



Region of Waterloo

Region of Waterloo

Stage 1 Light Rail Project

**REQUEST FOR PROPOSALS**

**RFP No. 2012-01**

**(RFP Version 4.0)**

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**Confidential – Economic Interests of The Region of Waterloo and Ontario Infrastructure and Lands Corporation**

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**REQUEST FOR PROPOSALS****SECTION 1 – INTRODUCTION****1.1 General**

(1) This Request for Proposals (“**RFP**”) is issued by the Regional Municipality of Waterloo (the “**Region**”), as set out in the RFP Data Sheet. Ontario Infrastructure and Lands Corporation (“**Infrastructure Ontario**”, also known as “**OIPC**” and “**IO**”) is engaged as the Region’s commercial procurement lead with respect to the Project in an advisory capacity and not as an agent of Her Majesty in right of Ontario.

(2) In this RFP, Prequalified Parties that submit documents in response to this RFP are referred to as “**Proponents**” and their submissions, as may be revised by RFP Sections 5.3 and 5.5, if applicable, are referred to as “**Proposals**”. The entity that is selected by the Region to enter into the Project Agreement is referred to as the “**Preferred Proponent**”. In this RFP the expression “Proponents” also includes Prequalified Parties prior to the submission of their Proposals.

(3) Except as provided in RFP Section 1.1(3)(a), the procurement process to select a Preferred Proponent shall commence with the issuance of this RFP and shall terminate on Financial Close or on the expiration of the Proposal Validity Period (or extended Proposal Validity Period, if applicable) whichever is first (the “**RFP Process**”). Only Proponents that submit a Proposal in accordance with this RFP will acquire any rights under the RFP. Except as provided in RFP Sections 3.8.2 and 3.8.3 and except for the Region's obligation to pay a Design and Bid Fee as applicable, all rights and obligations arising out of the RFP (the bidding contract or “**Contract A**”) terminate either on the cancellation of this RFP Process by the Region, if such cancellation occurs, or,

- (a) for the Preferred Proponent, on Financial Close (providing Commercial Close is reached prior to the expiration of the Proposal Validity Period, or extended Proposal Validity Period, if applicable); and
- (b) for the Proponents that are not the Preferred Proponent, on the expiration of the Proposal Validity Period (or extended Proposal Validity Period, if applicable) or Financial Close, whichever occurs first.

(4) The Region and Infrastructure Ontario will manage the RFP Process. The Region shall be the single point of contact for Proponents. During the RFP Process, Proponents shall contact the Region only through the Contact Person as set out in RFP Section 3.2.1(1).

(5) The Project to which this RFP applies has been approved by Council to proceed as a Design-Build-Finance-Operate-Maintain (“**DBFOM**”) project with an option to convert to a Design-Build-Finance-Maintain Project after ten years.

(6) A brief description of the project that is the subject of this RFP (the “**Project**”) is set out in the RFP Data Sheet. A detailed description of the Project is contained in the documentation in the Data Room.

(7) Note that the a Certificate of Officer in the form of Schedule 5A must be completed and filed with the Contact Person by each Proponent Team Member by 30 days of this issue of this RFP. See RFP Section 4.1(4) for additional filing requirements relating to the Certificate of Officer including upon any change of the information under the Certificate or the addition of a Proponent Team Member.

(8) While the Region and Infrastructure Ontario will manage the procurement process in respect of the Project, the Preferred Proponent, subject to the requirements and conditions of the RFP Documents, would actually enter into the Project Agreement with the Region, as set out in the RFP Data Sheet, as the signatory to the Project Agreement. Neither Infrastructure Ontario nor the Government of Ontario will be a party to the Project Agreement.

## 1.2 Prequalified Parties and Proponent Representatives

(1) Subject to RFP Section 3.6 and Section 10.2(4), only those parties that were prequalified through the Project's Request for Qualifications (“**RFQ**”) process that preceded this RFP are eligible to participate in the RFP Process. The prequalified parties are listed in the RFP Data Sheet (“**Prequalified Parties**”). The prequalification documents submitted by each of the Prequalified Parties in the RFQ Process that preceded and was with respect to this RFP Process are referred to as a Prequalified Party's “**Prequalification Submission**”.

(2) All correspondence from the Region and its Advisors to a Proponent will be sent to the person identified in the Proponent's Prequalification Submission to receive information and notices on behalf of the Proponent and otherwise represent that Proponent in this RFP Process (the “**Proponent Representative**”). Each Proponent is solely responsible to ensure that all contact information of its Proponent Representative is accurate and updated at all times during the RFP Process. Proponents may update or revise their Proponent Representative's information by notifying the Contact Person, in writing.

## 1.3 Overview of the Stages of Project Procurement and Implementation

(1) The Region will carry out the procurement and implementation of the Project in accordance with the following stages:

(a) Stage 1 – Prequalification Stage

The prequalification stage (“**Prequalification Stage**”) preceded the RFP Process and identified the Prequalified Parties. The Prequalification Stage is a stand alone independent stage and is complete once the Prequalified Parties are identified by the Region (whether identified initially as Prequalified Parties or added subsequently in accordance with the RFQ documents) and have received notification by the Region that they are prequalified for the RFP Process.

(b) Stage 2 – RFP Procurement Process

The RFP procurement process is the competitive procurement process described in detail in this RFP.



The RFP Process will be conducted in accordance with the Purchasing By-law using the “best overall cost” as defined in the Purchasing By-law to mean the best cost after all factors and criteria set out in the RFP are considered and is not limited to the lower dollar price. The lowest or any proposal will not necessarily be accepted.

(c) Stage 3 – Implementation of the Project Agreement

Once the Region and the Preferred Proponent have executed the Project Agreement, the terms and conditions of the Project Agreement shall determine how the Project is to proceed.

**1.4 Fairness Monitor**

(1) The Region has retained the Fairness Monitor named in the RFP Data Sheet to monitor the RFP Process.

**SECTION 2 – THE RFP DOCUMENTS AND THE DATA ROOM**

**2.1 RFP Documents**

- (1) The RFP Documents (the “**RFP Documents**”) are:
- (a) this RFP;
  - (b) Schedule 1 – RFP Data Sheet;
  - (c) Schedule 2 – Design Consultation Process;
  - (d) Schedule 3 – Submission Requirements and Evaluation Criteria consisting of:
    - (i) Part 1 – Technical Submission requirements;
    - (ii) Part 2 – Financial Submission requirements;
    - (iii) Part 3 – Innovation Submission requirements;
    - (iv) Part 4 – Proposal Format and Evaluation;
  - (e) Schedule 4 – Proposal Submission Form;
  - (f) Schedule 5A – Proponent Team Member Certificate of Officer;
  - (g) Schedule 5 – Proponent Team Member Declaration;
  - (h) Schedule 6 – Price Submission Form;

- (i) Schedule 7 – Administrative Checklist;
- (j) Schedule 8 – Letter of Credit;
- (k) Schedule 9 – Project Agreement (including all related Schedules appendices and attachments) as listed in the RFP Data Sheet; and
- (l) Addenda to the RFP Documents, if any.

(2) Subject to RFP Section 2.2(1), the RFP Documents shall be read as a whole. The Schedules and Addenda, if any, constitute an integral part of this RFP and are incorporated by reference. For greater clarity, Background Information documents are not RFP Documents.

## **2.2 Conflicts or Inconsistencies in Documents**

(1) For the purpose of the RFP Process, if there are any conflicts or inconsistencies among the terms and conditions of the documents comprising RFP Documents the following shall apply:

- (a) in respect of matters of interpretation related to the RFP Process and all competitive procurement process matters, this RFP shall prevail over the Schedules to this RFP during the RFP Process;
- (b) in respect of all matters of interpretation of the Project and the Project Agreement during the RFP Process, the Project Agreement shall prevail over this RFP and all other Schedules to this RFP; and
- (c) for the purpose of resolving conflicts or inconsistencies among the documents that constitute the Project Agreement, the provisions of the Project Agreement dealing with conflicts or inconsistencies shall govern.

(2) Despite RFP Section 2.2(1), if the Proponent believes that there is any term or condition in any RFP Document that is ambiguous, or that conflicts or is inconsistent with any other term or condition in the RFP Documents, the Proponent shall notify the Region of that ambiguity, conflict or inconsistency in accordance with RFP Section 3.2.2 and, for greater clarity, by the deadline set out in the RFP Data Sheet for the submission of RFIs.

(3) If there is a conflict or inconsistency between:

- (a) the Region's electronic version of an RFP Document as contained in the Data Room; and
- (b) any other version of the same RFP Document (whether in electronic or hard copy),

the Region's electronic version as contained in the Data Room shall govern.

(4) If there is any conflict or inconsistency between documents, including RFP Documents, contained in the Data Room and documents that are downloaded by the Proponent, the documents contained in the Data Room shall govern.

(5) If there is any conflict or inconsistency between two versions of the same RFP Document contained in the Data Room, the RFP Document of the later date or version number shall prevail over the same RFP Document of an earlier date or version number. Unless otherwise indicated, for the purposes of this RFP Section 2.2(5), the date of each RFP Document shall be determined by the date and time when that document was placed in the Data Room by the Region.

### 2.3 Distribution of Documents to Proponents

(1) Except as provided in RFP Section 2.3(2), the Region and its Advisors will circulate this RFP and all other RFP Documents, including Addenda, by placing them in the Data Room and notifying the Proponent Representatives by e-mail that RFP Documents or Addenda, as applicable, have been added to the Data Room. Notification to Proponents by the Region that documents have been added to the Data Room is a courtesy only and each Proponent is solely responsible to ensure that it reviewed all documents in the Data Room in accordance with RFP Section 2.4(3) and, in particular, has reviewed all documents in the Data Room immediately prior to submitting Proposals. Failure by any Proponent to obtain documents in the Data Room is at the sole and absolute risk of each Proponent.

(2) The Region may circulate some RFP Documents in paper copy. If the Region circulates any RFP Documents in paper copy, each Proponent Representative will be notified of a paper copy circulation by way of a notice in the Data Room.

### 2.4 Data Room

(1) The Region has established an electronic data room (the “**Data Room**”) at a secure website address for:

- (a) the distribution of RFP Documents and Addenda (including “**black-lined**” RFP Documents revised by Addenda);
- (b) the provision of various types of background information for the Proponents' review (“**Background Information**”); and
- (c) the receipt of RFIs from Proponents and the posting of responses to RFIs.

(2) The Data Room will be accessible on approximately the date set out in the Timetable. The Region may add, delete or amend documents in the Data Room at any time.

(3) Each Proponent is solely responsible to ensure that it:

- (a) contacts the Contact Person at the coordinates set out in the RFP Data Sheet to arrange access to the Data Room and receipt of a Data Room password;

- (b) has the appropriate software which allows the Proponent to access and download RFP Documents and Background Information from the Data Room; and
- (c) checks the Data Room frequently for the addition, deletion or amendment of RFP Documents, Background Information and the posting of responses to RFIs and, at all times during the RFP Process keeps itself informed of and takes into account the most current RFP Documents, Background Information and responses to RFIs.

## 2.5 Proponent Investigations

(1) Each Proponent and each of its Proponent Team Members is solely responsible, at its own cost and expense, to carry out its own independent research, due diligence or to perform any other investigations, including seeking independent advice, considered necessary by the Proponent to satisfy itself as to all existing conditions affecting the Project or the Project Agreement. The Proponents' and Proponent Team Members' obligations set out in this RFP Section 2.5 apply irrespective of any Background Information in the Data Room or information contained in the RFP Documents or in responses to RFIs. The Proponents' and Proponent Team Members' obligation to carry out independent research, investigations, due diligence or to seek independent advice or, if applicable, their ability to rely on information provided by the Region or its Representatives is more particularly set out in the Project Agreement.

(2) Except as explicitly provided in the Project Agreement, the Region and its Representatives make no representations or warranties, and there are no representations or warranties or conditions, express or implied, statutory or otherwise, in fact or law, with respect to the accuracy or completeness of any information set out in the RFP Documents or made available to Proponents or Proponent Team Members in the Data Room as Background Information or of any other background or reference information or documents prepared by the Region or by third parties and which may be made available to Proponents or Proponent Team Members by or through the Region or any of its Representatives or otherwise with respect to the Project. Proponents and Proponent Team Members shall make such independent assessments as they consider necessary to verify and confirm the accuracy and completeness of all such information as any use of or reliance by Proponents or Proponent Team Member on any and all such information shall be at the Proponents' or Proponent Team Members' sole risk and without recourse against the Region or its Representatives.

(3) Each Proponent and each of its Proponent Team Members is solely responsible, at its own cost and expense, for obtaining its own independent advice with respect to the RFP Process.

## SECTION 3 – THE RFP PROCESS

### 3.1 RFP Process Timetable

(1) The deadline for the submission of Proposals (the “**Submission Deadline**”) and the general timetable for the RFP Process (the “**Timetable**”) are set out in the RFP Data Sheet.

(2) The Region may amend the Timetable in its sole discretion:

- (a) at any time prior to the Submission Deadline for events that are to occur prior to or on the Submission Deadline, including the Submission Deadline itself; and
- (b) at any time in the RFP Process for events that are to occur after the Submission Deadline.

### 3.2 Questions and RFP Documents Comments

#### 3.2.1 Contact Person

(1) Except as set out in RFP Section 3.4.2, the Proponents shall submit all questions and other communications regarding the RFP Documents, the RFP Process and their Proposals to the contact person or contact persons named in the RFP Data Sheet (the “**Contact Person**” or “**Contact Persons**”, as applicable) electronically at the coordinates listed in the RFP Data Sheet and the questions shall be submitted in accordance with RFP Section 3.2.2 and shall be submitted in the form provided in the Data Room.

#### 3.2.2 Clarification/RFI Submission Process

(1) In addition to the requirement set out in RFP Section 3.2.1, the following rules shall apply to Proponents when submitting questions or requests for information (“**RFIs**”) to the Region during the RFP Process:

- (a) Proponents are permitted to submit RFIs categorized as follows:
  - (i) RFIs that are of general application and that would apply to other Proponents (“**General RFIs**”); and
  - (ii) RFIs that the Proponent considers to be commercially sensitive or confidential to that particular Proponent (“**Commercially Confidential RFIs**”);
- (b) if the Region disagrees with the Proponent's categorization of an RFI as a Commercially Confidential RFI, the Region will give the Proponent an opportunity to either categorize the RFI as a General RFI or to withdraw the RFI;
- (c) if the Region determines, in its sole discretion, that a Commercially Confidential RFI, even if it is withdrawn by a Proponent, is of general application or would provide a significant clarification of the RFP Documents or RFP Process to Proponents, the Region may issue a clarification to Proponents that deals with the same subject matter as the withdrawn Commercially Confidential RFI; and
- (d) if the Region agrees with the Proponent's categorization of a Commercially Confidential RFI, then the Region will provide a response to that RFI to only the Proponent that submitted the RFI.

(2) Responses to RFIs prepared and circulated by the Region are not RFP Documents and do not amend the RFP Documents. If, in the Region's sole discretion, RFIs require an amendment to the RFP Documents, such amendment will be prepared and circulated by Addendum in accordance with RFP Section 3.7. Only a response to an RFI that has been incorporated into or issued as an Addendum will modify or amend the RFP Documents and, otherwise, RFIs will have no force or effect whatsoever and shall not be relied upon by any Proponent.

(3) Proponents shall submit RFIs in accordance with the deadlines set out in the Timetable.

(4) Proponents shall submit all RFIs to the Contact Person electronically in accordance with the instructions set out in the RFP Data Sheet.

(5) The Region will respond to RFIs in written responses circulated to Proponents in accordance with the schedule set out in the Timetable. The Region may, in its sole discretion, distribute responses to RFIs of a minor or administrative nature to only the Proponent who submitted the minor or administrative RFI.

(6) It is the Proponent's obligation to seek clarification from the Region of any matter it considers to be unclear in accordance with RFP Section 3.2.2 and, for greater clarity, by the deadline set out in the Timetable for the submission of RFIs. The Region is not responsible in any way whatsoever for any misunderstanding by a Proponent or any of its Proponent Team Members of the RFP Documents, Background Information, responses to RFIs, any documents placed in the Data Room or any other type of information provided by or communication made by the Region.

(7) Any oral or written response provided by the Region or its Representatives in connection with this RFP, including, for clarity, any oral or written response provided by the Region or its Representatives at a Proponent's Meeting or Commercially Confidential Meetings or in response to any matters raised or discussed at either such meetings or otherwise, will neither be binding on the Region nor will it change, modify, amend or waive the requirements in this RFP in any way. Proponents shall not rely on any response provided other than an addendum issued in accordance with Section 3.7.

### 3.2.3 RFP Documents Comments

(1) The Region may, in its sole discretion, request Proponents to submit comments on the RFP Documents and, in particular, comments on the Project Agreement. Whether the Region intends to permit or require the submission of such comments and the schedule and format for the submission of those comments is set out in the RFP Data Sheet. The Region is not obliged to respond to each comment made by Proponents under this RFP Section 3.2.3. If the Region accepts a comment, or part of a comment, and that acceptance requires a change to the RFP Documents, the Region shall implement that change by Addendum.

### 3.3 Communications Restrictions

#### 3.3.1 Communications with Municipalities, Other Government Authorities and Utilities

(1) In addition to the restrictions in RFP Section 3.3.2, Proponents, Proponent Team Members and their respective Advisors are not permitted to communicate directly with any municipality, government authority or utility with respect to the Project provided that communications may be made with applicable utilities where required to obtain information with respect to or otherwise develop their respective Proposal.

(2) Without limiting the restrictions contained in RFP Section 3.3.1(1) and for greater certainty, the Region is not in any way whatsoever, responsible for any representations, statements, assurances, commitments or agreements which Proponents, Proponent Team Members or their respective Advisors receive or believe they may have received from a municipality, a government authority, or a utility. Proponents, Proponent Team Members and their respective Advisors rely on any such representations, assurances, commitments or agreements at their sole risk without recourse of any kind whatsoever against the Region.

#### 3.3.2 Prohibited Contacts and Lobbying Prohibition

(1) Proponents and Proponent Team Members and all of their respective Advisors, employees and representatives are prohibited from engaging directly or indirectly in any form of political or other lobbying, of any kind whatsoever, to influence the outcome of the RFP Process or to undermine or challenge the Project until Project completion (which for this purpose will be the commencement of revenue generating light rail transit service).

(2) Without limiting the generality of RFP Section 3.3.2(1), neither Proponents or Proponent Team Members or any of their respective Advisors, employees or representatives may contact or attempt to contact, either directly or indirectly, at any time during the RFP Process, any of the following persons or organizations on matters related to the RFP Process, the RFP Documents, or the Proposals:

- (a) any person at the Region (including the council of the Region, local area municipal Councillors within the Region, elected officials and their respective officers, employees, staff members and other appointees and members of the Planning and Works Committee), other than the Contact person;
- (b) any member of an evaluation team or the evaluation committee (including, for greater certainty, all staff, employees and officers of the Region involved in the evaluation of Proposals);
- (c) any expert or advisor assisting the Region, an evaluation team or the evaluation committee;
- (d) any staff, contractor, agent or representative of the Region;

- (e) any other Proponent or Representative or Team Member thereof (except Team Members that are part of more than one Proponent; or
- (f) any other additional party named in the RFP Data Sheet.

(3) If a Proponent or a Proponent Team Member or any of their respective Advisors, employees or representatives, in the opinion of the Region, contravenes RFP Section 3.3.2(1) or (2), the Region may, in its sole and absolute discretion:

- (a) take any action in accordance with RFP Section 7.1.2; or
- (b) impose conditions on that Proponent's or Proponent Team Member's continued participation in the RFP Process that the Region considers, in its sole and absolute discretion, to be appropriate.

(4) For clarity, the Region is not obliged to take any of the actions set out in RFP Section 3.3.2(3)(a) or 3.3.2(3)(b).

(5) Proponents are advised that Council, at its meeting held on June 6, 2012, has enacted a policy requiring that no elected official, officer or employee of the Region have contact with a Proponent or prospective Proponent participating in the RFQ Process or the RFP Process if such contact related directly or indirectly to the Project unless such contact is part of the formal RFQ Process or RFP Process. Proponents should review report E-12-033, dated May 29, 2012 (available through the Region's Website) in this regard.

(6) The provisions of this Section 3.2.2 shall survive any cancellation of this RFP and the conclusion of the RFP Process.

### 3.3.3 Media Releases, Public Disclosures and Public Announcements

(1) A Proponent shall not, and shall ensure that its Advisors, employees, representatives and Proponent Team Members, and their respective Advisors, employees and representatives do not, issue or disseminate any media release, public announcement or public disclosure (whether for publication in the press, on the radio, television, internet or any other medium) that relates to the RFP Process, the RFP Documents or the Project or any matters related thereto, without the prior written consent of the Region, which consent may be withheld in the Region's sole discretion.

(2) Neither the Proponent or any Proponent Team Members or any of their respective Advisors, employees or representatives shall make any public comment, respond to questions in a public forum, or carry out any activities to either criticize or disparage another Proponent or Proposal or to publicly promote or advertise their own qualifications, interest in or participation in the RFP Process, or transmit any other communication or information that has the effect of directly or indirectly influencing the RFP Process or the implementation of the Project Agreement, or to challenge or undermine the Project until the Project is complete (which for this purpose will be the commencement of revenue generating light rail service), in each case, without the Region's prior written consent, which consent may be withheld in the Region's sole discretion. Notwithstanding this RFP Section 3.3.3(2), Proponents, Proponent Team Members and their



respective Advisors, employees and representatives are permitted to state publicly that they are participating in the RFP Process.

(3) For the purpose of greater clarity, RFP Section 3.3.3(2) does not prohibit disclosures necessary to permit the Proponent to discuss the Project with prospective subcontractors but such disclosure is permitted only to the extent necessary to solicit those subcontractors' participation in the Project.

### 3.3.4 Restrictions on Communications between Proponents – No Collusion

(1) A Proponent shall not discuss or communicate, directly or indirectly, with any other Proponent any information whatsoever regarding the preparation of its own Proposal or the Proposal of the other Proponent in a fashion that would contravene Applicable Law. Proponents shall prepare and submit Proposals independently and without any connection, knowledge, comparison of information or arrangement, direct or indirect, with any other Proponent.

(2) For greater clarity, RFP Section 3.3.4(1) applies to Proponents and Proponent Team Members and their respective Advisors, employees and representatives.

(3) The restrictions contained in this RFP Section 3.3.4 remain in effect during the entire RFP Process without any discontinuation.

## 3.4 **Meetings with Proponents**

### 3.4.1 General Proponents Meeting(s)

(1) The Region will convene general Proponents meetings (each, a “**Proponents Meeting**”) on the dates and at the times set out in the Timetable and at the location and for the purposes set out in the RFP Data Sheet. While attendance at a Proponents Meeting is not mandatory, Proponents are strongly encouraged to attend. A Proponent's failure to attend a Proponents Meeting is at that Proponent's sole risk and responsibility.

(2) Proponents may ask questions and seek clarifications at a Proponents Meeting. Notwithstanding that the Region may give oral answers at a Proponents Meeting, those answers shall not be considered final, complete, or binding unless issued in writing. Therefore, Proponents are strongly encouraged to submit these questions in accordance with RFP Section 3.2.2 for response in accordance with RFP Section 3.2.2.

(3) No statement, consent, waiver, acceptance, approval or anything else said or done in any Proponents Meeting by the Region or any of its Advisors, employees or representatives shall amend or waive any provision of the RFP Documents, or be binding on the Region or be relied upon in any way by Proponents, Proponent Team Members or their Advisors, except when and only to the extent expressly confirmed in an Addendum to the RFP Documents issued in accordance with RFP Section 3.7.

### 3.4.2 Commercially Confidential Proponent Meetings

(1) The Region may, in its sole discretion, convene commercially confidential meetings with Proponents (“**Commercially Confidential Meetings**”). These Commercially Confidential Meetings may be either or both of the following:

- (a) bilateral meetings between the Region and its representatives and Advisors and individual Proponents and their representatives and Advisors, to discuss the Project Agreement and the Proponent's suggested amendments to the Project Agreement; and
- (b) bilateral meetings between the Region and its representatives and Advisors and individual Proponents and their representatives and Advisors to discuss either or both of:
  - (i) Project design issues (including Proponents’ proposed designs); or
  - (ii) other matters, Innovation Submissions or Separate Price Proposals being considered by the Proponents for inclusion in their Proposals, as applicable.

(2) Whether the Region intends to hold Commercially Confidential Meetings and the location of those meetings is set out in the RFP Data Sheet. The approximate date and time of Commercially Confidential Meetings is set out in the Timetable. While attendance at Commercially Confidential Meetings is not mandatory, Proponents are strongly encouraged to attend. A Proponent's failure to attend a Commercially Confidential Meeting is at the Proponent's sole risk and responsibility.

(3) If the Region holds Commercially Confidential Meetings, the Fairness Monitor may be present during some or all of those meetings.

(4) No statement, consent, waiver, acceptance, approval or anything else said or done in any of these Commercially Confidential Meetings by the Region or any of its Advisors, employees or representatives shall amend or waive any provision of the RFP Documents, or be binding on the Region or be relied upon in any way by Proponents, Proponent Team Members or any of their respective Advisors except when and only to the extent expressly confirmed in an Addendum to the RFP Documents issued in accordance with RFP Section 3.7.

(5) The Proponent, its Proponent Team Members and their respective Advisors and representatives and any of their attendees at Commercially Confidential Meetings acknowledge and agree that:

- (a) any statement made at a Commercially Confidential Meeting by the Region or any of its Advisors or representatives is not and shall not be deemed or considered to be an indication of a preference by the Region or a rejection by the Region of anything said or done by the Proponent, Proponent Team Member or any of their respective Advisors or representatives;

- (b) any statement made at a Commercially Confidential Meeting by the Region or any of its Advisors or representatives shall not and will not be relied upon in any way by the Proponent, Proponent Team Member or any of their respective Advisors or representatives for any purpose, including any purpose in connection with the RFP, the Project Agreement, the Project or otherwise, except and only to the extent expressly confirmed by Addendum in accordance with RFP Section 3.7, provided that the Region shall not be under any obligation to confirm any information by Addendum;
- (c) the Region may share process-related information, including clarifying information, with all Proponents if the need arises; and
- (d) the Proponent, its Proponent Team Members and their respective Advisors and representatives:
  - (i) shall participate in the Commercially Confidential Meetings in accordance with the guidelines, procedures and processes set out in the RFP;
  - (ii) waive any and all rights to contest and/or protest the RFP and the processes and guidelines set out herein, including the Commercially Confidential Meetings, based on the fact that such Commercially Confidential Meetings occurred or on the basis that information may have been received during a Commercially Confidential Meeting by another Proponent, Proponent Team Member or their respective Advisors or representatives that was not received by the Proponent, Proponent Team Member or any of their respective Advisors or representatives; and
  - (iii) agree that the Proponent, its Proponent Team Members and their respective Advisors and representatives must treat information received at a Commercially Confidential Meeting as Confidential Information.

### 3.5 Visiting the Lands and the Existing System Infrastructure

#### 3.5.1 Scheduled Visits

(1) If in the RFP Data Sheet, the Region has established scheduled dates for visits to see the Lands (“**Scheduled Visits**”) for all Proponents and their representatives and Advisors, the dates and times of the Scheduled Visits will be set out in the Timetable. For clarity, Scheduled Visits are in addition to any Proponent visits scheduled in accordance with RFP Section 3.5.3.

(2) The provisions of RFP Section 3.5.3(2), (3) and (4) will, in each case to the extent applicable, apply to Scheduled Visits.

### 3.5.2 Ownership of the Lands

(1) The Proponent acknowledges and agrees that, as of the date of the issuance of this RFP, the Region owns only a portion of the lands that will ultimately be acquired for the Project, and will not complete the process of obtaining the balance of such lands, until after Financial Close. That being the case, the Region will only be able to provide a Proponent with access to the portion of such lands owned by the Region at the applicable time.

### 3.5.3 Additional Visits to Existing System Infrastructure and the Lands

(1) Except for Scheduled Visits, if specified in the RFP Data Sheet, Proponents are not permitted to access either the Early Works or any part of the Lands which are not accessible by the general public, except by prior written arrangement with the Contact Person.

(2) A Proponent that wishes to arrange a visit to access either the Early Works or the Lands which are not accessible by the general public, other than a Scheduled Visit (an “**Additional Visit**”), shall submit a request to the Contact Person at least two (2) Business Days prior (or such other time as is set out in the RFP Data Sheet) to the Proponent's proposed date and time for an Additional Visit. The request shall set out the:

- (a) proposed date and time, and alternate date and time, of the proposed Additional Visit;
- (b) purpose of the Additional Visit;
- (c) areas of either the Early Works or the Lands which are not accessible by the general public for which access is requested; and
- (d) names, titles and contact information of the Proponent's representatives who will be attending the Additional Visit.

(3) If the Proponent has received approval for and written confirmation of any Additional Visit from the Contact Person, unless otherwise set out in the Contact Person's confirmation, the following shall apply to the Additional Visit:

- (a) all Proponent and Proponent Team Member representatives shall strictly obey all instructions from the Region's representatives during the visit and shall comply with all site-specific security, safety or other types of requirements;
- (b) all Proponent and Proponent Team Member representatives shall, at all times, make reasonable efforts to avoid disturbing or infringing upon the privacy of any persons occupying, residing or working in close proximity to either the Early Works or any part of the Lands which are not accessible by the general public, as applicable;

- (c) the Proponent and Proponent Team Member representatives shall visit only those specific areas of either the Early Works or the Lands which are not accessible by the general public, as applicable, to which the Proponent has been granted access in the Contact Person's confirmation; and
- (d) the Proponent and Proponent Team Member representatives shall not take photographs or make videos without the prior written consent of the Contact Person. If photographs or videos are permitted by the Contact Person, they may be taken by the Proponent and Proponent Team Member representatives only in the specific areas of either the Early Works or the Lands which are not accessible by the general public, for which consent to photograph or video has been given.

(4) The Proponent acknowledges that because either the Early Works and the Lands which are not accessible by the general public, or portions thereof, may be in use, unforeseen circumstances can arise and the Region may, in its sole discretion, cancel or reschedule any Additional Visit, change the areas of access of any Additional Visit or otherwise change any Additional Visit on short notice or no notice to the Proponent and Proponent Team Members or their representatives.

#### 3.5.4 Additional Environmental and Geotechnical Investigations

(1) If the Region has decided to commission and provide to the Proponents further reports or results of environmental or geotechnical investigations in respect of the Lands, details of this are set out in the RFP Data Sheet.

### 3.6 **Changes to Proponents and Proponent Team Members**

(1) Proponents shall not change their shareholders (unless the Proponent is a company whose equity securities are listed on a recognized stock exchange), Proponent Team Members, proposed subcontractors, Key Personnel, or other parties identified in the Proponent's Prequalification Submissions (the "**Identified Proponent Parties**") without the prior written consent of the Region.

(1A) If, at any time prior to Commercial Close, and notwithstanding any other provision in this RFP, there is a change in Control of a Proponent or of one of its Proponent Team Members (the "**Acquiree**") by one of the other Proponents or one of the other Proponents' Proponent Team Members (the "**Acquirer**"):

- (i) the Acquiree shall be immediately disqualified from further participation in this RFP. In the event that a Proponent Team Member is the Acquiree, the affected Proponent may request a change of the Acquiree and the Region shall consider such request in its sole discretion in accordance with this RFP Section 3.6. In the event that such request to change the Proponent Team Member is rejected by the Region, the Region shall disqualify the Proponent from continuing in the RFP Process; and
- (ii) the Region in its sole discretion may allow the Acquirer to continue in the RFP Process; however, the Region's consent to continue may be subject to such terms and conditions as the Region may require in its sole discretion.

(2) Despite RFP Section 3.6(1), Proponents are permitted to request a change in their Identified Proponent Parties in accordance with this RFP Section 3.6.

(3) If, prior to the Submission Deadline, a Proponent wishes to request a change in its Identified Proponent Parties, including any proposed withdrawal from, addition to or substitution of an Identified Proponent Party (each, a “**Proposed Change in Identified Proponent Parties**”), the Proponent shall notify the Contact Person as soon as possible and, in any event, no later than seven (7) days prior to the Submission Deadline. That notification shall clearly identify the Proposed Change in Identified Proponent Parties (including, as applicable, any proposed additional or substitute Identified Proponent Party) and provide sufficient documentation to demonstrate that:

- (a) such Proposed Change in Identified Proponent Parties will not materially adversely affect the Proponent’s ability to submit a complete and compliant Proposal or impair the Proponent’s or the Identified Proponent Parties’ ability to perform their respective obligations under the Project Agreement;
- (b) in the event that the Proposed Change in Identified Proponent Parties is a proposed addition to or a substitution of one or more of the Identified Proponent Parties, the proposed additional or substitute party, or parties, as the case may be, would have met or exceeded any applicable criteria applied during the RFQ Process; and
- (c) in the event that proposed additional substitute Identified Proponent Party will be a Prime Team Member of the Proponent, confirmation that such proposed additional or substitute Identified Proponent Party is not involved in litigation or pending litigation (as such terms are identified in Section 3.9.3) with the Region or if such proposed additional or substitute Identified Proponent Party is involved in litigation or pending litigation (as such terms are defined in Section 3.9.3) with the region, approval from Council has been obtained.

(4) In response to a request in accordance with RFP Section 3.6(3), the Region may, in its sole discretion, provide the Proponents with instructions as to the type of information required by the Region to consider the Proposed Change in Identified Proponent Parties as well as the deadlines for submission of information that the Proponents must meet in order to have its request considered by the Region.

(5) Each Proponent shall provide any further documentation as may be reasonably requested by the Region to assess any Proposed Change in Identified Proponent Parties. If the Region, in its sole discretion, considers the Proposed Change in Identified Proponent Parties to be acceptable, the Region may consent to such Proposed Change in Identified Proponent Parties. The Region’s consent to such Proposed Change in Identified Proponent Parties, however, may be subject to such terms and conditions as the Region may, in its sole discretion require. Without limiting the generality of the foregoing:

- (a) in the event that the Proposed Change in Identified Proponent Parties is a proposed withdrawal of an Identified Proponent Party, then, unless otherwise permitted by the Region in writing, the Proponent shall propose a substitute party for review by the

Region in the manner described in RFP Section 3.6(3) and if such proposed substitute is not acceptable to the Region, the Proponent shall propose an alternate substitute for review by the Region in the same manner as the first proposed substitute; or

- (b) in the event that the Proposed Change in Identified Proponent Parties is a proposed substitute for an Identified Proponent Party, which, for clarity, must be proposed for review by the Region in the manner described in RFP Section 3.6(3), and if such proposed substitute is not acceptable to the Region, the Proponent may propose an alternate substitute for review by the Region in the same manner as the first proposed substitute.

(6) The Region may, in its sole discretion, disallow any actual or Proposed Change in Identified Proponent Parties.

(7) In the case of an actual change in the Identified Proponent Parties previously made by the Proponent without consent of the Region or a change proposed after the Submission Deadline, the Region may, in its sole discretion, disqualify the Proponent and terminate the Proponent's continued involvement in the RFP Process or allow the Proponent to continue under such terms and conditions as the Region, in its sole discretion, may require.

(8) If on or after the Submission Deadline and prior to Commercial Close, there is an actual or Proposed Change in Identified Proponent Parties or if there is a change in circumstances that may materially adversely affect an Identified Proponent Party in a way which could impair the Proponent's or the Identified Proponent Party's ability to perform their respective obligations under the Project Agreement, then the Proponent shall promptly notify the Region in writing by delivery or facsimile to the Contact Person. The Region may, in its sole discretion, refuse to accept a change in an Identified Proponent Party that occurs or is requested by the Proponent after the Submission Deadline and may, in its sole discretion, disqualify the Proponent from continuing in the RFP Process.

### **3.7 Addenda/Changes to the RFP Documents**

(1) The Region may, in its sole discretion, amend or supplement the RFP Documents prior to the Submission Deadline. The Region shall issue changes to the RFP Documents by Addenda only. No other statement, whether oral or written, made by the Region or the Region's Advisors, employees or representatives, including, for clarity, the Contact Person, or any other person, shall amend the RFP Documents. The approximate final date that the Region will issue an Addendum in respect of the Project Agreement is set out in the Timetable. The Region may issue other Addenda at any time.

(2) Each Proponent is solely responsible to ensure that it has received all Addenda issued by the Region prior to the Submission Deadline regardless of when the Addendum is issued. Proponents may, in writing, seek confirmation of the number of Addenda issued under this RFP from the Contact Person.

(3) The Region shall issue Addenda by placing them in the Data Room and notifying the Proponents' Representatives by e-mail that an Addendum has been placed in the Data Room.

(4) Any reference to any one or all of the RFP Documents in the RFP Documents includes any amendments to the RFP Documents made in accordance with this RFP Section 3.7.

### 3.8 Freedom of Information, Confidentiality and Copyright Matters

#### 3.8.1 Freedom of Information and Protection of Privacy Act and other Disclosure Requirements

(1) Proponents are advised that the Region may be required to disclose the RFP Documents and a part or parts of any Proposal pursuant to the *Freedom of Information and Protection of Privacy Act* (Ontario) (“**FIPPA**”) and the *Municipal Freedom of Information and Protection of Privacy Act* (Ontario) (“**MFIPPA**”).

(2) Proponents are also advised that FIPPA and MFIPPA may provide protection for confidential and proprietary business information. Proponents are strongly advised to consult their own legal Advisors as to the appropriate way in which confidential or proprietary business information should be marked as such in their Proposals. If the Proponent believes that all or part of its Proposal should be protected from release, only the relevant parts of its Proposal (not the entire Proposal) should be clearly marked as confidential. This will not automatically protect the Proposal from release but will assist the Region in making a determination on release if a request is made.

(3) Subject to the provisions of FIPPA and MFIPPA, the Region will use reasonable commercial efforts to safeguard the confidentiality of any information identified by the Proponent as confidential but shall not be liable in any way whatsoever to any Proponent or Proponent Team Member if such information is disclosed based on an order or decision of the Information and Privacy Commissioner or otherwise as required under Applicable Law.

(4) Proponents are advised that the Region is required to disclose the identity of the Proponent Team Members contained in the Proponent’s Proposal to the public under the Purchasing By-law.

#### 3.8.2 Confidentiality Agreements

(1) No later than five (5) days after a request by the Region, a Proponent shall cause each of its employees, representatives and Advisors and its Proponent Team Members and each of their employees, representatives and Advisors who are in receipt of Confidential Information, to execute and deliver to the Region a confidentiality agreement in a form prescribed by and with terms and conditions acceptable to the Region, in its sole discretion.

#### 3.8.3 Confidential Information

(1) For the purpose of this RFP Process, “**Confidential Information**” means all material, data, information or any item in any form, whether oral or written, including in electronic or hard-copy format, supplied by, obtained from or otherwise provided by the Region in connection with the RFP Process, the RFP Documents or the Project, whether supplied, obtained from or provided before or after the RFP Process.

(2) The Proponent agrees that all Confidential Information:



- (a) shall remain the sole property of the Region and it shall treat it as confidential;
- (b) shall not be used by the Proponent for any purpose other than developing and submitting a Proposal in response to this RFP Process or the performance of any subsequent agreement relating to the Project with the Region;
- (c) shall not be disclosed by the Proponent to any person who is not involved in the Proponents' preparation of its Proposal or the performance of any subsequent agreement relating to the Project with the Region, without prior written consent of the Region;
- (d) shall not be used in any way detrimental to the Region; and
- (e) if requested by the Region, all Confidential Information shall be returned by the Proponent to the Region no later than ten (10) days after that request.

(3) Each Proponent shall be responsible for any breach of the provisions of this RFP Section 3.8.3 by any person to whom it discloses the Confidential Information including, for greater clarity, the Proponent's employees, representatives and Advisors and the Proponent Team Members and their employees, representatives and Advisors. Each Proponent shall indemnify the Region and its related entities and each of their respective directors, officers, consultants, employees, agents and representatives and save each of them fully harmless from and against any and all loss, cost, damage, expense, fine, suit, claim, penalty, demand, action, obligation and liability of any kind or nature (including, without limitation, professional fees on a full indemnity basis) suffered or incurred by any of them arising as a result of or in connection with any breach of any of the provisions of this RFP Section 3.8.3 by the Proponent or by any person to whom the Proponent has disclosed the Confidential Information. Each Proponent agrees that the Region acts as trustee for each of its related entities and each of their respective directors, officers, consultants, employees, agents and representatives with respect to all rights contemplated hereunder arising in favour of a related entity or any of their respective directors, officers, consultants, employees, agents or representatives and that the Region has agreed to accept such trust and hold and enforce such rights on behalf of each related entity and each of their respective directors, officers, consultants, employees, agents and representatives.

(4) Each Proponent acknowledges and agrees that a breach of the provisions of this RFP Section 3.8.3 would cause the Region and its related entities to suffer loss that could not be adequately compensated by damages, and that the Region and any of its related entities may, in addition to any other remedy or relief, enforce any of the provisions of this RFP Section 3.8.3 upon application to a court of competent jurisdiction without proof of actual damage to the Region or any of its related entities.

(5) Notwithstanding anything else to the contrary in this RFP, the provisions of this RFP Section 3.8.3 shall survive any cancellation of this RFP Process and the conclusion of the RFP Process and, for greater clarity, shall be legally binding on all Prequalified Parties, whether or not they submit a Proposal.

(6) The confidentiality obligations of the Proponents shall not apply to any information which falls within the following exceptions:

- (a) information that is lawfully in the public domain at the time of first disclosure to the Proponent, or which, after disclosure to the Proponent, becomes part of the public domain other than by a breach of the Proponent's confidentiality obligations or by any act or fault of the Proponent;
- (b) information which was in the Proponent's possession prior to its disclosure to the Proponent by the Region, and provided that it was not acquired by the Proponent under an obligation of confidence; or
- (c) information which was lawfully obtained by the Proponent from a third party without restriction of disclosure, provided such third party was at the time of disclosure under no obligation of secrecy with respect to such information.

#### 3.8.4 Copyright and Use of Information in Proposals

(1) The Region's rights, as set out in this RFP Section 3.8.4, to the Proposal and all Proposal Information submitted by the Proponent during the RFP Process shall be granted to the Region as follows:

- (a) if a Design and Bid Fee is offered in accordance with RFP Section 10.3.2:
  - (i) for unsuccessful Proponents, upon payment of the Design and Bid Fee; and
  - (ii) for the Preferred Proponent, upon Commercial Close; or
- (b) if RFP Section 3.8.4(1)(a) does not apply, upon submission of the Proposal.

(2) Proponents shall not use or incorporate into their Proposals any concepts, products or processes which are subject to copyright, patents, trademarks or other intellectual property rights of third parties unless Proponents have, or will procure through licensing without cost to the Region, the right to use and employ such concepts, products and processes in and for the Project.

(3) All requirements, designs, documents, plans and information supplied by the Region to the Proponents in connection with this RFP are and shall remain the property of the Region. Upon request of the Region, all such designs, documents, plans and information (and any copies thereof in any format or medium created by or on behalf of a Proponent) must be returned to the Region.

(4) The Proponent shall grant to the Region a non-exclusive, perpetual, irrevocable, world-wide, fully paid and royalty free license (fully assignable without the consent of the Proponent and with the right to sub-license without the consent of the Proponent) to use any of the Proposal Information (the "**Proposal Information Licence**"). Without limiting the foregoing, the Proposal Information Licence includes the right to modify the Proposal Information, and, where applicable, to use it, or any modified form of it, anywhere in the world. Under no circumstances shall the Proponent, except Project Co (as defined in the Project Agreement) in relation to this Project, be liable to the Region or to any other person or entity for any damages, losses, costs, expenses, claims or actions whatsoever arising directly or indirectly from the use of the Proposal Information pursuant to the Proposal Information Licence.

- (5) For the purpose of this RFP Section 3.8.4, “**Proposal Information**” includes:
- (a) all information contained in a Proposal or which is disclosed by or through a Proponent to the Region during the evaluation of Proposals or during the process of executing any Project Agreement; and
  - (b) any and all ideas, concepts, products, alternatives, processes, recommendations and suggestions developed by or through a Proponent and revealed to or discovered by the Region, including any and all those which may be connected in any way to the preparation, submission, review or negotiation of any Proposal or the Project Agreement.

(6) Proponents shall ensure that all intellectual property rights associated with any and all of the Proposal Information (including copyright and moral rights but excluding patent rights) provide for and give the Region the rights set out in this RFP Section 3.8.4. It is expressly understood and agreed that any actual or purported restriction in the future on the ability of the Region to use any of the Proposal Information, or anything else obtained by or through Proponents, shall be absolutely null and void and unenforceable as against the Region and each of its Advisors, and that the provisions of this RFP Section 3.8.4 shall take precedence and govern.

### **3.9 Conflict of Interest, Ineligible Persons and Litigation**

#### **3.9.1 Conflict of Interest**

(1) Each Proponent and Proponent Team Member and each of their Advisors shall disclose in their Proposal Submission Form and the Proponent Team Member Declaration (in respect of Proponent Team Members), all perceived, potential and actual Conflict of Interest.

(2) If a Proponent, a Proponent Team Member or any of their respective Advisors, prior to or following submission of its Proposal, discovers any perceived, potential or actual Conflict of Interest, the Proponent shall promptly disclose the perceived, potential or actual Conflict of Interest to the Region in a written statement to the Contact Person.

(3) At the request of the Region, the Proponent shall provide the Region with the Proponent’s proposed means to mitigate and minimize to the greatest extent practicable any perceived, potential or actual Conflict of Interest. The Proponent shall submit any additional information to the Region that the Region considers necessary to properly assess the perceived, potential or actual Conflict of Interest.

(4) The Region may, at any time and in its sole and absolute discretion, exclude any Proponent Team Member, Subcontractor or Proponent Advisor on the grounds of Conflict of Interest.

(5) Without limiting the generality of RFP Sections 3.9.1(4) or (6), the Region may, at any time and in its sole and absolute discretion, require the Proponent, Proponent Team Member, Subcontractor or a Proponent’s Advisor to substitute a new person or entity for the person or entity giving rise to the Conflict of Interest.

(6) The Region may, in its sole and absolute discretion, waive any and all perceived, potential or actual Conflicts of Interest of Proponents or a Proponent Team Members, a Subcontractor, or any of their respective Advisors. A waiver may be upon such terms and conditions as the Region, in its sole discretion, requires to satisfy itself that the Conflict of Interest has been appropriately managed, mitigated and minimized, including requiring the Proponent to put into place such policies, procedures, measures and other safeguards as may be required by and be acceptable to the Region, in its sole and absolute discretion, to manage, mitigate and minimize the impact of such Conflict of Interest.

(7) For the purposes of this RFP Process “**Conflict of Interest**” includes any situation or circumstance (including in connection with this RFP) where a Proponent or any Proponent Team Member or Proponent Advisor:

- (a) has other commitments, relationships contractual or otherwise, financial interests or involvement in ongoing litigation or pending litigation that:
  - (i) could or could be seen to exercise an improper influence over the objective, unbiased and impartial exercise of independent judgment by any personnel of the Region (including any member of Council) or its Advisors; or
  - (ii) could or could be seen to compromise, impair or be incompatible with the effective performance of a Proponent's obligations under the Project Agreement if that Proponent was determined to be the Preferred Proponent under the RFP Process;
- (b) has contractual or other obligations to the Region that could or could be seen to have been compromised or otherwise impaired as a result of its participation in the RFP Process or the Project; or
- (c) has knowledge of confidential information (other than Confidential Information disclosed by the Region in the normal course of the RFP Process) of strategic and/or material relevance to the RFP Process or to the Project that is not available to other Proponents and that could or could be seen to give the Proponent an unfair competitive advantage.

(8) The final determination of whether a perceived, potential or actual Conflict of Interest exists shall be made by the Region in its sole and absolute discretion.

### 3.9.2 Ineligible Persons

(1) As a result of their involvement in the Project, the persons named in the RFP Data Sheet as “**Ineligible Persons**”, their employees, their former employees involved in respect of the Project, and any of their subcontractors, advisors, consultants or representatives engaged in respect of this Project and, subject to RFP Sections 3.9.2(3) and 3.9.2(4) any person controlled by, that controls or that is under common control with the Ineligible Persons (each an “**Ineligible Person's Affiliate**”) are not eligible to participate as a

Proponent Team Member, Advisor to the Proponent, Financial Services Provider or Advisor to a Financial Services Provider.

(2) The Region may on written notice to the Proponents amend the Ineligible Persons list in the RFP Data Sheet from time to time during the RFP Process.

(3) An Ineligible Person's Affiliate may be eligible to participate as a Proponent Team Member, Advisor to the Proponent, Financial Services Provider or Advisor to a Financial Services Provider only after it has obtained a written consent from the Region permitting it to participate as a Proponent Team Member, Advisor to the Proponent, Financial Services Provider or Advisor to a Financial Services Provider. To obtain consent for an Ineligible Person's Affiliate to participate as a Proponent Team Member, Advisor to the Proponent, Financial Services Provider or Advisor to a Financial Services Provider, the Proponent must submit a request for consent to the Contact Person that includes the following information:

- (a) the full legal name of the Ineligible Person's Affiliate that the Proponent wishes to include on its team or as a Proponent Team Member, Advisor to the Proponent, Financial Services Provider or Advisor to a Financial Services Provider;
- (b) information regarding the Ineligible Person's Affiliate's relationship to the Ineligible Person; and
- (c) a description of the policies and procedures that will be put in place to manage, mitigate or minimize the impact of any potential Conflict of Interest.

(4) Upon the Contact Person's receipt of a Proponent's properly completed request for consent in accordance with RFP Section 3.9.2(3), the Region shall, in its sole and absolute discretion, make a determination as to whether it considers there to be an actual, perceived or potential Conflict of Interest and whether the impact of such actual perceived or potential Conflict of Interest can be appropriately managed, mitigated or minimized. The Proponent shall be notified of the Region's consent by means of a consent letter setting out the nature of the consent, and the management, mitigation or minimization measures required as a condition of consent. If the Ineligible Person's Affiliate is determined by the Region in its sole and absolute discretion to have a Conflict of Interest, the impact of which cannot be properly managed, mitigated or minimized, the Region shall add the Ineligible Person's Affiliate to the Ineligible Persons list by Addendum.

### 3.9.3 Prime Team Members that are in Litigation or Pending Litigation with the Region

(1) Section 40 of the Purchasing By-law shall apply to Proposals under this RFP, which tenders and proposals are referred to in this RFP Section 3.9.3 as "bids".

(2) The Region will not open and consider bids received from a Proponent if the Region is in litigation or pending litigation (as such terms are defined in the Purchasing By-law) with any of the Proponent's Prime Team Members, unless approval allowing such is obtained by the Proponent's Prime Team Member from Council prior to the close of the bid, being the Submission Deadline.

(3) The Region maintains a list, that is updated from time to time, that sets out persons that are in litigation or pending litigation with the Region pursuant to the Purchasing By-law. If the Proponent wishes to determine if any of its Prime Team Members is in litigation or pending litigation with the Region pursuant to the Purchasing By-law, then it must contact the Contact Person as provided in RFP Section 3.2.1(1). A copy of the current list is attached as Appendix A to Schedule 1 of this RFP.

(4) In order to obtain approval from Council to consider a bid under this RFP Section 3.9.3, the applicable Prime Team Member of the Proponent, before the close of the bid, being the Submission Deadline, must contact the Contact Person under RFP Section 3.2.1(1) in writing at least one (1) week before the next regularly scheduled Council meeting, setting out the request and any grounds to support the request. The request will then be presented to Council for its consideration.

(5) Council will review a request under RFP Section 3.9.3(4), and, in its sole and absolute discretion, Council may (or may not) provide approval for the Region to consider a bid.

(6) Proponents are advised that Council will not grant approval to the Region to open and consider a Proposal under this RFP Section 3.9.3(4) after the Submission Deadline.

### **3.10 Proponent Costs**

(1) The Proponent and the Proponent Team Members shall bear all costs and expenses incurred by them relating to any aspect of their participation in this RFP Process, including all costs and expenses related to their involvement in:

- (a) the preparation, presentation and submission of its Proposal;
- (b) attendance at any Proponents Meeting, Commercially Confidential Meeting or any other meeting with the Region;
- (c) due diligence and information gathering processes;
- (d) Scheduled Visits or Additional Visits;
- (e) preparation of responses to questions or requests for information from the Region;
- (f) preparation of the Proponent's own RFIs during the clarification process; and
- (g) negotiations.

(2) Except as explicitly provided in RFP Sections 10.3.2 and 10.4(3), if applicable, the Region is not liable to pay any costs or expenses of any Proponent or to reimburse or compensate a Proponent under any circumstances, regardless of the outcome of the RFP Process.

(3) By submitting a Proposal, each Proponent hereby irrevocably and unconditionally agrees with the foregoing Sections 3.10(1) and 3.10(2) and waives any claim against the Region relating to any costs and expenses it incurs.

### **3.11 Insurance and Workers Compensation**

#### **3.11.1 Insurance Required during the RFP Process**

(1) During the RFP Process, each Proponent is required to obtain, and to cause all Proponent Team Members and other persons listed below to obtain, and at all times keep and maintain in force, the insurance as set out in RFP Sections 3.11.1(1)(a) and (b), whenever the Proponent, a Proponent Team Member, or any of their respective directors, officers, employees, consultants, Advisors, agents or representatives are present at the Lands, Existing System Infrastructure or at any facilities or premises of the Region for any purpose whatsoever:

- (a) Commercial/Comprehensive General Liability insurance, having an inclusive limit of not less than \$5,000,000 for each occurrence or accident and covering all sums which the Proponent, a Proponent Team Member or any other persons listed above may become legally obligated to pay for damages as a result of bodily injury (including death at any time resulting there from) sustained by any person or persons or because of damage to, destruction of, or loss of use of property caused by an occurrence or accident arising out of any operations or activities carried out in connection with this RFP or RFP Process. The policy or policies shall include as insureds or additional insureds the Region and its directors, officers, employees, members, officials, consultants and agents), and an endorsement specifying that the policy is primary and without right of contribution from any insurance otherwise maintained by the Region; and
- (b) Motor Vehicle Liability insurance, in the amount of \$2,000,000 per accident, for vehicles used by Proponents or Proponent Team Members (or their respective directors, officers, employees, consultants, Advisors and agents) while on or at the Lands, Existing System Infrastructure or on or at any facilities or premises of the Region.

(2) As a condition of allowing access to the Lands, Existing System Infrastructure or to the facilities or premises of the Region, the Region reserves the right to require Proponents to provide evidence acceptable to the Region that the insurance required by RFP Sections 3.11.1(1)(a) and (b) is in place.

(3) If a Proponent proposes to perform any investigations at the Lands or Existing System Infrastructure, the risk related to which may not be fully insured under the above policies, the Region may, in its sole discretion, require the Proponent, at its own cost and expense, to obtain insurance additional to that specified in RFP Sections 3.11.1(1)(a) and (b).

(4) All insurance policies required to be obtained by Proponents shall provide that the insurance shall not be cancelled, reduced, restricted, modified or changed in any way without the insurer giving at least thirty (30) days prior written notice to the Region.

### 3.11.2 Workplace Safety during the RFP Process

(1) As a condition of allowing access to the Lands, Existing System Infrastructure or any facilities or premises of the Region the Region may, in its sole discretion, require Proponents to provide evidence acceptable to the Region that the Proponent and its Proponent Team Members are registered with the Workplace Safety Insurance Board of Ontario, if such registration is required under Applicable Law, or, if such registration is not required under Applicable Law, to provide evidence acceptable to it that the Proponent and its Proponent Team Members have employer's liability insurance in amounts and on terms and conditions acceptable to it.

### 3.11.3 Infrastructure Ontario Construction Insurance Program

(1) The Region has determined that certain construction insurance to be provided during the Construction Period under the Project Agreement will be obtained under the Infrastructure Ontario Construction Insurance Program (“**IOCIP**”). Please consult the IOCIP user guide (“**User Guide**”) posted as Background Information. The User Guide includes the form of confidentiality agreement that must be entered into between a Proponent and the IOCIP Broker of Record and the forms of applications to be completed by a Proponent and submitted to the IOCIP Broker of Record for the Construction Period construction insurance.

## **SECTION 4 – PROPOSAL FORM AND CONTENT REQUIREMENTS**

### **4.1 Format and Content of the Proposal**

(1) Proponents shall submit Proposals organized in accordance with, and in the format set out in Schedules 3 to 6 to this RFP.

(2) Each Proponent must submit a 14 Vehicle Submission. In addition to the 14 Vehicle Submission, Proponents may elect to also submit a 16 Vehicle Submission.

(3) Proponents shall submit Proposals in three (3) parts as follows:

- (a) Part A – Proposal Submission Form (Schedule 4 to this RFP) and a Proponent Team Member Declaration (Schedule 5 to this RFP) and Certificate of Officer (Schedule 5A to this RFP) for each Proponent Team Member;
- (b) Part B – Technical Submission consisting of:
  - (i) the Technical Submission Information;
  - (ii) the Innovation Submissions (Technical), if any;



- (c) Part C – Financial Submission consisting of:
- (i) Financial Submission for the 14 Vehicle Submission (the “**14 Vehicle Financial Submission**”) consisting of:
    - (A) Price Submission Form (Schedule 6A), and the Separate Price Proposals (including Part IV of Schedule 6 to this RFP).
    - (B) Financial Submission Information relating to the 14 Vehicle initial fleet; and
    - (C) the Innovation Submissions (Financial), if any.
  - (ii) If the Proponent is also making a 16 Vehicle Submission, a Financial Submission for the 16 Vehicle Submission (the “**16 Vehicle Financial Submission**”) consisting of:
    - (A) Price Submission Form (Schedule 6B) and the Separate Price Proposals (including Part V of Schedule 6 to this RFP);
    - (B) Financial Submission Information relating to the 16 Vehicle initial fleet; and
    - (C) The Innovation Submissions (Financial), if any.
- (4) Proponents shall submit each of Parts A, B and C of their Proposals in accordance with the requirements and instructions set out in Schedules 3 to 6 to this RFP.
- (5) Note that the Certificate of Officer in the Form of Schedule 5A must be completed and filed with the Contact Person by each Proponent Team Member at each and every one of the following times:
- (a) within 30 days of the issue of this RFP,
  - (b) by the Submission Deadline as part of the Proposal,
  - (c) at the time of the Commercial Close, and
  - (d) immediately upon the addition of a Proponent Team Member or any change of the information of a Proponent Team Member.

## **SECTION 5 – SUBMISSION, WITHDRAWAL, MODIFICATION OF THE PROPOSAL AND LENDER REQUIREMENTS**

### **5.1 Submission of Proposal**

(1) Each Proponent shall submit its Proposal before the Submission Deadline. For the purposes of the RFP Process, the determination of whether the Proposal is submitted before the Submission Deadline shall be based on the time and date stamp the Proponent must ensure it receives: (a) from the Region, in the case of all Proposal submissions other than the Financial Submission; and (b) from Infrastructure Ontario acting on behalf of the Region, in the case of the Financial Submission, each at the addresses for submission set out in the RFP Data Sheet. Any portion of the Proposal received after the Submission Deadline, in each case as documented by the time and date stamp, will result in the Proponent's entire Proposal being returned unopened to the sender.

(2) Proponents shall submit their Proposals by sending them by pre-paid courier or hand delivery to the Region and IO, as applicable at the addresses set out in the RFP Data Sheet. It is the sole responsibility of the Proponent to ensure that the Proposal is received by the Region and IO, as applicable prior to the Submission Deadline and to ensure it receives a date and time stamp receipt from the Region and IO, as applicable confirming the timely delivery of the Proposal. Proposals delivered by electronic mail will not be accepted.

(3) Proponents shall provide such number and type of hard and electronic copies of Proposals as specified in Schedule 3, Part 4 to this RFP.

(4) If there is any difference whatsoever between the electronic copy of a Proposal and the original hard copy of the Proposal, the original hard copy of the Proposal shall govern.

## **5.2 Withdrawal of Proposals**

(1) A Proponent may withdraw its Proposal only by giving written notice before the Submission Deadline to the Contact Person. The Region will return, unopened, a Proposal that has been withdrawn in accordance with this RFP Section 5.2.

## **5.3 Amendment of Proposal**

(1) Except as provided in RFP Section 5.5, Proponents may amend their Proposals after submission but only if the Proposal is resubmitted before the Submission Deadline in accordance with the following:

- (a) the Proponent shall withdraw its original Proposal by notifying the Contact Person in writing before the Submission Deadline; and
- (b) the Proponent shall submit a revised replacement Proposal in accordance with the RFP Documents and before the Submission Deadline in accordance with the requirements of RFP Section 5.1.

## **5.4 Proposal Irrevocability**

(1) Except as provided in RFP Sections 5.6(1) and 5.6(3) and subject to RFP Section 5.5 and the Proponent's right to withdraw a Proposal before the Submission Deadline, the Proposals shall be irrevocable

and shall remain in effect and open for acceptance for one hundred and eighty (180) days after the Submission Deadline (the “**Proposal Validity Period**”) or until Financial Close, whichever occurs first.

## 5.5 Credit Spreads and Lenders Commitment Letter

(1)

- (a) After the Submission Deadline, the Indicative Credit Spread Benchmarks (if applicable) and, subject to RFP Section 5.5(2)(e), the election pursuant to RFP Section 5.5(1)(b) shall not change.
- (b) On the Submission Deadline, each Proponent shall identify in writing to the Region by way of an election:
  - (i) which form(s) of lending facility and/or debt financing instruments, if any, in respect of which it shall participate in the First Credit Spread Lock-in Date (the “**Credit Spread Election Facilities**”); and
  - (ii) which form(s) of lending facility and/or debt financing instruments, if any, in respect of which it shall hold, subject to RFP Section 5.5(3.1), Credit Spreads for from the Submission Deadline to Financial Close (the “**Held Pricing Facilities**”),

and such information shall be reflected in the Financial Model.

- (c) In respect of the Credit Spread Election Facilities, a Proponent shall, no later than ten (10) Business Days prior to the Submission Deadline and using the process set out in Section 3.2.2 of the RFP, provide to the Region for its review and acceptance, in its sole discretion, a formula in writing describing how its Credit Spreads shall move upwards or downwards consistent with the movement in the Indicative Credit Spread Benchmarks and the Region shall confirm in writing to such Proponent whether the Region will accept such formula for the purposes of this RFP Section 5.5. The Region shall confirm whether or not it will accept the formula submitted by the Proponent no later than five (5) Business Days prior to the Submission Deadline. Any formula that is accepted by the Region may be used by the Proponent and the Proponent’s Lenders to explain (A) why the movement, if any, in the Indicative Credit Spread Benchmarks is or is not sufficient to require a change to the Credit Spreads, and (B) how the change, or lack thereof, to the Credit Spreads is consistent with the movement, if any, of the Indicative Credit Spread Benchmarks. Where the formula is not accepted, the provisions of this RFP Section 5.5 shall apply as if any such formula had not been provided to the Region by the Proponent.

(2) Each Proponent that has provided notification pursuant to RFP Section 5.5(1)(b)(i) shall, prior to identification of the Preferred Proponent under Section 8.1 and before 12:00:00 p.m. on the first Credit Spread lock-in date established by the Region in accordance with this RFP (the “**First Credit Spread**”

**Lock-in Date**”) confirm or change, in respect of the Credit Spread Election Facilities, the Credit Spreads set out in the Proponent's Financial Submission, in accordance with the following process:

- (a) the Region shall provide at least seven (7) calendar days prior written notice to the Proponents of the Region's establishment of the First Credit Spread Lock-in Date;
- (b) the Proponent shall, no later than the First Credit Spread Lock-in Date, advise the Region of either a confirmation or change to its Credit Spreads in accordance with the following:
  - (i) if there has been upward or downward movement in the Indicative Credit Spread Benchmarks sufficient to require a change to its Credit Spreads on or before the First Credit Spread Lock-in Date, the Proponent shall change its Credit Spreads by submitting to the Region:
    - (A) an updated Financial Model that has been,
      - (i) revised only to reflect the Proponent's changes to its Credit Spreads; and
      - (ii) optimized in accordance with the procedure outlined in the Financial Submission Requirements found in Section 6 of Section B of Part 2 of Schedule 3 to this RFP.

For greater clarity, no changes shall be made to the Financial Model other than to change the Credit Spreads and any resulting changes from the re-optimization of the Financial Model to reflect the revised Credit Spreads;

- (B) amended Price Forms (Schedule 6A and, if applicable, Schedule 6B) and Cost of Work Forms (Schedule 6A and, if applicable, Schedule 6B) revised only to reflect the Proponent's changes to its Credit Spreads;
- (C) a written explanation and, where applicable, calculations from the Proponent demonstrating:
  - (i) why the upward or downward movement in the Indicative Credit Spread Benchmarks from the Submission Deadline to the First Credit Spread Lock-in Date is sufficient to require a change to the Credit Spreads; and
  - (ii) that the change to the Credit Spreads is consistent with the movement of the Indicative Credit Spread Benchmarks of the Proponent from the Submission Deadline to the First Credit Spread Lock-in Date.

For greater clarity, the written explanation shall be supported by facts, justifications and analysis of relevant factors such as new issue spreads, credit default swap spreads, and/or other publicly verifiable spread indices as applicable;

- (D) a written explanation and, where applicable, calculations prepared and executed by the Proponent's Lenders demonstrating:
  - (i) why the upward or downward movement in the Indicative Credit Spread Benchmarks from the Submission Deadline to the First Credit Spread Lock-in Date is sufficient to require a change to the Credit Spreads; and
  - (ii) that the change to the Credit Spreads is consistent with the movement of the Indicative Credit Spread Benchmarks of the Proponent from the Submission Deadline to the First Credit Spread Lock-in Date.

For greater clarity, the written explanation shall be supported by facts, justifications and analysis of relevant factors such as new issue spreads, credit default swap spreads, and/or other publicly verifiable spread indices as applicable;

- (E) written confirmation that the Proponent has not changed any variables in the Financial Model or made any revisions to the Financial Submission except for the Credit Spreads and any resulting changes from the re-optimization of the Financial Model to reflect the revised Credit Spreads; and
- (F) if applicable and exclusively as a result of a change of Credit Spreads, any revision in NPV calculation, total nominal project cost and a schedule of Monthly Service Payment amounts reflecting the financial effect of the Innovation Submission(s) and the Separate Price(s);
- (ii) if there has not been upward or downward movement in the Indicative Credit Spread Benchmarks sufficient to require a change to its Credit Spreads, on or before the First Credit Spread Lock-in Date, the Proponent shall not change its Credit Spreads and shall submit to the Region:
  - (A) a written explanation and, where applicable, calculations from the Proponent demonstrating:

- (i) why the movement, if any, in the Indicative Credit Spread Benchmarks from the Submission Deadline to the First Credit Spread Lock-in Date is not sufficient to require a change to the Credit Spreads; and
- (ii) that maintaining the Credit Spreads as submitted on the Submission Deadline is consistent with the movement, if any, in the Indicative Credit Spread Benchmarks of the Proponent from the Submission Deadline to the First Credit Spread Lock-in Date.

For greater clarity, the written explanation shall be supported by facts, justifications and analysis of relevant factors such as new issue spreads, credit default swap spreads, and/or other publicly verifiable spread indices as applicable; and

- (B) a written explanation and, where applicable, calculations prepared and executed by the Proponent's Lenders demonstrating:
  - (i) why the movement, if any, in the Indicative Credit Spread Benchmarks from the Submission Deadline to the First Credit Spread Lock-in Date is not sufficient to require a change to the Credit Spreads; and
  - (ii) that maintaining the Credit Spreads as submitted on the Submission Deadline is consistent with the movement, if any, in the Indicative Credit Spread Benchmarks of the Proponent from the Submission Deadline to the First Credit Spread Lock-in Date.

For greater clarity, the written explanation shall be supported by facts, justifications and analysis of relevant factors such as new issue spreads, credit default swap spreads, and/or other publicly verifiable spread indices, as applicable;

- (iii) as of the First Credit Spread Lock-in Date, but subject to RFP Sections 5.5(3) and 5.6(2), the revised or unchanged Credit Spreads, as applicable, and, if applicable, any re-optimization of its Financial Model and any revisions to its Financial Submission provided by the Proponent shall apply until the expiry of the Proposal Validity Period.
- (c) if a Proponent fails to confirm or submit a change to the Credit Spreads in accordance with RFP Section 5.5(2) on or before the First Credit Spread Lock-in Date, the Region may:

- (i) deem that the Proponent has amended its Credit Spreads to be consistent with the movement of the Indicative Credit Spread Benchmarks of the Proponent from the Submission Deadline to the First Credit Spread Lock-in Date and require the Proponent to submit the information set out in RFP Section 5.5(2)(b)(i), failing which the Region may deem the Proposal materially non-compliant; and/or
  - (ii) deem that the Proponent has made no changes to its Credit Spreads subsequent to the Submission Deadline and require the Proponent to submit the information set out in RFP Section 5.5(2)(b)(ii), failing which the Region may deem the Proposal materially non-compliant; and/or
  - (iii) deem the Proposal materially non-compliant;
- (d) if, in the sole discretion of the Region, the Proponent's amendment or confirmation of the Credit Spreads under RFP Section 5.5(2) is not consistent with the Indicative Credit Spread Benchmarks, the Region may:
- (i) require the Proponent to re-submit pursuant to RFP Section 5.5(2)(b); and/or
  - (ii) consider this inconsistency in the evaluation and scoring of the Proponent's Proposal; and/or
  - (iii) decline to select the Proponent as the Preferred Proponent;
- (e) on the First Credit Spread Lock-in Date, each Proponent that has confirmed or changed its Credit Spreads in respect of the Credit Spread Election Facilities in accordance with RFP Section 5.5(2) shall identify in writing to the Region by way of an election that, if selected as the Preferred Proponent:
- (i) which, if any, Credit Spread Election Facilities it shall participate in respect of the Final Credit Spread Lock-in Date (the “**Final Credit Spread Election Facilities**”); and
  - (ii) which, if any, Credit Spread Election Facilities it shall hold Credit Spreads for from the First Credit Spread Lock-in Date to Financial Close.

(3) If the Preferred Proponent has provided notification pursuant to RFP Section 5.5(2)(e)(i), the Preferred Proponent shall, prior to Commercial Close and no later than the date established by the Region as the final Credit Spread lock-in date in accordance with this RFP (the “**Final Credit Spread Lock-in Date**”), further confirm or change, in respect of the Final Credit Spread Election Facilities, the Credit Spreads in its Financial Submission, and as submitted pursuant to RFP Section 5.5(2) in accordance with the following process:

- 
- (a) the Region shall provide at least one (1) Business Day prior written notice to the Preferred Proponent of the Region's establishment of the Final Credit Spread Lock-in Date and provided the Region may revoke its notice and issue a replacement notice in its sole discretion;
- (b) the Preferred Proponent shall, no later than the Final Credit Spread Lock-in Date, advise the Region of either a confirmation or change to its Credit Spreads in accordance with the following:
- (i) if there has been upward or downward movement in the Indicative Credit Spread Benchmarks sufficient to require a change to its Credit Spreads on or before the Final Credit Spread Lock-in Date, the Preferred Proponent shall change its Credit Spreads by submitting to the Region:
- (A) an updated Financial Model that has been,
- (i) revised only to reflect the Preferred Proponent's changes to its Credit Spreads; and
- (ii) optimized in accordance with the procedure outlined in the Financial Submission Requirements found in Section 6 of Part B of Part 2 of Schedule 3 to this RFP.
- For greater clarity, no changes shall be made to the Financial Model other than to change the Credit Spreads and any resulting changes from the re-optimization of the Financial Model to reflect the revised Credit Spreads;
- (B) amended Price Forms (Schedule 6A and, if applicable, Schedule 6B) and Cost of Work Forms (Schedule 6A and, if applicable, Schedule 6B) revised only to reflect the Preferred Proponent's changes to its Credit Spreads;
- (C) a written explanation and, where applicable, calculations from the Preferred Proponent demonstrating:
- (i) why the upward or downward movement in the Indicative Credit Spread Benchmarks from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date is sufficient to require a change to the Credit Spreads; and
- (ii) that the change to the Credit Spreads is consistent with the movement of the Indicative Credit Spread Benchmarks of the Preferred Proponent from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date.



For greater clarity, the written explanation shall be supported by facts, justifications and analysis of relevant factors such as new issue spreads, credit default swap spreads, and/or other publicly verifiable spread indices as applicable;

- (D) a written explanation and, where applicable, calculations prepared and executed by the Preferred Proponent's Lenders demonstrating:
  - (i) why the upward or downward movement in the Indicative Credit Spread Benchmarks from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date is sufficient to require a change to the Credit Spreads; and
  - (ii) that the change to the Credit Spreads is consistent with the movement of the Indicative Credit Spread Benchmarks of the Preferred Proponent from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date.

For greater clarity, the written explanation shall be supported by facts, justifications and analysis of relevant factors such as new issue spreads, credit default swap spreads, and/or other publicly verifiable spread indices as applicable;

- (E) written confirmation that the Preferred Proponent has not changed any variables in the Financial Model or made any revisions to the Financial Submission except for the Credit Spreads and any resulting changes from the re-optimization of the Financial Model to reflect the revised Credit Spreads; and
  - (F) if applicable and exclusively as a result of a change of Credit Spreads, any revision in NPV calculation, total nominal project cost and a schedule of Monthly Service Payments reflecting the financial effect of the Innovation Submission(s) and the Separate Price(s);
- (ii) if there has not been upward or downward movement in the Indicative Credit Spread Benchmarks sufficient to require a change to its Credit Spreads, on or before the Final Credit Spread Lock-in Date, the Preferred Proponent shall not change its Credit Spreads and shall submit to the Region:
    - (A) a written explanation and, where applicable, calculations from the Preferred Proponent demonstrating:

- (i) why the movement, if any, in the Indicative Credit Spread Benchmarks from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date is not sufficient to require a change to the Credit Spreads; and
- (ii) that maintaining the Credit Spreads as submitted on the First Credit Spread Lock-in Date is consistent with the movement, if any, in the Indicative Credit Spread Benchmarks of the Preferred Proponent from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date.

For greater clarity, the written explanation shall be supported by facts, justifications and analysis of relevant factors such as new issue spreads, credit default swap spreads, and/or other publicly verifiable spread indices as applicable; and

- (B) a written explanation and, where applicable, calculations prepared and executed by the Preferred Proponent's Lenders demonstrating:
  - (i) why the movement, if any, in the Indicative Credit Spread Benchmarks from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date is not sufficient to require a change to the Credit Spreads; and
  - (ii) that maintaining the Credit Spreads as submitted on the First Credit Spread Lock-in Date is consistent with the movement, if any, in the Indicative Credit Spread Benchmarks of the Preferred Proponent from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date.

For greater clarity, the written explanation shall be supported by facts, justifications and analysis of relevant factors such as new issue spreads, credit default swap spreads, and/or other publicly verifiable spread indices, as applicable; and

- (iii) as of the Final Credit Spread Lock-in Date, but subject to RFP Section 5.7(2), the revised or unchanged Credit Spreads, as applicable, and, if applicable, any re-optimization of its Financial Model and any revisions to its Financial Submission provided by the Preferred Proponent shall apply until Financial Close; and

- (c) if the Preferred Proponent fails to confirm or submit a change to the Credit Spreads in accordance with RFP Section 5.5(3) on or before the Final Credit Spread Lock-in Date, the Region may:
- (i) deem that the Preferred Proponent has amended its Credit Spreads:
    - (A) consistent with the movement of the Indicative Credit Spread Benchmarks of the Preferred Proponent from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date; and/or
    - (B) in the case of bonds, to reflect the Clearing Spread set out in RFP Section 5.5(4),and require the Proponent to submit the information set out in RFP Section 5.5(3)(b)(i) and/or RFP Section 5.5(4); and/or
  - (ii) deem that the Preferred Proponent has made no changes to its Credit Spreads subsequent to the First Credit Spread Lock-in Date and require the Preferred Proponent to submit the explanations set out in RFP Section 5.5(3)(b)(ii).

(3.1) Each Proponent that has provided notification under RFP Section 5.5(1)(b)(ii) or RFP Section 5.5(1)(b)(i) that it intends to provide, respectively, Held Pricing Facilities or Credit Spread Election Facilities may, on the First Credit Spread Lock-in Date only, as applicable (i) reduce the Credit Spreads set out in the Proponent's Financial Submission relating to the Held Pricing Facilities (or any of them), or (ii) redesignate the Credit Spread Election Facilities (or any of them) as Held Pricing Facilities conditional upon the redesignation resulting in a reduction of the Credit Spreads applicable thereto from those set out in the Proponent's Financial Submission, and, in each case, shall submit to the Region on the First Credit Spread Lock-in Date:

- (a) the decreased Credit Spreads for each of the affected Held Pricing Facilities or Credit Spread Election Facilities and an unconditional confirmation that the decreased Credit Spreads will remain in effect for the balance of the Proposal Validity Period with respect to the affected Held Pricing Facilities or Credit Spread Election Facilities;
- (b) an updated Financial Model that has been,
  - (i) revised only to reflect the Proponent's decreases to its Credit Spreads; and
  - (ii) optimized in accordance with the procedure outlined in the Financial Submission Requirements found in Section 6 of Part B of Part 2 of Schedule 3 to this RFP.

For greater clarity, no changes shall be made to the Financial Model other than to decrease the Credit Spreads and any resulting changes from the re-optimization of the Financial Model to reflect the decreased Credit Spreads;

- (c) amended Price Form (Schedule 6A and, if applicable, Schedule 6B) and Cost of Work Forms (Schedule 6A and, if applicable, Schedule 6B) revised only to reflect the Proponent's decrease(s) to its Credit Spreads;
- (d) written confirmation that the Proponent has not changed any variables in the Financial Model or made any revisions to the Financial Submission except for the decrease(s) to the Credit Spreads and any resulting changes from the re-optimization of the Financial Model to reflect the decreased Credit Spreads; and
- (e) if applicable and exclusively as a result of the decrease(s) to the Credit Spreads, any revision in NPV calculation, total nominal project cost and a schedule of Monthly Service Payments reflecting the financial effect of the Innovation Submission(s) and the Separate Price(s).

(3.2) The Region will evaluate the reasonableness of the Credit Spreads for the Credit Spread Election Facilities submitted by the Proponent and as priced at date of submission of Proposals. If the Region, acting in its sole discretion, does not find such Credit Spreads to be reasonable, the Region may:

- (a) either at the First Credit Spread Lock-in Date or at the Final Credit Spread Lock-in Date, as the case may be, deem that the Proponent has amended such Credit Spreads to be consistent with the movement of the Indicative Credit Spread Benchmarks of the Proponent from the Submission Deadline to the First Credit Spread Lock-In Date and/or from the First Credit Spread Lock-in Date to the Final Credit Spread Lock-in Date; provided, that, if the Region exercises its rights under this Section 5.5(3.2)(a), any deemed amendments to the Credit Spreads shall be equal to the change in the Indicative Credit Spread Benchmarks over the applicable period of time; or
- (b) no later than the identification of Preferred Proponent, deem the Proposal materially non-compliant.

(4) The Preferred Proponent on its own behalf and on behalf of its Lenders (including but not limited to underwriters, mandated lead arrangers and arrangers) acknowledge and agree that if, on the Final Credit Spread Lock-In Date:

- (a) The Clearing Spread for the bonds payable by the Preferred Proponent is less than the Credit Spread derived using Indicative Credit Spread Benchmarks, the full benefit of such lower Clearing Spread will be passed through to the Region. This Clearing Spread will be reflected in the reduction of the Monthly Service Payment payable by the Region as set out in the Financial Model submitted by

the Preferred Proponent prior to Financial Close using the optimization procedure set out in the RFP Schedule 3 Part 2 Part B Section 6.0.

- (b) The Clearing Spread for the bonds payable by the Preferred Proponent is higher than the Credit Spread derived using the Indicative Credit Spread Benchmarks, then the Lenders will be required to provide to the Region an explanation for such variance between the Clearing Spread and the Credit Spread derived using the Indicative Credit Spread Benchmarks described herein in this section of the RFP, supported by facts, justifications and analysis of relevant factors. Only if such explanation is accepted by the Region, acting in its sole discretion, then such higher Credit Spread will be reflected in the Monthly Service Payment payable by the Region as set out in the Financial Model submitted by the Preferred Proponent prior to Financial Close using the optimization procedure set out in the RFP Schedule 3 Part 2 Part B Section 6.0. If such explanation is not accepted by the Region, acting in its sole discretion, may exercise its rights set out in RFP Section 5.5(6) without limiting any other rights under this RFP.
- (c) To provide complete transparency, between the time of selection of the Preferred Proponent and targeted Financial Close, the Preferred Proponent and the Lenders will provide periodic updates to the satisfaction of the Region in respect of (i) the expected Clearing Spread for the bonds using the Indicative Credit Spread Benchmarks process pursuant to this RFP and (ii) any variances between the expected Clearing Spread for the bonds and the Credit Spread derived using the Indicative Credit Spread Benchmarks process pursuant to this RFP.

(5) In a written notice given to the Preferred Proponent, the Region shall prescribe the date (provided the Region may give a further notice of a revised date in its sole discretion) on which the Preferred Proponent shall submit to the Region a letter, the form and substance of which shall be satisfactory to the Region, on the letterhead of its Lenders and executed by the Lenders (the “**Lenders Commitment Letter**”) addressed to the Preferred Proponent confirming:

- (a) the Lenders funding commitment to provide the financing described in the Financial Submission including as revised under RFP Sections 5.5(2), 5.5(3), 5.5(3.1) or 5.5(4), which, subject to Section 5.5(5)(b), may be subject to such reasonable and customary conditions of the Lenders as agreed to by the Region, acting reasonably;
- (b) that the funding commitment does not contain any material adverse change clause, market flex clause, or any other similar condition which explicitly or implicitly makes the funding commitment by the Lenders conditional on the absence of a material adverse change in the market, or if any such conditions were originally applicable that the Lenders have now waived such conditions; and
- (c) that the Lenders accept the Project Agreement without any material change.

Prior to the issuance of the Lenders Commitment Letter, and no later than either the Final Credit Spread Lock-in Date, if applicable, or 5 Business Days prior to the due date of the Lenders Commitment Letter as prescribed by the Region pursuant to this RFP Section 5.5(5), the Preferred Proponent shall submit a draft thereof (the “**Draft Lenders Commitment Letter**”) to the Region for review and comment by the Region.

(6) If (i) in respect of the Final Credit Spread Election Facilities, the amendment or confirmation of the Credit Spreads under RFP Section 5.5(3) are not consistent with the Indicative Credit Spread Benchmarks of the Preferred Proponent, in the sole discretion of the Region, or (ii) in respect of the Final Credit Spread Election Facilities, the written explanations justifying the amendment or confirmation of the Credit Spreads under RFP Section 5.5(3) are not, in the sole discretion of the Region, acceptable to the Region, or (iii) any other of the requirements respecting the amendment or confirmation of the Credit Spreads under RFP Section 5.5(3) have not, in the sole discretion of the Region, been satisfied or complied with, or (iv) the Preferred Proponent's Lenders have not provided a Lenders Commitment Letter which, in the Region's sole discretion, satisfies the requirements of RFP Section 5.5(5), then:

- (a) The Region shall, no later than seven (7) Business Days after the Final Credit Spread Lock-In Date or the date of receipt by the Region of the Lenders Commitment Letter, give written notice to the Preferred Proponent setting out the manner in which any of the foregoing requirements of RFP Sections 5.5(3), 5.5(4) or 5.5(5) have not been satisfied or complied with (the “**Rectification Notice**”). The Preferred Proponent shall have seven (7) Business Days following the date of the Rectification Notice to rectify the failure to satisfy the requirements as set out in the Rectification Notice (for greater certainty, including the resubmission of an updated Financial Model that provides for revised Credit Spreads that are consistent with the changes to the Indicative Credit Spread Benchmarks of the Preferred Proponent or the resubmission of the Lenders Commitment Letter) by submitting to the Region a response to the Rectification Notice (the “**Rectification Notice Response**”).
- (b) If the Region, in its sole discretion: (A) is not satisfied with the Rectification Notice Response or with the Draft Lenders Commitment Letter; and/or (B) determines that the NPV of the Preferred Proponent's Financial Submission as revised by RFP Section 5.5(3) exceeds the budget for the Project; and/or (C) determines that the NPV of the Preferred Proponent's Financial Submission as revised by RFP Section 5.5(3) changes the overall rank of the Preferred Proponent relative to the other Proponents, the Region may, in its sole discretion and without limitation to any other right under this RFP:
  - (i) Request the Second Negotiations Proponent (as referred to in RFP Section 8.1(1)(b)) to confirm or change its Credit Spreads in accordance with RFP Section 5.5(3), and at the same time request the Preferred Proponent to again confirm or change its Credit Spreads in accordance with RFP Section 5.5(3), and based on the results thereof, re-run the evaluation process to determine which of the Preferred Proponent or the Second Negotiations Proponent is then the highest ranked Proponent. If the Second Negotiations

Proponent is then the highest ranked Proponent then the Second Negotiations Proponent shall then become the Preferred Proponent in place of the first selected Preferred Proponent for all purposes of this RFP;

- (ii) Commence negotiations with the Second Negotiations Proponent in accordance with RFP Section 8 including requesting the Second Negotiations Proponent to confirm or change its Credit Spreads in accordance with RFP Section 5.5(3). If the Second Negotiations Proponent is then the highest ranked Proponent then the Second Negotiations Proponent shall then become the Preferred Proponent in place of the first selected Preferred Proponent for all purposes of this RFP;
- (iii) Direct the Preferred Proponent to terminate its relationship with its Lenders, and the Region shall conduct, in conjunction with the Preferred Proponent, a competition amongst prospective lenders to become Lenders to the Preferred Proponent following which the Preferred Proponent shall resubmit its Financial Submission to incorporate the financial terms and conditions of the Lenders that are successful in the competition. Based thereon, the Region may, in its sole discretion, continue with the Preferred Proponent in accordance with the provisions of this RFP;
- (iv) Commence separate and distinct but contemporaneous negotiations with the Second Negotiations Proponent and the Preferred Proponent. If the Second Negotiations Proponent is then the highest ranked Proponent then the Second Negotiations Proponent shall then become the Preferred Proponent in place of the first selected Preferred Proponent for all purposes of this RFP; or
- (v) Request the Second Negotiations Proponent and the Preferred Proponent to resubmit their respective Proposals for evaluation under and in accordance with this RFP, and for such purpose shall establish a new Submission Deadline.

The Region may, in its sole discretion and for greater clarity, elect to change which of the RFP Section 5.5(6)(b) processes to employ at any time during the application of RFP Section 5.5(6)(b). In the event that the Region has determined to proceed under any of RFP Sections 5.5(6)(b)(i), (ii) or (iv), then the provisions of RFP Sections 8.1(2), (3) and (4) shall apply to such processes. Without limitation to the foregoing, and in its sole discretion, the Region may, if it is not satisfied with the Rectification Notice Response or the Lenders Commitment Letter, at any time notify the Preferred Proponent in a written notice (the “**Termination Notice**”) that the Preferred Proponent is disqualified and is no longer entitled to participate in the RFP Process. In such latter circumstance, the Region may consider the performance of the Preferred Proponent and the Proponent Team Members of the Preferred

Proponent and the fact of the giving of the Termination Notice to the Preferred Proponent in any future requests for qualifications issued by the Region.

- (c) The Region may, in its sole discretion, exercise any of its rights under RFP Section 5.5(6)(b)(i) to (v) in the event that the Region determine, in its sole discretion, that the Lenders have made any change to the Draft Lenders Commitment Letter in the Lenders Commitment Letter.
- (d) In the sole discretion of the Region, the Letter of Credit provided by the Preferred Proponent in accordance with RFP Section 9.1(2) may be returned to the Preferred Proponent within 3 days of delivery by the Region of the Termination Notice and/or such Preferred Proponent may be paid the amount, if any, of the Design and Bid Fee under RFP Section 10.3.2. The return of the Letter of Credit and/or the payment of the Design and Bid Fee to such Preferred Proponent shall represent full and final satisfaction of any obligation or liability of the Region to the Preferred Proponent and the Proponent Team Members of the Preferred Proponent in connection with this RFP, and the Region's decision to return the Letter of Credit and/or pay the Design and Bid Fee shall be contingent on the receipt of a waiver, in form and substance satisfactory to the Region, from such Preferred Proponent and the Proponent Team Members of the Preferred Proponent to that effect.

(7) The Region reserve the right to request and/or approve a change in the financing plan or debt strategy of the Preferred Proponent (for example, fixed or variable rate, the use of synthetics, bank debt or capital market debt) following identification of the Preferred Proponent under RFP Section 8.1 and prior to Financial Close.

## **5.6 Extension of Proposal Validity Period**

(1) If the Region wishes to extend the Proposal Validity Period, the Region shall submit a request to extend to those Proponents whose Proposals, in the Region's sole discretion, are still under consideration in the RFP Process. For the purpose of greater clarity, the Region may issue a request to extend the Proposal Validity Period after the Negotiations Proponents or the Preferred Proponent have already been identified. A Proponent may, in its discretion, refuse to extend the Proposal Validity Period in accordance with the following:

- (a) notwithstanding a Proponent's refusal to extend the Proposal Validity Period, that Proponent's Proposal shall continue to be valid in accordance with the original Proposal Validity Period; and
- (b) if the Region determines that it will be unable to determine the Preferred Proponent or reach Commercial Close prior to the expiration of the original Proposal Validity Period, the Region may discontinue the evaluation or consideration of a Proponent or may discontinue negotiations with a Negotiations Proponent or finalization of a Project Agreement with a Preferred Proponent if that Proponent has refused the



Region's request to extend the Proposal Validity Period and may continue the RFP Process with only those Proponents that have agreed to an extension of the Proposal Validity Period.

(2) In respect of the Preferred Proponent, the Region shall be considered to have accepted the Preferred Proponent's Proposal, including its Financial Submission and its revised Credit Spreads pursuant to RFP Section 5.5 prior to the expiration of the Proposal Validity Period if the Region and the Preferred Proponent reach Commercial Close prior to the expiration of the Proposal Validity Period (or the extended Proposal Validity Period, if applicable). For greater clarity, the Preferred Proponent shall maintain its prices as set out in its Vehicle Standard Price Submission Form (as submitted on the Submission Deadline or, if applicable, as amended pursuant to RFP Section 5.5 or during any negotiations process pursuant to RFP Section 5.5(5) or RFP Section 8.1) from Commercial Close until Financial Close, subject only to certain allowable adjustments to the Benchmark Rate(s) on Financial Close as described in Part 2 of Schedule 3 of this RFP.

(3) Notwithstanding RFP Section 5.6(1), if, during the course of negotiations between a Negotiations Proponent and the Region, the Negotiations Proponent resubmits prices to the Region or agrees to revised terms and conditions of the Project Agreement or the Negotiations Proponent's Proposal prior to the expiration of the Proposal Validity Period, that Negotiations Proponent is deemed to have agreed to an extension of the Proposal Validity Period for the Negotiations Proponent's amended Proposal for a period of ninety-five (95) days after the date of the Proponent's submission to the Region of the revised prices or revised terms and conditions, as applicable. For clarity, notwithstanding the submission by a Negotiations Proponent or Preferred Proponent of an amended Proposal in accordance with this RFP Section 5.6(3), the Proponent's original Proposal, as amended by the application or by RFP Section 5.5, as applicable, continues to exist in accordance with the original Proposal Validity Period.

(4) Notwithstanding RFP Sections 5.5 or 5.6(1), (7) or (8), the adjustments on Financial Close that are set out in Schedule 3, Part 2 to this RFP shall remain applicable.

## **5.7 Lender Requirements**

(1) At any time in the RFP Process, Proponents shall not enter into exclusivity arrangements with any Lenders, including prospective Lenders. The Proponent or the Proponent's financial advisor will be required to confirm in its letter to be delivered under Section 1.2 of Section E of Part 2 of Schedule 3 of this RFP that the Lenders have not entered into any exclusivity arrangement with the Proponent with respect to the Project. Notwithstanding any other provision of this RFP, but subject to the following proviso, the Lenders may act in the capacity of Lenders for more than one Proponent under this RFP Process provided the Lenders have agreed with each Proponent:

- (a) to establish industry standard confidentiality and conflict of interests screens to ensure that each Proponent is represented by a discrete team of Lender personnel;
- (b) to prohibit any communication regarding this RFP Process between members of different teams of Lender personnel;

- (c) to physically separate all documentation under the control of each team of Lender personnel;
- (d) to keep all computer based information and data discrete and control access to prohibit persons other than on a team of Lender personnel to have access to that Proponent team's information; and
- (e) that any breaches of such confidentiality requirements are appropriately sanctioned including possible dismissal.

(2) Lenders participating in a Proposal (“**Participating Lenders**”) shall not be Affiliates of any of the Proponent Team Members participating in that Proposal (“**Participating Proponent Team Members**”) (other than any other Participating Lender or a financial advisor wholly owned by a Participating Lender) and shall act at all times at arm’s length to every other Participating Team Member (other than any other Participating Lender or a financial advisor wholly owned by a Participating Lender).

## SECTION 6 – EVALUATION, CLARIFICATION AND VERIFICATION OF PROPOSALS

### 6.1 Process Overview and Litigation Compliance

(1) Proposals shall be processed and evaluated by the Region in a manner consistent with the procurement directives, policies and procedures governing the Region, including the Purchasing By-law. A copy of the Purchasing By-law can be viewed at the Region’s Website. By submitting a Proposal, the Proponent agrees to be bound by the terms and conditions of such procurement directives, policies and procedures and any amendments thereto from time to time, as if they are incorporated herein.

(2) The names of all Prime Team Members must be listed on the front of the bid package or envelope so that the Region can make the determination provided for in 3.9.3(2) with respect to any Proponent Team Members in litigation or pending litigation with the Region prior to opening a bid package or envelope.

### 6.2 Evaluation Committee and Advisors

(1) The Region will establish an evaluation committee (the “**Evaluation Committee**”) for the purpose of evaluating Proposals in accordance with the RFP Documents. The Region, in its sole discretion, will determine the size, structure and composition of the Evaluation Committee and any sub-committees of the Evaluation Committee. The Evaluation Committee may be assisted by and receive advice from the Region's Advisors, and any other employees or representatives of the Region in any manner determined necessary or desirable by the Region.

(2) If a member of the Evaluation Committee or, if applicable, an evaluation sub-committee becomes unable to continue serving on the Evaluation Committee or evaluation sub-committee before the completion of a step in the evaluation process, the evaluation comments and scores of that individual, in respect of the uncompleted steps in the evaluation process only, shall be ignored. For clarity, if an Evaluation Committee or sub-committee member becomes unable to continue serving on the Evaluation Committee or a

sub-committee after the full completion of a step in the evaluation process, the results of the completed steps of the evaluation process are unaffected and remain valid. Whether or not an Evaluation Committee or sub-committee member, in these circumstances, is replaced is in the sole discretion of the Region.

### 6.3 Region's Clarification and Verification of Proposals

- (1) The Region may:
  - (a) require a Proponent to clarify or verify the contents of its Proposal or any statement made by the Proponent;
  - (b) require the Proponent to submit supplementary documentation clarifying or verifying any matters contained in its Proposal; and
  - (c) seek a Proponent's acknowledgement of the Region's interpretation of the Proposal or any part of the Proposal.
- (2) The Region is not obliged to seek clarification or verification of any aspect of a Proposal or any statement by a Proponent, including an ambiguity in a Proposal or in a statement made by a Proponent.
- (3) Any written information received by the Region from a Proponent pursuant to a request for clarification or verification from the Region as part of the RFP Process may, in the Region's sole discretion, be considered as an integral part of the applicable Proposal.

### 6.4 Steps in the Evaluation Process

**The Region's review of a Proposal's compliance under Step 1 below will not proceed and the Proponent's Proposal will not be evaluated and the Proponent will be disqualified if the Region receives a Proposal from a Proponent whose Prime Team Members or any one Prime Team Member of the Proponent is in litigation or pending litigation (as such terms are described in RFP Section 3.9.3) with the Region and approval from Council to consider the Proposal has not been obtained by the Prime Team member prior to the Submission Deadline.**

The Region and its Representatives will evaluate the Proposals in accordance with the following steps:

#### 6.4.1 Step 1 – Compliance of Proposals

- (1) In Step 1, the Region will review the contents of the Proposal to assess whether it is in compliance with the terms and conditions of the RFP Documents, including whether all documents required to be submitted have been appropriately submitted.
- (2) The Region will also review the Proposal Submission Form (Schedule 4) and each Proponent Team Member Declaration (Schedule 5) and all Certificates of Officer (Schedule 5A) for Proponent Team Members other than Prime Team Members to ensure that the forms have been properly signed and to assess the information provided therein. The Region will assess the Proponent Team Member Declaration and

Certificate of Officer to determine whether the Proponent's ability to participate in the Project or perform its obligations under the Project Agreement could be, or could be seen to be, materially adversely affected in which case the Region may in its sole and absolute discretion disqualify that Proponent.

(3) If there is a misrepresentation in the information or a failure to disclose information relating to items 2.3 and 2.4 of the Proposal Submission Form or in the Proponent Team Member Declaration or any Certificate of Officer submitted by Prime Team Members then the Region may in its sole and absolute discretion disqualify that Proponent.

(4) If the list of Prime Team Members set forth on the front of each Proposal envelope or package does not contain the names of all Prime Team Members, and it is discovered at any stage in the evaluation process that a Prime Team Member who was not listed on the front of a Proposal envelope or package was, at the time of the Submission Deadline, involved or engaged in litigation or pending litigation (as such terms are defined in RFP Section 3.9.3) with the Region, and approval of Council to consider the Proposal was not obtained prior to the Submission Deadline, that Proponent's Proposal will be disqualified without liability, cost or penalty to the Region of any kind whatsoever, and the Proposal shall not be given any further consideration.

(5) In addition to the right of elimination set forth in this Section 6.4.1, if, in the sole and absolute discretion of the Region, a Proposal does not comply with the requirements set out in the RFP Documents, the Region may, in its sole and absolute discretion, without liability, cost or penalty of any kind whatsoever to the Region, eliminate the Proposal and the Proposal shall not be given any further consideration.

(6) For purposes of this RFP, "**comply**" and "**compliance**" mean that the Proposal conforms to the requirements of the RFP Documents without material deviation. A "**material deviation**" in a Proposal is any failure to comply with an RFP Document requirement that, in the sole and absolute discretion of the Region:

- (a) impedes, in any material way, the ability of the Region to evaluate the Proposal;
- (b) affects the Region's ability to enforce a Proponent's obligations pursuant to the RFP Documents; or
- (c) constitutes an attempt by the Proponent to revise the Region's or the Proponent's rights or obligations under the RFP Documents in a way not permitted by this RFP.

(7) A requirement in this RFP or in the Schedules to this RFP that a Proponent "must" or "shall" do anything is not intended to supersede this RFP Section 6.4.1 or, for greater clarity, to supersede the concepts of "comply", "compliance" or "material deviation" set out in this RFP Section 6.4.1.

(8) A Proponent's submission of a complete but poor quality Proposal shall not be considered a failure to comply but may affect the Proponent's evaluated score.

(9) If, during Step 1 of the evaluation process or at any time during the RFP Process, the Region determines that a Proposal is non-compliant pursuant to this RFP Section 6.4.1, the Region may, in its sole and absolute discretion and without liability, cost or penalty of any kind whatsoever to the Region, declare the Proposal to be non-compliant and the Proposal shall not be given any further consideration.

(10) For the purpose of clarity, each Proponent acknowledges and agrees that the Region's evaluation of compliance with the RFP Documents is not an evaluation of absolute compliance and that the Region may waive failures to comply that, in the Region's sole and absolute discretion, do not constitute a material deviation in accordance with this RFP Section 6.4.1. For clarity, the Region may also waive a material deviation as specified under RFP Section 10.2(3).

(11) For clarity, “design compliance” in this RFP Process is a matter which is evaluated and scored as part of the evaluation process. Design compliance may, in the Region’s sole and absolute discretion, be the subject of a minimum score requirement (in accordance with Schedule 3 to the RFP) but (notwithstanding the similarity of the terminology) it is not the same concept as the compliance review set out in this RFP Section 6.4.1.

6.4.2 Step 2 – Review of the Proposal Submission Form

- (1) In Step 2, the Region shall review the Proposal Submission Form to:
- (a) ensure that the form has been properly completed and signed;
  - (b) ensure that there have been no changes to the Proponent or Proponent Team Members from their Prequalification Submissions, except for changes that have been approved by the Region in accordance with RFP Section 3.6; and
  - (c) assess the Conflict of Interest and Confidential Information section of the Proposal Submission Form.

6.4.3 Step 3 – Review of the Acceptability of Innovation Submissions of the Proposal

- (1) The Innovation Submissions will be reviewed for their acceptability by the Region.

6.4.4 Step 4 – Identification of the Vehicle Standard

(1) If a Proponent is only making a 14 Vehicle Submission, the Vehicle Standard for such proponent will be the 14 Vehicle Submission.

(2) If a Proponent makes both a 14 Vehicle Submission and a 16 Vehicle Submission, the NPVs of the Proponent’s 14 Vehicle Financial Submission and 16 Vehicle Financial Submission will each be reviewed and, in accordance with Part 2 of Schedule 3 to this RFP, the 14/16 Vehicle Test shall be applied to identify the Vehicle Standard that will be the basis of a Proponent’s Proposal in the following steps of this evaluation process.

(3) If the Vehicle Standard is 14 Vehicles, only the Proponent's 14 Vehicle Submission will be reviewed and evaluated as the Proponent's Proposal under Steps 5 through 7 of this evaluation process. If the Vehicle Standard is 16 Vehicles, only the Proponent's 16 Vehicle Submission will be reviewed and evaluated as the Proponent's Proposal under Steps 5 through 7 of this evaluation process.

6.4.5 Step 5 – Review and Scoring of the Technical Submission and Accepted Innovation Submissions (Technical)

(1) The Technical Submission and any accepted Innovation Submissions (Technical) will be evaluated and scored in accordance with Schedule 3 to this RFP.

6.4.6 Step 6 – Affordability Review

(1) The Region will review the Proposals in accordance with the process set out in this RFP Section 6.4.6, to determine whether they are Affordable (the “**Affordability Review**”). For clarity, the Affordability Review will include the accepted Innovation(s) applicable to each Proponent's Proposal.

(2) Step 6-A: If one or more Proposal(s) is/are submitted which is/are Affordable (an “**Affordable Proposal**”), then only such Affordable Proposal(s) shall proceed to Steps 7 to 9 of this evaluation process. All other Proposals (each, an “**Unaffordable Proposal**”) shall be subject to RFP Section 6.4.6(4).

(3) Step 6-B: If all Proposals that are submitted by all Proponents are Unaffordable Proposals, then the Region may in its sole and absolute discretion waive the Affordability Criteria and this Affordability Review and review, score and rank all Proposals in accordance with Steps 7 to 9 of the evaluation process.

(4) If there is at least one Affordable Proposal and at least one Unaffordable Proposal, then in respect of each Unaffordable Proposal:

- (a) the Technical Submission and any accepted Innovation(s) (Technical) of any Unaffordable Proposal will be evaluated and scored in accordance with Schedule 3 and Schedule 6 to this RFP;
- (b) the Financial Submission and any accepted Innovation(s) (Financial), all of the foregoing as revised by RFP Section 5.5(2), as applicable, of any Unaffordable Proposal will be evaluated and scored in accordance with Parts 2, 3 and 4 of Schedule 3 and Schedule 6 to this RFP; and
- (c) the Design and Bid Fee shall be payable in respect of such Unaffordable Proposal pursuant to, and subject to the requirements of, RFP Section 10.3.

6.4.7 Step 7 – Review and Scoring of the Financial Submission and Accepted Innovation Submissions (Financial)

(1) The Financial Submission and any accepted Innovation Submissions (Financial), all of the foregoing as revised by RFP Section 5.5(2), as applicable, will be evaluated and scored in accordance with Parts 2, 3 and 4 of Schedule 3 and Schedule 6 to this RFP to assess which Financial Submission and accepted Innovation Submissions (Financial) present the best value for the Region.

6.4.8 Step 8 – Establishing a Final Proposal Score

(1) For the purpose of the evaluation process, the weightings and scoring set out in Schedule 3, Part 4 to this RFP will apply.

(2) The score established based on RFP Section 6.4.8(1) shall be the “**Final Proposal Score**”.

6.4.9 Step 9 – Ranking the Proponents

(1) In this Step 9, the Evaluation Committee shall rank only those Proponents that have met all requirements in Steps 1 through 8 and shall base the ranking on the Final Proposal Score.

(2) In the event of a tie in the Final Proposal Score between two Proponents the Region may, in its sole and absolute discretion, give the higher ranking to the Proponent with the higher Financial Score.

(3) The Evaluation Committee recommendations of the Preferred Proponent will be presented to the Planning and Works Committee of the Region. Upon review and approval of the Planning and Works Committee, the recommendation will be presented to Council. Upon review and approval from Council, the Region will proceed accordingly.

## **SECTION 7 – GENERAL EVALUATION AND DISQUALIFICATION PROVISIONS**

7.1.1 Region's Discretion in Determining Compliance, Scoring and Ranking

- (1) The Region shall, in its sole discretion, determine:
- (a) the membership of the Evaluation Committee and any sub-committees of the Evaluation Committee;
  - (b) whether a Proposal is compliant with the RFP Documents;
  - (c) whether a failure to comply constitutes a material deviation;
  - (d) whether any proposed Innovation Submissions will or will not be accepted by the Region;
  - (e) the Final Proposal Score of a Proposal;

- (f) the rankings of the Proposals; and
- (g) whether a Proposal or a Proponent,
  - (i) is disqualified; or
  - (ii) will cease to be considered in the evaluation process.

(2) The Region's discretion in determining compliance, scores, ranking and disqualification of the Proponents and their Proposal is not limited or restricted in any way by the fact that a prequalification process preceded this RFP Process.

(3) The Region has the right, at any time and in its sole discretion, to consider in the evaluation of the Proposals or in the exercise of any of the Region's rights under this RFP:

- (a) any instances of poor performance by a Proponent or a Proponent Team Member that the Region has experienced; and/or
- (b) any publicly available information about a Proponent or a Proponent Team Member that is, in the Region's sole discretion, credible information;

in each case where the Proponent or Proponent Team Member has been afforded the possibility to clarify the performance or information prior to it being considered.

#### 7.1.2 Disqualification

(1) The Region may, in its sole and absolute discretion, disqualify a Proponent, a Proposal, a Proponent Team Member or, an individual that is employed by, consults to or participates in a Proponent or Proponent Team Member or a Proposal or reverse its decision to make an award (even if the award has already been made to a Preferred Proponent under this RFP) at any time prior to Commercial Close with respect to the Preferred Proponent and at any time prior to Financial Close with respect to the remaining Proponents, if:

- (a) such is provided for pursuant to RFP Section 6.4.1;
- (b) the Proponent fails to cooperate in any attempt by the Region to verify any information provided by the Proponent in its Proposal or interview;
- (c) the Proponent contravenes RFP Sections 3.3.2 or 3.3.3;
- (d) the Proponent fails to comply with Applicable Law;
- (e) the Proposal omits required information, contains false or misleading information or a misrepresentation;



- (f) the Proposal, in the opinion of the Region, reveals a Conflict of Interest as described in RFP Section 3.9 and the Proponent,
  - (i) does not receive a waiver from the Region in accordance with RFP Section 3.9.1(6) or does not receive a consent in accordance with RFP Section 3.9.2(4), as applicable; or
  - (ii) fails to substitute the person or entity giving rise to the Conflict of Interest in accordance with RFP Section 3.9.1(5) with a person or entity that in the sole and absolute discretion of the Region does not have a Conflict of Interest;
- (g) if, in the opinion of the Region, acting reasonably, the Proponent or a Proponent Team Member or any of their respective Advisors, employees, former employees or representatives involved in the RFP Process directly or indirectly colluded with one or more other Proponents or its Proponent Team Members or any of their respective Advisors, employees, former employees involved in the RFP Process or representatives in the preparation or submission of a Proponent's Proposal or otherwise contravened RFP Section 3.3.2;
- (h) the Proponent or Proponent Team Member has committed a material breach of any existing agreement between the Proponent and the Region;
- (i) the Proponent or any Proponent Team Member has been convicted of an offence in connection with, any services rendered to the Region;
- (j) there are any convictions in Canada related to inappropriate bidding practices or unethical behaviour by a Proponent or a Proponent's Proponent Team Member or any of their respective Affiliates or any Employee of a Proponent or a Proponent Team Member or any of their respective Affiliates in relation to a public or broader public sector tender or procurement in any Canadian jurisdiction or elsewhere; or
- (k) the Proponent fails to provide a Certificate of Officer in the form of Schedule 5A at any of the times required under RFP Section 4.1(4).

(2) Where a Proponent Team Member or individual that is employed by, consults to or participates in a Proponent or Proponent Team Member or a Proposal is disqualified by the Region, the applicable Proponent or Proponent Team Member may offer another Proponent Team Member or individual to replace such person, subject to the Region's right to disqualify such replacement person under this Section 7.1.2 in its sole and absolute discretion.

**SECTION 8 – COMPETITION, NEGOTIATIONS AND THE IDENTIFICATION OF A PREFERRED PROPONENT****8.1 Evaluation Results and the Identification of a Preferred Proponent or Negotiations Proponents**

(1) Based on the Final Proposal Scores, the Region may, in its sole discretion (following approval by Council), at any time prior to the expiration of the Proposal Validity Period:

- (a) identify the highest ranked Proponent as the Preferred Proponent and accept the Proponent's Proposal as submitted, including or excluding its Innovation Submissions and its Separate Price Proposals;
- (b) identify the two highest ranking Proponents as the **First Negotiations Proponent** (highest ranked) and the **Second Negotiations Proponent** (second highest ranked) (together, the “**Negotiations Proponents**” and individually a “**Negotiations Proponent**”) and enter into negotiations with the First Negotiations Proponent and, failing successful negotiations, enter into negotiations with the Second Negotiations Proponent and identify the Proponent with whom the Region concludes successful negotiations as the Preferred Proponent; or
- (c) enter into separate and distinct but contemporaneous negotiations with the First Negotiations Proponent and the Second Negotiations Proponents and identify a Preferred Proponent as a result of those negotiations.

(2) The Region may use the negotiations process to negotiate any aspect of a Negotiations Proponent's Proposal (including any Innovation Submission and any Separate Price Proposals) or the Project Agreement, or both, including, for greater clarity, any amendments to the Project Agreement that are reasonably required to:

- (a) accommodate a Negotiations Proponent's financing arrangements; or
- (b) revise the scope of the Project in the event that all Proposal prices have exceeded the Region's Project budget.

(3) Except as provided in RFP Section 5.6(3), notwithstanding any negotiations between the Region and a Negotiations Proponent, the Proposals of all Proponents shall remain valid and irrevocable until the expiration of the Proposal Validity Period or until Financial Close, in accordance with RFP Section 5.4(1).

(4) If, in accordance with RFP Sections 8.1(1)(b) or (c) the Proponent and the Region negotiate revisions to the Project Agreement, the Region and the Preferred Proponent shall develop a revised Project Agreement and, for the purposes of RFP Section 9, the revised Project Agreement shall be the “Project Agreement”.

(5) The Region may, in its sole discretion and for greater clarity, elect to change the selection of which of the RFP Section 8.1(1) negotiations processes to employ at any time during the application of RFP Section 8.

## SECTION 9 – PREFERRED PROPONENT

### 9.1 Identification of the Preferred Proponent and the Letter of Credit

(1) Subject to RFP Sections 10.1 and 10.2, the Region intends to identify a Preferred Proponent in accordance with RFP Section 8.1 or RFP Section 5.5(5).

(2) No later than three (3) Business Days after a Proponent's receipt of a notice from the Contact Person that the Proponent is the Preferred Proponent, the Preferred Proponent shall provide an irrevocable standby letters of credit (the "**Letter of Credit**") in the aggregate amount, and with an initial expiry date, specified in the RFP Data Sheet and in the form attached as Schedule 8 to this RFP to secure the Preferred Proponent's obligations in accordance with RFP Section 9.1(5). The Preferred Proponent may, with the prior written consent of the Region, which consent may be withheld in the sole discretion of the Region, provide multiple irrevocable standby letters of credit from Proponent Team Members as approved and confirmed by the Region (each a "**Letter of Credit Provider**") totaling the amount specified in the RFP Data Sheet and in the form attached as Schedule 8 to this RFP to secure the Preferred Proponent's obligations in accordance with RFP Section 9.1(5).

(3) If the Preferred Proponent does not provide the Letter(s) of Credit to the Region as required by this RFP Section 9.1 the Region may, in its sole discretion, by written notice to the Preferred Proponent, cease all discussions with the Preferred Proponent, terminate any obligations of the Region to the Preferred Proponent under any agreement or understanding relating to the Project, and, for greater certainty, the Preferred Proponent will not be entitled to or receive any payment or compensation of any kind relating to the Project.

(4) Subject to the Region's right to retain and apply the Letter(s) of Credit as liquidated damages as provided in this RFP or in the Project Agreement, the Letter(s) of Credit shall be returned to the Preferred Proponent as follows:

- (a) if the Region gives notice to the Preferred Proponent that it is cancelling or discontinuing the RFP Process, no later than ten (10) days after receipt by the Region of a written demand for the Letter of Credit by the Preferred Proponent; or
- (b) unless the Region and the Preferred Proponent agree that the Letter of Credit shall be amended and delivered to the Region in satisfaction of Project Co's obligations in accordance with the Project Agreement, upon Commercial Close.

(5) The Region shall be entitled to draw on the Letter(s) of Credit and retain and apply the proceeds thereof as liquidated damages if:

- (a) there is a breach of the Preferred Proponent's obligations set out in RFP Section 9.2 by the Preferred Proponent;
- (b) a Termination Notice has been given to the Preferred Proponent under RFP Section 5.5(6)(b);
- (c) Commercial Close has not occurred (for reasons other than the failure of the Region to execute the Project Agreement),
  - (i) on or before the Commercial Close Target Date; or
  - (ii) if the Commercial Close Target Date has passed and the Region has given its consent, on or before the expiration of the Proposal Validity Period (or the extended Proposal Validity Period, if applicable); or
- (d) the Preferred Proponent has notified the Region in writing that it wishes to cease all discussions with the Region relating to the Project.

(6) The Region shall not be required to give any prior written notice to the Preferred Proponent of its intention to draw on the Letter of Credit(s). If the Preferred Proponent notifies the Contact Person in writing that the Preferred Proponent disputes the Region's right to draw on the Letter(s) of Credit and to retain the proceeds as liquidated damages, then the Region shall nonetheless be entitled to draw on the Letter(s) of Credit, but will remain liable to repay all or a portion of the amount drawn, together with interest charges at the rate prescribed on that amount, until such dispute has been finally resolved. If the Preferred Proponent fails to renew or extend the Letter(s) of Credit at least thirty (30) days prior to its expiry date, the Region may, at any time without notice to the Preferred Proponent, draw on the Letter(s) of Credit and hold the proceeds thereof in the same manner and for the same purposes as the Letter(s) of Credit.

(7) If the Preferred Proponent delivers multiple Letters of Credit from multiple Letter of Credit Providers in accordance with RFP Section 9.1(2), the Preferred Proponent acknowledges and agrees that:

- (a) the Region may draw upon any letter of Credit provided by any Letter of Credit Provider in any specified ratable amount;
- (b) the Region may draw on any Letter of Credit provided by any Letter of Credit Provider in a disproportionate amount to such Letter of Credit Provider's contribution to security;
- (c) the Region may draw upon any Letter of Credit provided by any Letter of Credit Provider even in the event that such Letter of Credit Provider is no longer a Proponent Team Member;
- (d) the provision of multiple Letters of Credit shall not in any way prejudice or adversely affect the rights of the Region to draw on any Letter of Credit in accordance with this RFP, including in the event that the Region is entitled to draw

on the Letter of Credit in accordance with RFP Section 9.1(5) and such circumstance is not the result of any act or omission of the Letter of Credit Provider whose Letter of Credit is drawn upon.

## 9.2 Preferred Proponent Obligations

(1) The Preferred Proponent shall:

(a) achieve Commercial Close,

(i) prior to the Commercial Close Target Date; or

(ii) if the Commercial Close Target Date has passed unless the Region have given its consent, prior to the expiration of the Proposal Validity Period (or the extended Proposal Validity Period, if applicable)

based on the Project Agreement in substantially the same form and content as finalized prior to the Submission Deadline or on the Project Agreement as revised and agreed to by the Preferred Proponent and the Region;

(b) execute the Project Agreement, subject only to revision in respect of the following:

(i) minor changes, additions and modifications necessary to create a legally complete and binding agreement;

(ii) changes, additions and modifications to those provisions which require:

(A) the insertion or addition of information relating to the Preferred Proponent's corporate and funding structure which are not inconsistent with the principles set out in the Project Agreement;

(B) the insertion or addition of information or the modification of provisions of the Project Agreement required in order to reflect accurately the nature of the Preferred Proponent's relationships with its principal subcontractors; or

(C) the revision of provisions in the Project Agreement to more accurately reflect the result of negotiations in accordance with RFP Section 8.1;

(iii) changes, additions and modifications required in order to complete (based on the Proposal) any provision of the Project Agreement (where contemplated in or required under the terms of the RFP Documents) or to complete any Schedules to the Project Agreement; and

- (iv) changes, additions and modifications to those parts of the Project Agreement which are indicated in the Project Agreement as being subject to completion or finalization,

provided, that, in each case the changes, additions or modifications identified in RFP Section 9.2(1)(b) are consistent with the principles set out in the Project Agreement and otherwise acceptable to the Region, acting reasonably; and

- (c) maintain its prices in accordance with the terms and conditions of this RFP, subject only to (i) revisions to the Credit Spreads, if any, in accordance with, as applicable, RFP Section 5.5(5), or (ii) revisions to the price explicitly agreed to by the Region.

(2) The Preferred Proponent shall not later than five (5) days after receipt of notice from the Region that it is the Preferred Proponent, deliver to the Contact Person a timetable setting out its schedule for achieving the following Financial Close milestone dates:

- (a) commencement and completion of financing documentation;
- (b) receipt of final ratings from rating agencies (if applicable); and
- (c) final pricing of the financing,

for review and approval by the Region, acting reasonably (the “**Financing Timetable**”). The Region may elect, in its sole discretion, to extend one or more of the dates identified in the Financing Timetable.

(3) The Preferred Proponent shall provide access and shall promptly make available to the Region and its Advisors, agents and representatives such documentation, financial and technical information as may be reasonably requested by the Region from time to time in connection with the Region's due diligence investigations including, without limitation, copies of any written representations, statements, assurances, commitments or agreements which the Preferred Proponent, any Preferred Proponent Team Member or any of their respective Advisors have received from any municipality, governmental authority or utility relating to the Project. The Preferred Proponent shall provide to the Region, in a timely fashion, final draft versions of all documents required to be delivered by the Preferred Proponent in accordance with the Project Agreement, together with such other documentation as the Region may reasonably request from time to time.

### **9.3 Region Authorization and Approvals**

(1) The Preferred Proponent acknowledges and agrees that the entering into of the Project Agreement by the Region is conditional on and subject to the Region obtaining any necessary authorizations and approvals required in connection with the Project, including, for certainty, the approval of any relevant government authority.

**SECTION 10 – GENERAL LEGAL MATTERS AND RIGHT TO ACCEPT OR REJECT****10.1 General Rights of the Region**

- (1) The Region may, in its sole and absolute discretion:
  - (a) reject any or all of the Proposals;
  - (b) reject an Innovation Submission or a Separate Price Proposal in any Proposal;
  - (c) accept any Proposal;
  - (d) if only one Proposal is received, elect to accept or reject it;
  - (e) elect to discontinue the RFP Process at any time before the end of the RFP Process, including after the identification of a Preferred Proponent but before Commercial Close;
  - (f) alter the Timetable, the RFP Process or any other aspect of this RFP, which for greater certainty, includes the right to schedule Financial Close on the day after Commercial Close; and
  - (g) cancel this RFP Process and subsequently advertise or call for new submissions for the same or different subject matter of these RFP Documents with the same or different participants or with some of the same and some different participants.
  
- (2) Without limitation to any other rights of the Region hereunder, in order to ensure the integrity, openness and transparency of the RFP Process, the Region may, in its sole and absolute discretion:
  - (a) impose at any time, and from time to time, on all Proponents and any Proponent Team Members additional conditions, requirements or measures, with respect to compliance with the Region's policies in respect of conflict of interest, anti-lobbying, anti-corruption, no litigation or pending litigation, as well as other legislative and other policy requirements relating to procurement, including, without limitation, a requirement to provide a certificate of an officer from any Proponent Team member in the form attached as Schedule 5A – Certificate of an Officer to this RFP; and
  - (b) require that any or all Proponents and/or any Proponent Team Member at any time, and from time to time, during the RFP Process provide the Region with copies of its internal policies, processes and controls establishing ethical standards for its bidding practices and evidence of compliance by the Proponent and all Proponent Team Members with such policies, processes and controls and the procurement policies of the Region.

If a financial institution put forward as a Proponent Team Member and acting in a financial advisory capacity is not an Affiliate of any of the Proponent Team Members (“**Exempt Financial Institution**”), then this RFP Section 10.1(2) shall not apply to any such Exempt Financial Institution.

(3) Further to RFP Section 10.1(2), and in the event that any Proponent and/or Proponent Team Member:

- (a) fails to comply with any requirement prescribed by the Region pursuant to RFP Section 10.1(2); or
- (b) complies with the Region’s requirement as prescribed in accordance with RFP Section 10.1(2), but the Region determines that any Proponent and/or Proponent Team Member has or may have engaged in inappropriate bidding practices or unethical behaviour,

the Region shall have the right, at any time and in its sole and absolute discretion, to reject and not consider a Proposal from a Proponent, or require the Proponent to remove and/or replace any Proponent Team Member.

## 10.2 Special Circumstances

(1) If the Region determines that all of the Proposals submitted are non-compliant in accordance with RFP Section 6.4.1, the Region may, in its sole discretion:

- (a) take any action in accordance with RFP Section 10.1;
- (b) carry out a process whereby all Proponents are directed to correct the material deviations in their Proposals for re-submission, without a change in their Commercial and Financial Sections of the Proposal; or
- (c) enter into negotiations with any one of the Proponents to attempt to finalize an agreement.

(2) If the Region receives:

- (a) one Proposal and that Proposal is compliant; or
- (b) more than one Proposal, but only one compliant Proposal,

the Region may, in its sole and absolute discretion: (i) take any action in accordance with RFP Section 10.1(1); or (ii) cancel this RFP and subsequently enter into negotiations with the Proponent that submitted a compliant Proposal.



(3) The Region, in its sole and absolute discretion, may waive a material deviation in a Proposal and, therefore, waive a material failure to comply with the requirements of the RFP Documents. The Region may, in its sole discretion, decline to disqualify a non-compliant Proposal.

(4) If at any time prior to the Submission Deadline any Proponent withdraws from the RFP Process, the Region may, in its discretion, invite the next highest-ranking party behind the Prequalified Parties under the RFQ Process that preceded this RFP, other than the Proponents (the “**Reserve Prequalified Party**”) to participate under the RFP Process to replace such Proponent. For clarity, the Reserve Prequalified Party must have submitted a complete Prequalification Submission under and in accordance with the terms of the RFQ and achieved the minimum score required by Section 6.1(3) of the RFQ. Prior to and as a condition of becoming a Prequalified Party and a Proponent under this RFP, such Reserve Prequalified Party shall be required to satisfy the requirements of RFQ Section 5.2(2) of the RFQ. Upon the satisfaction of such conditions, such Reserve Prequalified Party shall become a Prequalified Party and a Proponent under this RFP.

### **10.3 Region's Liability for Proponent's Costs**

#### **10.3.1 General**

(1) Except as provided in RFP Section 10.3.2, the Region is not liable for any expense, cost, loss or damage incurred or suffered by any Proponent, any Proponent Team Member, any Proponent Advisor or any person connected with any one of them, as a result of any action taken by the Region in accordance with RFP Sections 10.1 or 10.2.

#### **10.3.2 Design and Bid Fee**

(1) If the Region specifies in the RFP Data Sheet that it offers a Design and Bid Fee for this Project, such Design and Bid Fee plus any applicable HST, shall be paid to each Proponent other than the Proponent that achieves Commercial Close under the Project Agreement to this RFP, subject to the following conditions:

- (a) a Proponent must submit a full and proper Proposal for that Proponent to be eligible for the Design and Bid Fee, provided that the Region shall determine in its sole and absolute discretion whether a Proposal is full and proper based on factors that include whether the Proposal is compliant with this RFP (as determined in accordance with RFP Section 6.4.1) and whether the Proposal received a Final Proposal Score with respect to its Technical Submission of at least fifty percent (50%);
- (b) a Proponent must not withdraw from this RFP Process after the Submission Deadline in contravention of this RFP;
- (c) if the Region draws upon the Proponent's Letter of Credit in accordance with this RFP or a Proponent's Standby Letter of Credit in accordance with the Project Agreement, then such Proponent will not be eligible for the Design and Bid Fee;

- (d) Financial Close must be achieved with a Proponent under the Project Agreement to this RFP, provided that in the event that Financial Close is not achieved with a Proponent under the Project Agreement because the Region, as a result of a Severe Market Disruption,
- (i) exercises its rights under Section 2.4(b) of the Project Agreement (the “**Severe Market Disruption Event Date**”), and
  - (ii) concludes and reaches Financial Close under a new project agreement respecting the Project within six (6) months after the Severe Market Disruption Event Date,

then the condition contained in RFP Section 10.3.2(1)(d) shall be deemed to be satisfied.

For greater certainty, a Proponent shall not be eligible to receive both a Design and Bid Fee and the compensation contemplated under Section 2.4(c) of the Project Agreement.

(2) The amount of the Design and Bid Fee that will be paid to each eligible Proponent in accordance with RFP Section 10.3.2(1) is set out in the RFP Data Sheet. Any additional requirements for Proponents related to the Design and Bid Fee are set out in the RFP Data Sheet.

(3) Payment of a Design and Bid Fee shall represent full and final satisfaction of any obligation or liability of the Region to the Proponent and Proponent Team Members in connection with this RFP, and the Region's obligation to pay the Design and Bid Fee shall be contingent on the receipt of a waiver, in form and substance satisfactory to the Region, from the Proponent and Proponent Team Members to that effect.

#### **10.4 Applicable Law, Attornment and Limit on Liability**

(1) This RFP shall be governed and construed in accordance with Applicable Law as defined in the Project Agreement.

(2) The Proponent agrees that:

- (a) any action or proceeding relating to this RFP Process shall be brought in any court of competent jurisdiction in the Province of Ontario and for that purpose the Proponent irrevocably and unconditionally attorns and submits to the jurisdiction of that Ontario court;
- (b) it irrevocably waives any right to and shall not oppose any Ontario action or proceeding relating to this RFP Process on any jurisdictional basis, including *forum non conveniens*; and

- (c) it shall not oppose the enforcement against it, in any other jurisdiction, of any judgment or order duly obtained from an Ontario court as contemplated by this RFP Section 10.4.

(3) Except as provided in RFP Section 10.3.2, the Proponent agrees that if the Region or the Region's Advisors commit a material breach of their obligations under or in connection with this RFP (that is, a material breach of the bidding contract or Contract A), the Region's liability to the Proponent and the aggregate amount of damages recoverable against the Region for any matter relating to or arising from that material breach, whether based upon an action or claim in contract, warranty, equity, negligence, intended conduct or otherwise, including any action or claim arising from the acts or omissions, negligent or otherwise, of the Region, shall be the lesser of,

- (a) the Proposal preparation costs that the Proponent seeking damages from the Region can demonstrate; and
- (b) \$500,000.

(4) Each Proponent agrees that it is responsible to ensure that at all times it acts in accordance with Applicable Laws and to ensure that its personnel are fully knowledgeable and comply with the *Occupational Health and Safety Act* (Ontario).

#### **10.5 Licenses, Permits, etc.**

(1) If a Proponent is required by Applicable Law to hold or obtain a licence, permit, consent or authorization to carry on an activity contemplated in its Proposal or in the Project Agreement, neither acceptance of the Proposal nor execution of the Project Agreement by the Region shall be considered to be approval by the Region of carrying on such activity without the requisite licence, permit, consent or authorization.

#### **10.6 Power of Council**

(1) Proponents are advised that no provision of the RFP Documents (including a provision stating the intention of the Region) is intended to operate, nor shall any such provision have the effect of operating, in any way, so as to interfere with or otherwise fetter the discretion of Council in the exercise of its powers.

### **SECTION 11 – NOTIFICATION AND DEBRIEFING**

(1) Any time after the Preferred Proponent has been identified, the Region will formally notify all Proponents who were not successful in the RFP Process that they have not been selected. Notwithstanding such notification, the Proponent's Proposal shall be irrevocable until the expiration of the Proposal Validity Period (or extended Proposal Validity Period, if applicable) or Financial Close, in accordance with RFP Section 5.4.

(2) Any time after Financial Close, the Region, and a member or members of the Evaluation Committee will meet with any unsuccessful Proponents, at the request of the unsuccessful Proponent, to provide a de-briefing.

## **SECTION 12 – DEFINITIONS**

### **12.1 General**

(1) Unless otherwise defined in this RFP Section 12, capitalized terms and expressions used in this RFP have the meaning given to them in Schedule 1 to the Project Agreement (or in Schedule 15-1 to the Project Agreement) or in a Schedule to this RFP. In this RFP, the singular shall include the plural and the plural shall include the singular, except where the context otherwise requires.

(2) All references in this RFP to the Region's "discretion" or "sole discretion" means in the sole and absolute discretion of the party exercising the discretion.

(3) All references in this RFP to "day" or "days" means calendar days, unless otherwise stated. Any reference in the RFP Documents to a submission deadline means the noted time to the second, even where seconds are not explicitly noted. For greater certainty, a submission deadline is as of the zero count in seconds of the noted time.

### **12.2 RFP Definitions**

Whenever used in the RFP:

(1) "14 Vehicle Financial Submission" for each Proponent is defined in Section 4.1(2)(c)(i) of this RFP;

(2) "14 Vehicle Submission" for each Proponent is that portion of the Proponent's Proposal consisting of the completed Proposal Submission Form (Schedule 4 to this RFP), Proponent Team Member Declaration (Schedule 5 to this RFP, Certificates of Officers (Schedule 5A to this RFP), Technical Submissions (excluding any Vehicle Incremental Changes (Technical)) and 14 Vehicle Financial Submission;

(3) "14/16 Vehicle Test" means the test set out in Part 2 of Schedule 3 of this RFP by which the Vehicle Standard for a Proponent submitting both a 14 Vehicle Submission and a 16 Vehicle Submission is identified;

(4) "16 Vehicle Financial Submission" for each Proponent is defined in Section 4.1(2)(c)(ii) of this RFP;

(5) "16 Vehicle Submission" for each Proponent is that portion of the Proponent's Proposal consisting of the completed Proposal Submission Form (Schedule 4 to this RFP), Proponent Team Member Declaration (Schedule 5 to this RFP, Certificates of Officers (Schedule 5A to this RFP), Technical Submissions (including any Vehicle Incremental Changes (Technical)) and 16 Vehicle Financial Submission;

- (6) “Acquiree” is defined in RFP Section 3.6(1A);
- (7) “Acquirer” is defined in RFP Section 3.6(1A);
- (8) “Addendum” means a written addendum to the RFP Documents issued by the Region as set out in RFP Section 3.7;
- (9) “Additional Visit” is defined in RFP Section 3.5.3(2);
- (10) “Adjusted Service Payment” has the meaning given in Schedule 20 to the Project Agreement - Payment Mechanism;
- (11) “Advisors” means any person or firm retained to provide professional advice to the Region, a Proponent, a Proponent Team Member or a Financial Services Provider, as applicable;
- (12) “Affordable” means, with respect to a Proposal, meeting the Affordability Criteria;
- (13) “Affordability Compliance Form” has the meaning given to it in Part III of Schedule 6 to this RFP;
- (14) “Affordability Criteria” has the meaning set out in Section 2.21 of Section E of Schedule 3, Part 2 to this RFP;
- (15) “Affordable Proposal” is defined in RFP Section 6.4.6(2);
- (16) “Affordability Review” is defined in RFP Section 6.4.6(1);
- (17) “Background Information” means the various type of information provided by the Region and is defined in RFP Section 2.4(1)(b);
- (18) “Benchmark Rate” is defined in Part B of Part 2 of Schedule 3 to this RFP;
- (19) “Benchmarking Date” is defined in Part B of Part 2 of Schedule 3 to this RFP;
- (20) “Business Day” means any day other than a Saturday, a Sunday, a statutory holiday in the Province of Ontario or any day on which banks are not open for business in the city of Toronto, Ontario;
- (21) “Clearing Spread” means the financing premiums/spread in excess of the Benchmark Rate used to calculate the price at which the end investors purchase bonds, as accepted by the Region;
- (22) “Commercial Close” means the date the Project Agreement is signed by the Preferred Proponent and the Region;
- (23) “Commercial Close Target Date” means the date set out as the Commercial Close Target Date in the Timetable;

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- (24) “Commercially Confidential Meetings” is defined in RFP Section 3.4.2(1);
- (25) “Commercially Confidential RFIs” is defined in RFP Section 3.2.2(1)(a)(ii);
- (26) “Confidential Information” is defined in RFP Section 3.8.3(1);
- (27) “Conflict of Interest” is defined in RFP Section 3.9.1(7);
- (28) “Contact Person” is defined in RFP Section 3.2.1(1);
- (29) “Contract A” is defined in RFP Section 1.1(3);
- (30) “Control” has the meaning ascribed thereto in the *Business Corporations Act* (Ontario), and “Controlled”, “Controls” and “Controlling” have corresponding meanings;
- (31) “Cost of Work Form” has the meaning given to it in Part I of Schedule 6 to this RFP.
- (32) “Council” means the council of the Region;
- (33) “Credit Spread Election Facilities” is defined in RFP Section 5.5(1)(b)(i);
- (34) “Credit Spreads” means the financing premiums/spreads in excess of the Benchmark Rate as calculated/illustrated in the Financial Model in accordance with Section 3.0, Table A of Part B of Part 2 of Schedule 3 to this RFP. For greater certainty, Credit Spreads do not include any hedge premiums, swap counter party spreads or any other applicable fees;
- (35) “Data Room” is defined in RFP Section 2.4(1);
- (36) “DBFOM” is defined in RFP Section 1.1(5);
- (37) “Design and Bid Fee” means an amount to compensate a Proponent for some of the costs the Proponent had incurred in developing and submitting a Proposal, as determined by the Region in accordance with RFP Section 10.3.2;
- (38) “Design Consultation Process” is defined in Section 1.0(a) of Schedule 2 to this RFP;
- (39) “Design Consultation Session” is defined in Section 1.0(b) of Schedule 2 to this RFP;
- (40) “Design Consultation Team” is defined in Section 1.0(a) of Schedule 2 to this RFP;
- (41) “Design Feedback Meeting” is defined in Section 1.0(b) of Schedule 2 to this RFP;
- (42) “Design Presentation Meeting” is defined in Section 1.0(b) of Schedule 2 to this RFP;
- (43) “Draft Lenders Commitment Letter” is defined in RFP Section 5.5(5);

- (44) “Employee” is defined in Section 5 of Schedule 5A of this RFP;
- (45) “Evaluation Categories” is defined in Section 2.0 of Part B of Part 4 of Schedule 3 to this RFP and “Evaluation Category” shall be construed accordingly;
- (46) “Evaluation Committee” is defined in RFP Section 6.2(1);
- (47) “Exempt Financial Institution” is defined in RFP Section 10.1(2);
- (48) “Fairness Monitor” is defined in the RFP Data Sheet;
- (49) “Final Credit Spread Election Facilities” is defined in RFP Section 5.5(2)(e);
- (50) “Final Credit Spread Lock-in Date” is defined in RFP Section 5.5(3);
- (51) “Final Proposal Score” is defined in RFP Section 6.4.8(2);
- (52) “Financial Close” has the meaning given in the Project Agreement;
- (53) “Financial Model” means the computer model a Proponent has used and which is proposed to become the Financial Model under the Project Agreement in the format specified in Part 2 of Schedule 3 to this RFP;
- (54) “Financial Services Provider” means any Lender and any other provider of financial services or products;
- (55) “Financial Submission” means the component of the Proposal submitted in response to the requirements set out in Part 2 of Schedule 3 to this RFP;
- (56) “Financial Submission Information” means the information contained in a Proponent's Financial Submission;
- (57) “Financing Timetable” is defined in RFP Section 9.2(2);
- (58) “FIPPA” is defined in RFP Section 3.8.1(1);
- (59) “First Credit Spread Lock-in Date” is defined in RFP Section 5.5(2);
- (60) “First Negotiations Proponent” is defined in RFP Section 8.1(1)(b);
- (61) “Full Time Employee” means an employee who, (i) is an employee listed on the permanent payroll; (ii) receives such customary benefits of full time employees, such as pension plan participation and vacation pay; and (iii) works at least thirty (30) hours per week;
- (62) “General RFIs” is defined in RFP Section 3.2.2(1)(a)(i);

(63) “Government of Ontario” means Her Majesty in Right of the Province of Ontario and all ministries, agencies, boards, commissions and/or corporations thereof;

(64) “Held Pricing Facilities” is defined in RFP Section 5.5(1)(b)(ii);

(65) “HST” means Harmonized Sales Tax;

(66) “Identified Proponent Parties” is defined in RFP Section 3.6(1);

(67) “includes” and “including” means “includes without limitation” and “including without limitation” respectively;

(68) “Indicative Credit Spread Benchmarks” is defined in Section 2.8 of Part E of Part 2 of Schedule 3 to this RFP;

(69) “Ineligible Person's Affiliate” is defined in RFP Section 3.9.2(1);

(70) “Ineligible Persons” is defined in RFP Section 3.9.2(1);

(71) “Infrastructure Ontario” is defined in RFP Section 1.1(1);

(72) “Innovation Submission Meeting” is defined in Section 4.0 of Part A of Part 3 of Schedule 3 to this RFP;

(73) “Innovation Submissions” means the components of the Proposal submitted in response to the requirements set out in Parts A and B of Part 3 of Schedule 3 to this RFP;

(74) “Key Personnel” means those individuals identified in the Proponent’s Prequalification Submission as key personnel;

(75) “Lenders” means the lenders providing the debt financing described in the Financial Submission;

(76) “Lenders Commitment Letter” is defined in RFP Section 5.5(5);

(77) “Letter of Credit” is defined in RFP Section 9.1(2);

(78) “Mini-Perm Financing” has the meaning given in Schedule 28 of the Project Agreement - Refinancing;

(79) “Mini-Perm Period” is defined in Section 3.2(d)(i) of Part B of Part 4 of Schedule 3 to this RFP;

(80) “MFIPPA” is defined in RFP Section 3.8.1(1);



- (81) “Monthly Service Payment” has the meaning given in Schedule 20 to the Project Agreement - Payment Mechanism;
- (82) “Negotiations Proponents” is defined in RFP Section 8.1(1)(b);
- (83) “NPV” means net present value;
- (84) “Participating Lenders” is defined in RFP Section 5.7(2);
- (85) “Participating Proponent Team Members” is defined in RFP Section 5.7(2);
- (86) “Preferred Proponent” is defined in RFP Section 1.1(2);
- (87) “Prequalification Stage” is defined in RFP Section 1.3(1)(a);
- (88) “Prequalification Submission” is defined in RFP Section 1.2(1);
- (89) “Prequalified Parties” is defined in RFP Section 1.2(1);
- (90) “Price Form” has the meaning given to it in Part II of Schedule 6 to this RFP.
- (91) “Price Submission Form” consists of a Cost of Work Form, a Price Form and a Affordability Submission Form completed in accordance with Schedule 6 to this RFP;
- (92) “Prime Team Member” means any Proponent Team Member that: (i) is the Proponent Lead; (ii) has or will have a risk capital interest of at least ten percent in Project Co; (iii) will undertake at least twenty-five percent of the construction work of the Project based on total estimated construction costs of the Project; (iv) will have the lead design role for the Project; (v) will undertake at least twenty-five percent of the maintenance and rehabilitation work based on the total estimated maintenance costs of the Project; (vi) will undertake at least twenty-five percent of the vehicle operations work based on the vehicle operations costs of the Project; (vii) will provide any of the financial advisory services; or (viii) has, under the RFP Process, been put forward by the Proponent as a Prime Team Member providing a critical or material portion of the design or construction in connection with the Project;
- (93) “Procurement Process” means the RFQ Process and the RFP Process;
- (94) “Project” is defined in RFP Section 1.1(6);
- (95) “Project Agreement” are those documents listed as the “Project Agreement” in the RFP Data Sheet;
- (96) “Project Co” is the Preferred Proponent that has executed the Project Agreement with the Region;
- (97) “Proponent” is defined in RFP Section 1.1(2);

(98) “Proponent Lead” means the Prime Team Member of a Proponent which will play the lead project management and coordination role in respect of the Project;

(99) “Proponent Representative” is defined in RFP Section 1.2(2);

(100) “Proponent Team Members”, subject to any changes to members of the Proponent team permitted in accordance with RFP Section 3.6, means the applicable Proponent and all members of the Proponent team that were identified in the RFQ Process and were prequalified as a Proponent team to submit a Proposal in this RFP Process, and includes, for clarity, Prime Team Members;

(101) “Proponents Meeting” is defined in RFP Section 3.4.1(1);

(102) “Proposal” is defined in RFP Section 1.1(2);

(103) “Proposal Information” is defined in RFP Section 3.8.4(5);

(104) “Proposal Information Licence” is defined in RFP Section 3.8.4(4);

(105) “Proposal Validity Period” is defined in RFP Section 5.4(1);

(106) “Proposed Change in Identified Proponent Parties” is defined in RFP Section 3.6(3);

(107) “Purchasing By-law” means By-law Number 04-093 of the Region, A By-law to Provide for its Procurement of Goods and Services and the Disposal of its Surplus Goods and to Repeal By-law 61-91 of The Regional Municipality of Waterloo, as amended or as it may be amended from time to time;

(108) “Rectification Notice” is defined in RFP Section 5.5(6)(a);

(109) “Rectification Notice Response” is defined in RFP Section 5.5(6)(a);

(110) “Refinancing” has the meaning given in the Project Agreement;

(111) “Region” is defined in RFP Section 1.1(1);

(112) “Region’s Website” means the Region’s website located at <http://www.regionofwaterloo.ca/en/doingBusiness/bidsquotestenders.asp>;

(113) “Representatives” means the directors, officers, ministers, employees, agents, accountants, consultants, financial or legal advisors and all other representatives of the Person being referred to;

(114) “Reserve Prequalified Party” is defined in Section 10.2(4);

(115) “RFP” is defined in RFP Section 3.2.2(1);

(116) “RFP” is defined in RFP Section 1.1(1);

- (117) “RFP Data Sheet” means Schedule 1 to this RFP including all attachments and exhibits thereto;
- (118) “RFP Documents” is defined in RFP Section 2.1(1);
- (119) “RFP Process” is defined in RFP Section 1.1(3);
- (120) “RFQ” is defined in RFP Section 1.2(1);
- (121) “RFQ Process” is defined in the RFQ, being the process that begins with the issuance of the RFQ and ends when Prequalified Parties are identified by the Region;
- (122) “Scheduled Visits” is defined in RFP Section 3.5.1(1);
- (123) “Second Negotiations Proponent” is defined in RFP Section 8.1(1)(b);
- (124) “Separate Price” means a price submitted in response to Part IV or Part V of Schedule 6 to this RFP in conjunction with Part C of Part 3 of Schedule 3 to this RFP;
- (125) “Separate Price Proposal” means a Separate Price and the information provided in accordance with the requirements of Section C (1.0) of Part 3 of Schedule 3;
- (126) “Severe Market Disruption Event Date” is defined in RFP Section 10.3.2(1)(d)(i);
- (127) “Spread Decrease” is defined in Part C of Part 2 of Schedule 3 to this RFP;
- (128) “Submission Deadline” is defined in RFP Section 3.1(1);
- (129) “Submission Requirements” means all of the submission requirements set out in this RFP;
- (130) “Substantial Completion Payment” is defined in Section 2.16 of Part E of Part 2 Schedule 3 to this RFP;
- (131) “Technical Submission” means the component of the Proposal submitted in response to the requirements set out in Part 1 of Schedule 3 to this RFP;
- (132) “Technical Submission Information” means the information contained in the Proponent's Technical Submission;
- (133) “Termination Notice” is defined in RFP Section 5.5(6)(b);
- (134) “Timetable” is defined in RFP Section 3.1(1);
- (135) “Topic Meetings” is defined in Section 18.0(a) of Schedule 2 to this RFP;

(136) “Total Capitalized Cost of Construction” shall have the meaning provided in Section 1.21 of Schedule 21 to the Project Agreement;

(137) “Traffic Management Plan” is defined in Article 18 of Schedule 15-2 of the Project Agreement;

(138) “Unaffordable Proposal” is defined in RFP Section 6.4.6(2);

(139) “Vehicle Incremental Changes (Technical)” is defined in Section C of Schedule 3 Part 1 to this RFP; and

(140) “Vehicle Standard” means:

- a. if the Proponent is only submitting a 14 Vehicle Submission, the Proponent’s 14 Vehicle Submission that shall proceed to Steps 5 to 9 of the evaluation process as set out in Section 6.4 of this RFP; or
- b. if the Proponent is submitting both a 14 Vehicle Submission and a 16 Vehicle Submission, such submission, as determined by the 14/16 Vehicle Test, that shall proceed to Steps 5 to 9 of the evaluation process as set out in Section 6.4 of this RFP.

### **12.3 Copyright Notice**

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