

**DRAFT: JANUARY 9, 2009**

**AGREEMENT TO DESIGN AND BUILD**

**ANTHONY HENDAY DRIVE AND STONY PLAIN  
ROAD/100 AVENUE INTERCHANGE  
CITY OF EDMONTON  
ALBERTA, CANADA**

**HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA**

**and**

**[NAME OF CONTRACTOR]**

**[March 3, 2009]**

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**AGREEMENT TO DESIGN AND BUILD**

**ANTHONY HENDAY DRIVE AND STONY PLAIN ROAD / 100 AVENUE  
INTERCHANGE  
CITY OF EDMONTON  
ALBERTA, CANADA**

**made this [3rd] day of [March, 2009]**

BETWEEN:

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

AND:

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

**PREAMBLE:**

Pursuant to an RFQ and RFP process, the Province has selected the Contractor to design and build the Anthony Henday Drive and Stony Plain Road / 100 Avenue Interchange in the City of Edmonton.

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):

“**Bond**” means a contractual undertaking between the Contractor, the Province and the Surety, in which the Surety ensures that certain prescribed obligations of

the Contractor under the Agreement will be faithfully observed and performed;

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

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

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

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

“**City Road Allowances**” means the lands identified as City Road Allowances in Schedule 10 (Lands);

“**Component**” has the meaning indicated in Section 8.3 (Percentage Completion of Project);

“**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 5.17 (Construction Completion);

“**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;

“**Contract Price**” means \$\_\_\_\_\_ *[NOTE TO DRAFT: INSERT CONTRACT PRICE FROM PREFERRED PROPONENT’S PROPOSAL];*

“**Contract Price Breakdown**” has the meaning indicated in Section 8.3 (Percentage Completion of Project);

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

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

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

Section 5.5 (Contractor’s Designs, Plans and Schedule);

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

“**Contractor’s Proposal**” means the Proposal (as defined in the RFP) comprising the Technical Proposal (as defined in the RFP) and the Price Proposal (as defined in the RFP) 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 any Revision (as defined in the RFP) made by the consortium in accordance with the RFP;

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

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

“**End Date**” means the date that all the following conditions have been fulfilled:

- (a) subject to Section 17.5 (Survival of Obligations), the Contractor and the Province have performed all the obligations required under this Agreement;
- (b) the Construction Completion Certificate has been issued in accordance with Section 5.17 (Construction Completion); and
- (c) the Contractor has fulfilled all the obligations pursuant to Section 6 (Warranty);

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

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

“**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;

**“Future Utilities”** has the meaning indicated in Section 4.7 (Utility, Railway, and Drainage Agreements);

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

**“Holdback”** means any amount of payment that has not been paid to the Contractor as calculated and withheld pursuant to the provisions of Section 8.6 (Holdback);

**“Identified Encumbrances”** means:

- (a) all encumbrances and interests that as of January 13, 2009 are registered against any of the titles listed in section 4 (Lands) of Schedule 10 (Lands); and
- (b) all unregistered utility rights of way, easements and other similar interests that are:
  - (i) specifically identified in Appendix A to Schedule 10 (Lands);
  - (ii) as of January 13, 2009 within the “City Road Allowances” defined in Schedule 10 (Lands); or
  - (iii) known to the Contractor as of January 13, 2009, 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 (Independent Safety Auditor) who gives the ISA Recommendation under Section 5.13 (Anticipated Traffic Availability);

**“ISA Recommendation”** has the meaning indicated in Section 5.13 (Anticipated Traffic Availability);

**“Lands”** means the lands, within the Road Right of Way, described in Schedule 10 (Lands) as the Lands, and includes any lands added to the Lands by operation of Section 4.1 (Access and Use);

**“Lead Designer”** means [NOTE TO DRAFT: NEED TO INSERT NAME OF DESIGN TEAM LEAD FROM PREFERRED PROPONENT’S REQUEST FOR QUALIFICATIONS RESPONSE] or an alternate designer(s) retained by the Contractor and approved in advance and in writing by the Province, acting reasonably;

**“Letter of Credit”** means an irrevocable, unconditional, on sight letter of credit presentable for payment at a bank in Canada and issued by a bank authorized under the *Bank Act* (Canada) to do business in Canada (or issued by such other financial institution approved in advance for the purposes of this defined term by the Province, who may grant or decline such approval in its absolute discretion), and having a senior, unsecured long-term credit rating of not less than A+ (with a stable outlook) or equivalent from Standard & Poor’s, DBRS (formerly known as Dominion Bond Rating Service) or Fitch Ratings (or any other major credit rating agency approved for the purposes of this defined term by the Province, who may grant or decline such approval in its absolute discretion), and that complies with the requirements set out in Schedule 15 (Letter of Credit Requirements);

**“New Infrastructure”** means the infrastructure described in Schedule 11 (New Infrastructure), and subject to the foregoing generally means the Anthony Henday Drive and Stony Plain Road/100 Avenue Interchange in the City of Edmonton;

**“Payment”** means construction progress payments which the Province shall pay in amounts that are payable to the Contractor during the Construction Period as compensation for the design and construction of the New Infrastructure under Section 8 (Payment);

**“Payment Adjustment”** means an adjustment to the Payment authorized under Section 8.8 (Payment Adjustments) of this Agreement and Schedule 14 (Technical Requirements);

**“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;

**“Project”** means the design and build of the New Infrastructure in accordance

with the Project Requirements;

**“Project Requirements”** means the Province’s specifications and requirements for the Project, as set out in Schedule 14 (Technical Requirements), and including any amendments made or expressly 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 (Relief Event Defined), and subject to the foregoing generally means an event the risk of which is for some purposes allocated to the Province by Section 13 (Relief Events);

**“RFP”** means the request for proposals issued by the Province in respect of the Project;

**“Requirements for Certification of Traffic Availability”** has the meaning indicated in Section 5.14 (Requirements for Certification of Traffic Availability);

**“Road Right of Way”** means the lands described in Schedule 10 (Lands) as the Road Right of Way;

**“Surety”** is a legal entity, which is duly authorized to transact the business of suretyship in Canada, that, through the issuance of a Bond, agrees to uphold certain prescribed contractual obligations made by the Contractor in this Agreement for the benefit of the Province, if the Contractor fails to fulfill any of such obligations to the Province;

**“Technical Requirements”** means all requirements set out in Schedule 14 (Technical Requirements), including but not limited to the Project Requirements, including any amendments made pursuant to Section 7.1 (Modification of Project Requirements);

**“Term”** means the time commencing on the date of the Execution of this Agreement and ending on the End Date;

**“Termination Event”** means any event described in Section 16.8 (Termination Events), 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 (Termination Payments) required to be made by the Province to the Contractor upon termination of this Agreement;

**“Traffic Availability”** means the date when the Province issues a Certification of Traffic Availability pursuant to Section 5.15 (Certification of Traffic Availability);

**“Traffic Availability Target Date”** means October 14, 2011;

**“TUC”** means the “Transportation/Utility Corridor” lands so described in Schedule 10 (Lands); and

**“Upfront Work/Mobilization Cost”** has the meaning indicated in Schedule 9 (Contract Price Breakdown).

## **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 (Schedules).

## **1.3 Schedules**

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

Schedule 1 - Change Orders

Schedule 2 - Contractor’s Construction Schedule

Schedule 3 - Contractor’s Designs

Schedule 4 - Contractor’s Management Systems and Plans

Schedule 5 - Design and Plan Certification Process and Review Procedure

Schedule 6 - Dispute Resolution Procedure

Schedule 7 - Bonding Requirements

Schedule 8 - Insurance Requirements

Schedule 9 - Contract Price Breakdown

Schedule 10 - Lands

Schedule 11 - New Infrastructure

Schedule 12 - Safety Requirements

Schedule 13 - Subcontractors

Schedule 14 - Technical Requirements

Schedule 15 - Letter of Credit Requirements

#### **1.4 Order of Precedence**

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

#### **1.5 Entire Agreement**

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

#### **1.6 Currency**

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

#### **1.7 Liquidated Damages**

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

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

This Agreement is not intended to and does not:

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

- (e) constitute the relationship of lender and borrower;

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

### **1.9 Contractor's Knowledge**

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

- (a) prior to Execution of this Agreement, knowledge on the part of any personnel having direct involvement in the preparation of the Contractor's Proposal on behalf of any consortium member named in the Contractor's Proposal shall be deemed to have been knowledge of the Contractor, even if the Contractor had not yet been incorporated or created; and
- (b) during the Term, knowledge on the part of personnel of the Contractor's principal design subcontractor or principal construction subcontractor, provided such personnel are directly involved in the design or construction of the Project, shall be deemed to be knowledge of the Contractor.

### **1.10 Restated Schedules**

Where any provision of this Agreement expressly contemplates a consequential 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 AND BUILD**

### **2.1 Design and Build**

The Contractor undertakes to design and build the New Infrastructure in accordance with the Project Requirements and as more particularly set out in Section 5 (Design and Build of the New Infrastructure).

### **2.2 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. CONDITIONS PRECEDENT TO AGREEMENT**

#### **3.1 Conditions Precedent**

The Contractor must, as conditions precedent to this Agreement, deliver to the Province within three Business Days of the date of the Execution of this Agreement:

- (a) the Bonds in accordance with Schedule 7 (Bonding Requirements);
- (b) evidence, to the satisfaction of the Province acting reasonably, of the Contractor having a valid Workers' Compensation Board registration number; and
- (c) evidence, to the satisfaction of the Province acting reasonably, of compliance with the Insurance Requirements in accordance with Schedule 8 (Insurance Requirements);

failing which this Agreement shall not come into effect and shall not create legal obligations.

### **4. THE LANDS**

#### **4.1 Access and Use**

Subject to the provisions of this Section 4.1 (Access and Use), the Province hereby provides the Contractor with non-exclusive access to and use of, for the purpose of performing its obligations under this Agreement, all of the Lands currently owned by the Province and not leased to third parties (such ownership and leasing as disclosed in Schedule 10 (Lands) and as disclosed as forming one or more of the Identified Encumbrances, respectively), including all fixtures and improvements constructed thereon under this Agreement. Such access and use extends to and includes:

- (a) any of the Lands not presently owned by the Province as disclosed in Schedule 10 (Lands), once such lands have been acquired by the Province; and
- (b) any of the Lands presently leased by the Province to third parties as disclosed as forming one or more of the Identified Encumbrances, upon expiry of the leases to third parties.

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

The Contractor acknowledges that the Province may, without compensation to the Contractor except under Section 4.7(f) (Utility, Railway and Drainage Agreements) or as follows from the existence of a Relief Event under Section 13.2(m) (Relief Event

Defined), grant utility rights of way, easements or similar interests in land over the Lands, pursuant to the *Edmonton Restricted Development Area Regulations* (AR 287/74, as amended).

The Contractor acknowledges that the City Road Allowances are not owned by the Province, and that the Contractor will be responsible, at its own expense (except as follows from the existence of a Relief Event under Section 13.2(o) (Relief Event Defined) and subject to the obligation of the Province under Section 15.4 (Assistance with Permits and Utility Agreements) to provide reasonable assistance), to obtain permission from The City of Edmonton, to access and make use of the City Road Allowances for the purposes of the Project.

#### **4.2 Status of Lands**

Except as expressly set out in this Agreement:

- (a) access to and use of the Lands is being provided 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.

#### **4.3 Commencement and Duration**

The Contractor’s right to non-exclusive access to and use of the Lands comes into effect upon Execution of this Agreement and continues until the expiry of the Term or sooner termination of this Agreement. Such right to non-exclusive access and use (together with any right of access and use granted by the Contractor pursuant to Section 4.1 (Access and Use) automatically terminates upon any termination of this Agreement.

#### **4.4 No Access Fee**

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

#### **4.5 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 (other than the “**Third Party Leased Lands**” set out in Appendix F (Alberta Infrastructure Land Lease Summary and Drawings) to Schedule 14 (Technical Requirements)) 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 Lands; or
- (b) the Lands, without adding them to the Road Right of Way;

and in either such case, the Contractor's rights of non-exclusive access and use hereunder shall extend to such lands.

#### **4.6 Access to and Use of 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) and obtaining such other consents and complying with such other requirements as may from time to time be required by applicable laws; and
- (b) except to the extent that inability to obtain required consents constitutes a Relief Event under Section 13.2(i) or (o) (Relief Event Defined), it is the responsibility of the Contractor to obtain all consents and comply with all applicable laws as necessary to obtain access to and use of 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 and shall rectify any damage to the TUC outside of the Road Right of Way caused by the Contractor, its agents, subcontractors or others for whom the Contractor is legally responsible. The Province acknowledges and agrees that provided the Contractor complies with Section 4.6(a) and (b) (Access to and Use of TUC Lands) above neither the Project itself nor the observance and carrying out of the Technical Requirements by the Contractor shall of itself constitute damage to the TUC outside the Road Right of Way caused by the Contractor, its agents, subcontractors or others for whom the Contractor is legally responsible.

#### **4.7 Utility, Railway and Drainage Agreements**

Subject only to the Province's obligations under Section 15.4 (Assistance with Permits and Utility Agreements), 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 Construction Completion or sooner termination of this Agreement or upon written request of the Province;
    - (ii) the Contractor shall be deemed to have assigned the Utility Agreements to the Province upon Construction Completion 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 Construction Completion 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 and other authorized 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 (Access and Use). 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 enable the Contractor to require payment from such Future Utilities of those expenses; and
- (f) from the Province, to the extent that Ministerial consents given in respect of those Future Utilities do not enable the Contractor to require payment from such Future Utilities of those expenses.

As soon as absolutely reasonably possible upon the Contractor becoming aware of any actual difficulties or any reasonably anticipated difficulties in relation to Future Utilities that have potential to result in a claim by the Contractor against the Province under clause (f) of this Section 4.7 (Utility, Railway and Drainage Agreements), 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).

The Contractor acknowledges that the Province has entered into an agreement (the “**ATCO Agreement**”) with ATCO Gas and Pipelines Ltd. for the relocation of the natural gas pipelines set out therein, and further acknowledges and agrees as follows:

- (g) the Contractor is in receipt of a copy of and has reviewed the ATCO Agreement;
- (h) the ATCO Agreement shall be deemed to be a Utility Agreement entered into by the Contractor under this Section 4.7 (Utility, Railway and Drainage Agreements); and
- (i) the Contractor shall perform on behalf of the Province all obligations of the Province under the ATCO Agreement and shall assume direct responsibility for the ATCO Agreement by entering into the Assignment and Assumption Agreement (Schedule E to the ATCO Agreement) (the “**Assignment and Assumption Agreement**”) within 60 days of Execution of this Agreement and by satisfying the condition precedent set out in section 3.1 of the Assignment and Assumption Agreement within the time required in such section 3.1, and shall, subject to Section 16.2 (Province’s Indemnity), indemnify the Province against any liability under or in relation to the ATCO Agreement arising from the Contractor’s breach of any provision of the Assignment and Assumption Agreement.

#### **4.8 Condition of the Lands**

Subject to Sections 11.6 (Repair of Damage – Construction Period) and 13.2(e) (Relief Event Defined), and subject to the Contractor’s obligations under this Agreement to carry out the Project, the Contractor shall maintain the Lands in good and proper order and repair throughout the Construction Period, and shall:

- (a) subject to clause (e) below, be responsible for repairing all damage to the Lands, however caused, excepting only damage caused by a Force Majeure Event or caused directly by the Province or its employees, agents or contractors (except the Contractor but including, without limitation, those contractors other than the Contractor engaged by the Province under Section 7.3 (Other Work by Province)) or those for whom the Province is legally responsible or caused directly by any person exercising rights under an Identified Encumbrance, a grant contemplated by the third paragraph of Section 4.1 (Access and Use), Future Utilities (as

defined in Section 4.7 (Utility, Railway and Drainage Agreements)), or a consent contemplated by the last sentence of Section 4.13 (Uninterrupted Access and Use);

- (b) dispose of garbage from the Lands and comply with any requirements in the Technical Requirements relating to garbage on the Lands;
- (c) not stockpile any material on the Lands except during the Construction Period or otherwise when carrying out construction activities under this Agreement;
- (d) not commit or permit by the Contractor's agents or subcontractors or those for whom the Contractor is legally responsible, any waste or nuisance on the Lands; and
- (e) promptly deal with any Environmental Damage or Degradation to the Lands as required by applicable laws, with the exception only of:
  - (i) Environmental Damage or Degradation (including, without limitation, the presence of any Hazardous Substance) pre-existing as of the date of Execution of this Agreement and to the extent not required to be dealt with to carry out the Project; and
  - (ii) Environmental Damage or Degradation (including, without limitation, the presence of any Hazardous Substance) caused after the date of Execution of this Agreement by the Province or its employees, agents or contractors (except the Contractor) or those 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.

The Province acknowledges and agrees that neither the Project itself nor the observance and carrying out of the Technical Requirements by the Contractor shall of itself constitute a breach of the Contractor's obligations to maintain the Lands in good and proper order or its obligations under clauses (a) or (d) of this Section 4.8 (Condition of the Lands).

#### **4.9 Permitted Use**

The Contractor covenants that it (and others for whom it is legally responsible) will use the Lands and the New Infrastructure to be constructed thereon only for the purposes of the Project.

#### **4.10 No Encumbrances On Lands**

The Province covenants that it will not grant or permit to be granted any encumbrance that can be registered against title to the Lands that results in the Province being in breach of its obligations set out in Section 4.13 (Uninterrupted Access and Use).

#### **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, excepting those sums required to be retained under the provisions of any applicable statute of Alberta, and shall not by any act or omission cause, encourage, suffer or allow any lien or claim under any such statute to be made against the Province or filed or registered against the Lands or the New Infrastructure by reason of work, services or materials supplied or claimed to have been supplied to the Contractor or anyone holding any interest through or under the Contractor. 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 Lands shall be the property of the Province.

#### **4.13 Uninterrupted Access and Use**

The Province covenants that the Contractor's access to and use of the Lands pursuant to Section 4.1 (Access and Use) shall be uninterrupted during the duration of this Agreement, shall be without any disturbance or interference from the Province or any person claiming from or under the Province, and shall be adequate to enable the Contractor to carry out the Project throughout the Construction Period subject to the following:

- (a) the Identified Encumbrances and the Future Utilities (but subject in each case to the obligations of the Province under Section 15.4 (Assistance with Permits and Utility Agreements));
- (b) the exercise by the Province of any express right under and in accordance with this Agreement, including without limitation the Province's right under Section 5.10 (Stop Work Order) to direct the Contractor to cease construction, the Province's rights under Section 7.3 (Other Work by Province) to undertake additional improvements, the Province's right under Section 14.4 (Access, Inspection and Testing) to access to and use of the Lands for inspection purposes, and the Province's step-in rights under Section 16.6 (Province's Step-in Rights);

- (c) any interference including, without limitation, an injunction issued by a Court or action by protesters, to the extent attributable to a negligent or wrongful act or omission by the Contractor or those for whom the Contractor is legally responsible.

The Province shall defend its title to the Lands against any person (including, without limiting the generality of the foregoing, any person claiming aboriginal title or treaty rights) claiming any interest adverse to the Province in the Lands, except where such adverse interest arises as a result of a negligent or wrongful act or omission of the Contractor or those for whom it is legally responsible. Unless expressly otherwise stated by the Province, any entry upon the Lands by the Province in accordance with the provisions of this Agreement or by any third party through written consent of the Province's Minister of Infrastructure pursuant to the *Edmonton Restricted Development Area Regulations* (AR 287/74, as amended) shall not constitute a breach of this covenant of uninterrupted access to and use of the Lands, provided that such entry does not (having regard to and subject to the provisions of Sections 4.7 (Utility, Railway and Drainage Agreements) and 13.2(m) (Relief Event Defined) regarding Future Utilities) materially adversely interfere with or disturb the Contractor's carrying out of the Project.

#### **4.14 Payment of Taxes on Lands**

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

#### **4.15 Access and Use Rights to Cease**

Upon expiry of the Term or any sooner termination of this Agreement, the Contractor shall cease to have any right of access to and use of the Lands other than as is available to any member of the public, and if the Contractor fails to comply with this Section 4.15 (Access and Use Rights to Cease), then it shall indemnify the Province against any damages, losses or costs incurred by the Province in consequence of such failure.

#### **4.16 Hold Harmless**

Without limitation to the applicability of the general indemnity in Section 16.1 (Contractor's Indemnity), but subject to the last sentence of Sections 5.2 (Project Requirements) and 5.7(c) (Contractor Solely Responsible for Costs) and subject to the exceptions set out in Section 4.8(e) (Condition of the Lands) and in the last paragraph of Section 4.8 (Condition of the Lands), the Contractor shall hold harmless and indemnify the Province (and as such Section 20.3 (Conduct of Indemnified Claims) applies) from any and all third party claims for which the Contractor is legally responsible and arising in relation to the Lands, including without limiting the generality of the foregoing:

- (a) any claims for occupier's liability in respect of the Lands, including any claims for which the Province has liability solely as a result of being the registered owner of the Lands, except to the extent that a Court has determined that such liability was caused or contributed to by the Province or its employees, agents or contractors (excluding the Contractor), or those for whom the Province is legally responsible;
- (b) any claims arising out of negligence or willful acts by the Contractor or the Contractor's agents or subcontractors or those for whom the Contractor is legally responsible; and
- (c) any claims arising under or in relation to any Environmental Damage or Degradation (except for claims arising in relation to the Environmental Damage or Degradation set out in clauses (i) and (ii) of Section 4.8(e)) (Condition of the Lands) or any nuisance on the Lands.

## **5. DESIGN AND BUILD OF THE NEW INFRASTRUCTURE**

### **5.1 Contractor's Obligations**

The Contractor agrees to design and build the New Infrastructure 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 (Request for Clarification) and notwithstanding any other provision of this Agreement, the Contractor's obligation to design and build the New Infrastructure 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 (Modification of Project Requirements). If the Contractor asserts that any aspect of the Project Requirements is uncertain or ambiguous, either party may require that the interpretation of that aspect of the Project Requirements be determined pursuant to the Dispute Resolution Procedure. The Province acknowledges that it is responsible for the adequacy and suitability of the Project Requirements, and shall indemnify the Contractor against any claims by third parties (including the reasonable cost of defending such third party claims, on a solicitor and client basis) for personal injuries or property damage to the extent that a Court has determined that such

injury or damage was caused or contributed to by a failure of the Project Requirements to be adequate and suitable.

### **5.3 Contractor's Responsibility to Carry Out Project Requirements**

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

### **5.4 Request for Clarification**

The Contractor may request that the Province agree that a particular design element or construction specification complies with the Project Requirements, and if the Province so agrees, 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.

The Contractor shall submit to the Province a report or a request for clarification of any discrepancy, deficiency, ambiguity, error, inconsistency or omission contained in the Project Requirements, as soon as absolutely reasonably possible upon being aware of any such discrepancy, deficiency, ambiguity, error, inconsistency or omission contained therein.



### **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 Technical Proposal phase of the RFP. If the Contractor asserts that the Province has unreasonably withheld consent, either party may require that the matter be determined pursuant to Schedule 6 (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 (Assistance with Permits and Utility Agreements):
  - (i) the obtaining of all required permits;
  - (ii) all required arrangements, as more particularly contemplated by Section 4.7 (Utility, Railway and Drainage Agreements), relating to utilities, railways and drainage; and
  - (iii) all required arrangements with municipalities;
- (b) establishing or arranging its own operations 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 6 (Dispute Resolution Procedure); and
- (c) any claims by third parties asserting a right to damages as a result of the Project being carried out as contemplated by and in accordance with this Agreement, provided such claims are not founded on any negligent act or omission by the Contractor or any of its subcontractors or a failure by the Contractor to comply with this Agreement. The Province shall indemnify the Contractor against such third party claims set out in the foregoing portion of (c) (including the reasonable cost of defending such third party claims, on a solicitor and client basis).

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 8 (Payment) or elsewhere in this Agreement.

## **5.8 Construction Within the Lands**

Except to the extent expressly required otherwise in the Technical Requirements, the Contractor agrees to construct the Project entirely within the TUC (except, to the extent that the Road Right of Way is outside the TUC) and, subject to Section 4.5 (Additional TUC Lands), 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, shop drawings, and construction specifications, and for express clarity, including any changes to detailed designs previously provided to the Province in accordance with this Section 5.9) for the Project 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 (Design and Plan Certification Process and Review Procedure). The Contractor shall not commence work on any component of the Project if such work has not been addressed in detailed designs provided to the Province in accordance with this Section 5.9. The parties expressly intend and agree that neither comment by the Province nor failure by the Province to comment or otherwise participate in any manner in respect of the procedure prescribed by Schedule 5 (Design and Plan Certification Process and Review Procedure) shall shift or detract from the Contractor's absolute responsibility under Section 5.3 (Contractor's Responsibility to Carry Out Project Requirements) 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 shall, subject to Section 13.2 (Relief Event Defined), constitute a Relief Event under Section 13.2(c) (Relief Event Defined).

### **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 (subject to adjustment of the dates in clauses (a) and (b) below pursuant to Section 11.6 (Repair of Damage – Construction Period), Section 12.1(b) (Force Majeure During Construction Period) or Section 13.3(b) (Relief Event During Construction Period)) provide the Province with:

- (a) by December 31, 2011, the Contractor's plan for achieving Traffic Availability no later than October 30, 2012; and
- (b) from and after May 30, 2012, 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 the Safety Audit Plan forming part of Schedule 4 (Contractor's Management Systems and Plans).

At least 30 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 (Independent Safety Auditor) or Section 5.13 (Anticipated Traffic Availability) as the case may be;
- (c) the Independent Safety Auditor must carry professional liability insurance with errors and omissions coverage of not less than Five Hundred Thousand Dollars (\$500,000.00) 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 30 days the Project will be sufficiently completed that the New Infrastructure 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 to satisfy the Requirements for Certification of 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.

When the Independent Safety Auditor, having regard to any deficiencies and safety concerns noted by the Province within the 10 day period referred to in the paragraph above and all remedial action taken by the Contractor in response thereto, is satisfied that the New Infrastructure 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 is ready for and safe for vehicle traffic (the “**ISA Recommendation**”).

### **5.14 Requirements for Certification of Traffic Availability**

The requirements for Certification of Traffic Availability (the “**Requirements for**

**Certification of Traffic Availability”)** are:

- (a) the issuance of the ISA Recommendation to the Province;
- (b) the design and construction of the Project have been performed in substantial accordance with this Agreement, the Contractor’s Designs, the Contractor’s Management Systems and Plans, the Project Requirements and all codes, by-laws and regulations applicable to the Project; and
- (c) the satisfactory completion of all construction as necessary to facilitate the safe, uninterrupted, and unobstructed public use of all structures, travelled lanes, sidewalks, pathways, and shoulders, including without limitation;
  - (i) all roads are fully paved;
  - (ii) all structures and drainage systems are fully operational;
  - (iii) all traffic lighting and signalization are fully operational;
  - (iv) all permanent pavement markings at all intersections and on all major roads are in place;
  - (v) all regulatory and guide signing has been installed;
  - (vi) all median and roadside barrier and other safety devices have been installed; and
  - (vii) any other conditions expressly stated as being required to be satisfied before the New Infrastructure can safely be opened to the public for use by vehicle traffic.

### **5.15 Certification of Traffic Availability**

Upon the satisfaction of the Requirements for Certification of Traffic Availability, as determined by the Contractor acting reasonably, the Contractor may submit a written request to the Province for a Certification of Traffic Availability with the following documents (the “**Section 5.15 Request**”):

- (a) a letter addressed to the Province stating that the Contractor has performed all of its obligations to date under this Agreement; and
- (b) a letter addressed to the Province from the Lead Designer stating that based upon professional opinion the design and construction of the Project have been performed in substantial accordance with this Agreement, the Contractor’s

Designs, the Contractor's Management Systems and Plans, the Project Requirements and all codes, by-laws and regulations applicable to the Project.

Within 14 days of receipt of the Section 5.15 Request, the Province shall evaluate the New Infrastructure and determine, acting reasonably, whether or not the Requirements for Certification of Traffic Availability have been satisfied and thereafter, shall issue either:

- (c) a notice listing deficiencies noted in the New Infrastructure and any failure to satisfy the Requirements for Certification of Traffic Availability; or
- (d) a Certification of Traffic Availability.

Upon receipt of a notice issued pursuant to (c) above, the Contractor shall remedy all deficiencies noted and failures to satisfy the Requirements for Certification of Traffic Availability, and, upon completion of the work or activity required in the notice, the Contractor may re-apply for Certification of Traffic Availability in accordance with this Section.

Any difference of opinion and the question of whether and on what date the Requirements for Certification of Traffic Availability were satisfied and on what date the Certificate of Traffic Availability should have been issued shall be resolved pursuant to Schedule 6 (Dispute Resolution Procedure).

If the Contractor notifies the Province that it disputes when the satisfaction of the Requirements for Certification of Traffic Availability occurred, but that the Contractor intends to address such failure to satisfy the Requirements for Certification of Traffic Availability as requested by the Province while reserving its right to dispute such failure, then the Contractor may thereafter pursuant to the Dispute Resolution Procedure seek a determination that the work done by the Contractor in response to the Province's concerns shall be deemed to be work done pursuant to a Change Order Directive and a determination as to the extent that Section 5.16 (Late Traffic Availability) applies.

#### **5.16 Late Traffic Availability**

If the Contractor fails to achieve Traffic Availability on or before the Traffic Availability Target Date, then without limiting any other remedy available to the Province, the Province shall have the right to set-off against amounts owing to the Contractor or from the Holdback the amount of Ten Thousand Dollars (\$10,000.00) per day as liquidated damages for late Traffic Availability for each day or part thereof between the Traffic Availability Target Date and Traffic Availability.

#### **5.17 Construction Completion**

Following achievement of Traffic Availability, the Contractor shall diligently proceed to

Construction Completion. When the Contractor has provided the Province with a written request to issue a certificate confirming that Construction Completion has been achieved, the Province will do a further inspection (which shall be carried out jointly with the Contractor if so requested by the Contractor) and, when all noted deficiencies in the Project Requirements have been rectified, will issue a certificate confirming Construction Completion (the “**Construction Completion Certificate**”).

### **5.18 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. As security for the Contractor’s obligation to deliver a workplan and schedule within such 30 day period and to diligently carry out the workplan in accordance with the schedule, the Province may hold back an amount of three times the cost, estimated by the Province acting reasonably, of achieving Construction Completion. The Contractor and the Province have agreed in advance that the cost for completing the As-Built Construction Reports as defined in Schedule 14 (Technical Requirements) is Two Hundred Thousand Dollars (\$200,000.00), and so the applicable hold back shall be Six Hundred Thousand Dollars (\$600,000.00). When Construction Completion is achieved, the Province shall release the remaining balance of the holdback to the Contractor in accordance with Section 9.2 (Final Release of Holdback), 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.

## **6. WARRANTY**

### **6.1 Warranty of Contractor**

In addition to and not in substitution for all other obligations of the Contractor under this Agreement in relation to the New Infrastructure, the Contractor shall, subject to the third paragraph of this Section 6.1, warrant the New Infrastructure to be free from any defect or failure to withstand climatic conditions, maintenance and normal operating conditions, all in accordance with the Technical Requirements (including without limitation sections 400.2.14.5.11 (Reseeding), 400.2.18.6.1 (Traffic Signals – Warranty), and 400.2.52.6 (Permanent Highway Signing – Product Acceptance), of Schedule 14) for a period of two (2) years (except for the strip seal deck joints which will be for a period of five (5) years and except for pavement markings required under sections 200.2.4 (Miscellaneous Design Requirements) and 300.3.1.9.3 (Pavement Markings) of Schedule 14 which will

be for a period of 60 days), following Traffic Availability or earlier termination of this Agreement.

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 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 the cost of the work shall be a debt due and owing to the Province. The warranty work obligations of the Contractor shall be covered by the Bonds required under Section 10 (Bonding Requirements).

The Province has undertaken some advance work to design and install wick drains at select bridge approaches to facilitate fill settlement pursuant to Contract 7795/08 dated September 18, 2008 (the “**Wick Drain Contract**”) between the Province and Canadian Pipeline Construction Inc. titled “Site Preparation Wick Drain Installations and Other Work at 100 Ave./Stony Plain Road Interchange at Anthony Henday Drive, City of Edmonton”. Subject to the last sentence of this paragraph, the Contractor will not be held responsible for any defects or failures of these select fills to the extent directly resulting from the design and advance installation of such wick drains by the Province pursuant to the Wick Drain Contract. Also, subject to the last sentence of this paragraph, the Contractor will not be held responsible for any defects or failures to the extent directly attributed to the design mandated by Schedule 14 (Technical Requirements) of insulation or asphalt concrete pavement. The Contractor is relieved from being responsible for the defects or failures as set out in the two immediately preceding sentences, provided the Contractor is in material compliance with this Agreement and Schedule 14 (Technical Requirements) in respect of, as applicable, these select fills and the insulation or asphalt concrete pavement.

Upon the Contractor’s performance of all obligations under this Section 6.1 (Warranty of Contractor) except for the warranty on the strip seal deck joints greater than two years, and upon the Contractor’s written request to the Province, the Province will issue a certificate confirming final acceptance (the “**Final Acceptance Certificate**”).

## **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 in accordance with 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 in accordance with Schedule 1 (Change Orders). Upon a Change Order Confirmation or a Change Order Directive being issued by the Province pursuant to Schedule 1 (Change Orders) in respect of the Project or the Project Requirements:

- (a) Schedule 14 (Technical Requirements) or any other affected Schedule shall be amended accordingly;
- (b) except as otherwise agreed between the Province and the Contractor (including without limitation any arrangement proposed by the Contractor under clause (c) and agreed to by the Province), the Contractor shall be entitled to payment from the Province on a progress basis, invoiced and paid on a monthly basis, of the reasonable incremental costs, if any, of carrying out the Project or 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) if the Contractor anticipates that the Change Order will delay Traffic Availability, but is of the opinion the delay can be avoided or mitigated through extraordinary measures, the Contractor may propose to the Province that such extraordinary measures be taken by the Contractor at the Province's expense.

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 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 Third Party Consents to Change Orders**

The Province may require the Contractor to request the prior written consent of the insurer(s) or Surety or both to any Change Order.

## **7.3 Other Work by Province**

The Province shall be at liberty, during the Term, 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 or the Project Requirements; and
- (b) if the activities of the Province or its contractors in carrying out the additional improvements do interfere with or disrupt the Contractor's carrying out of the

Project or the Project Requirements (including without limitation as a result of damage caused to the New Infrastructure), such interference or disruption shall, subject to Section 13.2 (Relief Event Defined), constitute a Relief Event under Section 13.2(j) (Relief Event Defined).

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 Determination of Costs**

All payments on account of Change Orders under Sections 7.1 (Modification of Project Requirements) shall be calculated in accordance with the provisions of Schedule 1 (Change Orders).

### **8. PAYMENT**

#### **8.1 Contract Price**

The Province shall, subject to the terms of this Agreement, pay the Contractor the Contract Price, as adjusted in accordance with this Agreement, for performing the work on the Project, and the Contractor agrees to accept the Contract Price as full payment and reimbursement to the Contractor for performing the work on the Project including labour, materials, equipment, and overhead required to perform work on the Project.

#### **8.2 Payment of Upfront Work/Mobilization Cost**

Once the Contractor has been paid for five percent of the work on the Project pursuant to Sections 8.3 to 8.7 (for greater clarity, "paid for five percent of the work" is determined before application of the 10% holdback) and provided the Contractor is not in default of any provision of this Agreement, the Contractor may invoice the Province for the Upfront Work/Mobilization Cost and the Province shall pay such amount minus a holdback equal to 10% pursuant to Section 8.6 within 15 days of the receipt of such invoice.

Notwithstanding the paragraph above and no earlier than 45 days after the date of Execution of this Agreement and provided:

- (a) the Contractor has provided to the Province a Letter of Credit in the amount of the Upfront Work/Mobilization Cost minus 10% for the holdback (the "**8.2 L/C**");
- (b) the Contractor has completed mobilization activities, including without limitation the movement of personnel/equipment/supplies, the establishment of offices/other facilities, and the incurring of upfront expenses (such as insurance and bonding), necessary to start construction work on the Project; and

(c) the Contractor is not in default of any provision of this Agreement,

the Contractor may invoice the Province for the Upfront Work/Mobilization Cost and the Province shall pay such amount minus a holdback equal to 10% pursuant to Section 8.6 within 15 days of the receipt of such invoice.

The 8.2 L/C shall be held by the Province as security for the obligations of the Contractor to design and build the Project in accordance with this Agreement.

The 8.2 L/C must be maintained in effect by the Contractor until the Contractor has been paid for five percent of the work on the Project pursuant to Sections 8.3 to 8.7 (for greater clarity, “paid for five percent of the work” is determined before application of the 10% holdback) and upon such event but provided the Contractor is not in default of any provision of this Agreement, the Province shall immediately surrender the 8.2 L/C to the Contractor. The Province will also as soon as reasonably practicable surrender to the Contractor the 8.2 L/C if this Agreement is terminated in accordance with this Agreement other than under Section 17.1(a).

The Province may present the 8.2 L/C for payment only if:

(d) this Agreement is terminated by the Province under Section 17.1(a); or

(e) the Contractor fails to deliver a renewal of the 8.2 L/C at least 20 days before the expiry date specified in the 8.2 L/C.

Upon presenting the 8.2 L/C for payment, the Province may retain the proceeds therefrom in accordance with Section 18.2 (Termination for Default).

If the Province presents the 8.2 L/C under Section 8.2(e), and if thereafter, but prior to termination of this Agreement, the Contractor meets the conditions in this Section for release of the 8.2 L/C, then the Province shall within five Business Days thereafter repay to the Contractor, without interest (excepting only interest accruing pursuant to Section 8.13 (Interest on Overdue Payments) after such repayment becomes due), the proceeds from presenting the 8.2 L/C.

### **8.3 Percentage Completion of Project**

For work on the Project completed up to and including Traffic Availability, the Contractor shall invoice the Province not more frequently than monthly, in arrears, for the percentage of work on the Project completed since the last invoice (or from the start of construction if there was no last invoice) for each component of work on the Project (“**Component**”) identified in the Contract Price breakdown (the “**Contract Price Breakdown**”) as attached as Schedule 9 (Contract Price Breakdown).

#### **8.4 Determination of Percentage Completion of Project**

For the purposes of this Agreement, the Contractor shall be considered to have completed a particular percentage of a Component of the Project when the Lead Designer has certified in writing to the Province, and the Province has agreed that such certification is correct, having regard to the following, that such percentage of a Component of the Project has been completed:

- (a) percentage completion shall mean the percentage of a Component of the Project, on a cost basis, actually completed, taking into account engineering and design work, but excluding stockpiled materials not yet incorporated into the Project; and
- (b) percentage completion may be certified by tenths of a percentage, that is, percentage completion may be expressed to a single decimal place.

The Contractor shall provide to the Province copies of all relevant materials, records and calculations as may reasonably be requested by the Province each time that a percentage of the Project is certified by the Lead Designer as completed.

#### **8.5 Requirements for Payment**

Payment for work on the Project is subject to:

- (a) the invoiced work on the Project having been completed to the satisfaction of the Province;
- (b) the Contractor providing the Province with a certificate from the Lead Designer that the Lead Designer has examined the portion of work on the Project covered by the invoice, and that based upon professional opinion, that portion of work on the Project has been designed and constructed substantially in accordance with this Agreement, the Contractor's Designs, the Contractor's Management Systems and Plans, the Project Requirements, and all codes, by-laws and regulations applicable to the Project; and
- (c) the Contractor providing to the Province on a daily basis and in accordance with the following three sentences electronically generated weigh tickets for tonnage of asphalt concrete and granular materials. Asphalt concrete and granular materials shall be weighed on a certified weigh scale. Weigh tickets for each load shall be generated using an automatic pre-programmed printer which is certified and sealed to prevent manual override of any weight information. Each weigh ticket shall include the following information: project number; material type; date; time; ticket number (consecutive); haul unit number; net load (tonnes); subtotal of tonnes for each haul unit for that day; and an accumulated total for all haul units for that day.

The Province may adjust the Contractor's invoice to reflect the Province's estimate of the percentage of work on the Project satisfactorily performed as of the date of the invoice.

## 8.6 Holdback

The Province shall retain from each progress payment (including without limitation the payment of the Upfront Work/Mobilization Cost) a holdback equal to ten percent (10%) of the amount of the progress payment approved by the Province for payment to the Contractor. In addition to the foregoing sentence, the Province shall have the right, acting reasonably, to retain an additional holdback to the extent necessary to protect the Province from loss on account of one or more of the following:

- (a) the Contractor, in the opinion of the Province, is not making satisfactory progress toward Traffic Availability by the Traffic Availability Target Date;
- (b) deficiencies and defects in the work on the Project have not been remedied;
- (c) claims relating to work on the Project are filed, or reasonable evidence in the opinion of the Province indicating probable filing of claims;
- (d) evidence of failure of the Contractor to make payments to subcontractors where such payments are not subject to bona fide dispute; or
- (e) damage to other contractors of the Province.

The Province will not pay interest or other charges on any amounts retained pursuant to this Section.

Without limiting the application of the last paragraph of Section 8.7, the Contractor irrevocably grants to the Province the right to claim against or call upon the Holdback and, without limitation, set-off, out of any money due or payable at any time to the Contractor by the Province, in order to recover any overpayment to the Contractor or to recover any other sums which are due and payable to the Province by the Contractor.

The Province will accept from the Contractor a Letter of Credit in the amount of ten percent of the Contract Price in lieu of the Province retaining from each progress payment (including without limitation the payment of the Upfront Work/Mobilization Cost) a holdback equal to ten percent (the “**8.6 L/C**”).

The 8.6 L/C shall be held by the Province as security for the obligations of the Contractor to design and build the Project in accordance with this Agreement.

The 8.6 L/C must be maintained in effect by the Contractor until all the conditions for interim partial release of the Holdback as set out in Section 9.1 (Interim Partial Release of Holdback) have been satisfied, including without limitation the Contractor has provided to the Province the Construction Completion holdback (as set out in Section 5.18) in cash (for clarity, a portion of the amount necessary to cover the Construction Completion holdback may come from the portion of the Applied Contract Price (as defined in Schedule 9) connected with the percentage of work to complete the Project after Traffic

Availability) and upon such event, the Province shall immediately surrender the 8.6 L/C to the Contractor. The Province will also as soon as reasonably practicable surrender to the Contractor the 8.6 L/C if this Agreement is terminated in accordance with this Agreement other than under Section 17.1(a).

The Province may, after giving the Contractor five Business Days notice of its intention to do so, present the 8.6 L/C for payment if:

- (f) the Province is entitled pursuant to this Agreement to claim against any portion of the Holdback; or
- (g) the Contractor fails to deliver a renewal of the 8.6 L/C at least 20 days before the expiry date specified in the 8.6 L/C,

and in either case the amount received by the Province upon presentation of the 8.6 L/C shall be dealt with by the Province acting reasonably and in the same manner as the Holdback (in cash).

## **8.7 Timing of Payment and Payment Calculation**

Within 30 days of receipt of the Contractor's invoice pursuant to Section 8.3 (Percentage Completion of Project) and the certificate required by Section 8.5(b) (Requirements for Payment), the Province shall, subject to the terms of this Agreement, pay the Contractor a progress payment calculated by adding the following items:

- (a) each Component Price as set out in the Contract Price Breakdown multiplied by the Province's estimate of the percentage of that Component satisfactorily performed as of the date of the invoice; and
  - (b) any outstanding Payment Adjustments in favour of the Contractor,

and subtracting from the resulting sum of (a) and (b) immediately above:

- (c) each Component Price as set out in the Contract Price Breakdown multiplied by the Province's estimate of the percentage of that Component satisfactorily performed as of the date of the last invoice;
- (d) any outstanding Payment Adjustments in favour of the Province;
- (e) any set off pursuant to Section 8.12 (Set-off); and
- (f) the holdback set out in Section 8.6 (Holdback) on the amount of the sum (a) and (b) immediately above.

In addition to any other right or remedy available to the Province, the Province shall be entitled to set off against any payments due and payable by the Province to the

Contractor, or from any amounts retained from the Contractor, any amounts that are then due and payable by the Contractor to the Province under this Agreement.

### **8.8 Payment Adjustments**

The Payment is subject to Payment Adjustments on the basis set out in Schedule 14 (Technical Requirements) applied at the times and in the manner set out in Schedule 14.

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 (or, in the case of any bonuses in respect of the Payment Adjustments provided for in section 400 (Construction – New Infrastructure) including without limitation section 400.2.27 (Asphalt Concrete Pavement) of Schedule 14, the Contractor) 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.

The Payment Adjustments relate directly to the performance of the Contractor of a condition, covenant, or promise in this Agreement and shall not be construed by the parties as punitive but as a genuine pre-estimate and assessment, by mutual consent, of the applicable damages.

### **8.9 Payment not Acceptance**

Notwithstanding progress payments made pursuant to Section 8.7 (Timing of Payment and Payment Calculation), the Contractor is responsible for performing work on the Project in accordance with this Agreement. The Contractor acknowledges that payments do not represent a final evaluation or acceptance of work on the Project by the Province.

### **8.10 No Change in Contract Price**

Notwithstanding any other provision in this Agreement, no act or failure to act by the Province, shall give rise to a change in the Contract Price unless it has been set out in a Change Order.

### **8.11 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.

## **8.12 Set-off**

The Province is entitled to set off against any payment due and owing to the Contractor or against the Holdback, only an amount:

- (a) determined to be payable by the Contractor to the Province under this Agreement;  
or
- (b) paid by the Province under and in accordance with any statute in respect of any lien or claim arising from any act or omission of the Contractor, or those for whom it is legally responsible, in relation to the Project.

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

## **8.13 Interest on Overdue Payments**

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

## **9. HOLDBACK RELEASE**

### **9.1 Interim Partial Release of Holdback**

After a minimum of 45 days has expired from the date of Traffic Availability, and upon written request by the Contractor to the Province, the Province will release the full amount of the Holdback, less the amount retained pursuant to Section 5.18 (Construction Completion Holdback), and less any amounts required to satisfy the obligations of the Contractor in respect of items (a), (b) and (c) below, to the Contractor provided that all of (d), (e) and (f) below have occurred:

- (a) the Contractor is not in default of any terms and conditions of this Agreement;



- (b) there are no outstanding third party claims (including without limitation any *Public Works Act* (Alberta) claims) in respect of the Project to which the Province has been notified;
- (c) there are no amounts owing by the Contractor to the Province;
- (d) the Contractor has provided and the Province has received a clearance certificate from the Workers' Compensation Board indicating that all current assessments due from the Contractor have been paid;
- (e) the Contractor has provided and the Province has received a statutory declaration in form and substance acceptable to the Province, acting reasonably, stating that all payments due and owing by the Contractor to its employees, subcontractors, and suppliers, involved in the Project have been paid; and
- (f) the Contractor has provided the Province with written confirmation that the Contractor is in full compliance with all environmental approvals, permits licenses or written authorizations required for the Project.

## **9.2 Final Release of Holdback**

After a minimum of 45 days has expired from the date of Construction Completion, and upon written request by the Contractor to the Province, the Province will release the full amount of the remaining holdback to the Contractor provided that all of the following have occurred:

- (a) the Contractor is not in default of any terms and conditions of this Agreement;
- (b) there are no outstanding third party claims (including without limitation any *Public Works Act* (Alberta) claims) in respect of the Project to which the Province has been notified;
- (c) there are no amounts owing by the Contractor to the Province;
- (d) the Contractor has provided and the Province has received a clearance certificate from the Workers' Compensation Board indicating that all current assessments due from the Contractor have been paid;
- (e) the Contractor has provided and the Province has received a statutory declaration in form and substance acceptable to the Province, acting reasonably, stating that all payments due and owing by the Contractor to its employees, subcontractors, and suppliers, involved in the Project have been paid; and
- (f) the Contractor has provided the Province with written confirmation that the Contractor is in full compliance with all environmental approvals, permits licenses or written authorizations required for the Project.

## **10. BONDING REQUIREMENTS**

### **10.1 Contractor Provides Bonds**

The Contractor shall provide, pay for and maintain in force through to the date that is three years after Traffic Availability the Bonds set out in Schedule 7 (Bonding Requirements).

### **10.2 Replacement of Bonds**

If the Surety notifies either party that the Bonds are, or are going to be, terminated or cancelled for any reason whatsoever, the Contractor shall obtain and provide the Province with valid replacement Bonds as set out in Schedule 7 (Bonding Requirements), effective from the date of termination of such Bonds.

## **11. INSURANCE, DAMAGE AND DESTRUCTION**

### **11.1 Insurance Requirements**

Prior to the Contractor commencing construction of the New Infrastructure and until the expiration of the period(s) provided for in Schedule 8 (Insurance Requirements), the Contractor shall maintain in place all of the insurance specified in Schedule 8 (Insurance Requirements) as being required during the Term.

### **11.2 Other Requirements**

All insurance required under Section 11.1 (Insurance Requirements):

- (a) shall be primary and shall not require the pro rata sharing of any loss by any insurer of the Province; and
- (b) shall be endorsed to provide the Province with 30 days advance written notice of (i) material change restricting coverage or (ii) cancellation.

The Contractor shall require and ensure that each of its subcontractors working on the Project, maintains and provides evidence as reasonably requested by the Province of comparable insurance set forth in section 3.1(b) of Schedule 8 (Insurance Requirements) in an amount not less than \$5,000,000 inclusive per occurrence.

### **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 evidence satisfactory to the Province of all insurance policies required to be obtained and maintained by the Contractor by this Section 11 (Insurance, Damage and Destruction) at least five days prior to the Contractor making any entry upon the Lands for the purpose of commencing construction. The Contractor shall deliver or cause to be delivered to the Province certified copies of all insurance policies required to be obtained and maintained by the Contractor by this Section 11 as soon as reasonably practicable, and in any event within 30 days after Execution of this Agreement 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 (Insurance, Damage and Destruction) 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 (Evidence of Insurance), or if subsequent to providing evidence of all required insurance the Contractor's insurance is subject to a material change restricting coverage or is cancelled, the Province may in its sole and unfettered discretion and without regard to the interests of the Contractor, and upon five Business Days' notice to the Contractor, decide to obtain the required insurance not so evidenced or so restricted or cancelled, and may, acting reasonably, set off the cost of the insurance so obtained against any amount payable to the Contractor under this Agreement.

#### **11.6 Repair of Damage - Construction Period**

The Contractor shall repair all damage to the New Infrastructure during the Construction Period, of whatever nature and however caused, excepting only: damage caused by a Force Majeure Event (in which case Sections 12.1 (Force Majeure During Construction Period) and 12.2 (Procedure on Force Majeure Event) apply); Environmental Damage or Degradation described in Section 4.8(e)(i) or (ii) (in which case Section 4.8(e) applies); or damage caused by the Province or its employees, agents or contractors or subcontractors (except the Contractor and its subcontractors) or those for whom the Province is legally responsible. If damage to the New Infrastructure during the Construction Period 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 (Insurance Requirements) that is relevant to the damage;

the Contractor's Construction Schedule and the dates in Sections 5.11 (Construction Delays) and clauses (f), (g) and (h) of Section 16.8 (Termination Events) 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.

## **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 seven days, then the Contractor's Construction Schedule and the dates in Section 5.11 (Construction Delays) and clauses (f), (g) and (h) of Section 16.8 (Termination Events) 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 be adjusted, subject to the Contractor's obligation to take reasonable steps to mitigate the delay.

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

- (a) the Province may in its discretion, having regard to the nature and extent of the damage and acting reasonably, decline to repair the damage; and
- (b) if the Province, pursuant to clause (a), declines to repair the damage, that shall, subject to Section 13.2 (Relief Event Defined), constitute a Relief Event under Section 13.2(r) (Relief Event Defined) (but without prejudice to any termination right arising under Section 17.3 (Termination Upon Force Majeure)).

## 13. RELIEF EVENTS

### 13.1 Definitions

In Section 13.2 (Relief Event Defined), the following expressions have the following meanings:

- (a) **“Designated Change in Law”** means the following and no other changes in any applicable statute, regulation or other subordinate legislation or other law (whether federal, provincial or municipal, and including common law), including any change in binding judicial interpretation of any applicable law:
  - (i) a change directed specifically at the road construction industry in Alberta or directed specifically at the Contractor, the Project, the New Infrastructure or design-build arrangements of the nature of this Agreement;
  - (ii) a change of a standard incorporated by reference in the Technical Requirements, or any other change that is tantamount to a modification of the Technical Requirements; or
  - (iii) changes in applicable laws enacted by the Province in relation to

environmental approvals required or not required, as the case may be, for the Project, including related administrative practices and policies pursuant to such laws that are material to the requirement or absence thereof to obtain environmental approvals for the Project; and

- (b) “**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 July 1, 2010 the Province has not acquired fee simple ownership of all land within the Lands including the To Be Acquired Lands (as defined in section 4 of Schedule 10), free from any leasehold interests (except for Identified Encumbrances);
- (c) in the circumstances specified in Section 5.10 (Stop Work Order), 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) any Environmental Damage or Degradation in, on under or around the TUC that was unknown to the Contractor at the time of submission of the Contractor’s Proposal or was subsequently caused by parties other than the Contractor or its agents or subcontractors or those for whom the Contractor is legally responsible;
- (f) the presence in, under or on the TUC, 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;
  - (iv) any proceeding brought against the Contractor or its principal

subcontractor engaged to construct the Project, provided the proceeding relates to the nature of the Project and not to any wrongful or negligent act of the Contractor or such subcontractor or those for whom either of them is legally responsible;

- (h) during the Construction Period, a general strike or other labour disruption in Alberta that is applicable broadly to the roadbuilding or road maintenance industry in Alberta or is 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 the Province, obtained the Ministerial consent contemplated by Section 4.6(a) (Access to and Use of TUC Lands), 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) (Other Work by Province), interference with or disruption of the Contractor's carrying out of the Project or the Project Requirements;
- (k) any interference with the Project by persons claiming aboriginal title or treaty rights in respect of all or any part of the Lands or the TUC;
- (l) in the circumstances specified in Section 16.6(e) (Province's Step-in Rights), any Remedial Action (as defined in Section 16.6 (Province's Step-in Rights)) taken by the Province;
- (m) if, above and beyond the reasonable cooperation required of the Contractor by Section 4.7 (Utility, Railway and Drainage Agreements) 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 or interfered with as a result of Future Utilities;
- (n) 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 are delayed or prevented as a result of any encumbrances, other than Identified Encumbrances, that pertain to the Lands;
- (o) if the Contractor has not obtained the permission from The City of Edmonton, contemplated by Section 4.1 (Access and Use) in respect of the City Road Allowances within 21 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 (Assistance with Permits and Utility Agreements) in relation to the permission;
- (p) protest actions by persons protesting the construction of the Project;
  - (q) the presence on or around the TUC of animal or plant species protected by applicable environmental laws, which presence was unknown to the Contractor at the time of submission of the Contractor's Proposal;
  - (r) in the circumstances specified in Section 12.2 (Procedure on Force Majeure Event), a failure by the Province to repair, within a timeframe that is reasonable having regard to the circumstances, damage caused by a Force Majeure Event;
  - (s) any environmental assessment process or environmental impact assessment report directed under sections 44 or 47 of the *Environmental Protection and Enhancement Act* (Alberta), except where such direction arises as a result of activities or actions (whether planned or actually carried out) by the Contractor (or those for whom it is in law responsible) in circumstances where:
    - (i) it was reasonably foreseeable that such activities or actions could lead to such assessment process or report being directed; and
    - (ii) having regard to the Contractor's Designs generally, the Contractor could reasonably have carried out the Project without such activities or actions; or
  - (t) the exercise by the holder thereof, in respect of any of the Lands, of any of the rights under the caveat registered in the North Alberta Land Registration District as instrument 922 013 309;

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

### **13.3 Relief Event During Construction Period**

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

- (a) to the extent that and for so long as the Contractor is prevented by the Relief Event from performing any obligation under this Agreement, the Contractor is relieved from any liability or consequence under this Agreement 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 (Construction Delays) and clauses (f), (g) and (h) of Section 16.8 (Termination Events) shall be adjusted commensurately to the period during which the Contractor is prevented by the Relief Event from proceeding with the Project;

- (c) no non-performance of any obligation of the Contractor under this Agreement shall give rise to a Termination Event, to the extent that and for so long as performance of the obligation is prevented by the Relief Event;
- (d) the Traffic Availability Target Date shall be adjusted, subject to the Contractor's obligation to take reasonable steps to mitigate the delay;
- (e) if the Contractor anticipates that the Relief Event will delay Traffic Availability, but is of the opinion the delay can be avoided or mitigated through extraordinary measures, the Contractor may propose to the Province that such extraordinary measures be taken by the Contractor at the Province's expense;
- (f) if the Relief Event, when aggregated with the effect of any other Relief Event or Relief Events occurring in the same calendar year and not previously claimed for by the Contractor increases the Contractor's cost of carrying out the Project by at least Twenty Five Thousand Dollars (\$25,000.00), then subject to Section 13.4 (Procedure on Relief) and subject in every case to the Contractor's obligation to take reasonable steps to mitigate the increase in its costs, the Province shall, as soon as practicable following receipt from the Contractor of appropriate documentation establishing the amount payable, pay to the Contractor, without duplication:
  - (i) if the Relief Event is a breach by the Province of any of its obligations under this Agreement, the amount payable under the indemnity in Section 16.2 (Province's Indemnity);
  - (ii) if the effect of the Relief Event is tantamount to a change in the Project Requirements, the amount that would have been payable by the Province if the change in the Project Requirements had been a Change Order governed by Section 7.1 (Modification of Project Requirements) and requested by the Province pursuant to a Change Order Directive; and
  - (iii) in any other case, the Contractor's reasonable damages; and
- (g) no damages are payable under this Section 13.3 (Relief Event During Construction Period) to the extent that the damages are covered (or would have been covered but for the Contractor's failure to comply with Section 11 (Insurance, Damage and Destruction)) by insurance maintained by or for the benefit of the Contractor.

### **13.4 Procedure on Relief Event**

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

## **14. CONTRACTOR'S REPRESENTATIONS AND OBLIGATIONS**

### **14.1 Contractor's Representations**

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

- (a) the Contractor is duly organized, validly existing, in good standing, and registered and otherwise lawfully authorized to do business under the laws of Alberta, and has the **[corporate]** capacity, power and authority to enter into and perform its obligations under this Agreement;
- (b) this Agreement has been duly authorized on behalf of the Contractor, and upon its execution and delivery constitutes a legal, valid and binding obligation of the Contractor;
- (c) 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 including, without limitation, geotechnical conditions, subsurface conditions, bearing pressure, settlement characteristics, and nature and consistency of soil, and is not relying on any information received from or representation made by the Province, with the exception only of the Province's representations in Section 6.1 (Warranty of Contractor) and Section 15.1 (Province's Representations) and any information or representations relating to any of the 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;
- (d) 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

- (e) the Contractor, either in the Contractor's Proposal or in formal communications with the Province under the RFP, has made plain and true disclosure to the Province of all facts and circumstances regarding the Contractor or its intended subcontractors that might reasonably be material to the willingness of the Province to enter into this Agreement with the Contractor.

*[NOTE TO DRAFT: Portions of Section 14.1(a)(Contractor's Representations) may have to be customized depending upon the legal structure of the Contractor (for example, corporation versus partnership).]*

## **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) such other periodic reports as the Province may from time to time reasonably require; and
- (c) throughout the Term, 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, the Project Requirements, or this Agreement;

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

## **14.3 Records**

The Contractor shall, following Execution of this Agreement and for a period of one year following expiry of the Term or earlier termination of this Agreement, (i) maintain in an appropriate form full accounting and other records in respect of performance by it of its obligations under this Agreement, and (ii) keep those records available for inspection by the Province (including the Auditor General of the Province or any other representative designated by the Province for that purpose) at all reasonable times upon reasonable notice, for the purpose of determining the Contractor's compliance with this Agreement. Apart from this right of inspection and the obligation of the Contractor under Section 17.4(b) (Consequences of Termination) 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.

The Contractor shall not be required to hand over to the Province copies of any records that constitute proprietary information in the nature of trade secrets.

#### **14.4 Access, Inspection and Testing**

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

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

for the purpose of inspecting the Lands or materials to be used in the Project so as to be able to determine compliance by the Contractor with the terms of this Agreement; and such access shall not of itself be construed as constituting disturbance or interference with the Contractor's uninterrupted access to the Lands; provided however that the Contractor may exercise reasonable control over such access for reasons of safety and operational efficiency. For the purpose of such inspection, the Province may at all reasonable times and subject to the reasonable requirements of third party suppliers, perform any measurement, test or other observation or investigation. The Contractor shall provide reasonable cooperation (but without obligation to incur material expense) to facilitate any such measurements, tests or other observations or investigations. The Province shall conduct all such measurements, tests, observations and investigations in a manner that will not materially disturb, interfere with or disrupt the Project.

#### **14.5 Safety**

The Contractor shall observe all safety requirements specifically set out in Schedule 12 (Safety Requirements) or in the Technical Requirements, and shall in all respects and at all times carry out the Project and the Project Requirements with due regard for public safety.

#### **14.6 Contractor's Other Obligations**

The Contractor covenants to do all things specified in the Schedules to this Agreement to be done by the Contractor, in such manner and at such times as specified in the Schedules to this Agreement. The Contractor shall take all such actions in the context of the Project 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 contiguous roadways.

#### **14.7 Application of the Public Works Act (Alberta)**

The *Public Works Act* (Alberta) applies to the Project. For the purposes of interpreting the "Notice of Claim" provisions under section 14 of the *Public Works Act*, the claim shall be deemed to be a claim under section 14(2) in which the notice of claim shall be sent by registered mail not sooner than 30 days nor later than 90 days after the last day on which the labour, equipment, material or services were provided. The Contractor shall post, at its project field office or other conspicuous location accessible to employees, subcontractors, truckers and material suppliers, among others, copies of the following:

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

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

#### **14.8 Manufacturers' Warranty**

Prior to Construction Completion or earlier termination of this Agreement, the Contractor shall assign to the Province the benefit of all manufacturers' warranties still in effect in respect of mechanical and electrical equipment included in the New Infrastructure, including, without limitation, in respect of strip seal deck joints.

### **15. PROVINCE'S REPRESENTATIONS AND OBLIGATIONS**

#### **15.1 Province's Representations**

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

- (a) the Province has all requisite capacity, power and authority to enter into and perform its obligations under this Agreement;
- (b) this Agreement has been duly authorized on behalf of the Province, and upon execution and delivery constitutes a legal, valid and binding obligation of the Province;
- (c) officials of the Province's 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 Contractor's Contact Organization);

- (d) the Province is the owner of an estate in fee simple of all of the Lands, except for the lands described in Schedule 10 (Lands) as the "City Road Allowances" or the lands described in Schedule 10 (Lands) as the "To Be Acquired Lands";
- (e) the Province has not granted any leases that are outstanding in respect of the Lands, except for the leases forming part of the Identified Encumbrances and the leases described in Appendix F of Schedule 14 (Technical Requirements); and
- (f) the Province has the authority to use the Lands for a highway.

### **15.2 Province's General Obligation**

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

### **15.3 Contractor's Reliance on Information**

The representation by the Province in Section 15.1(c) (Province's Representations) shall not be construed as importing any duty of care to the Contractor on the part of the Province in relation to the accuracy of such reports, studies or other information, it being mutually understood and agreed that the Contractor will perform its own research, investigation and due diligence. However, the Contractor may rely on the accuracy and completeness for its intended purpose of the clearance letters for archeological and historical resources dated July 17, 2008 issued by Alberta Culture and Community Spirit-Historic Resources Management.

### **15.4 Assistance with Permits and Utility Agreements**

Without derogating from the Contractor's responsibilities under Section 5.6 (Contractor Solely Responsible for Project) 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 4.7 (Utility, Railway and Drainage Agreements)), the Province shall, in response to any reasonable request by the Contractor in relation to such required arrangements, 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, but otherwise including, in any case where the Province concludes that a third party is acting unreasonably in relation to the shared-use nature of the TUC, the exercise by the Province of all legal rights and remedies available to it in

relation to such third party, to the extent it is reasonable in the circumstances for the Province to exercise such legal rights and remedies.

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 as a result of being unable to arrange or enforce performance of any particular Utility Agreement (as defined in Section 4.7 (Utility, Railway and Drainage Agreements)) 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 costs billed by utilities to the Contractor pursuant to Utility Agreements (other than drainage agreements) for relocation, power hook-ups or other expenses (collectively, "**Utility Costs**") in relation to the Project in aggregate exceeding \$3,000,000.00, 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 Costs in aggregate exceed \$3,000,000.00 but do not exceed \$5,000,000.00; and
  - (ii) three-quarters of the amount by which the Utility Costs in aggregate exceed \$5,000,000.00.

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 (Calculation of and Limitation on Claims), 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
- (c) any third party claim alleging infringement by the Contractor or its subcontractors, in relation to the Project, of any intellectual property rights of third parties.

## **16.2 Province's Indemnity**

Subject to Section 16.3 (Calculation of and Limitation on Claims), 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 (and by extension, the subcontractors of the Contractor) in the same position it would have been in but for the occurrence of the specified event, having regard to the following circumstances and limitations but otherwise without limiting the generality of the foregoing:

- (a) the obligations and arrangements contemplated by the Contractor's Proposal (including obligations to and arrangements with parties specified in the Contractor's Proposal, but also including corresponding obligations to and arrangements with replacement parties), including but not limited to the Contractor's obligations to its subcontractors, but in each case premised upon break fees payable to the Contractor's subcontractors and others contracting with the Contractor must be commercially reasonable, having regard to customarily negotiated break fees between parties at arm's length from one another, and subject in every case to a duty on the part of the subcontractor or other contracting party to mitigate its damages; and
- (b) the Contractor's duty in every instance to take all commercially reasonable



measures to mitigate its damages or losses (and the Contractor's corresponding right to include in its damages or losses the reasonable costs of such measures).

Subject to the foregoing, no claim by either party arising from any breach of this Agreement or under any indemnity given by this Agreement, shall include any claim by such party against the other for punitive or exemplary damages, indirect or consequential damages, or any claim for 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. Notwithstanding the foregoing sentence, where either party is entitled pursuant to this Agreement to claim against the other for indemnification for a third party claim, such claim for indemnification may include such third party's claim for punitive or exemplary damages, indirect or consequential damages, or for economic loss.

The Province and the Contractor acknowledge that the Contractor will not be precluded from advancing any claim or seeking any relief under this Agreement solely by the reason that the Contractor is not liable to the applicable subcontractor identified in Schedule 13 (Subcontractors) under the applicable agreement between the Contractor and such subcontractor identified in Schedule 13 (Subcontractors) until such claim or relief is granted by the Province to the Contractor under this Agreement. Nothing in this paragraph creates any contract or obligation directly between the Province, the Contractor and the applicable subcontractor identified in Schedule 13 (Subcontractors).

#### **16.4 Exclusivity of Specified Remedies**

The Contractor shall not be entitled to damages or indemnification in respect of any breach by the Province under this Agreement that would duplicate compensation to the Contractor under Section 13 (Relief Events) arising from 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 17.1 (Termination by Province), 17.2 (Termination by Contractor) or 17.3 (Termination Upon Force Majeure); 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 the Term the Province reasonably believes that it needs to take action in relation to the Project:

- (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;

then the Province may, upon notice to the Contractor (which notice shall specify all pertinent details of the intended action) take such action including without limitation suspension of work by the Contractor, in whole or in part, on the Project (the “**Remedial Action**”) in relation to the Project as the Province reasonably considers necessary to mitigate the risk or discharge the statutory duty, 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 shall, subject to Section 13.2 (Relief Event Defined), constitute a Relief Event under Section 13.2(l) (Relief Event Defined); 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(j) (Termination Events), 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 (Contractor’s Representations);

“**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;

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

## 16.8 Termination Events

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

- (a) if the Contractor is declared or adjudged a bankrupt, makes a general assignment for the benefit of creditors, or takes the benefit of any legislation in force for (i) protection against creditors, (ii) orderly payment of debts, or (iii) winding up or liquidation;
- (b) if a receiver or receiver-manager is appointed for the business of the Contractor, unless the appointment is canceled within 21 days;
- (c) if any material part of the property of the Contractor is seized or attached and such seizure or attachment is not successfully contested by the Contractor within 21 days;
- (d) if the Contractor ceases active business operations;
- (e) 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;
- (f) if it is determined by arbitration pursuant to the Dispute Resolution Procedure that the Contractor has failed to achieve:
  - (i) by October 30, 2009, 10% completion of the Project; or
  - (ii) by July 30, 2010, 30% completion of the Project;
- (g) if the Contractor fails to achieve Traffic Availability by September 1, 2012;
- (h) if at any time after August 1, 2011, 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 30, 2012;
- (i) the Contractor permits any sum pertaining to the work on the Project to remain unpaid, which it does not in good faith dispute to be due from it, after legal proceedings have been commenced to enforce payment thereof;
- (j) if the Contractor, upon receiving a Notice of Default from the Province fails to:
  - (i) cure the Default within 21 days; or

- (ii) where the Default cannot by reasonable commercial efforts be cured within 21 days, communicate to the Province and initiate within that 21 days a commercially reasonable course of action designed to cure the Default, and thereafter diligently pursue that course of action until the Default is cured; or
- (iii) where the Default is an Incurable Default, within 21 days communicate to the Province and initiate a commercially reasonable course of action designed to mitigate the consequences of the Incurable Default to the maximum extent practicable, and thereafter diligently pursue that course of action until the consequences of the Incurable Default have been so mitigated.

## **17. TERMINATION**

### **17.1 Termination by Province**

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

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

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

### **17.2 Termination by Contractor**

Subject to Section 17.3 (Termination Upon Force Majeure), the Contractor may terminate this Agreement by notice to the Province only if:

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

- (c) the Province is in breach of Section 22.4 (Assignment by Province).

### **17.3 Termination Upon Force Majeure**

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

### **17.4 Consequences of Termination**

Upon any termination of this Agreement under Sections 17.1 (Termination by Province), 17.2 (Termination by Contractor) or 17.3 (Termination Upon Force Majeure):

- (a) the Province shall as soon as practicable pay to the Contractor the amount of the Termination Payment under the pertinent section of Section 18 (Termination Payments), together with interest thereon in accordance with Section 8.13 (Interest on Overdue Payments);
- (b) upon the Province providing confirmation to the Contractor that it is obligated to pay the Termination Payment under the pertinent Section of Section 18 (Termination Payments), then:
  - (i) 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); provided that
  - (ii) the Contractor shall have no obligation to hand over copies of records that constitute proprietary information in the nature of trade secrets.

### **17.5 Survival of Obligations**

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

- (a) all indemnification and hold harmless obligations, insofar as they apply to events that occurred prior to termination of this Agreement;
- (b) the obligations of the Contractor under Section 17.4 (Consequence of

Termination);

- (c) the obligation of the Province to make the Termination Payment specified in Section 18 (Termination Payments); and
- (d) the obligations in relation to Confidential Information set out in Sections 19.4 (Confidential Information), 19.5 (Disclosure of Confidential Information) and 19.7 (Collection, Use and Disclosure of Personal Information).

## **18. TERMINATION PAYMENTS**

### **18.1 Termination Payments Defined Terms**

In this Section 18 (Termination Payments), the following expressions have the following meanings:

**“Termination for Default”** means termination of this Agreement by the Province under Section 17.1(a) (Termination by Province) prior to the End Date;

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

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

**“Termination by Contractor”** means termination of this Agreement by the Contractor under Section 17.2 (Termination by Contractor).

### **18.2 Termination for Default**

Upon a Termination for Default, the Province may:

- (a) pursue any remedy available to it at law or in equity;
- (b) set-off any costs to complete the Project (as determined by the Province acting reasonably) against the Holdback and any other funds that may be then owing to the Contractor under this Agreement; and
- (c) maintain a reasonable holdback during the warranty period representing the Province’s estimate of costs of repair of work on the Project during the warranty period and on expiry of the warranty period, charge the Contractor the amount by which the cost of corrections during the warranty period exceeds the allowance, if any, provided for such corrections, or if the cost of such corrections is less than the allowance, pay the Contractor the difference.

### **18.3 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 amount which is the sum of:

- (a) the amount the Contractor is entitled to for work on the Project satisfactorily completed (including work completed but not yet invoiced for) to the date of termination determined in accordance with Section 8 (Payment);
- (b) breakage costs that are commercially reasonable and consistent with market practice, as determined by the Province, payable to the Contractor's subcontractors, having regard to customarily negotiated break fees between parties at arm's length from one another, and subject in every case to a duty on the part of the subcontractor to mitigate its damages and subject to the Contractor's duty in every instance to take all commercially reasonable measures to mitigate its damages or losses; and
- (c) fixed expenses of the Contractor, as determined by the Province, that would have been recovered as part of the progress payments after the date of termination, and subject to the Contractor's duty to take all commercially reasonable measures to mitigate its losses.

### **18.4 Termination for Convenience or Termination by Contractor**

Upon a Termination for Convenience or a Termination by Contractor, the Province shall pay to the Contractor a Termination Payment equal to the amount which is the sum of:

- (a) the amount the Contractor is entitled to for work on the Project satisfactorily completed (including work completed but not yet invoiced for) to the date of termination determined in accordance with Section 8 (Payment);
- (b) breakage costs that are commercially reasonable and consistent with market practice, as determined by the Province, payable to the Contractor's subcontractors, having regard to customarily negotiated break fees between parties at arm's length from one another, and subject in every case to a duty on the part of the subcontractor to mitigate its damages and subject to the Contractor's duty in every instance to take all commercially reasonable measures to mitigate its damages or losses; and
- (c) fixed expenses of the Contractor, as determined by the Province, that would have been recovered as part of the progress payments after the date of termination, and subject to the Contractor's duty to take all commercially reasonable measures to mitigate its losses.

## 18.5 Set-off Against Termination Payments

The Province may set off against any Termination Payment the amounts of any set off under Section 8.12 (Set-Off) triggered prior to the termination and not set off against a Payment.

## 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  
 2<sup>nd</sup> floor Twin Atria Building  
 4999 - 98 Avenue  
 Edmonton, Alberta  
 T6B 2X3  
 Attention: **[name]**  
 fax: (780) 440-8719  
 e-mail: **[e-mail address]**

(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:

**[name]**



Executive Director, Major Capital Projects Branch

(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 (Authority to Give Notices), 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, nor allow any non-arms length party to make, any public announcement relating to this Agreement except as approved in advance by the Province.

### **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, investors and potential investors, and rating agencies, surety companies and prospective guarantors) who reasonably require access to the Confidential Information for the due performance of this Agreement or to further the purposes of this Agreement;

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

### **19.6 Public Disclosure of Agreement**

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

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

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

The Province acknowledges that the financial, commercial and technical information contained in the Contractor’s Proposal has been submitted to the Province in confidence.

### **19.7 Collection, Use and Disclosure of Personal Information**

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

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

The Contractor shall not collect, use or disclose any personal information under this Agreement except that which is reasonably required to fulfil its obligations under this Agreement, or as otherwise authorized by the Province.

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

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

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

### **19.8 Naming Rights**

The Contractor acknowledges that the Province, as owner of the Lands, and the New Infrastructure, has the exclusive right to name and re-name the New Infrastructure and all related roadways and improvements. The Contractor shall not name nor purport to name the Project, the New Infrastructure, or any portions thereof. Where the Province has named 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.

### **20.3 Conduct of Indemnified Claims**

Where either party to this Agreement is entitled to indemnification under this Agreement (“**Indemnified Party**”) and determines that an event has occurred giving rise or that may give rise to a right of indemnification in favor of the Indemnified Party (an “**Indemnity Claim**”), the Indemnified Party shall promptly notify the party obligated to provide indemnification (the “**Indemnifying Party**”) of such Indemnity Claim (a “**Claim Notice**”) describing in reasonable detail the facts giving rise to the claim for

indemnification, and shall include in such Claim Notice (if then known) the amount or the method of computation of the amount of such Indemnity Claim; provided that the failure of an Indemnified Party to give timely notice thereof shall not affect any of its rights to indemnification nor relieve the Indemnifying Party from any of its indemnification obligations except to the extent the Indemnifying Party is materially prejudiced by such failure.

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

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

informed of the progress of the defence of the Indemnity Claim.

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

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

## **21. DISPUTE RESOLUTION**

### **21.1 Dispute Resolution Procedure**

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

### **21.2 Exception**

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

### **21.3 Termination and Dispute Resolution Procedure**

A party may refer to the Dispute Resolution Procedure for advance determination the question of whether it has grounds for terminating this Agreement (including, without limitation, whether the circumstances described in Section 16.8(f) or (h) have occurred).

However, the submission of that question to the Dispute Resolution Procedure shall not prevent either party from terminating this Agreement in accordance with its provisions prior to determination of that question by the Dispute Resolution Procedure. If either party has purported to terminate this Agreement in accordance with its provisions, the other party may submit to the Dispute Resolution Procedure the question of whether such termination was made in accordance with this Agreement, and request either:

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

#### **21.4 No Court Proceedings**

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

#### **21.5 Payments Where Amount in Dispute**

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

### **22. GENERAL PROVISIONS**

#### **22.1 Assignment by Contractor**

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

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

## **22.2 Subcontracting by Contractor**

The Contractor may subcontract its obligation to carry out the Project only to:

- (a) the respective subcontractors identified in Schedule 13 (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 Traffic Availability, allow or suffer any material change in its ownership (direct or indirect) unless such change has been consented to in advance by the Province, such consent not to be unreasonably withheld or delayed. For greater certainty, the Province shall not withhold or delay its consent where the Contractor has satisfied the Province, acting reasonably, that:

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

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

## **22.4 Assignment by Province**

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

of the Province in this Agreement.

## **22.5 Intellectual Property**

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

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

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

- (c) the carrying out of the Project; or
- (d) the use by a third party, other than in furtherance of the Project, 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.

## **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 (No Court Proceedings), 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

Date: **[March 3, 2009]**

Per: \_\_\_\_\_  
Gary Boddez  
Deputy Minister

**[NAME OF CONTRACTOR]**

Date: **[March 3, 2009]**

Per: \_\_\_\_\_  
**[name]**  
**[title]**