

SCHEDULE 27

DISPUTE RESOLUTION PROCEDURE

1. General

- 1.1 All disputes, controversies, or claims arising out of or relating to any provision of this Project Agreement, or the alleged wrongful exercise or failure to exercise by a Party of a discretion or power given to that Party under this Project Agreement, or the interpretation, enforceability, performance, breach, termination, or validity of this Project Agreement, including, without limitation, this Schedule 27, or any matter referred to for resolution pursuant to this Schedule 27 (collectively and individually, a “**Dispute**”) shall, in respect of Disputes relating to matters that are not Region Engineer Determination Matters, be resolved in accordance with the provisions of this Schedule 27 other than Section 12 and shall, in respect of Disputes relating to Region Engineer Determination Matters, be resolved in accordance with the provisions of Sections 1, 2 and 12 of this Schedule 27. The Parties acknowledge and agree that notwithstanding anything to the contrary set forth in this Schedule 27 – Dispute Resolution Procedure or otherwise in the Project Agreement, Region Engineer Determination Matters are only subject to review pursuant to Sections 1, 2 and 12 to this Schedule 27, and are not subject to review pursuant to or otherwise subject to any other provisions of this Schedule 27 other than Section 13 of this Schedule 27.
- 1.2 The Parties agree that at all times, both during and after the Project Term, each of them will make bona fide efforts to:
- (a) resolve by amicable negotiations any and all Disputes arising between them on a without prejudice basis; and
  - (b) have all Disputes resolved at the lowest level of management before engaging the dispute resolution processes described in Sections 2 to 9 and Section 12 (as applicable) of this Schedule 27.
- 1.3 If the Parties are unable to resolve a Dispute at the lowest level of management pursuant to Section 1.2(b) of this Schedule 27, either Party may deliver to the Region Representative or the Project Co Representative, as applicable, a written notice of dispute (the “**Notice of Dispute**”), which Notice of Dispute shall, subject to the terms of this Schedule 27 requiring resolution of a Dispute pursuant to a specific dispute resolution process set forth in this Schedule 27, initiate the dispute resolution process described in Sections 2 to 9 of this Schedule 27, or in respect of Region Engineer Determination Matters only, as described in Section 2 and 12 of this Schedule 27, as applicable, as more particularly described in this Schedule 27. To be effective, the Notice of Dispute must expressly state that it is a notice of dispute, set out the particulars of the matter in dispute, describe the remedy or resolution sought by the Party issuing the Notice of Dispute and be signed by the Region Representative, if given by the Region, or by the Project Co Representative, if given by Project Co.

**2. Amicable Resolution by Party Representatives**

2.1 On receipt of a Notice of Dispute, the Region Representative and the Project Co Representative (collectively “**Party Representatives**” and individually “**Party Representative**”) shall each promptly and diligently make all reasonable bona fide efforts to resolve the Dispute. Each Party Representative shall provide to the other, on a without prejudice basis, frank, candid and timely disclosure of relevant facts, information and documents (except such documentation that is subject to legal privilege) as may be required or reasonably requested by the other to facilitate the resolution of the Dispute.

**3. Amicable Resolution by Senior Officers of each Party**

3.1 If, following the process referred to in Section 2 of this Schedule 27 (or as otherwise agreed to in writing by the Parties pursuant to Section 13.6 of this Schedule 27), a Dispute is not resolved by the Party Representatives within 10 Business Days after receipt by a Party of the applicable Notice of Dispute, or within such longer period of time as the Party Representatives may both expressly agree, then at any time after the expiry of such period of time either Party Representative may, by notice in writing to the other, refer the Dispute to an executive of a Party who:

- (a) is in a position of authority above that of the Region Representative or the Project Co Representative, as the case may be; and
- (b) subject only to approval of the board of directors or similar governing body of the Party, has full authority to resolve and settle the Dispute.

3.2 Once a Dispute is referred to them, the executive of each Party shall promptly and diligently make all reasonable bona fide efforts to resolve the Dispute. All discussions and negotiations, and all documents exchanged, between them related to the Dispute shall be on a without prejudice basis to facilitate the resolution of the Dispute.

**4. Independent Certifier**

4.1 This Section 4 applies to all Disputes that fall within the description of Section 4.2 of this Schedule 27 that cannot be resolved as provided in Sections 2 and 3 of this Schedule 27 or as otherwise agreed to in writing by the Parties pursuant to Section 13.6 of this Schedule 27.

4.2 All Disputes related to

- (a) the Design and Construction Works and that:
  - (i) arise prior to, or otherwise in relation to Substantial Completion;
  - (ii) relate to completion of Minor Deficiencies;
  - (iii) relate to whether any proposed work regarding Design and Construction Works constitutes a Variation;

- (iv) relate to a review of Estimates or any other matters relating to Variations in respect of Design and Construction Works as the Independent Certifier is entitled to review and determine pursuant to Section 39 of the Project Agreement;
  - (v) are referred to in this Project Agreement for determination by the Independent Certifier; or
  - (vi) relate to the Certification Services or any Certification Service Variations (as those terms are defined in the Independent Certifier Agreement);
- (b) the Public Infrastructure Works that (i) relate solely to the scope, or cost of any changes, additions or deletions to the scope, of the Public Infrastructure Works, or (ii) that relate to Disputes relating to Delay Events,

shall initially be submitted to the Independent Certifier for independent determination by the Independent Certifier within such period as may be specified in this Project Agreement, or if no period is specified, within 10 Business Days after submission to the Independent Certifier.

4.3 Without limiting any obligations of the Parties under the Independent Certifier Agreement, the Parties shall cooperate with the Independent Certifier and provide such information, records and documents as may be required by the Independent Certifier to make the determination within the period referred to in Section 4.2 of this Schedule 27.

4.4 The Independent Certifier's decision to issue or not to issue a Substantial Completion Certificate shall be final and binding on the Parties solely in respect of determining the Payment Commencement Date, and a Dispute in relation to the Payment Commencement Date shall not be subject to resolution pursuant to this Schedule 27. Save and except as aforesaid the Independent Certifier's determinations are not binding on the Parties, and all Disputes in relation to the Independent Certifier's decisions shall be resolved pursuant to this Schedule 27, provided however that Sections 5 and 6 of this Schedule 27 shall not apply unless otherwise agreed by the Parties on terms acceptable to the Parties.

**5. Expert Determination**

5.1 If, following the process referred to in Section 2 and 3 of this Schedule 27 (or as otherwise agreed to in writing by the Parties pursuant to Section 13.6 of this Schedule 27), any Dispute as to:

- (a) whether a Liquid Market exists;
- (b) whether amendments proposed by potentially Qualifying Tenders to this Project Agreement or other Project Documents are material;
- (c) the Adjusted Highest Qualifying Tender Price; or
- (d) the determination of the Estimated Fair Value in accordance with Schedule 23 – Compensation on Termination of this Project Agreement,

has not been resolved within 10 Business Days after the date the Dispute was referred to the executives of the Parties for resolution by them, or within such longer period of time as the executives may expressly agree in writing in respect of a specific Dispute to allow them to continue

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their efforts to resolve the Dispute, then either Party may at any time thereafter, by written notice signed by their Party Representative and delivered to the other Party Representative, require that the Dispute be resolved on an expedited basis by a qualified and experienced expert (the “Expert”).

5.2 The Expert shall be appointed as follows:

- (a) if the Parties agree on the Expert, the Parties shall jointly appoint the Expert as soon as possible and, in any event, within 5 Business Days after delivery of the notice requiring that the Dispute be resolved by an Expert; and
- (b) if the Parties fail to agree or jointly appoint the Expert within such 5 Business Day period, either Party may apply to the Ontario Superior Court of Justice for appointment of the Expert, in which case the court shall appoint the Expert at the earliest opportunity from the list of potential Experts submitted by the Parties or, if either or both Parties fail to submit their list of potential Experts within 7 Business Days, the court may appoint such person as the Expert who meets the requirements set out in this Schedule 27 for qualifications and experience of the Expert.

5.3 No one shall be nominated or appointed to act as an Expert who is or was in any way interested, financially or otherwise, in the conduct of the Project Operations or in the business affairs of the Region, Project Co, or any consultant, subconsultant or subcontractor of any of them.

5.4 Subject to the matters the Expert is authorized to determine pursuant to Section 5.1 of this Schedule 27, the Expert will be appointed on a Dispute by Dispute basis, with each Expert having the qualifications and experience relevant to the issues in the particular Dispute for which the Expert is appointed.

5.5 The Expert shall determine the appropriate process for timely and cost effective resolution of the Dispute and, without limiting the generality of the foregoing, the Expert has discretion to, among other things:

- (a) solicit submissions and documents from both Parties, and impose deadlines for the receipt of such submissions;
- (b) require some or all of the evidence to be provided by affidavit;
- (c) direct either or both Parties to prepare and provide the Expert with such documents, test results or other things as the Expert may require to assist the Expert in the resolution of the Dispute and rendering of a decision;
- (d) require either Party to supply or prepare for examination by the Expert and the other Party, any document or information the Expert considers necessary;
- (e) inspect the Project Operations, giving reasonable notice to each Party of the time when, and the place where, the Expert intends to conduct any inspections;
- (f) convene meetings of the Parties to have the Parties discuss the issues in Dispute in the presence of the Expert; and

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- (g) take, or require either or both Parties to take and provide to the Expert, such measurements, perform such tests, audit such processes and procedures, and take any and all such other measures and steps as the Expert considers necessary to make a final determination in the Dispute.
- 5.6 The Expert shall render a decision as soon as possible and, in any event, shall use all reasonable efforts to render a decision no later than 10 Business Days after the date of the appointment of the Expert, or such longer period of time as agreed to in writing by the Parties. The Expert shall give reasons or a summary of reasons for the Expert's decision.
- 5.7 The Expert shall keep all information about the Dispute confidential and shall not disclose such information to anyone other than the Parties.
- 5.8 Each Party shall bear its own costs of the process for resolution of the Dispute by the Expert. In addition, the costs of the Expert shall be borne equally by the Parties.
- 5.9 Subject to a right to require the Dispute to be arbitrated or litigated pursuant to Sections 7, 8 and 9 of this Schedule 27 by giving the required notices to arbitrate or litigate within the time periods specified therein, the Parties agree that the Expert's determination shall be final and binding on both Parties and not subject to appeal, adjudication, arbitration, litigation or any other dispute resolution process, and both Parties expressly waive all rights of appeal in connection with the Expert's determination. For greater certainty, the final determination by the Expert shall not be referred to an Adjudicator (as defined below) for determination under Section 6 of this Schedule 27.
- 6. Adjudication**
- 6.1 If the Parties fail to resolve any Dispute through the process referred to in Section 2 and 3 of this Schedule 27 within 15 Business Days following referral of the Dispute to an executive in accordance with Section 3.1 (or such other period as may be agreed or expressly stipulated in respect of the relevant matter) and it is not a Dispute referred to in Sections 4.2 or 5.1 of this Schedule 27 or a Dispute referred to arbitration or litigation pursuant to Sections 4.4 or 5.9 of this Schedule 27 (except as otherwise agreed to in writing by the Parties pursuant to Section 13.6 of this Schedule 27), either Party may refer the Dispute to a single adjudicator selected in accordance with Section 6.2 of this Schedule 27 (the "**Adjudicator**").
- 6.2 The Adjudicator nominated by the Party issuing the Notice of Dispute shall be agreed between the Parties or, failing agreement, shall be determined by the Ontario Superior Court of Justice (following an application thereto by the Party issuing the Notice of Dispute) and shall:
- (a) be independent of and at arm's length to Project Co, the Region, the Lenders and any other person having an interest in the System, the Public Infrastructure or any of the Project Documents; and
  - (b) if the Dispute arises during the Project Term, be familiar with the construction, operation and management of rail transportation projects; and
  - (c) be a person who has the qualifications and experience with respect to the particular issues in Dispute.

- 6.3 The Adjudicator shall resolve the Dispute in accordance with the United Kingdom Construction Industry Council's *Model Adjudication Procedure: Fourth Edition* the terms of which are incorporated herein by reference, subject to the following modifications:
- (a) notwithstanding paragraph 14 of the *Model Adjudication Procedure*, within 7 Business Days of appointment in relation to a particular Dispute, the Adjudicator shall require the Parties to submit in writing their respective arguments; provided that, where necessary, the onus of proving that the System is operating in accordance with all relevant specifications and requirements set forth in the Project Agreement is on Project Co. The Adjudicator shall, in his absolute discretion, determine the procedure of the adjudication proceedings including without limitation, whether a hearing is necessary in order to resolve the Dispute;
  - (b) in any event, and subject to Section 6.4 of this Schedule 27, the Adjudicator shall provide to both Parties his written decision on the Dispute, within 10 Business Days of appointment (or within such other period as the Parties may agree after the reference). The Adjudicator shall give detailed reasons for the Adjudicator's decision. The Adjudicator shall be entitled to award compensation to a Party and shall be entitled to state the relief for such Party, which may include deeming the occurrence of any Relief Event, Delay Event, Compensation Event and/or Excusing Cause. Unless otherwise provided for in this Schedule 27, the Adjudicator's decision shall be binding on the Parties, but not final;
  - (c) notwithstanding paragraphs 29 and 30 of the *Model Adjudication Procedure*, the Adjudicator's costs, including any legal fees, of any reference shall be borne as the Adjudicator shall specify or in default, equally by the Parties. In no circumstances shall the Adjudicator be entitled to order a successful or partially successful Party in an adjudication to pay more than one half of the Adjudicator's fees. Each Party shall bear its own costs arising out of the reference, including legal costs and the costs and expenses of any witnesses;
  - (d) the Adjudicator shall be deemed not to be an arbitrator but shall render his decision as an expert and the provisions of the *Arbitration Act* (Ontario) and the law relating to arbitration shall not apply to the Adjudicator or his determination or the procedure by which he reached his determination;
  - (e) notwithstanding paragraph 26 of the *Model Adjudication Procedure*, the Adjudicator shall act impartially and may take the initiative in ascertaining the facts and the law. Unless otherwise expressly provided in this Project Agreement, the Adjudicator shall have the power to open up, review and revise any opinion, certificate, instruction, determination or decision of whatever nature given under this Project Agreement. For greater certainty, the Independent Certifier's decision to issue or not to issue a Substantial Completion Certificate shall be final and binding solely in respect of determining the Payment Commencement Date, and a Dispute in relation to the Payment Commencement Date shall not be subject to resolution pursuant to this Schedule 27;
  - (f) the Adjudicator shall execute a non-disclosure agreement (the "**Non-Disclosure Agreement**") in a form satisfactory to the Parties, providing that, among other things, all information, data and documentation disclosed or delivered by a Party to the Adjudicator in consequence of or in connection with his appointment as the Adjudicator shall be treated as

confidential and without prejudice to any potential litigation proceedings. The Adjudicator shall not, save except as expressly permitted by the Non-Disclosure Agreement, disclose to any person any such information, data or documentation, and all such information, data or documentation shall remain the property of the Party disclosing or delivering the same and all copies shall be returned to such Party on completion of the Adjudicator's mandate with respect to the Dispute; and

- (g) notwithstanding paragraph 34 of the *Model Adjudication Procedure*, the Adjudicator shall not be liable for anything done or omitted to be done in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith. Any employee or agent of the Adjudicator is similarly protected from liability.

6.4 Where it is determined by the Adjudicator that:

- (a) corrective measures must be taken by Project Co to resolve a Dispute, those measures must be implemented by Project Co as soon as reasonably practical, without payment by the Region unless (i) the Adjudicator determines otherwise; or (ii) that determination is subsequently reversed by a binding and final determination made in a court proceeding;
- (b) corrective measures are not required to be taken by Project Co to resolve a Dispute, the Region may, at its option, require corrective measures to be taken forthwith by Project Co, in which case those measures must be implemented by Project Co as soon as reasonably practical provided that the Region undertakes to pay Project Co for Direct Costs, plus reasonable overhead and profit incurred by Project Co as such costs are so incurred; provided that no such costs should exceed the amount Project Co is entitled to receive pursuant to Schedule 22 – Variation Procedure thereby incurred upon completion of those corrective measures, but any such undertaking and payment shall be without prejudice to the Region's right to contest the determination made by the Adjudicator in a subsequent proceeding. The Region shall provide Project Co such reasonable extensions of time in respect of Project Co's obligations under this Agreement necessary to allow Project Co to effect the corrective measures and such extension of time may be treated as a Delay Event or an Excusing Cause, as applicable, if so determined by the Adjudicator.

6.5 Subject to a right to require the Dispute to be arbitrated or litigated pursuant to Sections 7, 8 and 9 of this Schedule 27 by giving the required notices to arbitrate or litigate within the time periods specified therein, the Parties agree that the Adjudicator's determination is final and binding and not subject to appeal, arbitration, litigation or any other dispute resolution process, and both Parties expressly waive all rights of appeal in connection with the Adjudicator's determination.

## **7. Referral of Disputes to Arbitration or Litigation**

7.1 If:

- (a) the amount awarded by the Expert to a Party pursuant to Section 5 of this Schedule 27 or by the Adjudicator pursuant to Section 6 of this Schedule 27 is more than \$500,000 (index linked) in the aggregate or \$150,000 (index linked) in any one year;

- (b) the Dispute involves issues other than monetary claims by one Party against the other Party and which a Party reasonably believes are material and significant to that Party; or
- (c) a Notice of Dispute has been issued for a Dispute in relation to the Independent Certifier's decisions for which Section 4.4 of this Schedule 27 provides that Sections 5 and 6 of this Schedule 27 shall not apply to resolve such Dispute,

then, subject to the right of a Party to require litigation of the Dispute pursuant to Section 9.1 of this Schedule 27 or a consolidation of proceedings pursuant to Section 11 of this Schedule 27, either Party may, by written notice signed by their Party Representative, request that the Dispute be resolved by arbitration pursuant to Section 8 of this Schedule 27 upon the written consent of the other Party. Such notice will not be effective unless it indicates it is a notice to arbitrate, is signed by the Party Representative and is delivered to the other Party Representative within 15 Business Days after receipt of the Expert's determination, the Adjudicator's decision or the Notice of Dispute referred to in Section 7.1(c) of this Schedule 27, as applicable, and provided further that such notice expressly identifies the specific Dispute and determination of the Expert, decision of the Adjudicator or the Independent Certifier, as applicable, that is to be the subject of the arbitration.

- 7.2 If a Party is entitled to refer a Dispute to which Sections 5 or 6 of this Schedule 27 apply to arbitration or litigation pursuant to Sections 7.1 or 9.1 of this Schedule 27 then, unless the Parties otherwise expressly agree in writing, all information, documents and submissions prepared by a Party for the Expert or the Adjudicator which are not business records that would otherwise be kept in the normal course of business by the Party for its business purposes, and all decisions and determinations by the Expert or the Adjudicator, shall be confidential and inadmissible in any arbitration or litigation proceeding. For greater certainty, neither the Expert nor the Adjudicator shall be called as a witness by either party in any arbitration or litigation proceeding.

**8. Resolution by Arbitration**

- 8.1 Upon the mutual written consent of the Parties,

- (a) where the Parties fail to resolve a Dispute through the process set out in Sections 2, 3, 4, 5 and 6 (to the extent required) of this Schedule 27, and
- (b) all other requirements set out in this Schedule 27 have been satisfied,

such Dispute may be referred to arbitration in accordance with the *Arbitration Act, 1991* (Ontario) and this Section.

- 8.2 Disputes referred to arbitration shall be resolved by a single arbitrator unless one of the Parties, by notice in writing delivered to the other Party within 5 Business Days after a notice to arbitrate pursuant to Section 7.1 of this Schedule 27 has been delivered, expressly requires that the Dispute that is the subject of that notice to arbitrate be resolved by a three person arbitration tribunal, in which case that particular Dispute shall be resolved by a three person arbitration tribunal.



8.3 If the arbitration tribunal is comprised of a single arbitrator, the arbitrator shall be appointed as follows:

- (a) if the Parties agree on the arbitrator, the Parties shall jointly appoint the arbitrator as soon as possible and in any event within 5 Business Days after delivery of the notice to arbitrate pursuant to Section 7 of this Schedule 27; and
- (b) if the Parties fail to agree or jointly appoint the arbitrator within such 5 Business Day period, either Party may apply to the Ontario Superior Court of Justice for appointment of the arbitrator, in which case the court shall appoint the arbitrator at the earliest opportunity in accordance with the following:
  - (i) from the lists of potential arbitrators submitted to the court by the Parties, provided that potential arbitrators meeting the necessary qualifications and experience set out in this Schedule 27 are on the list; or
  - (ii) if one Party fails to submit its list of potential arbitrators to the court within 5 Business Days of a request from the court to submit a list, from the list submitted by the other Party provided that potential arbitrators meeting the necessary qualifications and experience set out in this Schedule 27 are on the list of that other Party; or
  - (iii) if no list is submitted by either Party, or if the list or lists submitted do not include potential arbitrators with the necessary qualifications and experience, the court shall be entitled at its sole discretion to appoint anyone who meets the requirements set out in this Schedule 27 for the qualifications and experience of the arbitrator.

8.4 If the arbitration tribunal is comprised of three arbitrators:

- (a) the arbitrators shall be appointed as follows:
  - (i) each Party shall appoint one arbitrator no later than 5 Business Days after delivery of the notice to arbitrate pursuant to Section 7 of this Schedule 27;
  - (ii) if a Party fails to appoint an arbitrator within 5 Business Days after delivery of the notice to arbitrate, the other Party is entitled to apply to the Ontario Superior Court of Justice to appoint that arbitrator, in which case the court shall appoint that arbitrator at the earliest opportunity using a comparable process to that described in Section 8.3(b) of this Schedule 27;
  - (iii) the arbitrators appointed in accordance with the foregoing shall, within 5 Business Days after their appointment, jointly appoint a third arbitrator who shall also act as the chair of the arbitration tribunal and who, in addition to all other required qualifications, shall have experience in arbitration or judicial processes and procedures; and
  - (iv) if the two arbitrators appointed by the Parties fail to appoint a third arbitrator within the required time, either of the other two arbitrators may apply to the Ontario Superior Court of Justice for appointment of the third arbitrator, in which case the

court shall appoint the third arbitrator at the earliest opportunity using a comparable process to that described in Section 8.3(b) of this Schedule 27; and

- (b) the arbitrators appointed by the Parties shall at all times be neutral and act impartially and shall not act as advocates for the interests of the Party who appointed them.
- 8.5 All arbitrators must have qualifications and experience relevant to the issues in the Dispute and also have qualifications and experience as arbitrators.
- 8.6 No one shall be nominated or appointed to act as an arbitrator who is or was in any way interested, financially or otherwise, in the conduct of the Project Operations or in the business affairs of the Region, Project Co, or any consultant, subconsultant or subcontractor of any of them.
- 8.7 The arbitrator(s) shall have the jurisdiction and power to:
- (a) amend or vary any and all rules under the *Arbitration Act, 1991* (Ontario), including rules relating to time limits, either by express agreement of the Parties or, failing such agreement, as the arbitrator(s) consider appropriate and necessary in the circumstances to resolve the Dispute and render an award;
  - (b) require some or all of the evidence to be provided by affidavit;
  - (c) hold a hearing at which evidence and submissions are presented by the Parties;
  - (d) direct either or both Parties to prepare and provide the arbitrator(s) with such documents, test results or other things as the arbitrator(s) may require to assist them in the resolution of the Dispute and rendering of an award;
  - (e) require either Party to supply or prepare for examination by the arbitrator(s) and the other Party, any document or information the arbitrator(s) considers necessary;
  - (f) inspect the Project Operations, giving reasonable notice to each Party of the time when, and the place where, the arbitrator(s) intend(s) to conduct any inspections;
  - (g) award any remedy or relief that a court or judge of the Ontario Superior Court of Justice could order or grant subject to and in accordance with this Project Agreement, including, without limitation, interim orders, interim and permanent injunctions, and specific performance; and
  - (h) require either or both Parties to take and provide to the arbitrator(s) such measurements, perform such tests, perform such audits, or take any and all such other measures or steps as the arbitrator(s) consider necessary or desirable to aid them in making a fair and reasonable award.
- 8.8 The place of arbitration shall be Toronto, Ontario. The language of the arbitration shall be English.
- 8.9 The costs of an arbitration are in the discretion of the arbitrator(s) who, in addition to any jurisdiction and authority under applicable law to award costs, has the jurisdiction and authority to make an order for costs on such basis as the arbitrator(s) considers appropriate in the circumstances, including to

award actual legal fees and disbursements and expert witness fees, and to specify or order any or all of the following:

- (a) the Party entitled to costs;
  - (b) the Party who must pay the costs;
  - (c) the amount of the costs or how that amount is to be determined; and
  - (d) how all or part of the costs must be paid.
- 8.10 In exercising discretion to award costs, however, the arbitrator(s) will take into account the desire of the Parties that costs should generally be awarded to each Party in proportion to the relative success that each Party has in the arbitration.
- 8.11 The award of the arbitrator(s) shall be final and binding upon both Parties, and both Parties expressly waive all rights of appeal in connection with the award of the arbitrator(s). Judgment may be entered upon the award in accordance with Applicable Law in any court having jurisdiction.
- 8.12 The Parties agree to and shall co-operate fully with the arbitrator(s) and proceed with the arbitration expeditiously, including in respect of any hearing, in order that an award may be rendered as soon as practicable by the arbitrator(s), given the nature of the Dispute. The arbitrator(s) shall render a decision as soon as possible and, in any event, shall use all reasonable efforts to render a decision no later than 20 Business Days after the date of the hearing, or such longer period of time as agreed to in writing by the Parties. If the arbitration tribunal is comprised of three arbitrators, the decision of a majority of the arbitration tribunal shall be deemed to be the decision of the arbitration tribunal, and where there is no majority decision, the decision of the chair of the arbitration tribunal shall be deemed to be the decision of the arbitration tribunal.
- 8.13 This Project Agreement, including this Schedule 27, constitutes an agreement to arbitrate that shall be specifically enforceable.
- 8.14 Any arbitrator appointed pursuant to this Section 8 of this Schedule 27 shall keep all information about the Dispute confidential and shall not disclose such information to anyone other than the Parties.

## **9. Litigation**

- 9.1 Notwithstanding that a notice to arbitrate has been delivered pursuant to Section 7.1 of this Schedule 27, following receipt of the Expert's award or determination pursuant to Section 5 of this Schedule 27, or of the Adjudicator's award or determination pursuant to Section 6 of this Schedule 27, or if applicable a Notice of Dispute has been issued following receipt of a decision of the Independent Certifier if the Dispute is a Dispute in relation to the Independent Certifier's decisions for which Section 4.4 of this Schedule 27 provides that Sections 5 and 6 of this Schedule 27 shall not apply, if one or more of the following apply then either Party may elect, by written notice signed by their Party Representative, to require that the Dispute be referred to and resolved solely by litigation in the Ontario Superior Court of Justice, and both Parties agree to attorn to the exclusive jurisdiction of the courts of the Province of Ontario in respect of the Dispute:

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- (a) if the actual or potential total value or amount at issue in the Dispute (as determined by adding all claims and counterclaims) is more than \$500,000 (index linked) in the aggregate or \$150,000 (index linked) in any one year; or
- (b) if the Dispute is considered by the Region to involve material issues of public health or safety.

Such notice will not be effective unless it indicates it is a notice to submit the Dispute to litigation, is signed by the Party Representative and is delivered to the other Party Representative within 15 Business Days after receipt of the Expert's determination, the Adjudicator's determination, or the Notice of Dispute referred to in Section 7.1(c) of this Schedule 27, as applicable, and provided further that such notice expressly identifies the specific Dispute and determination of the Adjudicator, Expert, Independent Certifier, as applicable, that is to be the subject of the litigation.

9.2 If neither Party delivers a notice of election to resolve a particular Dispute by litigation in the manner and within the time specified in Section 9.1 of this Schedule 27, then:

- (a) provided that one Party has, in the manner and within the time period specified in Section 7.1 of this Schedule 27, given notice to the other Party of election to resolve that Dispute by arbitration, and subject to a consolidation of proceedings pursuant to Section 11 of this Schedule 27, that Dispute shall be resolved only by arbitration pursuant to Sections 8.2 to 8.14 of this Schedule 27; and
- (b) subject to Section 9.2(a), where a Dispute was determined by the Expert, the Expert's determination is final and binding on both Parties and not subject to appeal, arbitration, litigation or any other dispute resolution process.

**10. Consolidation of Project Agreement Adjudication, Arbitration and Litigation**

10.1 For all Disputes that arise prior to Substantial Completion, unless:

- (a) both Parties otherwise agree; or
- (b) the issue in a particular Dispute arises in connection with the Review Procedure; or
- (c) the issue in a particular Dispute is such that waiting until after Substantial Completion to resolve that Dispute will cause irreparable harm to one of the Parties; or
- (d) the issue in a particular Dispute arises in connection with requirements of achieving or deficiencies in not achieving Substantial Completion, or OMSF/Test Track Readiness Completion, as applicable; or
- (e) in respect to a particular Dispute, the Dispute is consolidated with Third Party Disputes (as hereinafter defined) pursuant to Section 11 of this Schedule 27;

all adjudication, arbitral and litigation proceedings between the Parties prior to Substantial Completion shall be stayed and consolidated into, as applicable, a single adjudication, arbitration and a single litigation proceeding, with the adjudication, arbitration and, if applicable, litigation, proceeding promptly and expeditiously after Substantial Completion.

**11. Consolidation with Third Party Disputes**

11.1 Subject to Section 11.4 of this Schedule 27, if either Party is involved in an arbitration in the Province of Ontario with a third party (“**Third Party Arbitration**”), and if such Third Party Arbitration involves common factual or legal issues (including common issues of damages) which are also the subject of a Dispute between the Parties for which a Notice of Dispute has been given, then any arbitration of the Dispute between the Parties which includes those common factual, legal or damages issues (“**Project Agreement Arbitration**”) shall be stayed, consolidated or joined with the Third Party Arbitration(s) but only if the Region, Project Co and the other parties all agree or, failing their agreement, if a court in the Province of Ontario on application considers it just and convenient in all the circumstances that the Project Agreement Arbitration should be stayed or consolidated or joined with the Third Party Arbitration.

11.2 Subject to Section 11.4 of this Schedule 27, if either Party is involved in litigation in the Province of Ontario with a third party (“**Third Party Litigation**”) and if:

- (a) such Third Party Litigation involves common factual or legal issues (including common issues of damages) which are the subject of a Project Agreement Arbitration; and
- (b) one of the Parties is brought directly into the Third Party Litigation as a party to that litigation,

then on the application of either Party to the court in the Province of Ontario having jurisdiction the court may, if it determines that it is just and convenient in all the circumstances, order a stay of either or both the Project Agreement Arbitration proceeding and Third Party Litigation, or order a joinder of the Project Agreement Arbitration and the Third Party Litigation. If such joinder is ordered, the Project Agreement Arbitration and the Third Party Litigation ordered to be joined by the court shall be determined by that court or by another court in Ontario such that the Project Agreement Arbitration and the Third Party Litigation shall be resolved in one forum. For purposes of the foregoing, joinder of the Project Agreement Arbitration and the Third Party Litigation shall be construed to include stays and conditional stays of issues in the Project Agreement Arbitration pending the commencement and completion of third party proceedings by one or both of the Parties in the Third Party Litigation.

11.3 In considering whether to order a stay, consolidation or joinder of a Project Agreement Arbitration with a Third Party Arbitration or Third Party Litigation, the court will be entitled to give substantial weight to the desire by the Parties that all Disputes which are related to Third Party Arbitration or Third Party Litigation be resolved in a single forum to avoid multiplicity of proceedings and the potential for contradictory findings of fact, liability and quantum, and to ensure the arbitrator or court has the advantage of obtaining full evidence and disclosure from the Parties and from the other parties, as applicable and as required to resolve the Dispute and to make findings of fact, liability and quantum of damages and awards or judgments binding on the Parties based on all available evidence.

11.4 Sections 11.1 and 11.2 of this Schedule 27 only apply:

- (a) if the Dispute between the Parties includes a claim by one Party against the other for contribution or indemnity for that Party’s liability or potential liability to the third party

where such liability results or will result from an award in the Third Party Arbitration or a judgment in the Third Party Litigation; and

- (b) to those specific issues that are common issues in the Project Agreement Arbitration, the Third Party Arbitration and the Third Party Litigation, such that all other issues in the Dispute shall continue to be resolved by Project Agreement Arbitration and shall not be consolidated with the Third Party Arbitration or Third Party Litigation.

**12. Fast Track Process**

- 12.1 If the Parties fail to resolve any Region Engineer Determination Matter through the process referred to in Section 2 of this Schedule 27 within 5 Business Days after receipt by a Party of the applicable Notice of Dispute in respect of the applicable Region Engineer Determination Matter, or within such longer period of time as the Party Representatives may both expressly agree, then either Party may, by written notice signed by their Party Representative, refer such Dispute for a fast track final and binding arbitration in accordance with the *Arbitration Act, 1991* (Ontario) and this Section 12.
- 12.2 All discussions and negotiations, and all documents exchanged between the Parties relating to Region Engineer Determination Matters shall be on a without prejudice basis to facilitate resolution of the Dispute.
- 12.3 All Disputes relating to Region Engineer Determination Matters referred to the Fast Track Process shall be resolved by a single arbitrator, and the provisions of Section 8.3, 8.5, 8.6, 8.7, 8.8, 8.9, 8.10, 8.11, 8.13 and 8.14 of this Schedule 27 shall apply *mutatis mutandis* to the resolution of such Disputes.
- 12.4 The Parties agree to and shall cooperate fully with the arbitrator and proceed with the arbitration expeditiously, including in respect of any hearing, in order that an award may be rendered as soon as practicable by the arbitrator, given the nature of the Dispute. The Arbitrator shall render a decision as soon as possible and in any event, shall use all reasonable efforts to render a decision no later than 10 Business Days after the date of the hearing, or such longer period of time as may be agreed in writing by the Parties.
- 12.5 Notwithstanding anything to the contrary set forth in this Schedule 27 or otherwise in the Project Agreement, the arbitrator's determinations under the Fast Track Process are final and binding on the Parties.

**13. Miscellaneous**

- 13.1 Project Co and the Region shall diligently carry out their respective obligations under this Project Agreement during the pendency of any Disputes, including, without limitation, adjudication proceedings, arbitration proceedings, litigation proceedings or fast track proceedings. If during the pendency of any Dispute it is considered necessary by either Party to proceed in respect of the matter that is in Dispute, then without prejudice to Project Co's rights in respect of the Dispute (including in respect of Delay Events, Compensation Events and Variations), Project Co shall proceed in accordance with the direction of the Region, and in the event the matter in dispute is determined in favour of Project Co, then, to the extent that such Dispute affects the System or the Public Infrastructure, proceeding in accordance with the Region's position (i) prior to Substantial

Completion shall, subject to and in accordance with Section 40 of this Project Agreement, be treated as a Delay Event and, subject to and in accordance with Section 41 of this Project Agreement, be treated as a Compensation Event, and (ii) following Substantial Completion shall, subject to and in accordance with Schedule 22 - Variation Procedure, result in a Variation. For greater certainty, in respect of any Dispute relating to the Design and Construction Works referred to in Section 4.2 of this Schedule 27, the Independent Certifier shall be the decision maker of first instance and the Parties shall comply with the initial decision of the Independent Certifier unless and until it is overturned in a subsequent arbitration or litigation proceeding.

- 13.2 Nothing contained in this Schedule 27 will prevent the Parties from seeking interim protection from the courts of the Province of Ontario, including seeking an interlocutory injunction where available pursuant to Applicable Law, if necessary to prevent irreparable harm to a Party.
- 13.3 The Parties shall indemnify each other in respect of any damages suffered or incurred on amounts agreed to be paid pursuant to resolution of a Dispute by the Party Representatives or by the executives of the Parties pursuant to Sections 2 and 3 of this Schedule 27 and on the amount of any award or judgment as follows:
- (a) for amounts payable by Project Co to the Region, Project Co shall indemnify the Region as provided for at Section 56.1(e) of this Project Agreement from and against any damages suffered or incurred resulting from any overpayment to Project Co or, as applicable, any underpayment or non-payment by Project Co from the date of any overpayment to Project Co or, as applicable, from the date on which payment was due under this Project Agreement to the Region until the date of payment; or
  - (b) for amounts payable by the Region to Project Co, the Region shall indemnify Project Co as provided for at Section 56.2(c) of this Project Agreement from and against any damages suffered or incurred resulting from any overpayment to the Region or, as applicable, any underpayment or non-payment by the Region from the date of any overpayment to the Region or, as applicable, from the date on which payment was due under this Project Agreement to Project Co until the date of payment.
- 13.4 Project Co shall ensure that any and all documents and other information in the possession or control of any Project Co Party that are available to Project Co and that may be necessary for the resolution of a Dispute on an informed basis by the Party Representatives or by the executives of the Parties pursuant to Sections 2 and 3 of this Schedule 27, or by an expert, an adjudicator, an arbitrator, court of competent jurisdiction, are made available in a timely manner to the Region and the Region Representative.
- 13.5 The Region shall ensure that any and all documents and other information in the possession or control of any Region Party that are available to the Region and that may be necessary for the resolution of a Dispute on an informed basis by the Party Representatives or by the executives of the Parties pursuant to Sections 2 and 3 of this Schedule 27, or by an adjudicator, an arbitrator, court of competent jurisdiction, are made available in a timely manner to Project Co and the Project Co Representative.

13.6 The Parties can, by written agreement, on a Dispute by Dispute basis:

- (a) extend any or all timelines set out in this Schedule 27;
- (b) agree, in respect of matters that are not Region Engineer Determination Matters, to waive or by-pass any one or more of the Dispute resolution processes in Sections 2, 3, 4, 5 and 6 of this Schedule 27 and, instead, proceed directly to resolution of the Dispute by arbitration or litigation pursuant to Sections 7, 8 and 9 of this Schedule 27;
- (c) agree, in respect of Region Engineer Determination Matters, to waive or bypass the Dispute resolution process in Section 2 of this Schedule 27 and, instead, proceed directly to resolution of the Dispute under the Fast Track Process of this Schedule 27.
- (d) other than in respect of Region Engineer Determination Matters, agree to (i) resolve a Dispute by litigation rather than adjudication or arbitration notwithstanding the requirements of Section 6 and Section 8 of this Schedule 27, or (ii) agree to resolve a Dispute by arbitration rather than adjudication or litigation notwithstanding the requirements of Section 6 and Section 9 of this Schedule 27, or (iii) agree to resolve a Dispute by adjudication rather than arbitration or litigation notwithstanding the requirements of Section 8 and Section 9 of this Schedule 27; and
- (e) other than in respect of Region Engineer Determination Matters, agree to resolve a Dispute relating to the decision of an Expert by adjudication, arbitration or litigation, notwithstanding the provisions of Section 5 of this Schedule 27.