHT OF ALBERTA**, as represented by
the Minister of Infrastructure

Date: October ____, 2012

Per: _____
Ray Gilmour
Deputy Minister of Infrastructure

EPCOR WATER SERVICES INC.

Date: October ____, 2012

Per: _____
Name: Stephen Stanley
Title: Senior Vice President

Date: October ____, 2012

Per: _____
Name: Mark Wiltzen
Title: Senior Vice President and Chief
Financial Officer