

FINAL - OCTOBER 22, 2004

**AGREEMENT TO DESIGN, BUILD, FINANCE
AND OPERATE
ANTHONY HENDAY DRIVE
SOUTHEAST LEG RING ROAD**

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

and

[NAME OF CONTRACTOR]

[Date]

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**AGREEMENT TO DESIGN, BUILD, FINANCE
AND OPERATE
ANTHONY HENDAY DRIVE
SOUTHEAST LEG RING ROAD**

made this ___ day of _____, 2004

BETWEEN:

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

(the “**Province**”)

AND:

[name and legal nature of the special purpose vehicle]
(the “**Contractor**”)

PREAMBLE:

Pursuant to an RFQ and RFP process, the Province has selected the Contractor to design, build and finance, and to operate, maintain and rehabilitate for a 30 year term, the southeast leg of the Anthony Henday Drive Ring Road in the City of Edmonton. In addition, and during the same 30 year term, the Contractor has been selected to operate and maintain the west and southwest legs of the Anthony Henday Drive Ring Road, including portions of Highways 2 and 16.

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):

“**Alberta Infrastructure**” means the Province, as represented by the Minister of Infrastructure;

“**Alberta Transportation**” means the Province, as represented by the Minister of Transportation;

“**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;

“**Change Order**” has the meaning indicated by Sections 7.1 and 7.2;

“**City Road Allowances**” means the lands identified as City Road Allowances in Schedule 12;

“**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 under Section 5.16;

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

“**Construction Season**” means the period from May 1 through October 31, inclusive, in any year;

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

“**Contractor’s Designs**” means the Contractor’s preliminary designs and detailed designs for the New Infrastructure, set out in Schedule 3, and including any amendments made from time to time in accordance with Section 5.5;

“**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,

and including any amendments made from time to time in accordance with Section 5.5;

“**Contractor’s Proposal**” means the final (SR3) proposal submitted by a consortium of which the Contractor is the special purpose vehicle contemplated by the proposal, submitted in response to the RFP, and includes all amendments made by the Contractor in accordance with the RFP;

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

“**Direct Lender Agreement**” means the agreement contemplated by Section 3.2 and the Schedule 6, to be entered into among the Province, the Contractor, and one or more lenders who provide the Senior Debt Financing;

“**Dispute Resolution Procedure**” means the procedure set out in Schedule 7;

“**Equity**” means any part of the Project Financing other than the Senior Debt Financing;

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

“**Existing Infrastructure**” means the infrastructure described in Schedule 8, and subject to the foregoing generally means the Anthony Henday Drive West and Southwest Ring Road and portions of Highways 2 and 16;

“**Federal Funding**” means funding for the Project in the amount of \$75 million that the Government of Canada is expected, subject to compliance with the Federal Requirements, to contribute to the Province;

“**Federal Requirements**” means the requirements established by the Government of Canada in relation to the Project as conditions of the Federal Funding, as set out in Schedule 9;

“**Financing Letter of Credit**” means the letter of credit to be delivered by the Contractor to the Province under Section 3.3;

“**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:

- (i) the negligence of the party relying on the Force Majeure Event (or those for whom it is in law responsible); or
- (ii) 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 New Infrastructure and the Existing Infrastructure at the end of the Term in the condition required by Schedule 18 (Technical Requirements), including any amendments deemed to be made by the operation of Section 6.6;

“Identified Encumbrances” means:

- (a) all encumbrances and interests that as of October 22, 2004 are registered against any of the titles listed in section 4 of Schedule 12 (Lands), excepting only any mortgage registered (whether by caveat or otherwise) against the land identified in Schedule 12 as the “Roesinger Land”; and
- (b) all unregistered utility rights of way, easements and other similar interests that are:
 - (i) specifically identified in Appendix A to Schedule 12;
 - (ii) within the “City Road Allowances” defined in Schedule 12; or
 - (iii) known to the Contractor as of the date of the Contractor’s Proposal, or would have been disclosed to the Contractor on that date had the Contractor made inquiry through Alberta One-Call Corporation;

“Independent Safety Auditor” means the Independent Safety Auditor contemplated by Section 5.12 whose recommendation constitutes certification of Traffic Availability under Section 5.14;

“Lease” means the lease contemplated by Section 4.1;

“Leased Lands” means the lands, within the Road Right of Way, described in Schedule 12 (Lands) as the Leased Lands, and includes any lands added to the Leased Lands by operation of Section 4.1 or Section 4.5;

“Major Rehabilitation Payment” means the component of the O&M Payment that is designated in Schedule 14 (Payment Schedule) as the Major Rehabilitation Payment;

“New Infrastructure” means the infrastructure described in Schedule 13, and subject to the foregoing generally means the Anthony Henday Drive Southeast Ring Road;

“O&M” means the operation and maintenance of the New Infrastructure and the Existing Infrastructure, as contemplated by the O&M 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:

- (i) all aspects of the operation and maintenance of the New Infrastructure and the Existing Infrastructure; and
 - (ii) rehabilitation of the New 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 Traffic Availability (including the day Traffic 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 Schedule);

“**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 Payment**” means the payment or payments due to the Contractor under Section 9.1 in relation to the Federal Funding;

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

“**Project Financing**” means financing (of whatever nature, and inclusive of Senior Debt Financing and Equity) arranged by or on behalf of the Contractor sufficient 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, 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;

“**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;

“**Road Right of Way**” means the lands described in Schedule 12 (Lands) as the Road Right of Way;

“**Senior Debt Financing**” means any part of the Project Financing that is debt financing (including capitalized interest) and that, through arrangement with the Contractor has or shares in a first charge on, or otherwise has or shares in first priority to, the Payment; but not in any event exceeding the amount of the Senior Debt Financing indicated in or by the Contractor’s Proposal adjusted for any increase or decrease in that amount that is:

(a) attributable solely to movements in interest rates between the time of submission of the Contractor’s Proposal and the earlier of the initial financial closing of the Senior Debt Financing and one year after Execution of this Agreement; and

(b) in the case of an increase, communicated to the Province within 14 days after the Contractor causes or agrees to the increase;

and subject to the above limit means, in the event that the debt financing is initially raised in a currency other than Canadian dollars, the equivalent Canadian dollar amount that is: (i) if the amount raised is converted into Canadian dollars by a hedging instrument, the Canadian dollar equivalent, taking into account both the amount raised and the hedging instrument; or (ii) if the amount raised is not converted into Canadian dollars by a hedging instrument, the equivalent in Canadian dollars at the time the financing is raised;

“**Service Roads**” means the service roads specified by the Technical Requirements to be constructed by the Contractor;

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

“**Term**” means the period from and including the day Traffic Availability is achieved to and including the day immediately preceding the earlier of (i) 30 years from the day Traffic Availability is achieved, and (ii) 30 years from the Traffic 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;

“**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;

“**Traffic Availability**” means the date when the New Infrastructure and the Service Roads can safely be opened to the public for use by vehicle traffic, and subject to Section 5.15 is the date of certification under Section 5.14;

“**Traffic Availability Target Date**” means October 26, 2007;

“**Traffic Volume Adjustment**” means the traffic volume payment adjustment contemplated by section 200.3.1 of Schedule 18 (Technical Requirements); and

“**TUC**” means the “Transportation/Utility Corridor” lands so described in Schedule 12.

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 - Direct Lender Agreement Requirements

Schedule 7 - Dispute Resolution Procedure

Schedule 8 - Existing Infrastructure

Schedule 9 - Federal Requirements

Schedule 10 - Index Factor

Schedule 11 - Insurance Requirements

Schedule 12 - Lands

Schedule 13 - New 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. The provisions of the Direct Lender Agreement will have precedence over the provisions of this Agreement.

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 Alberta Transportation and Alberta Infrastructure

This Agreement is entered into by the Province as an indivisible legal entity. Although signing of this Agreement on behalf of the Province is necessarily effected by both Alberta Transportation and Alberta Infrastructure, the Province represents and warrants

that, unless and until the Province provides the Contractor with notice to the contrary, this Agreement will be administered solely by Alberta Transportation.

1.9 No Agency, Joint Venture or Partnership

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; or
- (c) constitute or create any partnership;

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

1.10 Contractor's Knowledge

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

- (a) senior personnel of any consortium member described in the Contractor's Proposal; or
- (b) any other individuals directly involved in the preparation of the Contractor's Proposal;

shall be deemed for the purposes of that provision to have been knowledge of the Contractor, even if the Contractor had not yet been incorporated.

1.11 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 Lease

The Province agrees to lease the Leased Lands to the Contractor on the terms and conditions set out in Section 4.

2.3 Design and Build

The Contractor undertakes to design and build the New Infrastructure and the Service Roads in accordance with the Project Requirements and as more particularly set out in Section 5.

2.4 Operation and Maintenance

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

2.5 Handback

The Contractor undertakes to hand back the New Infrastructure and the Existing Infrastructure upon expiry of the Term in accordance with the Handback Requirements and as more particularly set out in Section 8.

2.6 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 Direct Lender Agreement

The Province will, at the Contractor's request, enter into a Direct Lender Agreement with the Contractor and a lender or lenders (or any representative thereof contemplated by the definition of "Lender" in Schedule 6 (Direct Lender Agreement Requirements) who provide all or a substantial portion of the Senior Debt Financing, subject to the following:

- (a) any Direct Lender Agreement to be entered into under this Agreement must be in strict compliance with the parameters set out in Schedule 6, and must not

include any substantive obligations on the part of the Province other than as expressly contemplated by Schedule 6; and

(b) the Province will enter into a replacement Direct Lender Agreement at the Contractor's request, provided the Contractor has arranged cancellation of the Direct Lender Agreement previously in effect, it being understood that no more than one Direct Lender Agreement will be in effect at any time.

3.3 Condition Precedent

The Contractor must, as a condition precedent to this Agreement, deliver to the Province within three Business Days after Execution of this Agreement an irrevocable, unconditional, on sight letter of credit (the "**Financing Letter of Credit**") in the amount of \$17.5 million, issued by a bank having an office in Canada and authorized under the *Bank Act* (Canada) to do business in Canada (or 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 credit rating of not less than A+ or equivalent from Moody's Investors Service, Standard & Poor's, 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. The Province shall be deemed to have waived the above condition precedent if, within two Business Days after Execution of this Agreement, the conditions set out in Section 3.5(a) for release of the Financing Letter of Credit have been met.

3.4 Financing Letter of Credit

The Financing 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.

3.5 Release of Letter of Credit

The Financing Letter of Credit must be maintained in effect by the Contractor until either of the following events has occurred:

(a) the Contractor has satisfied the Province, acting reasonably but cautiously but otherwise having regard to the following, that the Project Financing has been arranged and is fully committed to the Project:

(i) bond financing shall be considered fully committed to the extent that arm's-length investors have committed to subscribe for bonds, provided proceeds of not less than \$50,000,000 from issuance of the bonds have been received by the Contractor or by a bond trustee, in circumstances

where the Province, acting reasonably, is satisfied that the proceeds will be applied to the Project;

(ii) bank financing shall be considered fully committed to the extent that a major bank or other major financial institution has:

(A) unconditionally undertaken to the Province that it will advance the funding to the Contractor for the purposes of the Project; or

(B) committed funding to the Contractor and made an advance of not less than \$50,000,000 of the Senior Debt Financing to the Contractor, in circumstances where the Province, acting reasonably, is satisfied that the advance will be applied to the Project; and

(iii) Equity shall be considered fully committed only to the extent that:

(A) it has been advanced to the Contractor or the obligation to advance it is backed by a letter of credit issued by a bank having an office in Canada and authorized under the *Bank Act (Canada)* to do business in Canada (or 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 credit rating of not less than A+ or equivalent from Moody's Investors Service, Standard & Poor's, 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); or

(B) an unconditional commitment to provide the Equity (whether through a subsidiary corporation or otherwise) has been given in writing to the Province by a party acceptable to the holders or prospective holders of the Senior Debt Financing;

in either case where it is reasonable for the Province to have a high level of comfort that the Equity, once paid into the Contractor, will not be repaid by the Contractor upon the Province returning the Financing Letter of Credit to the Contractor; or

(b) the Contractor has satisfied the Province, acting reasonably, that the Contractor has incurred in furtherance of the Project direct out of pocket expenditures, exclusive of:

(i) the cost of legal and financial advisors;

(ii) any costs incurred in connection with preparation of the Contractor's Proposal;

(iii) design costs;

(iv) any prepaid management or service fees; and

(v) the cost of any materials that have not been incorporated into the Project as fixtures;

of not less than \$35 million;

and upon either of such events, the Province shall immediately surrender the Financing Letter of Credit to the Contractor.

3.6 Presentation of Financing Letter of Credit

The Province may present the Financing Letter of Credit for payment, and subject to Section 3.7 retain the proceeds therefrom as liquidated damages, only if :

(a) this Agreement is terminated by the Province under Section 17.2(a); or

(b) the Contractor fails to deliver a renewal of the Financing Letter of Credit at least 20 days before the expiry date specified in the Financing Letter of Credit;

and only if neither of the conditions in Section 3.5 for release of the Financing Letter of Credit have been achieved prior to the occurrence of the event described in clause (a) or clause (b), as the case may be.

3.7 Repayment of Proceeds

If the Province presents the Financing Letter of Credit under Section 3.6(b), and if thereafter, but prior to termination of this Agreement, the Contractor meets the conditions in Section 3.5 for release of the Financing Letter of Credit, then the Province shall repay to the Contractor, without interest, the proceeds from presenting the Financing Letter of Credit.

4. LEASE OF LEASED LANDS

4.1 Lease

Subject to Section 4.19 and the reservation set out in this Section 4.1, the Province hereby leases to the Contractor all of the Leased Lands currently owned by the Province and not leased to third parties, including all fixtures and improvements constructed thereon under

this Agreement, and the Contractor hereby accepts and agrees to the Lease. This Lease extends to and includes:

- (a) any of the Leased Lands not presently owned by the Province, which lands shall be deemed to be leased to the Contractor under the Lease upon the Province acquiring the fee simple title to such lands; and
- (b) any of the Leased Lands presently leased by the Province to third parties, which lands shall be deemed to be leased to the Contractor under the Lease upon expiry of the leases to third parties.

The Province may, without compensation to the Contractor except under Section 4.8(f) or as follows from the existence of a Relief Event under Section 13.2(n), grant utility rights of way, easements or similar interests in land over the Leased Lands, pursuant to the *Edmonton Restricted Development Area Regulations* (AR 287/74, as amended) or, as applicable, the *Sherwood Park West Restricted Development Area Regulations* (AR 45/74, as amended).

The Contractor further acknowledges that the City Road Allowances are not presently owned by the Province, and that pending acquisition of the City Road Allowances, the Contractor will be responsible to at its own expense (except as follows from the existence of a Relief Event under Section 13.2(p), and subject to the obligation of the Province under Section 15.4 to provide reasonable assistance), obtain permission from the City of Edmonton to access and make use of the City Road Allowances for the purposes of the Project. The Province undertakes to obtain title to the City Road Allowances by August 31, 2005.

4.2 Condition of Leased Lands

Except as expressly set out in this Agreement:

- (a) the Leased Lands are leased to the Contractor on an “as is” basis; and
- (b) the Province provides no representations or warranties with respect to the Road Right of Way.

Without limiting the generality of the foregoing, the Contractor accepts the Lease subject to the Identified Encumbrances. The Province represents that it has not granted, and covenants that it will not grant, any mortgage or other security interest in the Leased Lands. The Province makes no representation as to the registerability of the Lease.

4.3 Commencement and Duration

The Lease comes into effect upon Execution of this Agreement and continues until the expiry of the Term or sooner termination of this Agreement. The Lease automatically terminates upon any termination of this Agreement.

4.4 Rent

The Contractor shall pay rent for the duration of the Lease in the amount of one dollar, receipt of which is acknowledged by the Province.

4.5 Additional TUC Lands

If the Contractor demonstrates to the satisfaction of the Province, acting reasonably, that lands within the TUC in addition to the Road Right of Way are reasonably required for the Project, the Province will, provided it is practicable to do so without material expense to the Province and without material impact upon other stakeholder uses within the TUC, add those lands to either:

- (a) the Road Right of Way, whereupon (and upon the Province being or becoming the owner of those lands) they will become part of the Leased Lands; or
- (b) the Leased Lands, without adding them to the Road Right of Way.

4.6 Access to TUC Lands

The Contractor acknowledges that:

- (a) access to and use of the TUC outside of the Road Right of Way is subject to the Contractor obtaining written consent of the Province's Minister of Infrastructure and otherwise complying with the *Edmonton Restricted Development Area Regulations* (AR 287/74, as amended) or, as applicable, the *Sherwood Park West Restricted Development Area Regulations* (AR 45/74, as amended) and obtaining such other consents and complying with such other requirements as may from time to time be required by applicable laws;
- (b) except to the extent that inability to obtain required consents constitutes a Relief Event under Section 13.2(i), it is the responsibility of the Contractor to obtain all consents and comply with all applicable laws as necessary to obtain access to the TUC outside of the Road Right of Way, and the Province has provided no representations or assurances in relation to such matters.

The Contractor shall be responsible for any damage to the TUC caused by the Contractor, its agents, subcontractors or others for whom the Contractor is legally responsible.

4.7 Additional Lands Outside the TUC

If, despite the Contractor's acknowledgement in Section 5.8, the Contractor decides that lands outside of the TUC and outside the Road Right of Way are required for the Project, then the Contractor shall acquire fee simple ownership of such additional lands at its sole cost, and the Contractor hereby grants to the Province an option, exercisable upon notice given at any time within 30 days before or after expiry of the Term or sooner termination of this Agreement, to purchase such additional lands for a purchase price of one dollar. The Contractor shall promptly notify the Province of any such lands that it acquires, shall provide to the Province the legal description of such lands, shall in furtherance of the option hereby granted and at the request of the Province from time to time enter into a formal option agreement in such form as the Province may reasonably require, and shall not grant or assume any mortgage or other security interest in such lands. The Province acknowledges and agrees that:

- (a) this Section 4.7 is not intended to apply to, and does not apply to, lands intended to be used temporarily by the Contractor that will not contain any of the New Infrastructure and will not materially affect the ownership, use, operation and maintenance of the New Infrastructure following expiry of the Term or sooner termination of this Agreement; and
- (b) the Contractor may grant a security interest in any lands to be acquired by the Contractor under this Section 4.7, but only if the Contractor satisfies the Province, acting reasonably, that the Province will be legally entitled to have the security interest discharged without payment by the Province upon the Province exercising its option to acquire the lands.

4.8 Utility, Railway and Drainage Agreements

Subject only to the Province's obligations under Section 15.4, the Contractor shall negotiate and arrange all agreements (the "**Utility Agreements**") required in respect of utilities, drainage outside the TUC or railways in order to carry out the Project, on the following basis:

- (a) the Utility Agreements shall be, to the extent practicable, in the form that the Province routinely enters into, or in such other form as is 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;

(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 or railway, the Province will be a party to the Utility Agreements; 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 by the Province or those for whom the Province is legally responsible.

The Contractor acknowledges that the TUC is premised upon ongoing cooperation among stakeholders, and acknowledges the probability that additional utility uses beyond those identified in the Identified Encumbrances (“**Future Utilities**”) of the TUC 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 Future Utilities to the extent that Ministerial consents given in respect of those Future Utilities require payment to the Contractor of those expenses; and

(f) from the Province, to the extent that Ministerial consents given in respect of those Future Utilities do not require payment to the Contractor of those expenses.

Immediately upon the Contractor becoming aware of 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 4.8, 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).

4.9 Condition of the Leased Lands

Subject to Sections 11.7 and 11.8, and subject to the Contractor's obligations under this Agreement to carry out the Project, the Contractor shall maintain the Leased Lands in good and proper order and repair throughout the duration of this Lease, and shall:

- (a) be responsible for repairing all damage to the Leased Lands, however caused, excepting only damage caused by a Force Majeure Event or caused directly by the Province or its agents or contractors or others for whom the Province is legally responsible;
- (b) dispose of garbage from the Leased Lands, in accordance with the requirements more particularly set out in the Technical Requirements;
- (c) not stockpile any material on the Leased Lands except during the Construction Period or during and for the purpose of doing major rehabilitation or otherwise carrying out construction, maintenance or repair activities under this Agreement;
- (d) not commit or permit any waste or nuisance on the Leased Lands; and
- (e) promptly rectify and remediate any environmental damage or degradation to the Leased Lands, with the exception only of:
 - (i) environmental damage or degradation pre-existing as of the date of Execution of this Agreement; and
 - (ii) environmental damage or degradation caused after the date of Execution of this Agreement by the Province or its agents or contractors or others for whom the Province is legally responsible;

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 Leased Lands in good and proper order or its obligations under clauses (a) or (d) of this Section 4.9, nor shall it constitute environmental damage or degradation that the Contractor is obligated to rectify under clause (e) of this Section.

4.10 Permitted Use

The Contractor covenants that the Leased Lands and the New Infrastructure to be constructed thereon shall be used only for the purposes of the Project and, from and after Traffic Availability, shall be used only as a public highway and not for any commercial purposes other than the Project and the O&M, and shall be continuously open and available for free public use excepting only such closures or partial closures as are expressly contemplated and authorized by the Technical Requirements.

4.11 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 or relating to the O&M, excepting those sums required to be retained under the provisions of any applicable statute of Alberta, and shall not permit any lien or claim under any such statute to be made against the Province or filed or registered against the Leased Lands or the New Infrastructure or the Service Roads 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. The Contractor shall at its own expense promptly take all steps required to effect a discharge of any lien so filed or registered.

4.12 Ownership of Improvements

The Contractor acknowledges that the New Infrastructure and all other fixed improvements that the Contractor may from time to time construct upon the Leased Lands shall be fixtures and will become the property of the Province upon the expiration or termination of this Lease, but until such expiration or termination the New Infrastructure and all such other fixed improvements shall be deemed (except as otherwise expressly agreed in writing between the Province and the Contractor), as between the Province and the Contractor, to be the separate property of the Contractor.

4.13 Quiet Enjoyment

Subject to the provisions of this Agreement, the Contractor shall have and may peaceably use and enjoy the Leased Lands during the duration of this Lease, without any interruption or disturbance from the Province or any person claiming from or under the Province. The Province shall defend its title to the Leased 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 Leased Lands, except where such adverse interest arises as a result of an act or omission of or willful misconduct on the part of the Contractor or those for whom it is legally responsible. Unless expressly otherwise stated by the Province, any entry upon the Leased Lands by the Province in accordance with the provisions of this Agreement or by any third party through written consent of the Province's Minister of Infrastructure pursuant to the *Edmonton Restricted Development Area Regulations* (AR 287/74, as amended) or, as applicable, the *Sherwood Park West Restricted Development Area*

Regulations (AR 45/74, as amended) shall not constitute a re-entry under this Lease, nor shall any such entry constitute a trespass or a breach of this covenant of quiet enjoyment.

4.14 Payment of Costs and Taxes

The Contractor will pay all costs and charges that may be levied against the Leased Lands, including without limitation all taxes payable in respect of the operation or occupancy of the Leased Lands or the New Infrastructure; provided, however, that the Province will directly pay on behalf of the Contractor all property taxes, special taxes, local improvement taxes and requisitions that may be imposed on the Leased Lands by a municipality pursuant to the *Municipal Government Act* (Alberta) or any successor legislation.

4.15 Relief from Forfeiture

The Contractor waives any right to, and undertakes not to, claim relief from forfeiture of this Lease if the Province terminates this Agreement in accordance with Section 17. Upon any termination of this Agreement and the Lease, the Contractor shall forthwith yield up possession of the Leased Lands, and if the Contractor fails to do so it shall indemnify the Province against any damages, losses or costs incurred by the Province in consequence of such failure.

4.16 No Assignment or Sublease

The Contractor may not sublet the whole or any part of the Leased Lands or licence the use of the whole or any part of the Leased Lands, and may not assign this Lease except through an assignment of all of its rights under this Agreement in accordance with Section 22.1; but this prohibition shall not prevent any granting by the Contractor of security in its leasehold interest in connection with the Project Financing. The Contractor may, for any purpose in furtherance of the Project or the O&M, grant a licence or other permission to its subcontractors, agents and employees or any representatives of the holders of the Senior Debt Financing to access the Leased Lands, but no such licence or permission shall have effect beyond expiry or termination of this Agreement.

4.17 Hold Harmless

Without limitation to the applicability of the general indemnity in Section 16.1, but subject to the exceptions set out in Section 4.9(e) and in the last paragraph of Section 4.9, the Contractor shall hold harmless the Province from any and all third party claims for which the Contractor is legally responsible and arising in relation to the Leased Lands, including without limiting the generality of the foregoing:

- (a) any claims for occupier's liability in respect of the Leased Lands, including any claims for which the Province has liability solely as a result of being the registered owner of the Leased Lands;

(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 laws or any damage to the environment or any nuisance.

4.18 Stand Alone Lease

If so requested by the Contractor for the purpose of facilitating the issuance of a leasehold title to the Leased Lands or for other good reason, the Province will give consideration to entering into a stand alone lease agreement on the same terms and conditions as are set out in, and consistent with the intent and effect of, this Section 4, and in that event all required documentation shall be provided by and at the expense of the Contractor.

4.19 Licence in Lieu of Lease

If the Contractor so elects by notice in writing to the Province upon or prior to Execution of this Agreement, then the Lease shall not come into effect, and instead the Leased Lands shall be licenced to the Contractor, with the intent that:

(a) the licence shall entitle the Contractor to do all such acts upon or in respect of the Leased Lands as the Contractor would have been entitled to do under the Lease;

(b) the contractual rights and obligations of the Contractor and the Province shall be the same as if the Lease had come into effect, except that the property right inherent in the Lease will not exist; and

(c) the Lease will be referred to instead as the "Licence", the Leased Lands will be referred to instead as the "Licenced Lands", and all other provisions of this Agreement applicable to the Lease will be read with all such necessary changes as follow from the substitution of the Licence for the Lease.

5. DESIGN AND BUILD OF THE NEW INFRASTRUCTURE

5.1 Contractor's Obligations

The Contractor agrees to design and build the New Infrastructure and the Service Roads 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 New Infrastructure 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 New Infrastructure and the Service Roads 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 by 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 for personal injuries or property damage to the extent that a Court of competent jurisdiction has determined that such injury or damage was caused or contributed to by a deficiency in the Project Requirements.

5.3 Contractor's Responsibility to Carry Out Project Requirements

Subject to Section 5.4, 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 exclusive responsibility for ensuring that the Project complies with the Project Requirements or 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 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 (the 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.

5.6 Contractor Solely Responsible for Project

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, 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 relating to utilities, railways and drainage; and
 - (iii) all required arrangements with municipalities;
- (b) establishing its own operations and maintenance yard (outside the TUC) and any other support facilities required by the Contractor; and
- (c) 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, 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 mediator or arbitrator acting under the Dispute Resolution Procedure, which are specifically provided for in Schedule 7 (Dispute Resolution Procedure); and
- (c) any claims by third parties asserting a right to compensation 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 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 Leased Lands

Subject to Section 4.7, the Contractor agrees to construct the Project entirely within the TUC (including, to the extent that the Road Right of Way is outside the TUC, within the Road Right of Way) and, subject to Section 4.5, entirely within the Road Right of Way, and acknowledges that it has fully familiarized itself with the Project and the TUC and has satisfied itself that no other land outside the TUC 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 and construction specifications) for the Project 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 no comment or failure to comment or other participation by the Province under 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 in accordance with the Project 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 may constitute a Relief Event under Section 13.2(c).

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 Traffic Availability by the Traffic Availability Target Date, the Contractor shall provide the Province with:

- (a) by December 31, 2007, the Contractor's plan for achieving Traffic Availability no later than June 30, 2008; and
- (b) from and after January 1, 2008, weekly progress and activity reports, including a statement of the Contractor's current expectation of when Traffic Availability will be achieved and all contingencies to which that expectation is subject.

5.12 Independent Safety Auditor

Prior to finalization of the Contractor's Designs and the Contractor's Management Systems and Plans, the Contractor must retain an Independent Safety Auditor to perform a safety assessment of the Contractor's Designs and the Contractor's Management Systems and Plans, in the manner contemplated by Schedule 4 (Contractor's Management Systems and Plans). At least 25 days prior to the date the Contractor anticipates that the Project will be sufficiently completed that the New Infrastructure can safely be opened to the public for use by vehicle traffic, the Contractor must retain an Independent Safety Auditor (who may be but need not be the same person as previously retained) to perform a safety assessment of the Project. In each case the Independent Safety Auditor shall be retained in accordance with the following:

- (a) the Independent Safety Auditor must be an engineering consultant having strong expertise in roadway design and traffic safety, selected in consultation with the Province;
- (b) the Independent Safety Auditor must agree to carry out and discharge the responsibilities contemplated by this Section 5.12 or Sections 5.13 and Section 5.14, as the case may be;
- (c) the Independent Safety Auditor must carry professional liability insurance with errors and omissions coverage of not less than \$500,000 per occurrence;

(d) all fees and expenses of the Independent Safety Auditor are to be borne by the Contractor; and

(e) the Independent Safety Auditor shall be impartial to the parties when required to make any recommendation, determination or assessment under this Agreement.

5.13 Anticipated Traffic Availability

When the Contractor anticipates that in approximately 25 days the Project will be sufficiently completed that the New Infrastructure and the Service Roads can safely be opened to the public for use by vehicle traffic, the Contractor shall:

(a) notify the Province, including an indication of the work still intended to be completed by the Contractor prior to Traffic Availability;

(b) procure an inspection by the Independent Safety Auditor; and

(c) provide the Province with the results of the inspection by the Independent Safety Auditor.

The Province may within 10 days after receiving such results (i) perform its own inspection and (ii) notify the Contractor and the Independent Safety Auditor of any deficiencies and safety concerns.

5.14 Certification of Traffic Availability

When the Independent Safety Auditor, having regard to any deficiencies and safety concerns noted by the Province within the above 10 day period and all remedial action taken by the Contractor in response thereto, is satisfied that the New Infrastructure and the Service Roads can safely be opened to the public for use by vehicle traffic, the Independent Safety Auditor shall issue to the Contractor and the Province a recommendation that the New Infrastructure and the Service Roads are ready for and safe for vehicle traffic, and such recommendation shall for the purposes of this Agreement but subject to Section 5.15 constitute certification that Traffic Availability has been achieved. For the purposes of determining whether the New Infrastructure and the Service Roads (except for gravel or oil surface Service Roads, to which only sections 400.4.2.4 and 400.4.4.2 shall apply) can safely be opened to the public, any unremedied deficiency in the Contractor's compliance with the following sections of the Technical Requirements shall be conclusively deemed to adversely affect the safety of the roads: 400.4.2.4 (cross-slope and superelevation, pavement width); 400.4.3.2 (smoothness); 400.4.4.2 (rutting); 400.4.5.3 (skid resistance); 100.2.9 (initial Operation & Maintenance Plan finalized); and 100.2.10 (initial Infrastructure Wholelife Management Plan finalized).

5.15 Province May Prevent Road Opening

Notwithstanding a recommendation and deemed certification under Section 5.14, the Province may, if it considers, based on safety concerns (i) identified in writing by the Province during the design review process, (ii) notified by the Province in accordance with Section 5.13, or (iii) that could not reasonably have been identified by the Province at the time of its inspection under Section 5.13, that the New Infrastructure and the Service Roads are not safe for vehicle traffic, immediately and upon so notifying the Contractor and the Independent Safety Auditor (which notice must set out the specific safety concerns), prevent the opening of the New Infrastructure to vehicle traffic until such time as the Province is satisfied that the New Infrastructure is safe for vehicle traffic. In that event:

(a) the Province and the Contractor will work cooperatively together to arrive at a mutually agreeable plan for the Contractor to rectify the safety concerns so that the New Infrastructure and the Service Roads can be opened to the public at the earliest possible date;

(b) Traffic Availability shall for all purposes of this Agreement be considered to have been achieved, the Province shall commence making the Payment accordingly, and the Contractor shall commence performing the O&M on the Existing Infrastructure and the New Infrastructure;

(c) the difference of opinion and the question of whether and on what date the New Infrastructure and the Service Roads were safe for vehicle traffic shall be resolved pursuant to the Dispute Resolution Procedure;

(d) if it should be determined pursuant to the Dispute Resolution Procedure that by reason of the safety concerns identified by the Province in the notice to the Contractor under this Section 5.15, the New Infrastructure and the Service Roads were not safe for vehicle traffic on or before the date of the recommendation by the Independent Safety Auditor under Section 5.14, then:

(i) the arbitrator making that determination shall determine the date on which the New Infrastructure and the Service Roads were safe for vehicle traffic, and award a credit to the Province, to be applied against the Payment next coming due, of \$2,000 for each day that the opening of the New Infrastructure and the Service Roads was delayed by the safety concerns; and

(ii) the Contractor shall as soon as practicable and at its expense rectify such of the safety concerns as have not yet been rectified.

In the event that the Contractor notifies the Province that it disputes safety concerns identified by the Province but intends to address such safety concerns as requested by the Province while reserving the right to dispute such safety 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.

5.16 Construction Completion

Following achievement of Traffic Availability, the Contractor shall diligently proceed to Construction Completion. When the Contractor has advised that Construction Completion has been achieved, the Province will do a further inspection and, when all noted deficiencies in the Project Requirements have been rectified, will issue a certificate confirming Construction Completion.

5.17 Construction Completion Holdback

If upon Traffic 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 a 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 cost, estimated by the Province acting reasonably, of achieving Construction Completion. The holdback shall be proportionately released to the Contractor, without interest, as the remaining work is done. When Construction Completion is achieved, the Province shall release the remaining balance of the holdback to the Contractor, without interest. If Construction Completion is not achieved within one year after Traffic Availability, 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 the remaining balance of the holdback as liquidated damages.

5.18 Service Roads

In addition to and not in substitution for all other obligations of the Contractor under this Agreement in relation to the Service Roads, the Contractor shall:

- (a) design and construct the Service Roads in compliance with all applicable municipal requirements; and
- (b) warrant the Service Roads to be free from any defect or failure to withstand climatic conditions, maintenance and normal operating conditions for a period of two years following Construction Completion.

The Province shall, during the warranty period, notify the Contractor of required warranty work as the Province becomes aware of the need for such warranty work, and

the Contractor shall diligently perform such warranty work as soon as practicable following receipt of such notice. If the Contractor fails to complete warranty work on the Service Roads within one month after expiry of the warranty (or, in the event that the warranty work is seasonally delayed, fails to within one month after expiry of the warranty provide the Province with a reasonable plan and timetable for completing the warranty work, and thereafter diligently carry out such plan in accordance with such timetable), the Province may upon so notifying the Contractor make other arrangements for performance of the warranty work, and set off the cost of the work against the Payment. The Province shall by March 31, 2005 arrange for the Contractor to have all rights of access to the Service Roads reasonably required for the construction of the Service Roads and the performance of the warranty work.

5.19 Coordination with Completion of Existing Infrastructure

The Contractor acknowledges that the Province has engaged other contractors to complete the Calgary Trail / Gateway Boulevard portion of the Existing Infrastructure, which contract work is expected to be completed on or before December 31, 2006 and will need to be coordinated with certain portions of the Project. Accordingly, the Contractor shall:

- (a) provide all reasonable cooperation with contractors completing the Existing Infrastructure;
- (b) coordinate and schedule the Project in such manner as will facilitate the completion of the Existing Infrastructure and connection of the New Infrastructure with the Existing Infrastructure; and
- (c) if and as often as it becomes aware of deficiencies in the construction of the Existing Infrastructure as will affect or interfere with the Project or obligations of the Contractor under this Agreement, immediately provide the Province with notice, including reasonable details, of those deficiencies.

The Province shall arrange the reciprocal reasonable cooperation of contractors engaged to complete the Existing Infrastructure.

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) as remain pertinent to the Operating Period, both for the New Infrastructure and the Existing Infrastructure, from Traffic Availability until the end of the Term or the sooner termination of this

Agreement in accordance with its provisions. The Service Roads are not included in the O&M to be performed by the Contractor.

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 for achieving public safety, and shall indemnify the Contractor against any claims by third parties for personal injuries or property damage to the extent that a Court of competent jurisdiction has determined that such injury or damage was caused or contributed to by a deficiency in the O&M Requirements.

6.3 Compliance with Applicable Laws

The Contractor undertakes to comply with all applicable laws in the carrying out of the O&M Requirements.

6.4 Road Closure Fees

Where the Contractor, as contemplated by and in accordance with the Technical Requirements, makes arrangements with the carriers of high loads or oversized loads to close any portion or any lane of the New Infrastructure or the Existing Infrastructure for that purpose, such arrangements shall limit the Contractor to recovering from such carriers an amount calculated according to section 3.2 of Schedule 1 as if such arrangement were pursuant to a Change Order.

6.5 Contractor Solely Responsible for O&M Costs

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 mediator or arbitrator acting under the Dispute Resolution Procedure, which are specifically provided for in Schedule 7 (Dispute Resolution Procedure); and
- (c) any costs, fees, charges or payments expressly to be made by the Province under the provisions of this Agreement.

6.6 Condition of Existing Infrastructure

The Province shall be responsible to turn over the Existing Infrastructure on Traffic Availability in a condition as if maintained in accordance with the O&M Requirements, and to that end:

(a) when the Contractor anticipates that Traffic Availability will be achieved in six months, the Contractor shall so notify the Province, and the Contractor and the Province shall:

(i) within 15 days thereafter; and

(ii) no earlier than 45 days prior to the anticipated date of Traffic Availability and no later than 30 days prior to the anticipated date of Traffic Availability;

arrange joint inspections of the condition of the Existing Infrastructure and identify all respects (“Deficiencies”) in which the condition of the Existing Infrastructure falls short of the condition required to be maintained pursuant to the O&M Requirements;

(b) upon identification of the Deficiencies, the Province shall, prior to Traffic Availability, for each Deficiency either:

(i) remedy the Deficiency at its own expense;

(ii) make arrangements with the Contractor to remedy the Deficiency, in consideration of such payment as the Province and the Contractor may negotiate; or

(iii) notify the Contractor that the Deficiency need not be remedied, in which case the O&M Requirements and the Handback Requirements as they apply to the Existing Infrastructure shall be deemed to be amended accordingly; and

(c) if the joint inspections fail to identify latent defects in the Existing Infrastructure, but such latent defects come to light on or before the date five years after Traffic Availability, then the Province shall correct and repair the defects in such manner and on such timetable as is reasonable in the circumstances and does not unreasonably interfere with the Contractor’s performance of the O&M.

The Province undertakes that the Existing Infrastructure will be completed no later than December 31, 2006.

7. MODIFICATIONS AND CHANGE ORDERS

7.1 Modification of Project Requirements

If during the Construction Period the Province wishes to modify the Project or the Project Requirements, it shall proceed as provided in Schedule 1 (Change Orders). If the Contractor wishes to recommend modification of the Project or the Project Requirements, it may invite the Province to proceed as provided in Schedule 1. Upon a Change Order being issued by the Province pursuant to Schedule 1 in respect of the Project or the Project Requirements:

- (a) Schedule 18 (Technical Requirements) 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 incremental costs, if any, of carrying out the Project Requirements, including, if the Change Order will delay Traffic Availability, any costs to the Contractor thereby occasioned, which payment shall be made as those costs are incurred following the Traffic Availability Target Date; and
- (c) 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 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 Traffic Availability by the Traffic Availability Target Date or otherwise materially and adversely alter the risk profile of the Project.

7.2 Modification of O&M Requirements

If the Province wishes to modify 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 Requirements, it may invite the Province to proceed under Schedule 1. Upon a Change Order being issued by the Province pursuant to Schedule 1 in respect of the O&M Requirements:

- (a) Schedule 18 (Technical Requirements) 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 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 effect a reduction in the O&M Requirements of such magnitude as could reasonably be expected to materially and adversely affect the Contractor.

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 TUC or within the Road Right of Way, 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 Requirements or the O&M Requirements (as the case may be); 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 Requirements or the O&M Requirements, such interference or disruption may constitute a Relief Event under Section 13.2(j).

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 Expansion by Province

The Province shall be at liberty during the Operating Period to undertake expansion to any aspect of the New Infrastructure or the Existing Infrastructure, but in that event:

- (a) the Province shall, before entering into any agreement to expand the New Infrastructure, but only to the extent permitted by law and any intergovernmental agreements to which the Province is then a party, offer to negotiate exclusively with the Contractor for a period of 60 days, with a view to engaging the Contractor to carry out such expansion and to mutually consider whether the expansion would materially and adversely alter the risk profile of the O&M;
- (b) if the Province does not engage the Contractor to carry out such expansion, the Province shall take all commercially reasonable measures to minimize interference with or disruption to the Contractor's carrying out of the O&M Requirements, and if the activities of the Province or its contractors in carrying out the expansion do interfere with or disrupt the Contractor's carrying out of the O&M Requirements, such interference or disruption may constitute a Relief Event under Section 13.2(k);

(c) if applicable, the O&M Requirements in Schedule 18 shall be amended to reflect the expansion, and in that event the scope of the O&M shall be extended to and include the expansion;

(d) if the expansion when completed increases the cost to the Contractor of carrying out the O&M Requirements, then the O&M Payments in Schedule 14 (Payment Schedule) shall thereafter be adjusted commensurately; and

(e) if expansion of the New Infrastructure is carried out other than by the Contractor, then:

(i) if the expansion materially and adversely alters the risk profile of the O&M, the Contractor is entitled to reasonable compensation therefor from the Province;

(ii) the Contractor shall provide all reasonable cooperation (but without obligation to incur material expense unless underwritten by the Province) to facilitate the carrying out of the expansion; and

(iii) for all purposes related to the Handback Requirements the expansion shall be treated as if it were part of the Existing Infrastructure and not part of the New Infrastructure.

7.5 Determination of Costs

All payments and adjustments of Schedule 14 (Payment Schedule) on account of Change Orders under Sections 7.1 or 7.2 or by the operation of Section 7.4(d) 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 New Infrastructure and the Existing 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, in the case of the New Infrastructure, major rehabilitation 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 57 months and not more than 63 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 15 months and not more than 18 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 New Infrastructure and the Existing 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. Notwithstanding the foregoing, the Province may not in any event hold back under this Section:

(a) any amount prior to the last four years of the Term; or

(b) any part of the Capital Payment prior to the last two years of the Term.

The Holdback shall be released to the Contractor, without interest, as the work is done by the Contractor. If the Handback Requirements are not achieved by the expiry of the Term (or, if the Term expires other than during the Construction Season, within 90 days after the next Construction Season begins), the Province may release the Contractor from its obligation to achieve the Handback Requirements and in that event may retain the Holdback as liquidated damages.

8.5 Substitution of Letter of Credit

The Contractor may at any time call for release of the Holdback upon delivering to the Province an irrevocable, unconditional, on sight letter of credit in the amount of the Holdback, drawn on a bank having an office in Canada and authorized under the *Bank Act* (Canada) to do business in Canada (or 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 credit rating of not less than A+ or equivalent from Moody's Investors Service, Standard & Poor's, 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; or
- (b) the Contractor fails to deliver a renewal letter of credit at least 20 days in advance of the expiry of the letter of credit;

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.

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 Progress Payment and Federal Funding

Subject to the Contractor complying with the Federal Requirements, the Province will make payment of the Progress Payment to the Contractor in accordance with the following:

- (a) on December 1, 2005, one-half of Eligible Costs (as defined in the Federal Requirements) incurred by the Contractor, to a maximum payment of \$25,000,000;
- (b) on December 1, 2006, one-half of incremental Eligible Costs incurred by the Contractor (that is, excluding Eligible Costs claimed for under clause (a)), to an aggregate maximum payment (that is, inclusive of the amount paid under clause (a)) of \$50,000,000; and
- (c) upon Traffic Availability, the balance of the \$75,000,000 Progress Payment (that is, \$75,000,000 less the amounts paid on December 1, 2005 and December 1, 2006).

The Contractor shall comply with the Federal Requirements in such manner as will enable the Province to obtain the Federal Funding in a timely manner. The Province is responsible for taking all administrative steps as may be required to be taken by it to facilitate the advance to it of the Federal Funding. If any part of the Federal Funding is not received by the Province upon compliance by the Contractor with the applicable Federal Requirements, the Province shall nonetheless make payment to the Contractor in accordance with clauses (a), (b) and (c) above.

9.2 Payment Mechanism

Apart from the Progress Payment, payment 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;
 - (ii) from time to time in accordance with the Index Factor, in accordance with Section 10.1; and
 - (iii) from time to time in accordance with the Traffic Volume Adjustment; less
- (c) the amount of any holdback made by the Province in accordance with Section 5.17 or Section 8.4; and

(d) the amount of any Payment Adjustments (excluding Traffic Volume 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. The Province shall, prior to or concurrently with making the Payment each month, provide a breakdown of the amount of the Payment, having regard to the above categories, and itemizing each Payment Adjustment (excluding Traffic Volume Adjustments) deducted from the Payment.

The Province's obligation to make the Payment each month until expiry of the Term 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 Traffic Availability is achieved, and each 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. The Province shall, on or before making each Payment, provide to the Contractor in the form specified by Schedule 14, the Province's calculation 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 30 days after the date the Payment is received, failing which, in the absence of manifest error, the Contractor shall be estopped from later disputing the correctness of the amount so paid.

9.4 Adjustment of the Payment Schedule

The Payment Schedule is premised upon Traffic Availability being achieved on the Traffic Availability Target Date, and the first Payment accordingly is in respect of the period from October 26 through October 31, 2007. Upon Traffic 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 Traffic Availability is achieved, remaining in that month; and

(b) the timing of all other Payments is adjusted accordingly.

9.5 Early Completion

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

- (a) the Term shall expire 30 years from the day Traffic Availability is achieved, that is, the Operating Period shall be 30 years; and
- (b) the Payment Schedule shall be adjusted and amended accordingly.

9.6 Late Completion

Subject to Section 9.10, in the event that Traffic Availability is not achieved until after the Traffic Availability Target Date, then:

- (a) the Term shall expire 30 years from the Traffic Availability Target Date, that is, so that the Operating Period is less than 30 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 Traffic Availability is achieved; and
 - (ii) the Contractor is entitled to payment for the month in which Traffic Availability is achieved, based on the number of days from and including the day Traffic 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 ("GST") under Part IX of the *Excise Tax Act* (Canada), and that its GST exempt number is R124072513. No amount payable by the Province under this Agreement is subject to GST.

9.8 Set-off

The Province is entitled to set off against any 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 in relation to the Project or the O&M.

9.9 Interest on Overdue Payments

Except as otherwise provided in Section 17.5(b)(i), 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.

9.10 Winter Relief

Notwithstanding Section 9.6, if Traffic Availability is not achieved by the Traffic Availability Target Date and is further delayed into the winter of 2007-2008, the Province agrees to provide the following (and no other) relief to the Contractor:

(a) for each month or pro-rated portion thereof from December 2007 through May 2008 during which Traffic Availability has not been achieved, the Province will pay to the Contractor two-thirds of the Capital Payment that would have been payable for such months had Traffic Availability been achieved;

(b) the amount payable by the Province under clause (a) shall be payable to the Contractor, without interest, only upon Traffic Availability;

(c) the amount payable by the Province under clause (a) shall be reduced (but not to less than zero) by any amount paid or payable by the Province under Section 12.1(d) or Section 13.3(c) in relation to the same months, it being the intent of the parties to avoid compensating the same loss more than once;

(d) should this Agreement be terminated prior to Traffic Availability but after December 1, 2007, then:

(i) if the termination is a Construction Period Termination or a Force Majeure Termination (in either case as defined in Section 18.1), the Province shall have no obligation arising under this Section 9.10;

(ii) if the termination is a Termination for Convenience (as defined in Section 18.1), the amount that would have become payable under this Section but for such termination shall be subsumed in the damages to which the Contractor is entitled under Section 18.9(b), it being the intent of the parties to avoid compensating the same loss more than once.

The relief afforded by the Province to the Contractor under this Section 9.10 is applicable, if at all, only to the months of December 2007 through May 2008, regardless of any intervening Relief Events or Force Majeure Events or any other circumstances.

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 is 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 15. 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 except for the Traffic Volume Adjustment (which is based on a percentage of the O&M Payment exclusive of the Major Rehabilitation Payment) 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 either by the Contractor or pursuant to the Direct Lender Agreement, then provided that:

- (a) the replacement O&M Subcontractor is at arm's length from both the Contractor and 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

Prior to the Contractor commencing construction of the New Infrastructure and until Construction Completion, the Contractor shall maintain in place all of the insurance specified in Schedule 11 (Insurance Requirements) as being required during the Construction Period. From and after Traffic Availability until the end of the Term, the Contractor shall, subject to the provisions of Section 11.9 addressing uninsurability, maintain in place all of the insurance specified in Schedule 11 (Insurance Requirements) as being required during the Operating Period.

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 material change restricting coverage or cancellation.

11.3 Waiver of Recourse

The Contractor shall, to the extent that any of its property is required under this Agreement to be insured against, waive any right of recourse against the Province in regard to any loss or damage to such property, and shall make its insurer(s) aware of such waiver.

11.4 Evidence of Insurance

The Contractor shall deliver or cause to be delivered to the Province certified copies of all insurance policies required to be obtained and maintained by the Contractor by this Section 11:

- (a) in relation to the insurance required for the Construction Period, at least 14 days prior to the Contractor making any entry upon the Leased Lands for the purpose of commencing construction; and
- (b) in relation to the insurance required for the Operating Period, prior to and as a precondition to Traffic Availability;

and shall provide or cause to be provided, not less than 10 days prior to expiration of any then current policy, certified copies of policies or other documentation 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, the Province may upon five Business Days' notice to the Contractor obtain the required insurance not so evidenced, and may set off the cost of the insurance so obtained against any amount payable to the Contractor under this Agreement.

11.6 Review and Benchmarking of Insurance

During the Operating Period, the Contractor and the Province shall jointly review Schedule 11 (Insurance Requirements) within three months of every anniversary of Execution of this Agreement, 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 such anniversary so as to reflect generally applicable changes to insurance premiums payable by highway operations and maintenance contractors in Alberta (having regard to any changes in coverage arising under clause (a) and otherwise having regard only to the insurance required by Schedule 11 and not to 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 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.

11.7 Repair of Damage - Construction Period

The Contractor shall repair all damage to the New Infrastructure during the Construction Period, of whatever nature and however caused, excepting only: damage caused by a Force Majeure Event (in which case Section 12.1 applies); environmental damage or degradation described in Section 4.9(e)(i) or (ii) (in which case Section 4.9(e) applies); or damage caused by the Province or its agents or contractors or subcontractors or others for whom the Province is legally responsible. If the damage causes Traffic Availability to be delayed beyond the Traffic 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 Province will, to the extent the loss occasioned to the Contractor by the delay is not insured against, compensate the Contractor for the loss occasioned by Traffic Availability being delayed beyond the Traffic Availability Target Date, in which event:

- (d) the Province shall, from and after the Traffic Availability Target Date, make advance payment on account of such loss;
- (e) the advance payment shall be the amount of the Capital Payment that would have been payable by the Province had Traffic Availability occurred on the Traffic Availability Target Date; and

(f) 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.

11.8 Repair of Damage - Operating Period

During the Operating Period, the Province will bear the risk of damage to the New Infrastructure and the Existing Infrastructure caused by:

- (a) any person other than the Contractor, its agents or subcontractors or others for whom the Contractor is legally responsible; and
- (b) any other incident or discrete event, including a tornado or earthquake but otherwise excluding weather events, and excluding:
 - (i) any damage to the extent caused or contributed to by any failure by the Contractor to meet the Project Requirements or the O&M Requirements; and
 - (ii) damage caused by a Force Majeure Event (in which case Section 12.2 applies);

(collectively, "**Damage Events**"). Upon the occurrence of a 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 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 \$25,000, the Province may instead tender the repair work.

If by reason of damage occurring during the Operating Period and caused other than by a Force Majeure Event all or any portion of the roadways in the New Infrastructure or the Existing Infrastructure are closed to vehicle traffic, then the O&M Payment shall abate in the same manner as is set out in Section 12.2 in respect of closure occasioned by a Force Majeure Event.

If damage is caused during the Operating Period by a weather event other than a tornado or earthquake, the Contractor shall repair damage to the New Infrastructure and the Province shall repair damage to the Existing Infrastructure.

11.9 Uninsurability

Notwithstanding Section 11.1, 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 roadbuilding and road maintenance contractors 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 roadbuilding and road maintenance contractors;

and shall only be considered an uninsurable risk during such period when the Contractor has not obtained insurance against the risk.

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 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 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, other than as a result of any act or omission of the Contractor, its agents or subcontractors or any other person for whom the Contractor is legally responsible, then the Province shall, at its option, either:

- (c) assume responsibility for the loss, to the extent of the insurance proceeds that would have been payable if insurance were available to the Contractor; or
- (d) declare a Force Majeure Termination, pay the Termination Payment required by Section 18.8 and, if applicable, discharge any uninsured third party liability claims arising from the occurrence.

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 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 21 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 Traffic Availability Target Date shall not be adjusted, but if by reason of the Force Majeure Event, Traffic Availability is delayed until beyond the Traffic Availability Target Date, then the Province shall upon Traffic Availability pay to the Contractor its damages resulting from Traffic Availability being delayed beyond the Traffic Availability Target Date by the Force Majeure Event (and shall, from and after the Traffic 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 Traffic Availability, it being mutually anticipated by the parties that such damages and such advance payment will include at least an amount equal to the Capital Payment that would have been payable had Traffic Availability been achieved), subject to the Contractor's obligation to take reasonable steps to mitigate the delay and to mitigate its damages;

(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; and

(f) if one or more Force Majeure Event results in the Contractor being wholly or substantially prevented from proceeding with the Project for an aggregate period of at least 120 days falling within one or more Construction Seasons, then the Payment Schedule shall be adjusted and amended by postponing all Major Rehabilitation Payments by:

(i) one year, if the aggregate period is up to 240 days falling within one or more Construction Seasons; and

(ii) two years, if the aggregate period is over 240 days falling within one or more Construction Seasons;

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

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 (other than Traffic Volume Adjustments) 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 roadways in the New Infrastructure or the Existing Infrastructure is closed to vehicle traffic as a result of the Force Majeure Event, then the O&M Payment, exclusive of the Major Rehabilitation Payment, shall abate proportionately during the period of closure due to the Force Majeure Event, and in that event:

(i) the proportionate abatement shall be based on the number of lane kilometers of the roadway that are not open to vehicle traffic; and

(ii) each portion of the roadway between interchanges shall be considered fully open to vehicle traffic only to the extent that a vehicle entering either end of that portion of the roadway can travel along the roadway without interruption.

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 Project or otherwise addressing the consequences of the Force Majeure Event.

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

its discretion, having regard to the nature and extent of the damage and acting reasonably, decline to repair the damage.

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) changes in the load limits generally applicable on roadways in Alberta;
 - (ii) the prohibition of salt usage on roadways in Alberta;
 - (iii) a change directed specifically at the road construction or maintenance industries in Alberta or directed specifically at the Contractor, the Project, the O&M, the New Infrastructure or the Existing Infrastructure or public-private arrangements of the nature of this Agreement; or
 - (iv) 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.
- (b) “**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 classified as hazardous or toxic by or under any applicable environmental law; and
- (c) “**Heritage Find**” means property of archaeological, palaeontological or heritage significance or historical resources located in, under or on the TUC.

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) if by May 1, 2005 (except, in the case of the City Road Allowances, by August 31, 2005) the Province has not acquired fee simple ownership of all land within the Leased Lands, free from any leasehold interests other than the Lease and free from any mortgages or other security interests;

(c) in the circumstances specified in Section 5.10, a stop work order issued by the Province;

(d) a Designated Change in Law coming into effect after submission of the Contractor's Proposal;

(e) the presence in, on, under or around the TUC or the Service Roads, of Hazardous Substances, which presence 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;

(f) the presence in, under or on the TUC or the Service Roads, of Heritage Finds, which presence was unknown to the Contractor at the time of submission of the Contractor's Proposal;

(g) 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 TUC or a portion thereof;

(iii) any other proceeding brought against the Province or to which the Province is a party;

(h) during the Construction Period, a general strike or other labour disruption applicable broadly to the roadbuilding industry in Alberta or directed at the Province;

(i) if the Contractor has not, within 60 days after having taken all reasonable steps and complying with all pertinent requirements and acting in accordance with any recommendations provided by Alberta Transportation, obtained the Ministerial consent contemplated by Section 4.6(a), without conditions other than conditions duplicated in all material respects by the Contractor's obligations under this Agreement;

(j) in the circumstances specified in Section 7.3(b), interference with or disruption of the Contractor's carrying out of the Project Requirements or the O&M Requirements;

(k) in the circumstances specified in Section 7.4(b), interference with or disruption of the Contractor's carrying out of the O&M Requirements;

(l) any interference with the Project or the O&M by persons claiming aboriginal title or treaty rights in respect of all or any part of the Leased Lands or the TUC or the Service Roads;

(m) in the circumstances specified in Section 16.6(d), any Remedial Action (as defined in Section 16.6) taken by the Province;

(n) if, above and beyond the reasonable cooperation required of the Contractor by Section 4.8 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 are unreasonably delayed as a result of Future Utilities;

(o) if, despite the Contractor taking all commercially reasonable measures to mitigate any delay or inconvenience (including providing the Province with timely notice of the delay or inconvenience encountered), the Contractor’s activities in carrying out the Project or the O&M are delayed or prevented as a result of any unregistered encumbrances, other than Identified Encumbrances, that pertain to the Leased Lands; or

(p) if the Contractor has not obtained the permission from the City of Edmonton contemplated by Section 4.1 in respect of the City Road Allowances within 60 days after having taken all reasonable steps for obtaining such permission, provided the Contractor has, immediately upon encountering difficulties in obtaining the permission, requested the assistance of the Province under Section 15.4 in relation to the permission;

but excluding any event to the extent caused by the negligence 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 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, 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) the Traffic Availability Target Date shall not be adjusted, but if by reason of the Relief Event, Traffic Availability is delayed until beyond the Traffic Availability Target Date, then the Province shall upon Traffic Availability pay to the Contractor its damages resulting from Traffic Availability being delayed beyond the Traffic Availability Target Date by the Relief Event (and shall, from and after the Traffic Availability Target Date, make advance payment on account of such damages, to the extent such damages can reasonably be determined prior to Traffic Availability, it being mutually anticipated by the parties that such damages and such advance payment will include at least an amount equal to the Capital Payment that would have been payable had Traffic Availability been achieved), subject to the Contractor's obligation to take reasonable steps to mitigate the delay and to mitigate its damages;

(d) if the Relief Event, when aggregated with the effect of any other Relief Event or Relief Events occurring in the same calendar year 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 (c), the Province shall upon Traffic Availability 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 Requirement had been a Change Order governed by Section 7.1; and

(iii) in any other case, the Contractor's reasonable damages;

(e) 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

(f) 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 falling within one or more Construction Seasons, then the Payment Schedule shall be adjusted and amended by postponing all Major Rehabilitation Payments by:

(i) one year, if the aggregate period is up to 240 days falling within one or more Construction Seasons; and

(ii) two years, if the aggregate period is over 240 days falling within one or more Construction Seasons;

provided that in no event shall Major Rehabilitation 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 (other than Traffic Volume Adjustments) 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;

(d) if the Relief Event, when aggregated with the effect of any other Relief Event occurring in the same calendar year 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 \$5,000 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 Requirement had been a Change Order governed by Section 7.2; 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.

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) the Contractor is a "special purpose vehicle" that has not carried on business other than directly in relation to, in anticipation of, and for the purposes of this Agreement;
- (d) all shareholdings in the Contractor at the time of Execution of this Agreement have been disclosed to the Province;

[note to Proponents: representations (a) and (b) will be further confirmed at the time of signing by a letter from the Contractor's external legal counsel addressed to the Province and its legal counsel.]

- (e) the Contractor is relying only on its own investigation and due diligence in relation to the business 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 of information or representations relating to:

- (i) any portion of the Existing Infrastructure not yet completed prior to Execution of this Agreement; or

(ii) any of the Leased Lands of which the Province is not the owner and has not been able to grant access to the Contractor prior to submission of the Contractor's Proposal;

(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 elsewhere, has made plain and true disclosure to the Province of all facts and circumstances regarding the Contractor or its shareholders or its intended subcontractors or the Project Financing that might reasonably be material to the willingness of the Province to enter into this Agreement with the Contractor.

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) during 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 O&M Requirements, and an annual report summarizing the Contractor's expenditures on major rehabilitation of the New 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 lender providing all or any part of the Senior Debt Financing;

(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 business of the Contractor, 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, during the Term and for a period of one year following expiry of the Term or 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 17.5(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 shall at all times until the end of the Term allow the Province full and free access to:

- (a) the Leased 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 or the O&M are fabricated or stored;

for the purpose of inspecting the Leased Lands or materials to be used in the Project or the O&M so as to be able to determine compliance by the Contractor with the terms of this Agreement. For such purpose, 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 disrupt the Project 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 as are from time to time required in order to allow the Province, other governmental authorities, police services and emergency response services to carry out their respective statutory duties in relation to the New Infrastructure and the Existing Infrastructure.

14.7 Conflict of Interest

The Contractor shall not for any purpose related to this Agreement directly or indirectly participate in any activity constituting a conflict of interest on the part of any Member of Parliament or any Member of the Legislative Assembly of Alberta prohibited by federal or Alberta laws, respectively.

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;

[note to Proponents: the above representations will be further confirmed at the time of signing by a letter from the Province's internal legal counsel addressed to the Contractor and its legal counsel.]

(c) officials of the Province's Transportation 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 of the Contractor, between the Province and the consortium members named in the Contractor's Proposal);

(d) the Province is the owner of an estate in fee simple of all of the Leased Lands, except for the lands described in Schedule 12 as the "Roesinger Land", the "Heppner Land" and the "City Road Allowances"; and

(e) the Province has not granted any leases that are outstanding in respect of the Leased Lands, except for the leases described in Appendix G of Schedule 18.

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) 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 their intended purposes of the following documents provided by the Province:

(a) the letter dated _____ issued under the *Canadian Environmental Assessment Act*; and

(b) the clearance letters for archeological and historical resources dated _____ issued by Alberta Community Development.

15.4 Assistance with Permits and Utility Agreements

Without derogating from the Contractor's responsibilities under Section 5.6 to obtain all permits and municipal approvals required for the Project and all required arrangements relating to utilities, railways and drainage (including but not limited to the "Utility Agreements" contemplated by Section 4.8), the Province shall in response to any reasonable request by the Contractor provide the Contractor with such reasonable assistance as the Province is able to offer without unduly fettering its executive discretion or pursuing amendment of any legislation or subordinate legislation.

In the event that the Contractor, despite acting reasonably and prudently and making all commercially reasonable efforts, and despite taking all reasonable mitigation measures (including, to the extent practicable, considering modifications to the Contractor's Designs):

(a) experiences a delay in the Project (measured on a critical path basis having regard to the Contractor's Construction Schedule) of at least 30 days within one or more Construction Seasons as a result of being unable to arrange any particular Utility Agreement (as defined in Section 4.8) other than drainage agreements, then any delay after the initial 30 day delay period shall be treated as if it were a Relief Event, except that:

(i) the Province shall not share in any costs occasioned by the initial 30 day delay period; and

(ii) after the initial 30 day period, the Province shall contribute one-half of the incremental costs occasioned to the Contractor by the further delay, and the Contractor shall absorb the other one-half; or

(b) incurs direct out-of-pocket utility relocation costs (defined as costs billed by utilities to the Contractor, and also including power hook-up costs billed to the Contractor) in relation to the Project in aggregate exceeding \$5,000,000, the Province shall, upon receipt of appropriate invoices and supporting documentation reimburse the Contractor for:

(i) one-half of the amount by which the utility relocation costs in aggregate exceed \$5,000,000 but do not exceed \$10,000,000; and

(ii) three-quarters of the amount by which the utility relocation costs in aggregate exceed \$10,000,000.

The Contractor shall, upon experiencing a delay in the Project as described in clause (a), provide notice to the Province of the commencement of the 30 day period in clause (a), including details of the 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 official, employee, agent or subcontractor of the Contractor in relation to the Project or the O&M; or
- (c) any third party claim alleging infringement by the Contractor or its subcontractors, in relation to the Project 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 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 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 in the same position it would have been in but for the occurrence of the specified event, having regard to:

- (a) the obligations and arrangements contemplated by the Contractor's Proposal, including commercially reasonable breakage costs in relation to subcontractors and suppliers;
- (b) participation by the Contractor directly, or indirectly by arrangement with the holders of the Senior Debt 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.

Subject to the foregoing, no claim by either party arising from any breach of this Agreement or under the indemnities given by Sections 16.1 or 16.2, shall include any claim by such party against the other for punitive or exemplary damages, indirect or consequential damages, or any claim for economic loss, whether or not the other party has been advised of the possibility of economic loss, and regardless of whether the action is framed in contract or in negligence; except that a claim by the Contractor for damages under Section 18.9(b) may include a claim for lost profits.

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 (excluding Traffic Volume Adjustments). The Contractor shall not be entitled to claim damages or indemnification in respect of any breach by the Province under this Agreement in respect of which the Contractor has sought compensation under Section 13 as a Relief Event.

Every right to claim damages or indemnification or reimbursement 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 twice.

16.5 Exclusivity of Termination Provisions

Neither party shall have any right to terminate this Agreement except as expressly set out in Sections 17.2, 17.3 or 17.4; 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 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; or
- (c) if necessary in order to prevent the Contractor or its subcontractors from excluding or limiting public use of the New Infrastructure or the Existing Infrastructure (other than for purposes expressly contemplated by the O&M Requirements);

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 New Infrastructure or the Existing Infrastructure as the Province reasonably considers necessary to mitigate the risk or discharge the statutory duty or keep the New Infrastructure and the Existing Infrastructure open for public use, and in that event:

- (d) 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;
- (e) 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 may constitute a Relief Event under Section 13.2(m); and
- (f) 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(n), the following expressions have the following meanings:

“**Default**” means any breach by the Contractor of any provision of this Agreement, including the material inaccuracy 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, taken together with any other Defaults of a similar nature:

- (i) creates a material risk to public 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 its insurance obligations under Sections 11.1 through 11.4, its reporting obligations under Section 14.2 or 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 (other than by any lender of any of the Senior Debt Financing), 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) if the Contractor carries on any business unrelated to the subject matter of this Agreement and does not cease to carry on such business within two Business Days of receiving notice to do so from the Province (in which context any lending between the Contractor and any of its shareholders shall not be considered to be carrying on a business unrelated to the subject matter of this Agreement);

(f) if, during the Construction Period and at any time during the Construction Season, the Contractor (by its own actions, and not merely by the actions of the subcontractor retained by the Contractor in respect of the Project unless the Contractor fails to diligently take action in response to abandonment of the Project by the subcontractor) abandons the Project;

(g) if it is determined by arbitration pursuant to the Dispute Resolution Procedure that the Contractor has failed to achieve:

(i) by October 26, 2005, 10% completion of the Project; or

(ii) by October 26, 2006, 20% completion of the Project;

(h) if the Contractor fails to achieve Traffic Availability by October 26, 2008;

(i) if at any time after October 26, 2006 it is determined by arbitration pursuant to the Dispute Resolution Procedure that there is no reasonable possibility of the Contractor achieving Traffic Availability by October 26, 2008;

(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 Project by the subcontractor) abandons the business of carrying out the O&M Requirements;

(k) if the Contractor, having become subject to Payment Adjustments specified in any of sections 400.1.5, 400.2.1.5, 400.3.3.3, 400.4.2.4, 500.1.5, 500.2.5, 500.3.3.3 of Schedule 18 (Technical Requirements) as a potential Termination Event, 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 the Contractor, having become subject to Payment Adjustments (excluding Traffic Volume Adjustments) in any 12 month period that in aggregate exceed 75% of the aggregate O&M Payment (exclusive of any Major Rehabilitation 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;

(m) if after Traffic 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 exclude or limit the public from lawfully using the New Infrastructure for vehicle traffic or to prevent the performance by the Province of any statutory duty, or otherwise asserts any right of exclusive possession under the Lease; or

(n) 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 Direct Lender Agreement

All rights to terminate this Agreement, and all Termination Payments required to be made under Section 18, are in every case subject to the provisions of the Direct Lender Agreement.

17.2 Termination by Province

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

(a) upon or within a reasonable time (having regard to the provisions of the Direct Lender Agreement, and 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 17.2 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.

17.3 Termination by Contractor

Subject to Section 17.4, 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; or
- (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.

17.4 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 falling within one or more Construction Seasons; 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.

17.5 Consequences of Termination

Upon any termination of this Agreement under Sections 17.2, 17.3 or 17.4:

- (a) the Payment for the month during which the termination occurs shall be prorated according to the number of days in that month up to and including the day when termination occurs;
- (b) the Province shall as soon as practicable:

(i) pay to the Contractor the amount of the Termination Payment under the pertinent Section of Article 18, together with interest thereon at Prime from the date of the termination until the date of payment; or

(ii) enter into any alternative arrangement in respect of the Termination Payment that is provided for in the Direct Lender Agreement; and

(c) upon the Province providing confirmation to the Contractor that it is obligated to pay the Termination Payment under the pertinent Section of Section 18 (or in lieu of such payment to enter into any alternative arrangement provided for in the Direct Lender Agreement), then: 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 Project Requirements (if the termination is prior to Traffic Availability) or the O&M Requirements (if the termination is after Traffic 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.

17.6 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:

(i) all indemnification and hold harmless obligations, insofar as they apply to events that occurred prior to termination of this Agreement;

(ii) the obligations of the Contractor under Section 17.5(c);

(iii) the obligation of the Province to make the Termination Payment specified in Section 18; and

(iv) the obligations in relation to Confidential Information set out in Sections 19.4 and 19.5.

18. TERMINATION PAYMENTS

18.1 Termination Payments Defined Terms

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

“Canada Call Redemption Feature” means the right of an issuer of bonds (the “Bonds”) to redeem the Bonds at the greater of the remaining par value and a price calculated to provide a yield to maturity equal to the Government of Canada Yield (as defined below) plus a spread equal to 25% of the Original Spread (as defined below) on the business day preceding the date of the resolution of the issuer authorizing the redemption, where:

- (i) “Government of Canada Yield” means on any date the yield to maturity on such date compounded semi-annually which a non-callable Government of Canada bond would carry if issued, in Canadian dollars in Canada, at 100% of its principal amount on such date with a remaining life equal to the average remaining life of the Bonds, to be calculated as the average of the yields determined by two major Canadian investment dealers selected by the issuer; and
- (ii) “Original Spread” means the spread between the yield to maturity of the Bonds and the yield to maturity on the benchmark Government of Canada bond used to price the Bonds on the date of issuance;

“Capital Amount” means :

- (i) the parties’ mutually agreed calculation of the net present value, as of:
 - (A) for purposes of Section 18.2 and Section 18.7, the effective date of the Construction Period Termination or the Force Majeure Termination, as the case may be; and
 - (B) for purposes of Section 18.8, the earlier of the Traffic Availability Target Date and Traffic Availability;
 of the aggregate Capital Payments (calculated using as a discount rate the Contractor’s weighted average cost of capital for the Project Financing, that is, for both the Senior Debt Financing and Equity, 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 Province’s request for proposals and elected by the Contractor at the time of submitting the Contractor’s Proposal), but not in any event exceeding the total amount of Project Financing anticipated by the Contractor’s Proposal; plus
- (ii) the amount of the Federal Funding;

“Construction Period Termination” means termination of this Agreement by the Province under Section 17.2(a) prior to Traffic Availability;

“Force Majeure Capital Amount” means the Capital Amount, exclusive of the amount of the Federal Funding;

“Force Majeure Termination” means termination of this Agreement by either party under Section 17.4 on account of a Force Majeure Event;

“Operating Period Termination” means termination of this Agreement by the Province under Section 17.2(a) on or after Traffic Availability;

“Redemption Payment” means the lesser of:

- (i) the amount actually required to redeem the Senior Debt Financing (inclusive of hedging transactions described in Section 16.3(b) that meet the provisos in Section 16.3(b)) in accordance with its terms; and
- (ii) the amount that would be required to redeem the Senior Debt Financing:
 - (A) to the extent that the Senior Debt Financing is bond financing, if it were bond financing issued with a Canada Call Redemption Feature; and
 - (B) to the extent that the Senior Debt Financing is bank financing, if it were issued with a prepayment amount premised upon net present value calculation consistent with reasonable commercial terms and without additional penalty;

“Termination for Convenience” means termination of this Agreement by the Province under Section 17.2(b);

“Termination for Payment Default” means termination of this Agreement by the Contractor under Section 17.3.

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 Capital Amount less:

- (a) such portion of the Federal Funding as the Contractor has received through Progress Payments;
- (b) the reasonable cost to the Province, established by competitive bidding process (and including out-of-pocket costs incurred by the Province in relation to that process), of completing the Project, where the competitive bidding process is premised on:
 - (i) a design-build or conventional contract with progress payments and standard industry warranty;
 - (ii) use of as much of the Contractor’s Designs as is practicable; and
 - (iii) a duty on the part of the Province to mitigate the cost of completing the Project and thereby minimize the amount payable by the Contractor under this clause (b); and
- (c) liquidated damages of \$7.5 million to compensate the Province for loss of its bargain.

18.3 Termination While Province Holds Financing Letter of Credit

Notwithstanding Section 18.2, if a Construction Period Termination occurs while the Province continues to hold the Financing Letter of Credit and none of the conditions for release set out in Section 3.5 have occurred, then the Province shall have no obligation to make a Termination Payment to the Contractor.

18.4 Operating Period Termination

Upon an Operating Period Termination, the Province shall by notice to the Contractor elect to pay to the Contractor either a Termination Payment under Section 18.5 or a Termination Payment under Section 18.6. If the Province fails to make such election by notice to the Contractor within 10 Business Days after an Operating Period Termination, then the Province shall be irrevocably deemed to have elected to make a Termination Payment under Section 18.6.

If the Province elects to pay a Termination Payment under Section 18.5, the Province shall as soon as practicable thereafter (but in any event within 90 days) solicit expressions of interest in order to assess whether there are likely to be two suitable bidders (in which context, "suitable" shall be determined having regard to a bidder's relevant practical experience, appropriate qualifications, technical competence and resources available to it, including financial resources and subcontracts, all having regard to the obligations to be performed under this Agreement). If the Province fails to elicit at least two bona fide expressions of interest from suitable potential bidders, it shall immediately re-elect to pay a Termination Payment under Section 18.6.

Between the time of the Operating Period Termination and the making of the Termination Payment, the Province shall make advance payments to the Contractor against the Termination Payment in accordance with and subject to the following:

- (a) the advance payments shall be made monthly, at the times and in the amounts that would have been payable by the Province as the Capital Payment had this Agreement not been terminated; and
- (b) if the Province reasonably concludes that making or continuing to make the advance payments may result in a negative net balance owing by the Province on account of the Termination Payment, then the Province shall have no obligation to make or continue to make (as the case may be) the advance payments.

18.5 Payment Based on Sale of Contractual Rights

If upon an Operating Period Termination the Province elects a Termination Payment under this Section 18.5, then the following provisions shall apply:

- (a) the Province shall within six months after the Operating Period Termination obtain at least two bona fide, fully committed bids, each from a suitable bidder

(having regard to the same criteria as set out in Section 18.4), for acquiring all rights and obligations (both present and future) of the Contractor under this Agreement as if this Agreement had not been terminated;

(b) the Province shall conduct the bidding process so as to obtain the maximum cash purchase price (but otherwise, to the extent practicable, generally in accordance with its usual procurement processes), and shall select the winning bidder accordingly;

(c) the Province shall, as soon as practicable (having regard to clause (a)), implement and complete the bidding process and enter into an agreement with, and collect the purchase price from, the winning bidder;

(d) upon receiving the purchase price from the winning bidder, the Province shall pay to the Contractor a Termination Payment consisting of:

(i) the purchase price received by the Province from the winning bidder; less

(ii) the Province's reasonable costs reasonably incurred in establishing and conducting the bidding process and entering into the new agreement; and

(e) if the Province fails to:

(i) within six months after the Operating Period Termination, obtain two bids in accordance with clause (a); or

(ii) within 12 months after the Operating Period Termination, enter into an agreement with, and collect the purchase price from, the winning bidder;

then the Province shall be deemed to have elected to make a Termination Payment under Section 18.6 rather than under this Section 18.5.

18.6 Payment of Fair Market Value

If upon an Operating Period Termination the Province elects a Termination Payment under this Section 18.6, or if by Section 18.4 or Section 18.5(e) is deemed to have elected a Termination Payment under this Section 18.6, then the following provisions shall apply:

(a) the Province and the Contractor shall seek to arrive at agreement on the fair market value of the Contractor's rights and obligations under this Agreement, calculated:

(i) as of the date of the Operating Period Termination and as if this Agreement had not been terminated and no Termination Event had occurred or was imminent;

(ii) on the assumption that the purchaser would be responsible for curing any existing default (or, in the case of an “Incurable default” as defined in Section 16.7, taking the remedial action contemplated by Section 16.8(n)(iii)) by the Contractor under this Agreement);

(iii) on the assumption of a willing and qualified purchaser and the Contractor as a willing vendor; and

(iv) having regard to the future Payments expected for the duration of the Term, the costs of curing or taking required remedial action in respect of an existing default, the projected costs of carrying out the O&M without incurring Payment Adjustments, and a reasonable risk margin;

(b) if the Province and the Contractor have not within 30 days after the election (or deemed election) arrived at agreement under clause (a), then the fair market value of the Contractor’s rights and obligations under this Agreement shall be determined by the Dispute Resolution Procedure, applying the same assumptions as set out in clause (a); and

(c) upon the fair market value of the Contractor’s rights and obligations under this Agreement being determined under clause (a) or clause (b), the Province shall pay to the Contractor as a Termination Payment an amount consisting of the fair market value so determined, less:

(i) the Province’s reasonable costs reasonably incurred of calculating the fair market value; and

(ii) the Province’s reasonable costs, or the Province’s reasonable pre-estimate thereof, of selecting and entering into a new agreement with a new provider of services in lieu of the Contractor’s performance of the O&M under this Agreement.

18.7 Force Majeure Termination - Construction Period

Upon a Force Majeure Termination during the Construction Period, the Province shall pay to the Contractor a Termination Payment equal to the lesser of:

(a) the Force Majeure Capital Amount; and

(b) the amount (to a maximum of the amount of the Project Financing) actually expended in furtherance of the design, build and financing of the Project by the Contractor, less the amount of any Progress Payments that the Contractor has received or become entitled to receive;

less, in either case, all insurance proceeds, if any, claimable by the Contractor as a result of events occurring prior to the Force Majeure Termination.

18.8 Force Majeure Termination - Operating Period

Upon a Force Majeure Termination during the Operating Period, the Province shall pay to the Contractor a Termination Payment equal to the Force Majeure Capital Amount less:

- (a) all principal repaid on the Senior Debt Financing prior to the Force Majeure Termination;
- (b) all distributions on Equity (including, in the case of subordinated debt, all payments of principal and interest) made prior to the Force Majeure Termination, and all such distributions that the Contractor, immediately prior to the Force Majeure Termination, could have made (on the basis of free cash in hand) but had not yet made; but not exceeding, in aggregate, the amount of the Equity component of the Project Financing; and
- (c) all insurance proceeds, if any, claimable by the Contractor as a result of events occurring prior to the Force Majeure Termination.

18.9 Termination for Convenience or Payment Default

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

- (a) the Redemption Payment; plus
- (b) the Contractor's reasonable damages (including for loss of its bargain) calculated having regard to the principles set out in Section 16.3, provided however that such damages may include break fees payable to the Contractor's subcontractors only to the extent that the amounts of such break fees are:
 - (i) commercially reasonable, having regard to customarily negotiated break fees between parties at arm's length from one another; and
 - (ii) subject to a duty on the part of each such subcontractor to mitigate its damages; less
- (c) if the Termination occurs during the Construction Period, any amount of the Project Financing that has not been expended on the Project.

18.10 Set-off Against Termination Payments

The Province may set off against any Termination Payment the amounts of any Payment Adjustments (excluding Traffic Volume Adjustments) triggered prior to the termination and not set off against a Payment; provided that where Section 18.9 applies the Province shall be entitled to claim a set-off only to the extent that the net Termination Payment is not reduced below the amount of the Redemption Payment.

18.11 Negative Amounts

If the amount of the Termination Payment calculated under any of Sections 18.2, 18.5 or 18.6 is a negative number, the Province shall be entitled to claim that amount (stated as a positive number) from the Contractor.

18.12 Rescue Financing

Notwithstanding the definitions of “Capital Amount” and “Force Majeure Capital Amount” in Section 18.1 and the definition of “Senior Debt Financing” in Section 1.1, if the Province expressly and by express reference to this Section 18.12 so agrees, in consideration of the Contractor raising financing in addition to the amount of the Project Financing in order to enable completion of the Project, then the amount of such additional financing up to a maximum of 10% of the initial amount of the Senior Debt Financing shall be known as “**Rescue Financing**”, and in that event:

- (a) the Capital Amount and the Force Majeure Capital Amount shall be adjusted so as to include the value of the Rescue Financing; and
- (b) for the purposes of the Redemption Payment, the Rescue Financing shall be deemed to be part of the Senior Debt Financing.

18.13 Delivery of Information

Upon any termination of this Agreement, each party shall as soon as practicable deliver to the other all information within the possession of, or that thereafter from time to time comes into the possession of, that party that is relevant to the determination and calculation of the Termination Payment.

Upon the initial closing of the Senior Debt Financing, the Contractor shall deliver to the Province particulars of:

- (a) the amount of the Senior Debt Financing;
- (b) the basis for determining the amount by which the Senior Debt Financing by its terms can be redeemed in advance of its maturity; and

(c) any hedging transactions material or potentially material to any Termination Payment that may in future become payable under this Agreement;

and after the initial closing of the Senior Debt Financing, the Contractor shall deliver to the Province particulars of any material changes in or additions to the information delivered under clause (a), within five Business Days of those changes or additions being effected.

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 Transportation
 2nd floor Twin Atria Building
 4999 - 98 Avenue
 Edmonton, Alberta
 T6B 2X3
 attention: Neill McQuay, P. Eng.
 fax: (780) 440-8719
 e-mail: neill.mcquay@gov.ab.ca

(b) if to the Contractor:

attention:
 fax: ()
 e-mail:

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:

Neill McQuay, P. Eng.
Director, P3 Transportation Projects

(b) in the case of the Contractor:

[name]
[office held]

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 any public announcement relating to this Agreement except as approved in advance by the Province and in compliance with the Federal Requirements.

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 officers, employees, consultants, advisors and contractors (including, in the case of the Contractor, its lenders and potential lenders and

investors and potential investors) who reasonably require access to the Confidential Information for the due performance of this Agreement or to further the purposes of this Agreement;

(b) to the Government of Canada, for purposes contemplated by the Federal Requirements;

(c) as required by FOIP or any other applicable law; or

(d) where the disclosure is consented to by the other.

19.6 Public Disclosure of Agreement

The Contractor agrees that the Province will be at liberty to make public disclosure of 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, would be exempted from disclosure under Part 1 of FOIP by the provisions of FOIP governing third party confidential information. The Province acknowledges that the financial, commercial and technical information contained in the Contractor's Proposal (including but not limited to the financial model contained therein) has been submitted to the Province in confidence.

19.7 Naming Rights

The Province has the exclusive right to name and re-name the Existing Infrastructure, the New Infrastructure and all related roadways and improvements. The Contractor shall not name nor purport to name the Project, the Existing Infrastructure, the New Infrastructure, or any portions thereof. Where the Province has named the Existing Infrastructure or the New Infrastructure, the Contractor shall not publicly refer to 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.

21. DISPUTE RESOLUTION

21.1 Dispute Resolution Procedure

All disputes regarding 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 regarding 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 a 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 with the prior approval of the other, initiate in any Court any proceedings (including but not limited to any application for an injunction) relating to or arising from 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, except that the Contractor may assign to a party to the Direct Lender Agreement the right to receive the Payment, in which case the Province will consent to the assignment as required by section 94 of the *Financial Administration Act* (Alberta). Except as set out in Section 4.7(b), nothing in this Agreement restricts the Contractor from granting such other security interests in its assets as it sees fit.

22.2 Subcontracting by Contractor

The Contractor may subcontract its obligation to carry out the Project and its obligation to perform the O&M Requirements 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 Traffic Availability, allow or suffer any material change in its ownership unless such change has been consented to in advance by

the Province, such consent not to be unreasonably withheld. For the purposes of this Section, neither 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 Corporation shall be considered to be a material change in the ownership of the Corporation.

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, 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, arising from or in relation to the Contractor’s Proposal or the Contractor’s performance of this Agreement (collectively, the “**Intellectual Property**”), shall be owned by the Province, subject to and in accordance with the following:

- (a) the Province shall upon request by the Contractor grant to the Contractor an irrevocable, perpetual, royalty-free licence to use any of the Intellectual Property; and
- (b) the Contractor shall ensure that its employees, subcontractors and agents waive all moral rights in respect of the Intellectual Property.

The Contractor may grant such permissions and, if applicable, sub-licences to its subcontractors as are reasonably required for:

- (c) the carrying out of the Project and the O&M; or
- (d) the use by a third party, other than in furtherance of the Project 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 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 transmission shall constitute good delivery.

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 Transportation and the
Minister of Infrastructure

Date: January ____, 2005

Per: _____
Jay Ramotar, P.Eng.
Deputy Minister, Alberta Transportation

Date: January____, 2005

Per: _____
Eric McGhan
Deputy Minister, Alberta Infrastructure

**[NAME OF SPECIAL PURPOSE
VEHICLE]**

Date: January____, 2005

Per: _____
[name]
[office held]

Per: _____
[name]
[office held]

[note to Proponents: Contractor to advise whether one or two signatures, and of name(s) of authorized signing officer(s)]