

THE CITY OF EDMONTON
PROJECT AGREEMENT
VALLEY LINE WEST LRT

Schedule 27
Compensation on Termination

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SCHEDULE 27

COMPENSATION ON TERMINATION

1. DEFINITIONS

1.1 Definitions

In this Schedule 27 [*Compensation on Termination*], unless the context indicates a contrary intention, terms which are defined in the Agreement (and not otherwise defined in this Schedule 27 [*Compensation on Termination*]) shall have meanings given to them in the Agreement and the following terms shall have the following meanings:

- (a) “**City Default Termination Sum**” has the meaning given in Section 2.1(b) of this Schedule 27 [*Compensation on Termination*].
- (b) “**City Payment Date**” has the meaning given in Section 5.1(c)(i) of this Schedule 27 [*Compensation on Termination*].
- (c) “**Employee Termination Payments**” means termination payments which are required under Applicable Law to be made to employees of Project Co or any Project Co Party as a direct result of terminating the Agreement (provided that Project Co or the relevant Project Co Party shall take commercially reasonable steps to mitigate its loss) and provided that, in calculating such amount, no account should be taken of any liabilities and obligations of Project Co or the relevant Project Co Party arising out of:
 - (i) contracts of employment or other agreements or arrangements entered into by Project Co or the relevant Project Co Party to the extent that such contracts of employment, agreements or arrangements were not entered into in connection with the Project; or
 - (ii) contracts of employment or other agreements or arrangements entered into by Project Co or the relevant Project Co Party other than in the ordinary course of business and on commercial arm’s length terms, save to the extent that amounts would have arisen if such contracts or other agreements or arrangements had been entered into in the ordinary course of business and on commercial arm’s length terms.
- (d) “**Invoice Date**” means the date that is the later of:
 - (i) the date on which the City receives an invoice from Project Co for the relevant termination sum; and
 - (ii) the date on which the City receives the supporting evidence required pursuant to Section 5.1(a) of this Schedule 27 [*Compensation on Termination*].
- (e) “**Non-Default Rate**” means, with respect to a termination payment to be made pursuant to Section 5.1(c)(i) or Section 5.1(d) of this Schedule 27 [*Compensation on Termination*] and a specified period of time, (i) such amount multiplied by (A) such period of time in days divided by the actual number of days in the current year multiplied by (B) Prime.
- (f) “**Non-Default Termination Sum**” has the meaning given in Section 4.1(b) of this Schedule 27 [*Compensation on Termination*].
- (g) “**Project Co Amount**” means any amount payable to Project Co as a return and/or profit to Project Co shown in the Revised Final Financial Model, including for greater certainty any loans made or capital contributed to Project Co by any Affiliate of Project Co or a Project Co Party,

prorated by a fraction, the numerator of which is the period between the date of commencement of the Project Work and the Termination Date, and the denominator of which is the period between the date of commencement of the Project Work and the Target Construction Completion Date.

- (h) **“Project Co Default Termination Sum”** has the meaning given to it in Section 3.1(b) of this Schedule 27 [*Compensation on Termination*].
- (i) **“Project Co Payment Date”** has the meaning given to it in Section 5.1(d) of this Schedule 27 [*Compensation on Termination*].
- (j) **“Senior Debt Amount”** means, at any time, the then outstanding principal amount of debt funded under the terms of the Senior Financing Agreements by the Senior Lenders to Project Co, together with all interest accrued thereon at that time in accordance with the Senior Financing Agreements, provided that at any time where any portion of the interest payable to the Senior Lenders is subject to the Hedging Agreement(s), accrued interest in respect of such portion of the interest payable to the Senior Lenders shall be calculated based on the fixed rate payable by Project Co under the Hedging Agreement(s) without regard to whether such fixed rate is payable directly to a Senior Lender or to the Hedge Provider(s) under the Hedging Agreement(s) and all references to interest payable to the Senior Lenders under the Agreement shall be construed accordingly. For greater certainty, the Senior Debt Amount excludes the Senior Debt Makewhole.
- (k) **“Senior Debt Makewhole”** means, (i) at any time, any amount (other than the Senior Debt Amount) then due and payable to the Senior Lenders under the Senior Financing Agreements with respect to the Senior Debt Amount, including any “make whole” payments, breakage costs (less any breakage benefits) and all other fees, costs and expenses reasonably and properly incurred which Project Co is obligated to pay to the Senior Lenders pursuant to the Senior Financing Agreements with respect to the Senior Debt Amount; and (ii) any swap breakage costs (less breakage benefits), if any, then due and payable to the Hedge Provider(s) under the Hedging Agreement(s) entered into with respect to the Senior Debt Amount.
- (l) **“Subcontractor Losses”** means, subject to Project Co’s obligations under the Agreement to limit any compensation to Subcontractors, the amount reasonably and properly payable by Project Co to each Project Contractor under the terms of the Project Contract as a direct result of the termination of the Agreement (including any reasonable commercial breakage fee, the reasonableness of which fee shall not be determined by or by reference to any arrangement made between Project Co and a Project Contractor), provided that such amount shall be reduced to the extent that Project Co or the Project Contractor fails to take commercially reasonable steps to mitigate such amount; provided, however, that, no account should be taken of any liabilities and obligations of Project Co to the relevant Project Contractor arising out of:
 - (i) any loss of overhead or profit of such Project Contractor relating to any period or costs after the Termination Date (save to the extent the same are properly included in any reasonable commercial breakage fee set out in any of the Project Contracts);
 - (ii) agreements or arrangements entered into by Project Co or the Project Contractor to the extent that such agreements or arrangements were not entered into in connection with those parties’ obligations in relation to the Project; or
 - (iii) agreements or arrangements entered into by Project Co or the Project Contractor other than in the ordinary course of business and on commercial arm’s length terms, save to the extent that amounts would have arisen if such agreements or arrangements had been entered into in the ordinary course of business and on commercial arm’s length terms.

2. COMPENSATION ON TERMINATION FOR CITY DEFAULT OR CONVENIENCE

2.1 Compensation

- (a) If Project Co terminates the Agreement pursuant to Section 15.3 [*Termination By Project Co*] of the Agreement or the City terminates the Agreement pursuant to Sections 15.2(b) or 15.2(c) of the Agreement, the City shall pay to Project Co the City Default Termination Sum.
- (b) The “**City Default Termination Sum**” shall be an amount equal to the aggregate of:
- (i) the Senior Debt Amount and the Senior Debt Makewhole;
 - (ii) any amount payable by the City to Project Co in accordance with Sections 10.1(c), 11.2.1(c) or 11.2.2(c) of the Agreement;
 - (iii) the Employee Termination Payments and the Subcontractor Losses;
 - (iv) any reasonable costs properly incurred by Project Co to wind up its operations; and
 - (v) the Project Co Amount;

LESS, the aggregate (without double counting) of the following, to the extent it is a positive amount:

- (vi) all credit balances on any bank accounts held by or on behalf of Project Co on the Termination Date and the value of any insurance proceeds due to Project Co or to which Project Co would have been entitled had insurance been maintained in accordance with the requirements of the Agreement (save where such insurance proceeds are to be applied in reinstatement, restoration or replacement, or, in the case of third party legal liability, in satisfaction of the claim, demand, proceeding or liability or where the City is required to procure insurances and to make proceeds available to Project Co under the Agreement and it has failed to do so) or sums due and payable from third parties other than sums wholly unrelated to the Project Work, the Project and the Agreement (but only when received from third parties) but excluding any claims under any Subcontracts or claims against other third parties which have not been determined or have been determined but not yet paid, provided that, in such case, Project Co shall assign any such rights and claims under the Subcontracts or claims against other third parties (other than claims against other third parties wholly unrelated to the Project Work, the Project and the Agreement) to the City and, at no additional cost to Project Co, give the City reasonable assistance in prosecuting such claims;
- (vii) to the extent realized before the Invoice Date, the fair market value of any other assets and rights of Project Co (other than those transferred to the City pursuant to the Agreement) less liabilities of Project Co properly incurred in carrying out its obligations under the Agreement as at the Termination Date, provided that no account should be taken of any liabilities and obligations of Project Co arising out of:
 - (A) agreements or arrangements entered into by Project Co to the extent that such agreements or arrangements were not entered into in connection with Project Co’s obligations in relation to the Project; or
 - (B) agreements or arrangements entered into by Project Co other than in the ordinary course of business and on commercial arm’s length terms, save to the extent that liabilities and obligations would have arisen if such agreements or

arrangements had been entered into in the ordinary course of business and on commercial arm's length terms; and

- (viii) amounts which the City is entitled to set off pursuant to Section 8.6 *[Set-off]* of the Agreement,

provided that the City Default Termination Sum shall never be less than the aggregate of the Senior Debt Amount and the Senior Debt Makewhole.

- (c) To the extent that such assets and rights referred to in Section 2.1(b)(vii) of this Schedule 27 *[Compensation on Termination]* are not realized and applied pursuant thereto, Project Co shall, on payment of the City Default Termination Sum, assign such assets and rights to the City.
- (d) The City shall pay the City Default Termination Sum in accordance with Section 5 *[General]* of this Schedule 27 *[Compensation on Termination]*.

3. COMPENSATION ON TERMINATION FOR PROJECT CO DEFAULT

3.1 Compensation

- (a) If the City terminates the Agreement pursuant to Section 15.2(a) of the Agreement, the City shall pay to Project Co the Project Co Default Termination Sum.
- (b) The "**Project Co Default Termination Sum**" shall be an amount equal to the Total Capital Cost Amount, as adjusted in accordance with the terms of the Agreement as of the Termination Date, less the aggregate, without duplication, of each of the following:
 - (i) any amount of the Payments paid by the City on or before the Termination Date, provided that for the purposes of this (i), the amount of such Payments shall not take into account any holdbacks or Construction Payment Adjustments deducted therefrom;
 - (ii) the City's estimate of the cost to complete the Project Work, including the cost to remedy any defective or deficient Project Work determined on a reasonable basis in consultation with the Independent Certifier and the City's other consultants and including all reasonable and proper costs incurred by the City in re-tendering the Project Work or any portion thereof;
 - (iii) the City's estimate of the aggregate of all Direct Losses suffered, sustained or incurred by the City as a result of, in respect of, or arising out of the event or events which resulted in the termination of the Agreement and arising out of the termination together with all costs of entering into a new construction contract to complete the Project Work, including any warranty obligations for the Project Work in place and to be performed, on substantially the same terms and conditions as the Agreement;
 - (iv) to the extent not included in (ii) above, the Construction Completion Deficiencies Holdback and/or Phase 1 Construction Completion Deficiencies Holdback, as at the time the Project Co Default Termination Sum is required to be made;
 - (v) the Legislative Holdback required to be maintained by the City as at the time the Project Co Default Termination Sum is required to be made, which amount will be paid by the City in accordance with the Builders' Lien Act; and
 - (vi) amounts which the City is entitled to set off pursuant to Section 8.6 *[Set-off]* of the Agreement.

- (c) To the extent that any amounts that the City has estimated or determined pursuant to Sections 3.1(b)(ii), 3.1(b)(iii) or 3.1(b)(iv) of this Schedule 27 *[Compensation on Termination]* are in excess of what is required by the City to complete the Project Work or compensate for Direct Losses, the Construction Completion Deficiencies Holdback, the Phase 1 Construction Completion Deficiencies Holdback or the Legislative Holdback, as applicable, the City shall promptly return such excess amounts to or to the order of Project Co.
- (d) The City shall pay the Project Co Default Termination Sum in accordance with Section 5 *[General]* of this Schedule 27 *[Compensation on Termination]*.

4. CONSEQUENCES OF NON-DEFAULT TERMINATION

4.1 Consequences

- (a) If either Party terminates the Agreement pursuant to Section 9.4 *[City's Election not to Reinstate]* or Section 15.5 *[Termination Upon Force Majeure or Limited Relief Event]* of the Agreement, the City shall pay to Project Co the Non-Default Termination Sum.
- (b) The "**Non-Default Termination Sum**" shall be an amount equal to the aggregate of:
 - (i) the Senior Debt Amount and the Senior Debt Makewhole;
 - (ii) any amount payable by the City to Project Co in accordance with Sections 10.1(c), 11.2.1(c) or 11.2.2(c) of the Agreement; and
 - (iii) the Employee Termination Payments and the Subcontractor Losses (but excluding therefrom any claims for loss of profit);

LESS, the aggregate (without double counting) of the following, to the extent it is a positive amount:

- (iv) all credit balances on any bank accounts held by or on behalf of Project Co on the Termination Date and the value of any insurance proceeds due to Project Co or to which Project Co would have been entitled had insurance been maintained in accordance with the requirements of the Agreement (save where such insurance proceeds are to be applied in reinstatement, restoration or replacement, or, in the case of third party legal liability, in satisfaction of the claim, demand, proceeding or liability or where the City are required to procure insurances and to make proceeds available to Project Co under the Agreement and it has failed to do so) or sums due and payable from third parties other than sums wholly unrelated to the Project Work, the Project and the Agreement (but only when received from third parties), but excluding any claims under any Subcontracts or claims against other third parties which have not been determined or have been determined but not yet paid, provided that, in such case, Project Co shall assign any such rights and claims under the Subcontracts or claims against other third parties (other than claims against other third parties wholly unrelated to the Project Work, the and the Agreement) to the City and, at no additional cost to Project Co, give the City reasonable assistance in prosecuting such claims; and

- (v) to the extent realized before the Invoice Date, the fair market value of any other assets and rights of Project Co (other than those transferred to the City pursuant to the Agreement) less liabilities of Project Co properly incurred in carrying out its obligations under the Agreement as at the Termination Date, provided that no account should be taken of any liabilities and obligations of Project Co arising out of:
 - (A) agreements or arrangements entered into by Project Co to the extent that such agreements or arrangements were not entered into in connection with Project Co's obligations in relation to the Project; or
 - (B) agreements or arrangements entered into by Project Co other than in the ordinary course of business and on commercial arm's length terms, save to the extent that liabilities and obligations would have arisen if such agreements or arrangements had been entered into in the ordinary course of business and on commercial arm's length terms; and
- (vi) amounts which the City are entitled to set off pursuant to Section 8.6 *[Set-off]* of the Agreement,

provided that the Non-Default Termination Sum shall never be less than the aggregate of the Senior Debt Amount and the Senior Debt Makewhole.

- (c) To the extent that such assets and rights referred to in Section 4.1(b)(v) of this Schedule 27 *[Compensation on Termination]* are not realized and applied pursuant thereto, Project Co shall, on payment of the Non-Default Termination Sum, assign such assets and rights to the City.
- (d) The City shall pay the Non-Default Termination Sum in accordance with Section 5 *[General]* of this Schedule 27 *[Compensation on Termination]*.

5. GENERAL

5.1 Payment and Interest Following Termination

- (a) In respect of the termination payments to be made pursuant to either Section 2 *[Compensation on Termination For City Default or Convenience]* or Section 4 *[Consequences of Non-Default Termination]* of this Schedule 27 *[Compensation on Termination]*, as soon as practicable after, and, in any event, within 30 days after, the Termination Date, Project Co shall give to the City an invoice for the relevant termination sum and sufficient supporting evidence, reasonably satisfactory to the City, justifying the amount of the relevant termination sum including a detailed breakdown of each of the individual items comprising such sum.
- (b) In respect of the termination payments to be made pursuant Section 3 *[Compensation on Termination for Project Co Default]* of this Schedule 27 *[Compensation on Termination]*, as soon as practicable, and in any event, within 120 days after the Termination Date, the City shall calculate and notify Project Co of the Project Co Default Termination Sum under Section 3.1(b) of this Schedule 27 *[Compensation on Termination]*, and shall deliver to Project Co sufficient supporting evidence reasonably satisfactory to Project Co.
- (c) The City shall:
 - (i) pay to Project Co the relevant termination payment within 60 days after the Invoice Date or the date of delivery of the Notice described in Section 5.1(b) of this Schedule 27 *[Compensation on Termination]*, as applicable (the "**City Payment Date**"), together with interest for the period from (but excluding) the Termination Date to (and including) the

City Payment Date at the Non-Default Rate, provided that all demobilization of the Project Work as required under this Agreement has been completed;

- (ii) in respect of the termination payments to be made pursuant to either Section 2 *[Compensation on Termination For City Default or Convenience]* or Section 4 *[Consequences of Non-Default Termination]* of this Schedule 27 *[Compensation on Termination]*, pay interest on the relevant termination sum (or any part of such sum that remains outstanding) from the date which is 60 days following the Invoice Date until the date of payment at the rate set out in Section 8.7 *[Interest on Overdue Payments]* of the Agreement; and
 - (iii) in respect of the termination payment to be made pursuant to Section 3 *[Compensation on Termination for Project Co Default]* of this Schedule 27 *[Compensation on Termination]*, if the applicable termination sum is positive, pay interest on the relevant termination sum (or any part of such sum that remains outstanding) from the date which is 60 days following the date of delivery of the Notice referred to in Section 5.1(b) of this Schedule 27 *[Compensation on Termination]* until the date of payment at the rate set out in Section 8.7 *[Interest on Overdue Payments]* of the Agreement.
- (d) In respect of the termination payment to be made pursuant to Section 3 *[Compensation on Termination for Project Co Default]* of this Schedule 27 *[Compensation on Termination]*, if the applicable termination sum is negative, the City shall have no obligation to make any payment to Project Co and Project Co shall, within 60 days following the date of delivery of the Notice referred to in Section 5.1(b) of this Schedule 27 *[Compensation on Termination]* (the “**Project Co Payment Date**”), pay to the City the amount by which such termination sum is negative together with interest for the period from (but excluding) the Termination Date to (and including) the Project Co Payment Date at the Non-Default Rate, failing which Project Co shall thereafter also pay interest thereon until the date of payment at the rate set out in Section 8.7 *[Interest on Overdue Payments]* of the Agreement.

5.2 Costs

- (a) The costs and expenses to be taken into account in the calculation of all termination sums due pursuant to this Schedule 27 *[Compensation on Termination]* shall only be such costs and expenses to the extent that they are reasonable and proper in quantum and shall have been or will be reasonably and properly incurred.

5.3 Undisputed Amounts

- (a) If the calculation of any termination amount is disputed then any undisputed amount shall be paid in accordance with this Section 5 *[General]* and the disputed amount shall be dealt with in accordance with Schedule 20 *[Dispute Resolution Procedure]*.

5.4 Outstanding Debt Amounts

- (a) The City shall be entitled to rely on a certificate of the Lenders’ Agent as conclusive as to the Senior Debt Amount and the Senior Debt Makewhole, as applicable, outstanding or payable at any relevant time.
- (b) If a receipt or other acknowledgement is given by the Lenders’ Agent acknowledging or otherwise confirming receipt of payment or payments in respect of the Senior Debt Amount and the Senior Debt Makewhole, as applicable, such receipt or other acknowledgement shall discharge the City’s obligation to pay such portion of compensation due to Project Co that is equal to the amount acknowledged or confirmed.