

**SCHEDULE 1**

**CHANGE ORDERS**

**1. DEFINITIONS**

In this Schedule 1, in addition to the definitions set out in Section 1.1 of this Agreement, the following expressions have the following meanings (and, where applicable, their plurals have corresponding meanings):

“**Change Order**” means a variation, addition, reduction, substitution, omission, modification, deletion, removal or other change, other than one which does not have a material effect, to the whole or any part of:

- (a) the Works, the Existing Facilities O&M or the Works Requirements; or
- (b) the O&M or the O&M Requirements;

“**Change Order Confirmation**” means a written confirmation issued by the City of the Estimate, including any agreed modifications thereto, and, if applicable, of any adjustments to Project Co’s Construction Schedule and/or any payments due to Project Co hereunder;

“**Change Order Directive**” means a written instruction and description of a Change Order issued by the City directing Project Co to immediately proceed with the work associated with the Change Order;

“**Change Order Enquiry**” means a written notice and description of a proposed Change Order issued by the City, including, where applicable, the method of procurement for the Change Order;

“**Construction Equipment Cost**” means the cost of use of rented or owned construction equipment, including the cost of loading, transporting, unloading, erecting, maintaining, dismantling and removing equipment, at the rates under an equipment rate schedule approved in writing by the City prior to the commencement of work or procurement associated with the Change Order, or, in the absence of such a rate schedule, actual cost of invoices from an arm’s-length third party;

“**Design Cost**” means the cost of design work required in connection with a Change Order, including consultant fees and associated expenditures, at the rates under a rate schedule approved in writing by the City prior to the commencement of work or procurement associated with the Change Order, or, in the absence of such a rate schedule, actual cost of invoices for design work from an arm’s-length third party;

“**Direct Labour Cost**” means the base wage costs of employees under a wage schedule approved in writing by the City prior to the commencement of work or procurement associated with the Change Order, or, in the absence of such a wage schedule, the salaries or wages paid under the applicable collective agreement, or, in the absence of any collective agreement, the

actual cost of salaries and wages, excluding Payroll Burden Cost and all superintendent's or foreman's wages or other personnel responsible for supervision of the work;

“**Estimate**” means a detailed breakdown, estimate and other information attributable to a Change Order prepared by Project Co in accordance with and meeting the requirements of Section 3.4;

“**Estimate Dispute**” has the meaning indicated in Section 3.4(i);

“**Materials Cost**” means the cost of materials, supplies, small equipment and tools (excepting such small equipment and tools owned by personnel), including the cost of loading, transporting, unloading, erecting, maintaining, dismantling and removing same, less any rebates, refunds, returns from sale of surplus materials and supplies and trade discounts (other than prompt payment discounts);

“**Overhead Cost**” means:

- (a) in respect of Change Orders issued during the Construction Period, the costs of Project Co, subcontractors and sub-subcontractors in performing the work associated with a Change Order related to:
  - (i) operation and maintenance of head offices, branch offices and site offices;
  - (ii) administration at head offices, branch offices and site offices;
  - (iii) general management, legal, audit and accounting services;
  - (iv) procurement administration;
  - (v) financing and other bank charges;
  - (vi) bonding and insurance;
  - (vii) salaries and other compensation of off-site personnel;
  - (viii) salaries and other compensation of on-site superintendents and other supervisory personnel;
  - (ix) planning, estimating and scheduling of work;
  - (x) expendable and non-expendable small tools not owned by personnel, including maintenance thereof, and consumables;
  - (xi) recruitment and training of on-site staff;
  - (xii) other costs of a similar nature not included with the Total Cost of Materials and Labour; and
  - (xiii) management of on-site safety; and

- (b) in respect of Change Orders issued during the Operating Period, the costs of Project Co, subcontractors and sub-subcontractors in performing the work associated with a Change Order related to the items listed in paragraphs (a)(i) to (a)(v), (a)(vii), (a)(ix) and (xiii) above;

“**Own Forces Work**” has the meaning indicated in Section 3.4(c);

“**Payroll Burden Cost**” means the statutory charges and benefits costs additional to Direct Labour Cost and the payments made to or on behalf of the employees for holiday pay, Workers’ Compensation Board assessments, Employment Insurance and Canada Pension Plan payments;

“**Subcontractor Work**” has the meaning indicated in Section 3.4(d);

“**Temporary Work Cost**” means the cost of temporary structures, facilities, services, controls, and other temporary items used in conjunction with the performance of the work associated with a Change Order, including maintenance, dismantling and removal, less any residual value after dismantling and removal;

“**Third Party Input**” has the meaning indicated in Section 3.2(b);

“**Total Cost of Materials and Labour**” means the sum of costs directly related to and necessarily and properly incurred by Project Co, subcontractors and sub-subcontractors in performing the work associated with a Change Order, including:

- (a) Materials Cost;
- (b) Total Labour Cost;
- (c) Temporary Work Cost;
- (d) Construction Equipment Cost;
- (e) Design Cost; and
- (f) in respect only of Change Orders issued during the Operating Period, bonding and insurance and salaries and other compensation of on-site superintendents and other supervisory personnel,

but excluding Overhead Cost and profit; and

“**Total Labour Cost**” means the sum of Direct Labour Cost and Payroll Burden Cost.

## **2. GENERAL PROVISIONS**

### **2.1 Change Order**

- (a) Subject to the provisions of this Schedule 1 and without invalidating this Agreement, the City may from time to time propose or require Project Co to carry out and implement a Change Order.
- (b) Project Co shall not be entitled to any payment, compensation or extension of time for a Change Order except in accordance with this Agreement and this Schedule 1. A Change Order shall not be regarded as confirming an extension to the Milestone Payment Target Date or Substantial Completion Target Date unless expressly stipulated.

## **2.2 Valuation and Payments for Reductions or Avoided Costs**

- (a) If a Change Order involves any reduction in the Works, the Existing Facilities O&M, the Works Requirements, the O&M or the O&M Requirements and results in net savings in costs (in the context of a reduction in the Works or the Works Requirements having regard, without limitation, to any reasonable make whole premiums, hedging or other breakage costs, or prepayment fees and all reasonable redemption implementation costs reasonably incurred by Project Co as a result of any adjustments to debt service payments that are directly attributable and limited to the reduction in the Works or Works Requirements) to Project Co for completing the Works or performing the Existing Facilities O&M or the Works Requirements, the O&M or the O&M Requirements, then the value of all such savings shall be reflected in a lump sum payment to the City or in adjustments to any payments due to Project Co hereunder to the extent determined by the parties, acting reasonably.
- (b) Project Co shall not be entitled to claim for any losses, costs or damages for fixed overhead or profit due to the reduction, deletion or removal of any part of the Works, the Existing Facilities O&M, the Works Requirements, the O&M or the O&M Requirements, except to the extent that any of such amounts would have been incurred or receivable by Project Co and included in any payments due to Project Co hereunder payable by the City after the date on which the Works, the Existing Facilities O&M, the Works Requirements, the O&M and/or O&M Requirements are reduced, deleted or removed.

## **3. CHANGE ORDER ENQUIRY PROCESS**

### **3.1 Initiating a Change Order Enquiry**

- (a) If the City wishes to propose a Change Order, or if Project Co has requested a Change Order and the City agrees to proceed with such Change Order, the City shall deliver to Project Co a Change Order Enquiry. The Change Order Enquiry shall describe the proposed Change Order with sufficient detail to enable Project Co to prepare an Estimate.
- (b) If the City would be required by Applicable Law or intergovernmental agreements to require Project Co to seek invitational tenders or to competitively tender any contract in relation to the proposed Change Order, then the City may include in the Change Order Enquiry a requirement that Project Co seek and evaluate invitational tenders or quotations, or seek and evaluate competitive tenders, for the proposed Change Order in preparing the Estimate.

- (c) The City shall not, without the prior written consent of Project Co, pursue any Change Orders that singly or in the aggregate involve:
- (i) an alteration in the scope of the Works of such magnitude that it could reasonably be expected to materially impact the Project Financing, Project Co's ability to receive the Milestone Payment by the Milestone Payment Target Date, Project Co's ability to achieve Substantial Completion by the Substantial Completion Target Date or otherwise materially and adversely alter the risk profile of the Works (including any increased or decreased exposure to Payment Adjustments); or
  - (ii) an alteration in the scope of the O&M of such magnitude that it could reasonably be expected to materially and adversely alter the risk profile of the O&M (including any increased or decreased exposure to Payment Adjustments).

### **3.2 Project Co's Delivery of Estimate**

- (a) As soon as practicable and in any event not more than 15 Business Days after receipt of a Change Order Enquiry, or such longer period as the parties agree, Project Co shall deliver to the City an Estimate prepared in accordance with and meeting the requirements of Section 3.4.
- (b) If Project Co is of the reasonable opinion that the accuracy of the Estimate will benefit from certain third party design work or third party detailed cost estimating (excluding design work or detailed cost estimating done by the Design and Construction Subcontractor) (the "**Third Party Input**"), Project Co may propose to the City that the Third Party Input be arranged by Project Co at the City's expense.
- (c) If the City gives its written agreement to such proposal, which written agreement may be expressly subject to any terms and conditions that the City deems appropriate, then such Third Party Input expenses shall be paid by the City whether or not the Change Order Enquiry is ultimately withdrawn, or deemed to have been withdrawn, by the City. In deciding whether or not to give its written agreement, the City shall give consideration to the reasonableness of the Third Party Input expenses and the reasonableness of the assurances given by Project Co that the sum of the Estimate with the Third Party Input plus the Third Party Input expenses may be materially less than an Estimate without the Third Party Input.

### **3.3 Project Co Grounds for Objection**

- (a) Project Co may only refuse to deliver an Estimate if Project Co can demonstrate to the City's satisfaction, acting reasonably, within the period for delivery of an Estimate specified or agreed pursuant to Section 3.2(a), that:
- (i) the implementation of the proposed Change Order would materially and adversely affect the health and safety of any person;

- (ii) the implementation of the proposed Change Order would:
    - (A) breach Applicable Law;
    - (B) cause to be revoked any of the existing Permits and Approvals required by Project Co to perform the Project, and any such Permits and Approvals are not, using commercially reasonable efforts, capable of amendment or renewal; or
    - (C) cause Project Co to violate the Effluent Standards;
  - (iii) the proposed Change Order would render any insurance policies required under this Agreement void or voidable and the City does not agree to provide replacement insurance satisfactory to Project Co, acting reasonably; or
  - (iv) the proposed Change Order falls within the circumstances set out in Section 3.1(c).
- (b) If Project Co refuses to provide an Estimate on any of the grounds set out in Section 3.3(a), Project Co shall, within the period for delivery of an Estimate specified or agreed pursuant to Section 3.2(a), deliver to the City a written notice specifying the grounds upon which Project Co refuses to provide an Estimate and the details thereof.

**3.4 Estimate Requirements**

- (a) The Estimate shall include such of the following information as is applicable, sufficient to demonstrate to the City's satisfaction:
  - (i) the steps Project Co will take to implement the Change Order, in such detail as is reasonable and appropriate in the circumstances;
  - (ii) any impact on payment of the Milestone Payment, Substantial Completion and Project Co's Construction Schedule, which information must be provided if Project Co intends to claim compensation from the City for delays to payment of the Milestone Payment or Substantial Completion resulting from the Change Order;
  - (iii) an estimate of and explanation for the reasonable incremental financing costs and reasonable breakage costs or make whole premiums on financing to be paid in the event payment of the Milestone Payment or Substantial Completion is delayed by the Change Order;
  - (iv) any impact on Project Co's ability to perform the O&M, including any impact on any payments due to Project Co hereunder;
  - (v) any subcontractors required in addition to or in substitution for the Design and Construction Subcontractor;

- (vi) the estimated Total Cost of Materials and Labour and, subject to Sections 3.4(c), 3.4(d) and 3.4(e), the Overhead Costs and profit attributable to the Change Order;
  - (vii) any permits that are required to be obtained or amended attributable to the Change Order, and the estimated time for obtaining or amending same;
  - (viii) the proposed methods of certification of any Works Requirements or O&M Requirements required by the Change Order if not currently contemplated within the provisions of this Agreement; and
  - (ix) any other impact of the Change Order on this Agreement,
- in each case, together with such supporting information and justification as is reasonably required.
- (b) In preparing an Estimate, Project Co shall include sufficient information to demonstrate that:
- (i) Project Co has used commercially reasonable efforts, including the use of invitational tenders or competitive tenders if appropriate or required, to oblige its subcontractors to minimize any increase in costs and to maximize any reduction in costs;
  - (ii) the full amount of any and all expenditures that have been reduced or avoided have been taken into account and applied in total to reduce the amount of all Change Order costs;
  - (iii) Project Co has mitigated or will mitigate the impact of the Change Order, including on Project Co's Construction Schedule for completion of the Works and the performance of the O&M Requirements;
  - (iv) in considering the impact of the Change Order on any payments due to Project Co hereunder, if applicable, Project Co has considered, where the Change Order will increase the O&M or the O&M Requirements, the Total Cost of Materials and Labour attributable to such increase, including anticipated renewals;
  - (v) Project Co will perform all work associated with a Change Order in accordance with the times allowed for Project Co access to the Lands and the Infrastructure described in Schedule 18 (Technical Requirements); and
  - (vi) Project Co is in compliance with Applicable Law or intergovernmental agreements to which the City is a party with respect to invitational tenders, quotations or competitive tenders.
- (c) For the work associated with a Change Order that is to be performed by Project Co's own forces or the Design and Construction Subcontractor, that portion of the work associated

- with the Change Order (the “**Own Forces Work**”) shall be valued as the Total Cost of Materials and Labour for the Own Forces Work, plus:
- (i) for Overhead Costs, an additional 10% of the Total Cost of Materials and Labour for the Own Forces Work; and
  - (ii) for profit, an additional 10% of the sum of the Total Cost of Materials and Labour for the Own Forces Work and the amount determined in accordance with Section 3.4(c)(i).
- (d) For the work associated with a Change Order that is to be performed by a subcontractor of Project Co other than the Design and Construction Subcontractor, that portion of the work associated with the Change Order (the “**Subcontractor Work**”) shall be valued as the Total Cost of Materials and Labour for the Subcontractor Work, plus:
- (i) for Overhead Costs of the subcontractor performing the Subcontractor Work, an additional 10% of the Total Cost of Materials and Labour for the Subcontractor Work;
  - (ii) for profit for the subcontractor performing the Subcontractor Work, an additional 10% of the sum of the Total Cost of Materials and Labour for the Subcontractor Work and the amount determined in accordance with Section 3.4(d)(i); and
  - (iii) for Project Co’s work (including without limitation Overhead Costs and profit) on the Subcontractor Work, an amount equal to 5% of the sum of the Total Cost of Materials and Labour for the Subcontractor Work and the amounts determined in accordance with Sections 3.4(d)(i) and 3.4(d)(ii).
- (e) Notwithstanding Section 3.4(d), if the City has required Project Co to seek and evaluate competitive tenders for the work associated with a Change Order, then for the work associated with the Change Order that is to be performed by a subcontractor of Project Co other than the Design and Construction Subcontractor arising from the awarding of the competitive tender, that portion of the Change Order shall be valued as the amount of the accepted bid or tender plus, for Project Co’s work on the such tendered subcontractor work, an amount equal to 5% of the amount of the accepted bid or tender.
- (f) Project Co shall use commercially reasonable efforts to obtain the best value for money when procuring any work, services, supplies, materials or equipment required by the Change Order and shall use commercially reasonable efforts to comply with prevailing Good Industry Practice in relation to any such procurement to a standard no less than Project Co would apply if all costs incurred were to its own account.
- (g) As soon as practicable, and in any event not more than 15 Business Days after the City receives an Estimate or such longer period as the parties agree, including any consequential changes to the Estimate resulting from a modification thereof or an addition of a requirement to seek invitational bids or competitive tenders, Project Co and



the City shall discuss and seek to agree on the Estimate and, if applicable, an adjustment to Project Co's Construction Schedule or any payments due to Project Co hereunder.

- (h) The City may modify a Change Order Enquiry in writing, at any time prior to the agreement between the parties referred to in Section 3.4(g), in which case Project Co shall, as soon as practicable and in any event not more than 10 Business Days after receipt of such modification or such longer period as the parties agree, notify the City in writing of any consequential changes to the Estimate and, if applicable, to an adjustment to Project Co's Construction Schedule or any payments due to Project Co hereunder.
- (i) If the parties cannot agree on an Estimate provided pursuant to a Change Order Enquiry, and, if applicable, an adjustment to Project Co's Construction Schedule or any payments due to Project Co hereunder ("**Estimate Dispute**"), then:
  - (i) in the case an Estimate Dispute during the Construction Period, the Estimate Dispute shall be submitted to the Project Adjudicator for recommendation, and, if either party does not agree with the Project Adjudicator's recommendation, the Estimate Dispute shall be determined in accordance with the Dispute Resolution Procedure; or
  - (ii) in the case an Estimate Dispute during the Operating Period, the Estimate Dispute shall be determined in accordance with the Dispute Resolution Procedure.

### **3.5 Change Order Confirmation**

- (a) As soon as practicable, and in any event not more than 10 Business Days (unless an extension is agreed to by Project Co, acting reasonably) after the date the Estimate was agreed to, and, if applicable, an adjustment to Project Co's Construction Schedule or any payments due to Project Co hereunder, were agreed to, the City shall either:
  - (i) issue a Change Order Confirmation; or
  - (ii) withdraw the Change Order Enquiry by written notice to Project Co.
- (b) If the City does not issue a Change Order Confirmation within 10 Business Days (or such extended period as may have been agreed to) after the date the Estimate and, if applicable, an adjustment to Project Co's Construction Schedule or any payments due to Project Co hereunder, were agreed to, then the Change Order Enquiry shall be deemed to have been withdrawn.
- (c) If the City has required Project Co to seek and evaluate invitational tenders or to seek and evaluate competitive tenders in relation to the Change Order and the City either withdraws or is deemed to have withdrawn the Change Order Enquiry, the actual costs necessarily and properly incurred by Project Co directly attributable to the invitational or competitive tendering process, including any Design Cost, as the parties agree, will be invoiced by Project Co in a form satisfactory to the City and will be paid by the City.

- (d) Upon the Change Order Confirmation being issued:
  - (i) the parties shall, as soon as practicable, do all acts and execute all documents necessary to implement the Change Order, including provision for payment to Project Co in the amount set out in the Estimate, and, if applicable, implementation of an adjustment to Project Co's Construction Schedule or any payments due to Project Co hereunder; and
  - (ii) Project Co shall as soon as practicable thereafter implement the Change Order as provided for in the Change Order Confirmation.
- (e) If a Change Order Confirmation requires an amendment to Appendix A to Schedule 14 (Payment Schedule), such amendment shall take account of the applicable Index Factor.

#### **4. CHANGE ORDER DIRECTIVE PROCESS**

##### **4.1 Initiating a Change Order Directive**

- (a) At any time and from time to time (including whether or not the City has made a Change Order Enquiry, or Project Co fails to provide an Estimate, or an Estimate is not promptly agreed upon by the parties, or there is an Estimate Dispute), if the City wishes to proceed immediately with a Change Order, the City shall issue a Change Order Directive. The Change Order Directive shall describe the Change Order with sufficient detail to enable Project Co to prepare an Estimate and to proceed immediately with the work associated with the Change Order.
- (b) If the City would be required by Applicable Law or intergovernmental agreements to require Project Co to seek invitational tenders or to competitively tender any contract in relation to the proposed Change Order, then the City may include in the Change Order Directive the requirement that Project Co must seek and evaluate invitational tenders or quotations, or seek and evaluate competitive tenders, in relation to the Change Order.
- (c) Project Co will proceed to immediately implement the work associated with the Change Order, including the appropriate method of procurement, if applicable, upon receipt of the Change Order Directive.

##### **4.2 Estimate and Change Order Confirmation**

- (a) If Project Co has not previously done so, Project Co shall, as soon as practicable, and in any event not more than 15 Business Days after the issuance of the Change Order Directive, or such longer period as the parties agree, provide an Estimate to the City prepared in accordance with and meeting the requirements of Section 3.4.
- (b) As soon as practicable, and in any event not more than 15 Business Days after the City receives an Estimate, or such longer period as the parties agree, Project Co and the City shall discuss and seek to agree on the Estimate and, if applicable, an adjustment to Project Co's Construction Schedule or any payments due to Project Co hereunder.

- (c) As soon as practicable, and in any event not more than 10 Business Days (unless an extension is agreed to by Project Co, acting reasonably) after the date the Estimate was agreed to, the City shall issue a Change Order Confirmation.
- (d) As soon as practicable after the City has issued the Change Order Confirmation, the parties will do all acts and execute all documents necessary to implement the Change Order, including provision for payment to Project Co in the amount set out in the Estimate and, if applicable, implementation of an adjustment to Project Co's Construction Schedule or any payments due to Project Co hereunder.
- (e) Pending issuance of the Change Order Confirmation, the undisputed value of the work performed by Project Co pursuant to the Change Order Directive, as the parties agree, will be invoiced by Project Co and will be paid by the City monthly on a progress basis and all such amounts paid will be accounted for in determining the Total Cost of Materials and Labour under Section 4.3.

#### **4.3 Valuation of Change Order Directive**

If the City has issued a Change Order Directive and the City and Project Co have not been able to reach agreement on the Estimate and, if applicable, an adjustment to Project Co's Construction Schedule or any payments due to Project Co hereunder, then adjustments to Project Co's Construction Schedule or any payments due to Project Co hereunder shall be determined by the Dispute Resolution Procedure, applying the criteria set out in Section 3.4.