

## SCHEDULE 5

### DESIGN AND PLAN CERTIFICATION PROCESS AND REVIEW PROCEDURE

#### 1. GENERAL

##### 1.1 Capitalized Terms and Section References

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

##### 1.2 Definitions and Interpretation

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

"**Good Industry Practice**" is defined as the exercise of the degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a person skilled and experienced in the design and construction of roads, bridges and related structures seeking in good faith to comply with all applicable laws and the same contractual obligations as the contractual obligations of the Contractor under the DBFO Agreement;

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

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

##### 1.3 DBFO Agreement Reference

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

#### 2. DESIGN AND PLAN CERTIFICATION PROCESS

##### 2.1 Designs and Plans Submission Schedule and Compliance with Technical Requirements

Prior to the commencement of the design and plan certification process for the Project, the Contractor shall provide a design and plan submission schedule. This design and plan

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submission schedule shall take into account that more than one submission will likely be required for each design package. The schedule shall illustrate that the design and plan submissions are reasonably spread over the entire design period and that the schedule is reasonable to achieve.

The Contractor shall prepare all of the Detailed Designs and plans necessary for the construction of the Project or the performance of the O&M in accordance with the Technical Requirements, as may be amended by Change Order.

### **2.2 Design Engineer, Check Engineer and Review Engineer Certification**

Without limitation, all engineering designs shall have received the design checks required by section 100.2.1.1 (Design) of Schedule 18, prior to submission for the Province's review pursuant to Section 3. In addition to the relevant design, and at the same time the Contractor submits the engineering designs to the Province for review, the Contractor shall provide to the Province a certificate signed by the Design Engineer, the Check Engineer or the Review Engineer as required by section 100.2.1.1 (Design) of Schedule 18, certifying that the design was prepared in accordance with the Project Requirements or the O&M Requirements, as the case may be, and is complete, internally consistent and was created using Good Industry Practice. In circumstances where there are two Design Engineers designing interacting elements (such as bridge abutments behind retaining walls), one of the Design Engineers shall be identified as the Design Engineer responsible for the design of the interaction between the two interacting elements.

### **2.3 Deviation from Designs and Plans Prohibited**

Designs and plans submitted to the Province in accordance with this Design and Plan Certification Process and Review Procedure shall not be departed from in the construction of the Project or the performance of the O&M, unless subject to Change Order. However, in the event that the Contractor proposes that a change to such designs and plans is required due to unforeseen circumstances beyond the Contractor's control or that meet the Technical Requirements, then the Contractor shall as soon as reasonably possible and in accordance with Section 2.2 submit such changed designs and plans to the Province in accordance with this Design and Plan Certification Process and Review Procedure.

### **2.4 Appointment of Project Adjudicator**

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

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

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and experienced with respect to the design and construction of projects in the Province of Alberta similar to the Project.

The appointment of the Project Adjudicator will be deemed to be a joint appointment and will be irrevocable by each party without the consent of the other. The appointment of the Project Adjudicator will continue until the completion of the Project. If the Project Adjudicator resigns, dies, or is unwilling or unable to continue to act as Project Adjudicator before the completion of the Project, the parties shall immediately appoint a replacement and in such case, the procedure provided for under this Section 2.4 shall apply.

The fees and expenses of the Project Adjudicator shall be set by the terms of the agreement between the parties and the Project Adjudicator. The Province and the Contractor will share the total costs of the Project Adjudicator equally. Each party shall bear its own costs and expenses in preparing submissions for and attending meetings with the Project Adjudicator. The Province and the Contractor will agree to release and indemnify the Project Adjudicator in respect of certain claims provided the Project Adjudicator has acted in good faith and in accordance with the agreement among the parties.

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

### **2.5 Design and Plan Submission**

Subject to Sections 3.3, 3.4 and 3.9, the Contractor shall not commence or permit the commencement of construction of any part of the Project or the performance of any O&M until 10 Business Days following the Province's receipt of all detailed designs (including, but not limited to, design reports, detailed design drawings, shop drawings and construction specifications), all relevant certificates, all the Contractor's Management Systems and Plans, and the Contractor's Construction Schedule required in respect of such part of the Project or the O&M. Neither comment nor failure to provide comment by the Province shall relieve against or excuse any failure by the Contractor to carry out the Project or perform the O&M in accordance with the Project Requirements or the O&M Requirements, as applicable.

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

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The Non-Compliance Submission shall contain the following information:

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

### **2.6 Design and Plan Availability**

To facilitate review by the Province, the Contractor shall make available at each distinct work area for the Project a current set of reviewed and “issued for construction” drawings for the specific work then being undertaken at such distinct work area. Such drawings shall be accessible by the Province and its servants, agents, advisors, consultants and contractors. The Contractor shall ensure that superseded drawings are removed from the relevant work area at the time they are superseded.

## **3. REVIEW PROCEDURE**

### **3.1 Additional Documents Requiring Review**

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

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

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

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

The Province shall, as soon as is practicable and in any event within 10 Business Days of receipt, return a response on the relevant submission endorsed “Received” or “Comments” or “Observations”, as is appropriate.

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

In the case of submission documents or proposed courses of action endorsed "Received" by the Province, the Contractor may proceed. A "Received" response (or a failure to

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provide comment or any response) by the Province shall not relieve the Contractor from exclusive responsibility for ensuring that the Project complies with the Project Requirements or that the O&M Requirements are met or estop the Province from asserting any non-compliance with the Project Requirements or the O&M Requirements, as the case may be.

**3.5 Submission endorsed "Comments"**

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

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

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

The Contractor shall not commence or permit the commencement of construction of that part of the Project or the performance of that portion of the O&M until five Business Days following the Contractor's resubmission to the Province of any documents or proposed courses of action to which an endorsement of "Comments" was originally attached by the Province (a "**Contractor's Resubmission**") except as may be agreed by the Province in writing.

Subject to the Province and Contractor agreeing otherwise in writing, any construction commenced or permitted to be commenced by the Contractor in respect of that portion of the Project or performance of that portion of the O&M:

- (a) prior to the Province issuing a response of "Received" to a Contractor's Resubmission; or
- (b) in respect of a further response of "Comments" by the Province to a Contractor's Resubmission, prior to the resolution of the issues raised in the Province's further response of "Comments",

is at the Contractor's risk in that the Contractor's obligation to carry out the Project and to perform the O&M in accordance with the Technical Requirements and Schedule 16 to

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the DBFO Agreement shall not be relieved against and the Province shall not be estopped from asserting any non-compliance with the Technical Requirements or Schedule 16 of the DBFO Agreement.

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

When the Province provides "Comments" regarding any document or course of action submitted by the Contractor, such "Comments" may relate to:

- (a) the Contractor's proposed designs, construction activities, construction materials, O&M activities or O&M materials, not likely achieving compliance with the Technical Requirements or Schedule 16 to the DBFO Agreement and thus requiring the Contractor to revisit the document or course of action; or
- (b) on the face of the submission, it is not clear, as determined by the Province acting reasonably, that the Contractor's proposed designs, construction activities, construction materials, O&M activities or O&M materials, will achieve compliance with the Technical Requirements or Schedule 16 to the DBFO Agreement and thus requiring the Contractor to clarify the document or course of action.

### **3.7 Submission endorsed "Observations"**

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

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

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

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

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

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

### **3.9 No Response by the Province**

If the Province does not return a Contractor's initial submission document within 10 Business Days, or documents part of a Contractor's Resubmission within five Business Days of that document's delivery to the Province, then the Contractor shall be entitled to commence or permit to be commenced the construction of those elements of the Project or the performance of those elements of the O&M addressed by the submitted document. Neither comment by the Province nor failure by the Province to provide comment or otherwise participate in any manner in respect of the procedure prescribed by this Schedule shall relieve against or excuse any failure by the Contractor to carry out the Project or to perform the O&M in accordance with the Technical Requirements and Schedule 16 to the DBFO Agreement or estop the Province from asserting any non-compliance with the Technical Requirements or Schedule 16 of the DBFO Agreement.

### **3.10 Further Information Requested by the Province**

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

### **3.11 Disagreement over Comments**

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

## **4. PROJECT ADJUDICATOR'S PROCEDURE**

### **4.1 Engaging the Project Adjudicator**

Pursuant to Section 2.4 or Section 3.11, failing the resolution by agreement of any

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dispute between the parties relating to or arising out of the designs, plans, or the Project Requirements, that dispute shall in the first instance be referred to the Project Adjudicator for the Project Adjudicator's interpretations of the Project Requirements in relation to design or construction for immediate interim resolution.

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

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

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

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

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

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

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

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



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performed in the completion of the Project.

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

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

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

### **4.4 Project Adjudicator's Conclusion Disputed**

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

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

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

### **4.6 Performance of Obligations**

Notwithstanding the existence of any dispute between the parties, the Province and the Contractor will, to the extent not precluded by the matter in dispute, continue with the Project and the performance of their respective obligations under the DBFO Agreement (including the Province's obligation to make Payments to the Contractor) without prejudice to the right to contest, dispute and challenge the relevant matter in accordance with the provisions of the DBFO Agreement.