

**THE CITY OF EDMONTON**  
**DESIGN-BUILD AGREEMENT**  
**CAPITAL LINE SOUTH LRT EXTENSION**

***Schedule 20***  
***Dispute Resolution Procedure***

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## SCHEDULE 20

### DISPUTE RESOLUTION PROCEDURE

#### 1. DEFINITIONS

##### 1.1 Definitions

In this Schedule 20 [*Dispute Resolution Procedure*], unless the context indicates a contrary intention, terms which are defined in the Agreement (and not otherwise defined in this Schedule 20 [*Dispute Resolution Procedure*]) shall have meanings given to them in the Agreement and the following terms shall have the following meanings:

- (a) “**ADRIA**” has the meaning given in Section 3.5(b).
- (b) “**ADRIC**” has the meaning given in Section 4.2(a).
- (c) “**Appointed Referee**” has the meaning given in Section 3.5(b).
- (d) “**Arbitration Notice**” has the meaning given in Section 4.2.
- (e) “**Arbitrator**” has the meaning given in Section 4.2(b).
- (f) “**BAFO**” has the meaning given in Section 3.5(c)(iv).
- (g) “**BAFO Submission Date**” has the meaning given in Section 3.5(c)(iv).
- (h) “**Commencement Date**” has the meaning given in Section 3.5(b).
- (i) “**Commercial Referee Panel**” has the meaning given in Section 2.1(a).
- (j) “**Consolidated Proceeding**” has the meaning given in Section 5.2.
- (k) “**Design-Build Agreement Arbitration**” has the meaning given in Section 5.4(a).
- (l) “**Dispute Notice**” has the meaning given in Section 3.2.
- (m) “**Dispute Resolution Procedure**” has the meaning given in Section 3.1.
- (n) “**FTRP Initiating Party**” has the meaning given in Section 3.5(b).
- (o) “**FTRP Receiving Party**” has the meaning given in Section 3.5(b).
- (p) “**Initial Meeting**” has the meaning given in Section 3.3.
- (q) “**Initial Submission**” has the meaning given in Section 3.5(c).
- (r) “**Initiating Party**” has the meaning given in Section 3.2.
- (s) “**Negotiation Period**” has the meaning given in Section 3.3.
- (t) “**Notice of Declination**” has the meaning given in Section 3.5(b).
- (u) “**Objection Notice**” has the meaning given in Section 3.5(b).

- (v) **"Rebuttal Submission"** has the meaning given in Section 3.5(c).
- (w) **"Receiving Party"** has the meaning given in Section 3.2.
- (x) **"Referee"** has the meaning given in Section 3.5(a).
- (y) **"Referee Agreement"** has the meaning given in Section 2.1.
- (z) **"Referee Appointment Notice"** has the meaning given in Section 3.5(b).
- (aa) **"Referee Notice"** has the meaning given in Section 3.5(a).
- (bb) **"Referee Selection Notice"** has the meaning given in Section 3.5(b).
- (cc) **"Response"** has the meaning given in Section 3.2.
- (dd) **"Selected Referee"** has the meaning given in Section 3.5(b).
- (ee) **"Standing Referees"** has the meaning given in Section 2.1.
- (ff) **"Surrebuttal Submission"** has the meaning given in Section 3.5(b).
- (gg) **"Technical Referee"** is a qualified individual selected by the Parties, in accordance with Section 2.1(b) [*Appointment of Standing Referees*] to resolve Disputes relating to geotechnical, engineering, design, construction and other technical matters, including, without limitation, Disputes relating to matters contemplated in Schedule 4 [*Design and Construction Protocols*]; Schedule 5 [*D&C Performance Requirements*] Schedule 6 [*Testing and Commissioning*], and Schedule 7 [*Construction Completion, Service Readiness and Final Completion*].
- (hh) **"Third Party Arbitration"** has the meaning given in Section 5.4(a).
- (ii) **"Third Party Litigation"** has the meaning given in Section 5.4(b).

## 2. STANDING REFEREES

### 2.1 Appointment of Standing Referees

Three standing referees (collectively, the **"Standing Referees"**) shall be appointed within 120 days following the Effective Date of this Agreement as follows:

- (a) two qualified individuals, to be appointed for resolution of all Disputes not relating to matters described in Section 2.2 [*Ad Hoc Technical Referee*], including, without limitation, Disputes in respect of the interpretation, breach, validity or enforcement of rights, obligations or remedies under this Agreement (the **"Commercial Referee Panel"**); and
- (b) one qualified individual, to be appointed for resolution of all Disputes relating to Payment described in Section 3.4 [*Payment Disputes*] (the **"Payment Referee"**).

pursuant to a referee agreement which the Parties shall enter into with each Standing Referee at the time of such appointment in the form attached as Appendix 20A [*Referee Agreement*] (the **"Referee Agreement"**).

## 2.2 Ad Hoc Technical Referee

If the Dispute is relating to geotechnical, engineering, design, construction and other technical matters, including, without limitation, Disputes relating to matters contemplated in Schedule 4 [Design and Construction Protocols]; Schedule 5 [D&C Performance Requirements], Schedule 6 [Testing and Commissioning], and Schedule 7 [Construction Completion, Service Readiness and Final Completion] then the Parties shall appoint a qualified individual for resolution of the Dispute (the “**Technical Referee**”) in accordance with Section 3.5 [Fast Track Referee Process].

## 2.3 No Conflicts

Subject to Section 2.4 [Termination], each Standing Referee shall be appointed for the duration of the Term and shall be reasonably available to act as the Referee at any time during the Term. No Standing Referee or Technical Referee shall act as a Referee in respect of any Dispute in which he or she may have a conflict of interest in so acting, including being financially, or otherwise in any way, interested in the conduct of the Project Work or in the business affairs of the City, Design-Builder or any consultant, subconsultant or subcontractor of any of them and each Standing Referee or Technical Referee shall disclose to each of the Parties, as soon as the Standing Referee or Technical Referee becomes aware of, any conflict or potential conflict of interest that may prevent or disqualify the Standing Referee or Technical Referee from acting as a Referee in respect of a Dispute.

## 2.4 Termination

Each Standing Referee’s appointment may be terminated, which termination will be without prejudice to any accrued rights and obligations of the Parties and the Standing Referee as at the date of termination, by:

- (a) mutual agreement of the City and Design-Builder on 15 days’ notice to the Standing Referee;
- (b) either the City or Design-Builder in the event of a breach of the Referee Agreement by the Standing Referee that has not been rectified within 7 days following receipt by the Standing Referee of notice of such breach; or
- (c) the Standing Referee on 120 days’ written notice of termination to the City and Design-Builder unless the Standing Referee is acting as the Referee on a Dispute, in which case the Standing Referee may not terminate their appointment until the later of the resolution of that Dispute and the end of the 120-day notice period.

Following termination of a Standing Referee, the Parties shall appoint a replacement Standing Referee in accordance with the requirements of Section 2.1 [Appointment of Standing Referees] within 5 Business Days of such termination.

## 3. DISPUTE RESOLUTION

### 3.1 Procedure

Unless both Parties otherwise agree, all Disputes shall be resolved in accordance with the provisions of this Schedule 20 [Dispute Resolution Procedure] (the “**Dispute Resolution Procedure**”). The Parties agree that at all times, both during and after the Term, each of them will make bona fide efforts to: (a) resolve by amicable negotiations any and all Disputes arising between them on a without prejudice basis; and (b) have all Disputes resolved at the lowest level of management before engaging the dispute resolution processes described in this Schedule 20 [Dispute Resolution Procedure].

### 3.2 Dispute Notice and Response

If the Parties are unable to resolve a Dispute at the lowest level of management pursuant to Section 3.1, either Party (the “**Initiating Party**”) may give a written notice to the other Party (the “**Dispute Notice**”) briefly setting out the nature of the Dispute, the remedy or relief sought and the grounds on which such remedy or relief is sought. Within five Business Days of receiving a Dispute Notice, the Party that received the Dispute Notice (the “**Receiving Party**”) will provide a response to the Dispute Notice (the “**Response**”) to the Initiating Party briefly setting out the Receiving Party’s response to the Dispute, including the remedy or relief sought by the Receiving Party and the grounds on which such remedy or relief is sought by the Receiving Party.

### 3.3 Diligent Negotiation

Within three Business Days of the Initiating Party receiving a Response from the Receiving Party or, if a Response was not received, within five Business Days following receipt of the Dispute Notice by the Receiving Party, the Parties’ Representatives will meet (the “**Initial Meeting**”) and, in a diligent manner, make bona fide efforts to resolve the Dispute on a without prejudice basis. The Parties will attempt to resolve the Dispute within five Business Days of the Initial Meeting or within such longer period as the Parties may mutually agree in writing (the “**Negotiation Period**”). Each Party’s Representative shall provide to the other, on a without prejudice basis, timely disclosure of all relevant facts, information and documents (except such documentation that is subject to legal privilege) as may be required or reasonably requested by the other to facilitate the resolution of the Dispute.

### 3.4 Payment Disputes

- (a) If the Dispute is with respect to an amount included in a Proper Invoice that is the subject of a notice of non-payment by the City, the Dispute shall be submitted by written notice provided by the Design-Builder to the City and to the Payment Referee within seven days of the date of the notice of non-payment for independent determination by the Payment Referee.
- (b) Disputes referred to the Payment Referee shall be addressed as outlined in Subsection (c) [*Submissions and Final Offer Proposal*] of Section 3.5 [*Fast Track Referee Process*] of this Schedule as follows
  - (i) The Design-Builder will be the FTRP Initiating Party.
  - (ii) The Commencement Date shall be the date that the Design-Builder provides the written notice to the City and to the Payment Referee of the Dispute.
- (c) Subject to a right to require the Dispute to be arbitrated pursuant to Section 4 [*Arbitration*] within the time period specified therein, the Parties agree that the Payment Referee’s decision shall be final and binding on both Parties and subject only to adjudication pursuant to the PPCLA.

### 3.5 Fast Track Referee Process

- (a) *Referee Notice*

If a Dispute (other than one to which Section 3.4 [*Payment Disputes*] applies) is not resolved pursuant to Section 3.3 [*Diligent Negotiation*] to the mutual satisfaction of the Parties during the Negotiation Period, either Party may, within five Business Days of the end of the Negotiation Period by written notice to the other (a “**Referee Notice**”), request the appointment of a single referee (“**Referee**”) in accordance with the provisions of this Section 3.5 [*Fast Track Referee Process*]. If neither Party requests the appointment of a

Referee on or before the fifth Business Day following the end of the Negotiation Period, the Dispute Notice shall be deemed to have been withdrawn.

(b) *Referee Appointment and Commencement*

The Referee shall be appointed as an expert to resolve the Dispute and shall be appointed in the following manner:

- (i) The Party that issues the Referee Notice (the “**FTRP Initiating Party**”) shall:
  - (A) identify a Standing Referee from the Commercial Referee Panel that such Party proposes should be appointed as the Referee to resolve the Dispute, or
  - (B) if the Dispute is with respect to a technical matter as described in s. 2.2 [*Ad Hoc Technical Referee*], identify three individuals that such Party proposes should be appointed as the Technical Referee to resolve the Dispute.
- (ii) If the Party receiving the Referee Notice (the “**FTRP Receiving Party**”) objects:
  - (A) to the individual Standing Referee identified by the FTRP Initiating Party, or
  - (B) to each of the individuals identified as a Technical Referee,that Party must provide written notice of such objection (an “**Objection Notice**”), with reasons, to the FTRP Initiating Party within 2 Business Days of receiving the Referee Notice.
- (iii) If the FTRP Receiving Party
  - (A) fails to provide an Objection Notice under Section 3.5(b)(ii) within two Business Days of receiving the Referee Notice, or
  - (B) delivers a notice expressly accepting the Standing Referee or one of the individuals as a Technical Referee proposed by the FTRP Initiating Party in the Referee Notice,

the Standing Referee or the Technical Referee agreed to by the Parties under Section 3.5(b)(iii)(B) or as designated by the FTRP Initiating Party under Section 3.5(b)(iii)(A) shall, subject to Section 3.5(b)(v), be selected as the Referee and the FTRP Initiating Party shall provide immediate written notice to the Standing Referee or the Technical Referee (the “**Selected Referee**”) of their selection (a “**Referee Selection Notice**”) with a copy to the FTRP Receiving Party.

- (iv) If the FTRP Receiving Party provides an Objection Notice and the Parties fail to select another Standing Referee or Technical Referee within three Business Days following delivery of such Objection Notice, then either Party may, within five Business Days from the expiry of the abovementioned three Business Day period apply to the ADR Institute of Alberta (“**ADRIA**”) for a referee to be promptly appointed under the “National Arbitration Rules” of the ADR Institute of Canada to act as the Referee in relation to the Dispute (the “**Appointed Referee**”). The FTRP Initiating Party shall provide written notice to the Appointed Referee of their appointment within two Business Days following such

appointment (a “**Referee Appointment Notice**”). If neither Party applies to ADRIA for the appointment of a referee on or before the fifth Business Day from the expiry of the abovementioned three Business Day period, the Dispute Notice shall be deemed to have been withdrawn.

(v) Within three Business Days of receipt of the Referee Selection Notice or the Referee Appointment Notice, the Selected Referee or the Appointed Referee, as applicable, shall provide written notice to each of the Parties either accepting their selection or appointment or advising the Parties that they are unable or unwilling to act as the Referee in respect of the relevant Dispute (a “**Notice of Declination**”). If the Parties receive a Notice of Declination from the Selected Referee, the FTRP Initiating Party shall issue a revised Referee Notice identifying a different Standing Referee or Technical Referee (as applicable) that such Party proposes should be appointed as the Referee to resolve the Dispute. The process outlined in this Section 3.5(b) shall apply to this revised Referee Notice. If the Parties receive a Notice of Declination from all Standing Referees, then either Party may, within five Business Days from the receipt of the last Notice of Declination apply to ADRIA for the appointment of an Appointed Referee. The FTRP Initiating Party shall provide the Referee Appointment Notice within two Business Days following such appointment.

(vi) If

(A) the FTRP Initiating Party does not issue a revised Referee Notice before the fifth Business Day from receipt of the first Notice of Declination from the Selected Referee, or

(B) neither Party applies to ADRIA for the appointment of a referee on or before the fifth Business Day from receipt of the last Notice of Declination from the Selected Referee,

the Dispute Notice shall be deemed to have been withdrawn.

(vii) The Referee’s selection or appointment shall be deemed to have been confirmed on the date (the “**Commencement Date**”) that the Referee delivers to the Parties written notice pursuant to Section 3.5(b)(v) accepting their selection or appointment. Such notice shall include the Referee’s email address for delivery of submissions and for delivery of the BAFO as provided herein.

(viii) If the Parties do not agree on whether a particular Dispute should be referred to a Technical Referee or a Commercial Referee, the Dispute shall be referred to a Commercial Referee for determination as to whether the Dispute should be referred to a Commercial Referee or a Technical Referee in accordance with Subsection (c) [*Submissions and Final Offer Proposal*].

(ix) Neither Party may proceed to Section 3.5(c) [*Submissions and Final Offer Proposal*] with more than one Dispute at any time. The FTRP Initiating Party of a Dispute, when another Dispute is already in progress, must inform the Selected Referee or the Appointed Referee, as applicable, that the Commencement Date will not occur until the date on which the decision of the Referee in the first Dispute is delivered to the Parties.

(c) *Submissions and Final Offer Proposal*



- (i) Within five Business Days of the Commencement Date, the FTRP Initiating Party shall deliver to both the Referee and the FTRP Receiving Party a written submission setting forth the FTRP Initiating Party's position in regards to the Dispute and the reasons supporting such position (the "**Initial Submission**"). If the FTRP Initiating Party fails to deliver its Initial Submission to the Referee and the FTRP Receiving Party within such five-Business Day period, the Dispute Notice shall be deemed to be withdrawn.
- (ii) Within five Business Days of the delivery to the Referee and the FTRP Receiving Party of the Initial Submission, the FTRP Receiving Party may deliver to the Referee and the FTRP Initiating Party a written submission (the "**Rebuttal Submission**") responding to the submissions contained in the Initial Submission. If the FTRP Receiving Party fails to deliver its Rebuttal Submission to the Referee and the FTRP Initiating Party within such five-Business Day period, the FTRP Receiving Party shall be deemed to have adopted the FTRP Initiating Party's Initial Submission.
- (iii) Notwithstanding Section 3.5(c)(ii) and Section 6.2, the FTRP Receiving Party may, within five Business Days of the delivery of the Initial Submission, on notice to the FTRP Initiating Party, apply to the Referee for, and the Referee may (in their discretion) make, a direction extending the time provided in Section 3.5(c)(ii) for the delivery of a Rebuttal Submission if the Initial Submission contains evidence (including expert evidence) that has not been previously provided to the FTRP Receiving Party.
- (iv) The FTRP Initiating Party may, within two Business Days of the delivery of the Rebuttal Submission, on notice to the FTRP Receiving Party, apply to the Referee for, and the Referee may (in their discretion) by notice in writing grant, permission to the FTRP Initiating Party to deliver to the Referee and the FTRP Receiving Party a further submission ("**Surrebuttal Submission**") if the Rebuttal Submission contains evidence (including expert evidence) that has not previously been provided to the FTRP Initiating Party. If the Referee grants permission to the FTRP Initiating Party to deliver a Surrebuttal Submission, such Surrebuttal Submission shall be delivered by the FTRP Initiating Party to the Referee and the FTRP Receiving Party no more than five Business Days following the grant of permission by the Referee and is limited to responding to the evidence that was not previously provided.
- (v) Within three Business Days from the delivery to the Referee and the other Party of the Rebuttal Submission or the Surrebuttal Submission (if any) (the "**BAFO Submission Date**"), each Party must submit to the Referee its "best and final offer" (a "**BAFO**") for resolution of the Dispute. The BAFO shall be limited to the Party's offer and shall not contain any further submissions or elaboration of the Party's position. The Referee shall not deliver to either Party a copy of the other Party's BAFO until both Parties' BAFO have been received by the Referee.
- (vi) If a Party fails to submit a BAFO within the three-Business Day period, that Party shall be deemed to have submitted the same BAFO as the other Party.
- (vii) The Parties may change, by agreement in writing, the time permitted for the delivery of the Initial Submission, the Rebuttal Submission, the Surrebuttal Submission or the BAFO.
- (viii) The Initial Submission, the Rebuttal Submission, the Surrebuttal Submission and the BAFO shall be in digital/electronic format and shall be delivered to the

Referee and the other Party, where delivery to the other Party is specified in the above sections, by email or other electronic means.

- (ix) Upon request by the Referee, the Parties shall provide the Referee with paper copies of their respective Initial Submissions, Rebuttal Submissions, Surrebuttal Submissions and BAFOs.

### 3.6 Referee's Rights and Obligations

In addition to any other rights and obligations the Referee may have under this Schedule 20 [*Dispute Resolution Procedure*] or the Referee Agreement:

- (a) **Referee Review:** The Referee appointed pursuant to Section 3.5 [*Fast Track Referee Process*] shall conduct an impartial consideration of the relevant Dispute in such manner as the Referee thinks fit, including (in their sole discretion) carrying out on-site inspections and interviews with any persons that the Referee considers appropriate. In considering the Dispute, the Referee shall rely on the Dispute Notice, the Initial Submissions, the Rebuttal Submissions, the BAFOs and any advice or assistance provided by other professional persons or experts retained by the Referee as contemplated below. The Referee shall not be obligated to conduct their enquiries in the presence of the Parties or to receive further submissions from the Parties, except to the extent that the Referee considers appropriate, and may render their decision notwithstanding the failure of a Party to participate in any proceedings, hearings or enquiries. The Referee may from time to time request supplemental submissions from either Party or from both Parties, but such supplemental submissions will not modify any of the time periods stipulated herein for the rendering of a decision by the Referee. Any submission or documentation in respect of the Dispute provided to the Referee by a Party will also be provided by the Referee to the other Party. In considering the Dispute and rendering his decision, the Referee may also, with the prior written approval of both Parties, retain other professional persons or experts to provide assistance or advice to the Referee and the Referee shall pay due regard to any request by either Party for the Referee to retain such other professional persons or experts.
- (b) **Standard of Care:** The Referee shall exercise the standard of skill, care, and diligence that would be expected of an expert professional experienced in providing services of a similar nature to those of the Referee on projects of a similar nature to the Project.
- (c) **Disclosure of Conflicts:** The Referee shall disclose to the Parties, as soon as the Referee becomes aware of same, any conflict or potential conflict of interest that arises during the Referee's appointment.
- (d) **Referee's Decision:** The Referee will render their decision in writing, with detailed reasons, and shall provide a copy of the decision to each Party within 5 Business Days of the BAFO Submission Date or such later date as the Parties may agree in writing (the "**Referee Review Period**"). The Referee's decision (unless otherwise expressly agreed by the Parties in writing) shall be based on one Party's BAFO and shall not be based on or influenced by any matter or consideration other than may be contained in the successful Party's BAFO.
- (e) **Parties' Cooperation.** The Parties shall cooperate with the Referee and comply with all reasonable requests from the Referee for additional information, documents and access to personnel and the City Lands which the Referee considers necessary or desirable for their consideration of the Dispute.

- (f) **Referee's Decision Binding.** Subject to a right to require the Dispute to be arbitrated pursuant to Section 4 *[Arbitration]* within the time period specified therein, the Parties agree that the Referee's decision shall be final and binding on both Parties and shall not be subject to appeal, adjudication, arbitration, litigation or any other dispute resolution process.
- (g) **Fees and Expenses.** One-half of all fees and expenses of a Referee appointed pursuant to Section 3.5 *[Fast Track Referee Process]* (including the fees and expenses of any professional persons or experts retained by the Referee pursuant to Section 3.6(a) *[Referee Review]*, and, any retainer payable to Standing Referees pursuant to the terms of the applicable Referee Agreement), shall be paid by each of the City and Design-Builder. The City shall pay the full amount of such fees and expenses on the day that such fees and expenses are due and payable and Design-Builder shall reimburse the City for Design-Builder's share of all such fees and expenses within 5 Business Days of receipt of a written demand from the City, failing which the City shall be entitled to deduct the amount of Design-Builder's share of such fees and expenses from amounts otherwise due to Design-Builder under the provisions of this Agreement. Each Party shall otherwise bear all of its own costs, fees and expenses in connection with the Fast Track Referee Process.
- (h) **No Liability for Referee.** The Parties hereby release and save harmless each Referee appointed pursuant to Section 3.5 *[Fast Track Referee Process]* from any liability arising from such Referee's actions, made in good faith and in accordance with the standard of care required under Section 3.6(b) *[Standard of Care]*, in carrying out the duties of the Referee as described in this Schedule 20 *[Dispute Resolution Procedure]*.
- (i) **Independence/Authority of Referee.** The Referee:
- (i) shall be an independent consultant and shall not, and shall not purport to be, a partner, joint venturer, or agent of either Party or otherwise related to either Party;
  - (ii) other than as may be expressly set out in this Agreement, including this Schedule 20 *[Dispute Resolution Procedure]*, shall have no authority to give any directions to the Parties or to the Parties' officers, employees, contractors, consultants, or agents; and
  - (iii) shall have no authority to waive or alter any terms of this Agreement nor to discharge or release either Party from its obligations under this Agreement unless jointly agreed in writing by the Parties.
- (j) **Confidentiality.** The proceedings under Section 3.5 *[Fast Track Referee Process]* shall be confidential and all information, data or documentation disclosed or delivered by either Party to the Referee as a result of or in connection with the Referee's duties as the Referee shall be treated as confidential and neither of the Parties nor the Referee shall, except as required by Applicable Law, disclose to any Person any such information, data or documentation unless the Parties otherwise agree in writing.
- (k) **Evidence in Arbitration.** Notwithstanding Section 3.6(j) *[Confidentiality]*, the decision of the Referee and any and all documents, evidence, and submissions relating to a Dispute decided under Section 3.5 *[Fast Track Referee Process]* may be submitted as evidence or background information by either Party in arbitration proceedings relating to the same Dispute under Section 4.2 *[Arbitration]*.

## 4. ARBITRATION

### 4.1 Commencement of Arbitration Proceedings

If either:

- (a) the amount in Dispute is more than \$500,000 (index linked); or
- (b) the Dispute involves material and significant issues other than monetary claims by one Party against the other Party;

such Party may, at any time up to 90 days following the issuance of the Referee's decision, commence proceedings to have the Dispute settled by arbitration under Section 4.2 [Arbitration]. In any such proceedings, the scope of issues will not be limited strictly to the terms of the Dispute Notice but may extend to include directly related matters for the purpose of completely resolving the Dispute, including, without limitation, issues that are the subject of the Referee's decision.

Any arbitration commenced under Section 4.2 [Arbitration] shall be decided on a *de novo* basis and shall not be, or considered to be, an appeal of the Referee's decision. For greater certainty the arbitrator selected to hear the Dispute shall not be bound by, or be required to adhere to, any findings of fact by, or any other findings or decisions or determinations of the Referee, and Section 3.6(k) [Evidence in Arbitration] shall apply to the arbitration of the Dispute.

### 4.2 Arbitration

If a Party is entitled under Section 4.1 [Commencement of Arbitration Proceedings] to commence proceedings to have a Dispute settled by arbitration, then the Party may commence such proceedings at such time and according to the protocol set out below in this Section 4.2 [Arbitration] by giving the other Party notice (an "**Arbitration Notice**") of its intention to submit the Dispute to binding arbitration, which notice shall set out the name of the proposed arbitrator and the scope of issues to be determined by arbitration in addition to those set out in the Dispute Notice, if any.

If a Party issues an Arbitration Notice pursuant to this Section 4.2 [Arbitration], the following procedure shall apply:

- (a) **Applicable Rules:** The "National Arbitration Rules" of the ADR Institute of Canada Inc. ("**ADRIC**") will apply to the arbitration, as modified by this Schedule 20 [Dispute Resolution Procedure] or as otherwise agreed by the Parties;
- (b) **Single Arbitrator:** A single arbitrator shall be selected (the selected arbitrator being referred to herein as the "**Arbitrator**"). The Party proposing the arbitrator shall provide a written resume of that individual's work background, qualifications and arbitration experience. Within 20 days after receipt of an Arbitration Notice, the other Party shall give notice to the first Party advising whether such other Party accepts the arbitrator proposed by the first Party, and, if not, proposing another individual to be the single arbitrator, including a written resume of that individual's work background, qualifications and arbitration experience. If such notice is not given by the other Party within such 20 day period, the other Party shall be deemed to have accepted the arbitrator proposed by the first Party. If the Parties do not agree upon a single arbitrator within 20 days after the other Party proposed an alternate individual, any Party may apply to the court under the *Arbitration Act* (Alberta) for the appointment of a single arbitrator;
- (c) **Scope of Award:** The Arbitrator shall have the authority to award any remedy or relief that the Court of King's Bench of Alberta could order or grant in accordance with the

Agreement, including specific performance of any obligation created under the Agreement, the issuance of an interim, interlocutory or permanent injunction, or the imposition of sanctions for abuse or frustration of the arbitration process;

- (d) **Place/Language of Arbitration:** The place of arbitration shall be Edmonton and all meetings and hearings of the Arbitrator shall take place in the City of Edmonton or in such other place as the Parties agree and such meetings and hearings will be conducted in the English language unless otherwise agreed by such Parties;
- (e) **Date/Time/Location of Arbitration:** The Arbitrator may at any time fix the date, time and location of meetings and hearings in the arbitration, upon reasonable notice to the Parties;
- (f) **Privacy/Legal Representation:** All meetings and hearings held in respect of the arbitration will be in private unless the Parties agree otherwise, and either Party may be represented at any meetings or hearings by legal counsel;
- (g) **Confidentiality:** The arbitration will be kept confidential and the existence of the proceeding and any element of it, including any pleadings, briefs or other documents submitted or exchanged, and testimony or other oral submission and any decision or awards by the Arbitrator, will not be disclosed to any party other than the Arbitrator, the Parties including their respective directors, officers, shareholders, experts and legal counsel, and such other persons as may be necessary to the conduct of the proceeding or as may be required by law;
- (h) **Arbitrator's Decision:** The Arbitrator shall deliver a decision in writing as soon as possible in the circumstances after the conclusion of the hearing and, unless the Parties agree otherwise, will set out reasons for the decision;
- (i) **Arbitrator's Decision Binding:** The decision of the Arbitrator shall be final and binding on both Parties and shall not be subject to appeal, adjudication, arbitration, litigation or any other dispute resolution process, and both Parties expressly waive all rights of appeal in connection with the Arbitrator's decision.; and
- (j) **Fees and Expenses:** Each Party shall pay one-half of the Arbitrator's fees and expenses, and shall bear all of its own fees and expenses in connection with the arbitration. The Arbitrator shall, however, have the authority, in the Arbitrator's discretion, to award recovery of all costs and fees (including legal fees on a solicitor and own client basis, administrative fees, and the Arbitrator's fees and expenses, as applicable) to the prevailing Party in the arbitration.

## 5. CONSOLIDATION OF PROCEEDINGS

### 5.1 Acknowledgement

The Parties acknowledge that a Dispute under this Agreement may be based on facts or issues of law that also apply or relate to a dispute under a Subcontract and in these circumstances it may be appropriate for the Dispute proceedings that may have been initiated under two or more of these agreements to be consolidated into one proceeding.

### 5.2 Consolidation

For all Disputes that arise prior to Construction Completion, unless:

- (a) both Parties otherwise agree; or

- (b) the issue in a particular Dispute is such that waiting until after Construction Completion to resolve the Dispute would cause material harm to one of the Parties as determined by a Standing Referee; or
- (c) the issue in a particular Dispute arises in connection with requirements of achieving or deficiencies in not achieving Construction Completion,
- (d) with respect to a particular Dispute, the Dispute is consolidated with any Third Party Arbitration or Third Party Litigation (as hereinafter defined) pursuant to Section 5.4 [*Consolidation with Third Party Disputes*],

all arbitration proceedings between the Parties prior to Construction Completion shall be stayed and consolidated into a single arbitration proceeding (the "**Consolidated Proceeding**"), with the arbitration proceeding promptly and expeditiously after Construction Completion.

### 5.3 Terms

To the extent appropriate, the terms of this Schedule 20 [*Dispute Resolution Procedure*] apply to the Consolidated Proceeding (including all parties to the Consolidated Proceeding and the Arbitrator appointed for the Consolidated Proceeding) in the same manner as they apply to the individual proceedings being consolidated, and the parties to the Consolidated Proceeding will appoint the Arbitrator for the Consolidated Proceeding in accordance with Section 4.2 [*Arbitration*].

### 5.4 Consolidation with Third Party Disputes

- (a) Subject to Section 5.4(d), if either Party is involved in an arbitration in the Province of Alberta with a third party (a "**Third Party Arbitration**"), and if such Third Party Arbitration involves common factual or legal issues (including common issues of damages) which are also the subject of a Dispute between the Parties for which an Arbitration Notice has been given, then any arbitration of the Dispute between the Parties which includes those common factual, legal or damages issues (a "**Design-Build Agreement Arbitration**") shall be stayed, consolidated or joined with the Third Party Arbitration(s) but only if the City, Design-Builder and the other parties all agree or, failing their agreement, if a court in the Province of Alberta on application considers it just and convenient in all the circumstances that the Design-Build Agreement Arbitration should be stayed or consolidated or joined with the Third Party Arbitration.
- (b) Subject to Section 5.4(d), if either Party is involved in litigation in the Province of Alberta with a third party ("**Third Party Litigation**") and if:
  - (i) such Third Party Litigation involves common factual or legal issues (including common issues of damages) which are the subject of a Design-Build Agreement Arbitration; and
  - (ii) one of the Parties is brought directly into the Third Party Litigation as a Party to that litigation,

then a court in the Province of Alberta may, on the application of either Party, order a stay of either or both the Design-Build Agreement Arbitration proceeding and the Third Party Litigation, or order a joinder of the Design-Build Agreement Arbitration and the Third Party Litigation. If such joinder is ordered, the Design-Build Agreement Arbitration and the Third Party Litigation ordered to be joined by the court shall be determined by that court or by another court in the Province of Alberta such that the Design-Build Agreement Arbitration and the Third Party Litigation shall be resolved in one forum. For

purposes of the foregoing, joinder of the Design-Build Agreement Arbitration and the Third Party Litigation shall be construed to include stays and conditional stays of issues in the Design-Build Agreement Arbitration pending the commencement and completion of third party proceedings by one or both of the Parties in the Third Party Litigation.

- (c) In considering whether to order a stay, consolidation or joinder of a Design-Build Agreement Arbitration with a Third Party Arbitration or Third Party Litigation, the court will be entitled to give substantial weight to the desire by the Parties that all Disputes which are related to Third Party Arbitration or Third Party Litigation be resolved in a single forum to avoid multiplicity of proceedings and the potential for contradictory findings of fact, liability and quantum, and to ensure the arbitrator or court has the advantage of obtaining full evidence and disclosure from the Parties and from the other parties, as applicable and as required to resolve the Dispute and to make findings of fact, liability and quantum of damages and awards or judgments binding on the Parties based on all available evidence.
- (d) Sections 5.4(a) and 5.4(b) only apply:
  - (i) if the Dispute between the Parties includes a claim by one Party against the other for contribution or indemnity for that Party's liability or potential liability to the third party where such liability results or will result from an award in the Third Party Arbitration or a judgment in the Third Party Litigation; and
  - (ii) to those specific issues that are common issues in the Design-Build Agreement Arbitration, the Third Party Arbitration and the Third Party Litigation, such that all other issues in the Dispute shall continue to be resolved by Design-Build Agreement Arbitration and shall not be consolidated with the Third Party Arbitration or Third Party Litigation.

## **6. GENERAL**

### **6.1 Other Remedies**

Neither Party may initiate a proceeding in a court of competent jurisdiction, whether before or after a Dispute has been initiated by a Dispute Notice, in respect of any aspect of the Dispute, including the application or interpretation of any provision of this Agreement, except as expressly permitted by the (a) Agreement; (b) the *Arbitration Act (Alberta)*; or (c) the prior written approval of both Parties.

### **6.2 Strict Compliance with Time Limits**

The Parties acknowledge that timely resolution of Disputes is mutually beneficial and the time limits set out in this Schedule 20 [*Dispute Resolution Procedure*], or as otherwise agreed to by the Parties, shall be strictly complied with and enforced.

### **6.3 The City's Directive**

If a Dispute occurs, then the City and Design-Builder will diligently carry out their respective obligations under this Agreement pending resolution of the Dispute pursuant to this Schedule 20 [*Dispute Resolution Procedure*]. Prior to resolution of the Dispute, the City may in its discretion by notice to Design-Builder direct Design-Builder to proceed with work activities in respect of the matter in Dispute or any related matter and Design-Builder will comply with and implement the direction. If Design-Builder fails to comply with the City's direction within 5 Business Days from the issuance thereof, the City shall be entitled to engage others to perform the work activities specified in such direction at the risk and cost of Design-Builder and the City may deduct any cost

incurred from any payment or payments to Design-Builder under this Agreement. Such City direction shall be without prejudice to Design-Builder's rights to claim compensation or other relief as an element or aspect of the resolution of the relevant Dispute or to assert other rights under the Agreement. Nothing in this Schedule 20 *[Dispute Resolution Procedure]* shall limit the City's right to require a Change in circumstances where the Dispute is determined in favour of Design-Builder.

#### **6.4 Subcontracts**

Design-Builder shall ensure that each Subcontract contains terms that are substantially similar to, and in no way inconsistent with, the terms of this Schedule 20 *[Dispute Resolution Procedure]* or otherwise expressly incorporates the terms of this Schedule 20 *[Dispute Resolution Procedure]* into the Subcontract. Specifically, but without limitation, Design-Builder shall ensure that each Subcontract:

- (a) contains identical provisions relating to the appointment of the Referee and the Arbitrator as provided in this Schedule 20 *[Dispute Resolution Procedure]* including an identical roster of Standing Referees;
- (b) provides for the mandatory fast track referee process and binding arbitration proceedings for the resolution of all disputes that are governed by identical rules of procedures as provided in this Schedule 20 *[Dispute Resolution Procedure]*; and
- (c) provides for the consolidation of proceedings as contemplated under Section 5 *[Consolidation of Proceedings]*;

Design-Builder shall also cause each Design-Builder Person to abide by, comply with, and enforce the terms of this Section 6.4 *[Subcontracts]* for any Dispute in which the City is a party or a participant.

#### **6.5 No Disruption to Project**

It is the intent of the City and Design-Builder that no Dispute shall disrupt, compromise, limit, restrict or otherwise adversely affect the performance of their respective obligations or the exercise of their rights under this Agreement while the Dispute is outstanding and in progress and not fully resolved between the Parties. Each Party will use commercially reasonable efforts at all times in a diligent manner to take such steps or actions as may be reasonably necessary to avoid or mitigate any potential or possible disruption, compromise, limitation, restriction or other adverse impact to the Project, the Project Work or the performance of obligations and the exercise of rights of or by the Parties in relation to a Dispute.

#### **6.6 Limitation Periods**

The limitation of actions as outlined in section 51 of the *Arbitration Act* (Alberta) is suspended pursuant to section 7 of the *Limitations Act* (Alberta) once a Dispute has been referred for resolution pursuant to this Schedule 20 *[Dispute Resolution Procedure]*.



APPENDIX 20A

REFEREE AGREEMENT

**[Note to Bidders – The form of the Referee Agreement for a Technical Referee shall be amended as required to address their appointment]**

THIS AGREEMENT is made as of the <\*> day of <\*>, <\*>

AMONG:

**The City of Edmonton**

(the “City”)

AND:

<\*>

(“Design-Builder”)

AND:

<\*>

(the “Standing Referee”)

This Agreement confirms the appointment of the Standing Referee under the Design-Build Agreement dated <\*> between the City and Design-Builder (the “**Design-Build Agreement**”). The terms of this appointment are as contained in Schedule 20 [*Dispute Resolution Procedure*] to the Design-Build Agreement, which terms are incorporated by reference in this Referee Agreement.

The Standing Referee confirms that the Standing Referee:

- (i) has received a briefing from the City and Design-Builder on the Project, the Design-Build Agreement, the types of disputes that might possibly arise for which the Referee may be appointed and has reviewed a copy of the Design-Build Agreement and related materials, including Schedule 20 [*Dispute Resolution Procedure*] to the Design-Build Agreement;
- (ii) has reviewed Schedule “A” - Design-Build Agreement Party List [NTD – to be developed based on Design-Builder organization] and confirms that the Referee is not in a conflict of interest, including being financially, or otherwise in any way, interested in the conduct of the Project Work or in the business affairs of the City, Design-Builder, or with respect to any of the parties noted in the list.
- (iii) accepts the appointment as, and agrees to perform in a diligent and professional manner the functions of, a referee under the Design-Build Agreement on the terms and conditions set out in Schedule 20 [*Dispute Resolution Procedure*] of the Design-Build Agreement;
- (iv) agrees to be bound by the terms and conditions set out in Schedule 20 [*Dispute Resolution Procedure*] of the Design-Build Agreement as applicable and acknowledges that those terms and conditions are incorporated by reference in this Referee Agreement;
- (v) will keep reasonably well informed of the progress and status of the Project not less than quarterly by reviewing monthly reports forwarded by the City; and

- (vi) agrees that additional parties may join this Referee Agreement without any additional standby retainer fee payable where such parties are party to a Consolidated Proceeding as defined in Schedule 20 *[Dispute Resolution Procedure]* of the Design-Build Agreement.

Compensation for the Standing Referee will consist of and be limited to:

- (a) an annual standby retainer fee of \$[.] for keeping informed on the state of the Project payable in two equal installments semi-annually in arrears.”; and
- (b) daily/hourly rate for fees for specific appointments in dealing with Disputes is \$\_\_\_\_\_. In addition to your invoiced fees, the City will pay any and all reasonable disbursements incurred in providing your services.

Invoices should be submitted as follows:

- (a) refer to the purchase order number;
- (b) list the number of work-days or work-hours spent and the various rates used to calculate the invoice;
- (c) if applicable, provide all necessary details to allow for the calculations of Non-Resident Withholding Tax as stipulated under the applicable Canada Revenue Agency’s guidelines;
- (d) show the GST as a separate amount; and
- (e) addressed to:

LRT Expansion & Renewal - City of Edmonton  
20th Floor, MNP Tower - 10235 - 101 Street  
Edmonton, AB T5J 3G1  
Attention: [TBD]

Notices given pursuant to the terms of this Referee Agreement shall be sufficiently given:

- (a) in case of notice to the City, if such notice is sent by e-mail, prepaid registered mail, or personally delivered to the following address:

LRT Expansion & Renewal - City of Edmonton  
20th Floor, MNP Tower - 10235 - 101 Street  
Edmonton, AB T5J 3G1  
Attention: [TBD]  
e-mail:

- (b) in case of notice to Design-Builder, if such notice is sent by e-mail, prepaid registered mail, or personally delivered, to the following address:

<\*>

- (c) and, in case of notice to the Referee, if such notice is sent by e-mail, prepaid registered mail, or personally delivered, to the following address:

<\*>

Either party may, at any time, give notice in writing to the other of any change of address of the party giving such notice and, from and after giving of such notice, the address herein specified shall be deemed to be the address of the party for the giving of notice hereunder.

Termination of this Referee Agreement is subject to the provisions of Schedule 20 [Dispute Resolution Procedure] of the Design-Build Agreement.

This Referee Agreement is not assignable. This Referee Agreement shall be governed by and construed in accordance with the laws of the Province of Alberta and the federal laws of Canada applicable therein.

It is the express wish of the Parties that this document and any related documents be drawn up and executed in English. Les parties aux présentes ont expressément demandé que ce document et tous les documents s'y rattachant soient rédigés et signés en anglais.

SIGNATURE BLOCK: