

# **PROJECT AGREEMENT**

for the New St. Paul's Phase 1a

**PROVIDENCE HEALTH CARE SOCIETY**

and

**PCL NSP 2021 LTD.**

Dated: February 24, 2021

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## PROJECT AGREEMENT

THIS AGREEMENT dated as of February 24, 2021 is entered into:

BETWEEN:

**PROVIDENCE HEALTH CARE SOCIETY**

(the "Owner")

AND:

**PCL NSP 2021 LTD.**

("Project Co")

WHEREAS:

A. pursuant to a request for proposals and the Competitive Selection Process provided for therein, the Owner has selected Project Co to design, build and finance the Facility; and

B. the rights and obligations between the parties will be governed by the terms and conditions set out in this Agreement.

NOW THEREFORE THIS AGREEMENT WITNESSES THAT, in consideration of the mutual covenants herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby expressly acknowledged by each of the parties hereto, the parties hereto agree as follows:

### 1. INTERPRETATION

#### 1.1 Definitions

In this Agreement, unless the context otherwise requires, the capitalized terms will have the meanings set out in Schedule 1 [Definitions and Interpretation]. Certain words and expressions are defined within the schedules hereto and such definitions will apply, unless the context otherwise requires, in all other parts of this Agreement whether or not Schedule 1 [Definitions and Interpretation] contains a cross-reference to such definitions.

#### 1.2 Interpretation

This Agreement will be interpreted and construed in accordance with the provisions set out in Schedule 1 [Definitions and Interpretation].

#### 1.3 Schedules

The schedules hereto and the terms set out therein will be deemed fully a part of this Agreement.

## **2. GENERAL PROJECT TERMS**

### **2.1 Term and Termination**

The term of this Agreement (the “**Term**”) will commence on the Effective Date and will continue to the Expiry Date unless earlier terminated:

- (a) by the Owner at any time in its discretion, and at the convenience of the Owner, by notice stating that termination is for convenience pursuant to this Section 2.1(a);
- (b) by the Owner pursuant to Section 6.6 if the Owner elects not to re-instate the Project after receipt of a Reinstatement Plan;
- (c) by either party pursuant to Section 6.7 in connection with insufficient insurance;
- (d) by either party pursuant to Section 6.8 in connection with uncollectible Insurance Receivables;
- (e) by the Owner pursuant to Section 6.14(a) or 6.14(c)(2) in connection with a Principal Insured Risk becoming Uninsurable;
- (f) by either party pursuant to Section 8.4(c) or 8.4(e) in connection with a Relief Event;
- (g) by either party pursuant to Section 8.5(c) or 8.5(d) in connection with a Force Majeure Event;
- (h) by the Owner pursuant to Section 12.4 in connection with a Project Co Event of Default; or
- (i) by Project Co pursuant to Section 13.3 in connection with an Owner Event of Default.

Unless otherwise specified, the Termination Date for such earlier terminations will be the date notice of termination is given by one party to the other party in accordance with this Agreement. Except as referred to in this Section 2.1, neither party will have the right to terminate this Agreement.

### **2.2 Document Deliveries**

Concurrently with the execution and delivery of this Agreement:

- (a) the Owner will deliver to Project Co the documents described in Section 3 of Schedule 18 [Completion Documents]; and
- (b) Project Co will deliver to the Owner the documents described in Section 2 of Schedule 18 [Completion Documents].

### **2.3 Assumption of Risk**

Except to the extent expressly allocated to the Owner or otherwise provided for under this Agreement, all risks, costs and expenses in relation to the performance by Project Co of its obligations under this Agreement are allocated to, and accepted by, Project Co as its entire and exclusive responsibility.

### **2.4 Opportunities**

Except as expressly provided in this Agreement, or as may be specifically agreed in writing between the Owner and Project Co during the Term, the Owner reserves the right to all commercial and other opportunities for, or related to, the Project and the Lands.



## 2.5 General Duty of Project Co to Mitigate

In all cases where Project Co is entitled to receive from the Owner any compensation in addition to the payments described in Section 3.1(a), costs, damages or extensions of time, Project Co will use all reasonable efforts to mitigate such amount required to be paid by the Owner to Project Co under this Agreement, or the length of the extension of time. Upon request from the Owner, Project Co will promptly submit a detailed description, supported by all such documentation as the Owner may reasonably require, of the measures and steps taken by Project Co to mitigate and meet its obligations under this Section 2.5.

## 2.6 General Duty of Owner to Mitigate

In all cases where the Owner is entitled to receive from Project Co any compensation, costs or damages, but not in any other case, the Owner will use all reasonable efforts to mitigate such amount required to be paid by Project Co to the Owner under this Agreement, provided that such obligation will not require the Owner to:

- (a) take any action which is contrary to the public interest, as determined by the Owner in its discretion;
- (b) undertake any mitigation measure that might be available arising out of its status as a public body, but which measure would not normally be available to a private commercial party; or
- (c) alter the amount of any Deductions it is entitled to make under this Agreement.

The Owner will have no obligation to mitigate, implied or otherwise, except as set out in this Section 2.6 or as otherwise expressly set out in this Agreement. Upon request from Project Co, the Owner will promptly submit a detailed description, supported by all such documentation as Project Co may reasonably require, of the measures and steps taken by the Owner to mitigate and meet its obligations under this Section 2.6.

## 2.7 Not Used

## 2.8 Key Individuals

- (a) Attached as Schedule 17 [Key Individuals] is a list of individuals (the “**Key Individuals**”) that Project Co will utilize in undertaking the Design and the Construction, as described in that Schedule.
- (b) With respect to each of the Key Individuals:
  - (1) Project Co will appoint each Key Individual for a one year term commencing as of the Effective Date, with renewal for successive one year terms unless the Owner gives written notice a minimum of 60 days prior to the end of the applicable term that the Owner does not consent to the renewal. If the Owner fails to give such notice by such date, then the Owner will be deemed to have given consent to the renewal. If the Owner does not intend to consent to the renewal, the Owner will a minimum of 120 days before the end of the applicable term advise Project Co, or senior management designated by Project Co, in writing of the Owner's intent not to consent, with reasons. Senior management of each of the parties will, at the request of Project Co, meet within a reasonable period after such written advice of the Owner's intent not to consent to the renewal;
  - (2) Project Co will use all reasonable efforts to retain the Key Individuals to perform the duties described in Schedule 17 [Key Individuals];

- (3) Project Co will not remove (except due to retirement, death, disability, incapacity or voluntary or involuntary termination of employment) or replace any Key Individual without the Owner's consent, such consent not to be unreasonably withheld;
  - (4) if for any reason a Key Individual is unavailable (whether through resignation or otherwise) to perform the duties described in Schedule 17 [Key Individuals] then Project Co will use all reasonable efforts to retain a replacement with similar expertise and experience to the unavailable Key Individual, satisfactory to the Owner, acting reasonably;
  - (5) references in this Section 2.8 to unavailability of a Key Individual will not include vacation or other reasonable temporary absences provided there is reasonable coverage of the Key Individual's responsibilities during vacation or other reasonable temporary absences; and
  - (6) at the Owner's written request, acting reasonably, such request to be accompanied by the Owner's reasons for such request, Project Co will remove and replace any Key Individual, provided that in the event Project Co objects to such request within 10 Business Days of receipt of same, senior management of each of the parties will, at the request of Project Co, meet within a reasonable period after notice of such objection is provided, to discuss the proposed removal and replacement of such Key Individual and reasons for Project Co's objection thereto.
- (c) Within 10 days of Project Co Having Knowledge that a Key Individual is or will be unavailable, Project Co will:
- (1) notify the Owner; and
  - (2) immediately commence the process to retain a replacement prior to the unavailability of such Key Individual or promptly thereafter and will replace the Key Individual no later than 20 Business Days after the unavailability of such Key Individual.
- (d) If either the Owner or Project Co reasonably considers that a replacement will not reasonably be retained within such 20 Business Days (and the Owner shall notify Project Co of its opinion within five Business Days of receipt of the notice from Project Co), Project Co will on or prior to the 10th Business Day after the unavailability of such Key Individual deliver to the Owner a reasonable program (set out, if appropriate, in stages) for retaining the replacement. The program will specify in reasonable detail the manner in, and the latest date, by which the replacement will be retained.
- (e) The Owner will have 10 Business Days from receipt of the program within which to notify Project Co that the Owner, acting reasonably, does not accept the program, failing which the Owner will be deemed to have accepted the program. If the Owner notifies Project Co that it does not accept the program as being reasonable, the parties will use all reasonable efforts within the following five Business Days to agree to any necessary amendments to the program put forward. In the absence of an agreement within such five Business Days, the question of whether the program (as it may have been amended by agreement) will result in the retainer of a replacement in a reasonable manner and within a reasonable time period (and, if not, what would be a reasonable program) may be referred by either party for resolution in accordance with the Dispute Resolution Procedure.
- (f) If either (i) the position of any Key Individual remains unfilled for more than 25 Business Days after the applicable individual Key Individual ceased to hold the position or ceased to

perform the functions of that position, or (ii) the Owner has accepted a program under Section 2.8(e) and Project Co at any time fails to comply with any part of the program:

- (1) for each such Key Individual position the Owner will be entitled to make a Deduction of \$2,500 for each week or part thereof until such Key Individual position is filled commencing on the day after the 25th Business Day set out in (i) above or the day after the Owner has notified Project Co under (ii) above of its failure to comply with any part of such program;
  - (2) in addition to the remedies under Sections 2.8(f)(1), Project Co will pay the Owner's reasonable internal administrative and personnel costs and all reasonable out-of-pocket costs related to any measures the Owner considers are reasonably incurred in relation to the position being unfilled, including the costs to ensure that Project Co meets its requirements for Design and Construction and for the Owner to review and consider any replacement under this Section 2.8, provided that the maximum liability of Project Co under this Section 2.8(f)(2) will be \$2500 per week or part thereof; and
  - (3) the Owner at its election may at any time deem the position of the Key Individual to be a Change (other than the requirements to comply with this Section 2.8) and upon such election the further liability of Project Co under Sections 2.8(f)(1) and 2.8(f)(2) will cease and the Owner will be credited with the amount of the cost (wages, benefits, fees and other costs) that would have been incurred by Project Co and Sub-Contractors in respect of the Key Individual plus a mark-up as set out in Section 2.10 of Schedule 6 [Changes].
- (g) Project Co acknowledges that the Owner incurs costs and expenses in reviewing and considering any replacement under this Section 2.8, and agrees that in addition to the provisions of Section 2.8(f), if in any rolling 2 year period there are two or more replacements of Key Individuals (other than for circumstances of illness, death, a temporary replacement of a Key Individual when a desired permanent Key Individual is not immediately available (and when the temporary replacement and the use of a temporary replacement is opposed by the Owner), or for cause or to otherwise remedy material performance issues of the Key Individual), Project Co will pay the Owner's reasonable internal administrative and personnel costs and all reasonable out-of-pocket costs related to the costs to review and consider any replacement under this Section 2.8. Within 10 days of Project Co Having Knowledge that the second or subsequent Key Individual within such period is or will be unavailable, Project Co will make a payment to the Owner in the amount of \$15,000 against its obligations under this Section 2.8(g) (and if applicable Section 2.8(f)). If the Owner accepts or rejects the replacement, the Owner will either refund any overpayment or invoice Project Co for any additional amounts owing under either this Section 2.8(g) or 2.8(f) and Project Co will promptly pay such amount to the Owner.
- (h) On the replacement of any Key Individual pursuant to this Section 2.8, any replacement individual will, unless the Owner otherwise agrees, be subject to a 90-day probationary period, at any time during which the Owner, acting reasonably, may reject that individual and require replacement by another individual.

## 2.9 Naming

The Owner will have the exclusive right to name the Facility and any parts thereof.

## 2.10 Signs

Subject to Section 6.19 of Schedule 2 [Design and Construction Protocols], Project Co will not erect or maintain any signs on the Lands or in the Facility without the written consent of the Owner.

## 3. OWNER'S GENERAL OBLIGATIONS

### 3.1 Payments

Subject to Project Co meeting the requirements for payment set out in this Agreement, the Owner will pay Project Co amounts expressly provided for herein, including:

- (a) the Construction Payments and the Service Commencement Payment, set out in Schedule 8 [Payments];
- (b) the Termination Payments as set out in Schedule 9 [Compensation on Termination];
- (c) amounts owing under Section 6 (Insurance, Damage and Destruction);
- (d) amounts owing under Section 7 (Changes);
- (e) amounts owing under Section 8 (Supervening Events);
- (f) amounts owing under Section 9 (Indemnities, Limits on Liabilities, Remedies, Warranties and Performance Security); and
- (g) amounts owing under Section 15 (Dispute Resolution);

in accordance with the provisions of this Agreement.

### 3.2 Limitation on Payments

Other than the payments expressly provided for herein, Project Co will have no right to any further payment from the Owner in connection with the Design, the Construction or otherwise in connection with the Project.

### 3.3 Provision of Lands

The Owner will make the Lands available for the Project in accordance with Schedule 7 [Lands] and the parties' rights and obligations in respect of the Lands are set out in such Schedule.

### 3.4 Representations and Warranties

The Owner represents and warrants to Project Co, as of the Effective Date, that:

- (a) the Owner is a society incorporated under the *Societies Act* (British Columbia) and the Owner has full power and capacity to enter into, carry out the transactions contemplated by and duly observe and perform all its obligations contained in this Agreement and all other documents, instruments and agreements required to be executed and delivered by the Owner pursuant to this Agreement;
- (b) the execution and delivery of this Agreement and all documents, instruments and agreements required to be executed and delivered by the Owner pursuant to this Agreement, and the completion of the transactions contemplated by this Agreement, have been duly authorized by all necessary corporate action on the part of the Owner, and this Agreement has been duly executed and delivered by the Owner and constitutes a legal,

valid and binding obligation of the Owner enforceable in accordance with its terms, subject to limitations by bankruptcy, insolvency, liquidation, reorganization, reconstruction and other similar laws of general application affecting the enforceability of remedies and rights of creditors and subject to availability of equitable remedies such as specific performance and injunction that are in the discretion of a court;

- (c) all required third party consents to the execution by the Owner of, and performance of its obligations under, this Agreement have been received;
- (d) the Owner has the rights and interest in and to the Lands, in each case free and clear of all encumbrances, restrictions or limitations except the Encumbrances and any encumbrances which do not adversely affect, financially or otherwise, the Licence and the ability of Project Co to conduct the Design or Construction as contemplated by this Agreement;
- (e) the parcels or interests comprising the Lands permit the grant of the Licence by the Owner and the conduct by Project Co of the Design and the Construction as contemplated by this Agreement; and
- (f) to the extent the Owner's chief project officer for the Project Has Knowledge, there are no facts or information relating to the Project or Disclosed Data which the Owner has intentionally not disclosed to Project Co and which, if learned by Project Co, would reasonably be expected to materially affect Project Co's evaluation of the risks Project Co is assuming pursuant to this Agreement.

#### **4. PROJECT CO'S GENERAL OBLIGATIONS**

##### **4.1 General Obligations Re: Project**

Subject to and in accordance with the provisions of this Agreement, Project Co will carry out the Design and the Construction.

##### **4.2 Records and Reports**

Project Co will, at its own cost and expense, retain and maintain the records and reports referred to in Schedule 14 [Records and Reports] in accordance with such Schedule and in a form that is capable of audit by the Owner. Project Co will:

- (a) make all such records available to the Owner for inspection and copying (at the Owner's expense) during normal business hours upon reasonable notice; and
- (b) upon request from the Owner provide the Owner with electronic copies of any such records as soon as reasonably practicable.

##### **4.3 No Other Business**

Project Co will not engage in any business or activity other than the business or activities conducted for the purpose of the Project or otherwise expressly permitted hereunder.

##### **4.4 Project Co Persons**

Project Co will, as between itself and the Owner, be responsible for, and not relieved of its obligations hereunder by, the acts, omissions, breaches, defaults, non-compliance, negligence and wilful misconduct of each Project Co Person and all references in this Agreement to any act, omission, breach, default, non-compliance, negligence or wilful misconduct of Project Co will be construed accordingly to include any such

act, omission, breach, default, non-compliance, negligence or wilful misconduct committed by a Project Co Person.

#### **4.5 Use of Sub-Contractors**

Without limiting Section 4.4, the Owner acknowledges that Project Co may carry out the Design and the Construction by contracting such obligations to the Design-Builder who in turn may contract all or part of its obligations under the Design-Build Agreement to one or more Sub-Contractors. In respect of the Project, Project Co will not contract with, or allow the Design-Builder or any Sub-Contractors to contract with, any Person that is a Restricted Person. Notwithstanding the use of the Design-Builder or Sub-Contractors, Project Co:

- (a) will not be relieved or excused from any of its obligations or liabilities under this Agreement; and
- (b) will remain principally liable to the Owner for the due observance and performance of all the covenants, obligations, agreements and conditions of this Agreement that are to be observed and performed by Project Co.

#### **4.6 Material Contracts**

Project Co will not:

- (a) terminate, or agree to or permit the termination of, all or any material part of any Material Contract except:
  - (1) as required to do so by the Owner pursuant to the provisions of this Agreement; or
  - (2) if there is an event of default under the Design-Build Agreement and Project Co terminates it in order to prevent or cure a Project Co Event of Default;
- (b) make, or agree to or permit the making of:
  - (1) any material amendment of any Material Contract, other than amendments (whether made by change order or otherwise) that are the direct and reasonable consequence of a Change; or
  - (2) any departure by any party from any material provision of any Material Contract;
- (c) permit any Material Contract Party to assign or transfer to any Person any of such Material Contract Party's rights or obligations under a Material Contract other than by way of a Sub-Contract that is not a subcontract of all or substantially all of the obligations under the Material Contract or by way of assignment by way of security by a Material Contract Party; or
- (d) enter into, or permit the entering into of, any Material Contract other than those entered into on or before the Effective Date,

unless Project Co has, at its earliest practicable opportunity, submitted to the Owner notice of the proposed course of action (and any relevant documentation) and the Owner has consented to such course of action, such consent not to be unreasonably withheld or delayed. The Owner will give or deny such consent within: (i) 10 Business Days of receipt of such notice and all relevant documentation, if Project Co is seeking to terminate a Material Contract and such Material Contract may, in accordance with its terms, be terminated immediately; and (ii) 30 Business Days of receipt of such notice and all relevant documentation in all other cases, and if the Owner fails to give or deny its consent within such time periods it will be deemed to have

given its consent. In determining whether to provide such consent and without limiting the Owner's discretion, it will be reasonable for the Owner to refuse its consent to the proposed course of action if:

- (e) the proposed assignee, transferee or party entering into any Material Contract, or any of its Affiliates as provided in paragraph (h) of the definition of Restricted Person, is a Restricted Person; or
- (f) the proposed course of action could, in the reasonable opinion of the Owner, have a material adverse effect on the Owner or the Project.

#### **4.7 Costs of Request for Consent**

If Project Co requests consent to a proposed course of action pursuant to Section 4.6, Project Co will pay, without duplication, the Owner's reasonable internal administrative and personnel costs and all reasonable out-of-pocket costs in connection with considering any such request. At the time of such request, Project Co will make a payment to the Owner in the amount of \$15,000 against its obligations under this Section 4.7. After the Owner renders its decision, the Owner will either refund any overpayment or invoice Project Co for any additional amounts owing under this Section 4.7 and Project Co will promptly pay such amount to the Owner.

#### **4.8 Replacement Material Contract**

If any Material Contract at any time lapses, terminates, or otherwise ceases to be in full force and effect (whether by reason of expiry or otherwise), unless the goods, services or rights which were the subject matter of such Material Contract are no longer reasonably required for the Project:

- (a) Project Co will forthwith enter into, or cause to be entered into, a replacement contract or contracts upon the same or substantially similar terms as the contract so replaced (to the extent reasonably practicable); and
- (b) if the replaced Material Contract is the Design-Build Agreement, Project Co will forthwith enter into, and cause the replacement Material Contract Party to enter into, a Design-Builder Collateral Agreement.

#### **4.9 Delivery of Amended Material Contracts**

If at any time any amendment is made to any Material Contract, or a replacement Material Contract (or any agreement which materially affects the interpretation or application of any Material Contract) is entered into, Project Co will deliver to the Owner a copy of each such amendment or agreement within 10 Business Days of the date of its execution or creation, certified as a true copy by an officer of Project Co.

#### **4.10 Project Co's Representations and Warranties**

Project Co represents and warrants to the Owner that:

- (a) Project Co is a duly incorporated and validly existing corporation under the *Business Corporations Act* (Alberta) and has full power and capacity to enter into, carry out the transactions contemplated by and duly observe and perform all its obligations contained in this Agreement and all other documents, instruments and agreements required to be executed and delivered by Project Co pursuant to this Agreement;
- (b) [Intentionally Deleted];
- (c) the information set out in Schedule 12 [Project Co's Ownership Information] is true and correct and, except as set out in Schedule 12 [Project Co's Ownership Information], there

is as at the date of this Agreement no outstanding offer, agreement or other arrangement pursuant to which any Person is obligated to subscribe for or take by means of transfer or by conversion any form of investment, security or voting rights in Project Co;

- (d) none of Project Co, Persons who control Project Co or any Affiliates of those Persons as provided in paragraph (h) of the definition of Restricted Person, the Design-Builder and Sub-Contractors is a Restricted Person;
- (e) the execution and delivery of this Agreement and all other documents, instruments and agreements required to be executed and delivered by Project Co pursuant to this Agreement, and the completion of the transactions contemplated by this Agreement, have been duly authorized by all necessary corporate action on the part of Project Co, and this Agreement has been duly executed and delivered by Project Co and constitutes a legal, valid and binding obligation of Project Co enforceable in accordance with its terms, subject to limitations by bankruptcy, insolvency, liquidation, reorganization, reconstruction and other similar laws of general application affecting the enforceability of remedies and rights of creditors and subject to availability of equitable remedies such as specific performance and injunction that are in the discretion of a court;
- (f) all required third party consents to the execution by Project Co of, and performance of its obligations under, this Agreement have been received, other than the Permits and other approvals contemplated herein to be obtained after the Effective Date in connection with the Project; and
- (g) it has carefully reviewed the whole of this Agreement, including the Design and Construction Protocols and the Design and Construction Specifications, and all applicable Laws, and has taken all steps it considers necessary to satisfy itself that nothing contained herein inhibits or prevents Project Co from performing and completing the Design and the Construction in accordance with this Agreement in a good and safe manner in accordance with Good Industry Practice so that Project Co achieves and satisfies the requirements of this Agreement.

The representation and warranty of Project Co in Section (g) is included only for the purpose of allowing the Owner to rely on it for the purpose of defending or contesting any action brought against the Owner pursuant to this Agreement or any claim by Project Co for damages, extensions of time, additional compensation or any other relief arising pursuant to this Agreement and the Owner may not rely on such representation and warranty for the purpose of bringing any action against Project Co or for the purposes of terminating this Agreement.

#### **4.11 Disclosed Data**

It is Project Co's responsibility to have conducted its own analysis and review of the Project and, before the execution of this Agreement, to have taken all steps it considers necessary to satisfy itself as to the accuracy, completeness and applicability of any Disclosed Data upon which it places reliance and to assess all risks related to the Project. Subject to Section (e) of the definition of Compensation Event and the Owner's obligations set out in Schedule 7 [Lands], Project Co will not be entitled to and will not make (and will ensure that none of the Design-Builder or any Sub-Contractor makes) any claim against the Owner or any Owner Indemnified Persons, whether in contract, tort or otherwise including any claim in damages, for extensions of time or for additional payments under this Agreement on the grounds:

- (a) of any misunderstanding or misapprehension in respect of the Disclosed Data;
- (b) that the Disclosed Data was incorrect or insufficient; or



- (c) that incorrect or insufficient information relating to the Disclosed Data was given to it by any Person other than the Owner,

nor will Project Co be relieved from any obligation imposed on or undertaken by it under this Agreement on any such ground.

#### **4.12 Responses to the Owner Inquiries**

Unless otherwise specified in this Agreement, Project Co will respond in writing to all written inquiries received from the Owner as soon as reasonably practicable and in any event within 10 Business Days of receipt of such inquiry or such longer period as the circumstances and content of the inquiry may reasonably require.

### **5. FINANCING OF THE PROJECT**

#### **5.1 Compliance with Senior Financing Agreements**

Project Co will keep the Senior Financing Agreements in good standing and will ensure that none of the terms and conditions of the Senior Financing Agreements will prevent Project Co from performing its obligations under this Agreement. If at any time Project Co receives a notice that an “event of default”, any event entitling the Senior Lenders to enforce any security or any other similar event has occurred under the Senior Financing Agreements, Project Co will forthwith deliver to the Owner a copy of such notice.

#### **5.2 Changes to Senior Financing Agreements**

Project Co will not without the written consent of the Owner, not to be unreasonably withheld, or delayed, terminate, amend, assign or otherwise modify the Senior Financing Agreements, or waive or exercise any of its rights under the Senior Financing Agreements or enter into any replacement Senior Financing Agreement or any agreement which affects the interpretation or application of any Senior Financing Agreements if such action would:

- (a) adversely affect Project Co’s ability to perform its obligations under this Agreement; or
- (b) have the effect of increasing any liability or potential liability of the Owner other than as contemplated in the Financial Model.

If at any time any amendment is made to any Senior Financing Agreement or Project Co enters into any replacement Senior Financing Agreement (or any agreement which affects the interpretation or application of any Senior Financing Agreement), Project Co will deliver to the Owner a copy of each such amendment or agreement within 10 Business Days of the date of its execution or creation, certified as a true copy by an officer of Project Co.

#### **5.3 Consent Required for Refinancing**

Except for an Exempt Refinancing, Project Co will not enter into any Refinancing without the consent of the Owner, not to be unreasonably withheld or delayed. Without limitation, it will be reasonable for the Owner to withhold consent if such Refinancing occurs before Service Commencement, has a material adverse effect on Project Co’s ability to perform its obligations under this Agreement, increases any liability or potential liability of the Owner (unless the Owner is specifically compensated for such liability or potential liability) or is with a Restricted Person.

#### **5.4 Refinancing Process**

If Project Co intends to undertake a Qualifying Refinancing, Project Co will notify the Owner of such intention at least 120 days (or such later date agreed by the Owner, acting reasonably) before the

anticipated completion date of such Refinancing and will include with such notice all applicable information then available to Project Co (including any of the information set out below in this Section 5.4 if and to the extent available to Project Co at that time). Project Co will keep the Owner informed of the progress of the proposed Refinancing, will provide the Owner with additional information as it is available, and will consult with and reasonably take into account the views of the Owner during the Refinancing process. Without limiting the foregoing, as soon as reasonably available, and in any event no later than 30 days (or such later date agreed by the Owner, acting reasonably) before the anticipated completion date of such Refinancing, Project Co will provide to the Owner (not necessarily all at the same time):

- (a) all proposed revisions to the Senior Financing Agreements;
- (b) a copy of the proposed updated Financial Model both before and after the Refinancing;
- (c) the basis for the assumptions and calculations used in the proposed updated Financial Model;
- (d) particulars of:
  - (1) any increase in the principal amount of all funding for the Project committed under the Senior Financing Agreements that will result from the proposed Refinancing;
  - (2) the nature (and estimated amount if reasonably capable of being calculated or estimated) of any increase in any liability or potential liability of the Owner, including on early termination of this Agreement, that would be reasonably likely to arise from the proposed Refinancing;
  - (3) any effect on Project Co's ability to perform its obligations under this Agreement;
  - (4) the terms of the proposed Refinancing;
  - (5) the lenders and other parties proposed to be involved in the proposed Refinancing; and
  - (6) the financing instruments to be used to carry out the proposed Refinancing and their key attributes (especially as to those attributes that would or could affect the liability of the Owner on any early termination of this Agreement);
- (e) a statement setting out Project Co's estimate of the resulting Refinancing Gain, including the Owner's share thereof expressed in terms of the payment described in Section 5.6 (Payment to the Owner) (including the estimated timing of receipt thereof by the Owner); and
- (f) a schedule for implementation of the proposed Refinancing including the principal milestones and proposed dates for the achievement of such milestones (including the estimated date for closing of the proposed Refinancing).

Project Co will promptly provide all other documents and information related to the proposed Refinancing as the Owner may reasonably request. If any change is proposed to the information provided to the Owner pursuant to the above, including information referred to in Sections 5.4(a) to 5.4(f), Project Co will promptly (and in any event not less than 5 Business Days before the completion date of the proposed Refinancing) provide the Owner with full details of the change. Project Co will only proceed with a Qualifying Refinancing in accordance with the information provided to the Owner in accordance with this Section 5.4 and in compliance with the other applicable provisions of this Section 5.

## **5.5 The Owner's Share of Refinancing Gain**

The Owner will be entitled to receive a 50% share of any Refinancing Gain arising from a Qualifying Refinancing. The Owner's share will be calculated as at the time of each Qualifying Refinancing.

## **5.6 Payment to the Owner**

The Owner will receive its share of any Refinancing Gain as a single payment, in accordance with Section 10.1 (Payments), in an amount no greater than any Distribution made by Project Co arising as a result of the Refinancing.

## **5.7 Calculation of Refinancing Gain**

The Owner and Project Co will negotiate in good faith the basis and method of calculation of the Refinancing Gain and payment of the Owner's share of the Refinancing Gain, taking into account how the Owner has elected to receive its share of the Refinancing Gain pursuant to Section 5.6 and the profile of the Refinancing Gain. The Refinancing Gain will be calculated after taking into account the reasonable and proper professional costs that Project Co directly incurs in relation to the Refinancing and, if applicable, the Owner's costs that Project Co pays pursuant to Section 5.8. If the Owner and Project Co are unable to agree on the basis and method of calculation of the Refinancing Gain or the payment of the Owner's share, the Dispute will be determined in accordance with the Dispute Resolution Procedure.

## **5.8 The Owner's Expenses**

Project Co will pay the Owner's reasonable internal administrative and personnel costs and all reasonable out-of-pocket costs in connection with a consent under Section 5.2 or 5.3. At the time of the request for such consent, Project Co will make a payment to the Owner in the amount of \$50,000 against its obligations under this Section 5.8. After the Owner renders its decision, the Owner will either refund any overpayment or invoice Project Co for any additional amounts owing under this Section 5.8 and Project Co will promptly pay such amount to the Owner. The amounts payable under this Section 5 are payable even if the Refinancing Gain is determined to be zero.

## **5.9 Audit Rights**

The Owner will have unrestricted rights of audit at any time (whether before or after the applicable event) over any proposed Financial Model, books, records and other documentation (including any aspect of the calculation of any Refinancing Gain) used in connection with any Refinancing or any other matter for which Project Co requires consent from the Owner under this Section 5.

# **6. INSURANCE, DAMAGE AND DESTRUCTION**

## **6.1 Insurance Coverage**

Subject to Section 6.14(b), each of Project Co and the Owner will take out, maintain in force, pay for and renew, or cause to be taken out, maintained in force, paid for and renewed, insurance for the Project as set out in Schedule 5 [Insurance Requirements].

## **6.2 Agreement Not Affected by Damage or Destruction**

Except as otherwise expressly provided, the partial destruction or damage or complete destruction by fire or other casualty of the Facility will not permit either party to terminate this Agreement or entitle Project Co to surrender possession of the Facility or to demand any increase in any amounts payable to Project Co under this Agreement and all of the provisions of this Agreement, including Section 8 (Supervening Events) will continue to apply.

### 6.3 Project Co's Obligations - Damage or Destruction

Subject to Section 6.4, and without prejudice to Section 8, if all or any part of the Facility is damaged or destroyed before the Service Commencement Date, Project Co will repair, replace or restore the part of the Facility so damaged or destroyed in accordance with the Design and Construction Specifications subject only to:

- (a) applicable Laws; and
- (b) the Owner agreeing to pay to Project Co:
  - (1) the amount, if any, by which the cost of such repair, replacement or restoration exceeds the maximum amount of insurance coverage required under this Agreement for such risk; or
  - (2) if no insurance coverage is required under this Agreement for such risk, an amount equal to the total costs of such repair, replacement or restoration,

and if the Owner agrees, the Owner will pay such amounts promptly upon receipt of one or more invoices from Project Co indicating that such amounts are due and payable by Project Co in connection with such repair, replacement or restoration.

For the purposes of this Section 6.3, the maximum amount of insurance coverage is (1) in respect of insurance required to be obtained by Project Co, the full amount of coverage required under this Agreement for such risk prior to any deductibles for which Project Co is responsible pursuant to Schedule 5 [Insurance Requirements] or (2) in respect of insurance required to be obtained by the Owner, the full amount of applicable Insurance Proceeds and applicable Insurance Receivables plus any deductibles for which Project Co is responsible pursuant to Schedule 5 [Insurance Requirements]).

### 6.4 Project Co's Obligations - Material Damage or Destruction

If the Facility suffers damage or destruction before the Service Commencement Date that is likely to cost more than \$5 million to repair, replace and restore:

- (a) Project Co will, as soon as practicable and in any event within 30 days of such damage or destruction, and before undertaking any material remedial work (other than any emergency work required to stabilize other parts of the Facility), provide the Owner with a draft plan (the "**Draft Reinstatement Plan**") for the carrying out of the works necessary (the "**Reinstatement Works**") to repair, replace and restore the damaged or destroyed portions of the Facility and related assets, and containing to the extent possible the details required to be included in the Reinstatement Plan under (d) below;
- (b) as soon as reasonably practicable and in any event within 21 days after the delivery of the Draft Reinstatement Plan, the Owner:
  - (1) will provide Project Co with any comments it may have on the Draft Reinstatement Plan; and
  - (2) if it has decided that the Facility is not required to be reinstated in the same form as prior to the damage or destruction, will issue a Preliminary Change Instruction to that effect;
- (c) as soon as reasonably practicable and in any event within 14 days after receipt of the Owner's comments pursuant to Section 6.4(b)(1), Project Co will deliver to the Owner a revised plan (the "**Reinstatement Plan**") amending the Draft Reinstatement Plan to

reasonably take into account the comments received from the Owner and those changes to the Draft Reinstatement Plan necessary to reflect the contractual terms agreed (as negotiated and finalised) with the Person effecting the Reinstatement Works; and

- (d) the Reinstatement Plan will set out in as much detail as is reasonable in the circumstances:
- (1) the identity of the Person, or (if Project Co is seeking competitive tenders) Persons intended, to effect the Reinstatement Works;
  - (2) the terms and timetable or (if not then established) the reasonably anticipated terms and timetable upon which the Reinstatement Works are to be effected (including the date upon which the Facility is reasonably expected to be restored to the condition specified by the Reinstatement Plan);
  - (3) the total cost or (if not then established) the reasonably anticipated total cost of the Reinstatement Works; and
  - (4) the impact of any Change requested by the Owner as part of the reinstatement.

Thereafter, unless a party elects to terminate this Agreement (in accordance with the provisions of Section 6.6, 6.7, or 6.8 or otherwise), Project Co will repair, replace or restore the Facility, subject to applicable Laws.

#### **6.5 Financial Model Update**

Upon delivery of the Reinstatement Plan, Project Co will amend the Financial Model based on the following assumptions:

- (a) that the Reinstatement Plan will be effected in accordance with its terms;
- (b) that the payments under the Senior Financing Agreements (including any amendments agreed between Project Co and the Senior Lenders in connection with the Reinstatement Plan in respect of which a consent request has been submitted to the Owner) to be paid during the period of the Reinstatement Plan will be met without any rescheduling; and
- (c) that payments in respect of any Change comprised in the Reinstatement Plan will be determined in accordance with Schedule 6 [Changes],

and will deliver the updated Financial Model to the Owner for its approval, not to be unreasonably withheld or delayed.

#### **6.6 Owner Election Not to Reinstatement**

The Owner may, by notice to Project Co within 30 days after receipt of the Reinstatement Plan, terminate this Agreement and pay compensation to Project Co in accordance with Section 2 of Schedule 9 [Compensation on Termination].

#### **6.7 Insufficient Insurance**

If:

- (a) the Facility is completely or substantially destroyed;
- (b) the cost to repair, replace or restore the Facility exceeds the maximum amount of insurance coverage (which for greater certainty is the maximum amount of coverage prior to any

deductibles for which Project Co is responsible pursuant to Schedule 5 [Insurance Requirements]) required under this Agreement for the risk that caused the destruction; and

- (c) neither the Owner nor Project Co has agreed to pay the amount by which the cost to repair, replace or restore the Facility exceeds the Insurance Proceeds and Insurance Receivables with respect to such destruction,

at any time on or after 30 days after delivery of the Reinstatement Plan to the Owner, either party may, by notice to the other party, terminate this Agreement, in which case:

- (d) if:
  - (1) the Owner has failed to obtain insurance coverage in accordance with Schedule 5 [Insurance Requirements] and Sections 6.13 and 6.14 do not apply;
  - (2) the Owner has not deposited an amount equal to the insurance proceeds that would have been payable in the Insurance Account in accordance with Section 6.7(g)(2); and
  - (3) the amount of such insurance proceeds would have been sufficient to repair, replace or restore the Facility,

the Owner will pay compensation to Project Co in accordance with Section 2 of Schedule 9 [Compensation on Termination];

- (e) in any other case:
  - (1) the Owner will pay compensation to Project Co in accordance with Section 4 of Schedule 9 [Compensation on Termination]; and
  - (2) if the Owner is required to obtain insurance coverage in accordance with Schedule 5 [Insurance Requirements] and the Owner has failed to obtain such insurance and Sections 6.13 and 6.14 do not apply, the Owner will also, but without duplicating payment of any item payable in accordance with Section 4 of Schedule 9 [Compensation on Termination], pay Project Co an amount equal to the insurance proceeds that would have been payable under the relevant policies in respect of such insurance had such insurance been obtained.

For the purpose of Section 6.7(b), the reference to the maximum amount of insurance coverage is:

- (f) in respect of insurance required to be obtained by Project Co, the full amount of coverage prior to any deductibles for which Project Co is responsible pursuant to Schedule 5 [Insurance Requirements]; and
- (g) in respect of insurance required to be obtained by the Owner,
  - (1) the full amount of applicable Insurance Proceeds and applicable Insurance Receivables plus any deductibles for which Project Co is responsible pursuant to Schedule 5 [Insurance Requirements], plus
  - (2) in the event and to the extent that the Owner has failed to obtain such insurance in accordance with Schedule 5 [Insurance Requirements] and Sections 6.13 and 6.14 do not apply, an amount equal to the insurance proceeds that would have been payable under the relevant policies in respect of such insurance had such insurance been obtained in accordance with Schedule 5 [Insurance

Requirements], provided the Owner deposits to the Insurance Account an amount equal to such insurance proceeds for application of such amount for the same purposes as the insurance.

### **6.8 Uncollectible Insurance Receivables**

If at any time while Project Co is relieved of its obligations under Sections 6.3 or 6.4 by reason of the Relief Event described in Section (f) of the definition of Relief Event in Schedule 1 [Definitions and Interpretation]:

- (a) Project Co has complied with its obligations hereunder with respect to such Relief Event; and
- (b) notwithstanding such compliance by Project Co collection of the applicable Insurance Receivables is not possible using all reasonable efforts,

either party may, by notice to the other party, terminate this Agreement, in which case the Owner will pay compensation to Project Co in accordance with Section 4 of Schedule 9 [Compensation on Termination].

### **6.9 Application of Insurance Proceeds If No Termination**

Unless a party has terminated this Agreement (including pursuant to Section 6.6, 6.7 or 6.8), the Owner and Project Co will cause all:

- (a) applicable Insurance Proceeds which either has received;
- (b) applicable Insurance Proceeds which either is entitled to receive;
- (c) amounts which the Owner has agreed to pay as contemplated in Section 6.3(b); and
- (d) amounts which the Owner or Project Co has agreed to pay to cover the amount by which the cost to repair, replace or restore the Facility exceeds the Insurance Proceeds and Insurance Receivables with respect to complete or substantial destruction,

to be applied to the reinstatement of the Facility in accordance with the terms of this Agreement.

### **6.10 Application of Insurance Proceeds In Case of Termination**

If a party has terminated this Agreement pursuant to Section 6.6 or, 6.7:

- (a) any Insurance Proceeds received prior to the Termination Payment Date by either Project Co or the Owner in respect of damage to the Facility and not already applied to the repair of such damage will first be applied towards the Termination Payment and any Insurance Proceeds remaining after such application will be paid to the Owner; and
- (b) on the Termination Payment Date, Project Co will assign to the Owner the benefit of all Insurance Receivables which have been taken into account in calculating the Termination Payment.

### **6.11 Standards of Replacement, Repair or Reconstruction**

Any replacement, repair, or reconstruction of the Facility or any part thereof pursuant to the provisions of Sections 6.3 or 6.4 will be made or done in compliance with the Design and Construction Protocols and the Design and Construction Specifications, subject to any agreement made between the Owner and Project Co to revise the Design and Construction Protocols or the Design and Construction Specifications as they pertain to any replacement, repaired or reconstructed Facility.

## 6.12 Mitigation

Project Co and the Owner will take all reasonable steps to mitigate the effects of any risks or claims covered by this Section 6 (including minimizing the amount of any costs and expenses which might result).

## 6.13 Risks Becoming Uninsurable

Each party will, forthwith upon Having Knowledge, notify the other if a Principal Insured Risk becomes or is expected to become Uninsurable. If both parties agree or it is determined in accordance with the Dispute Resolution Procedure that the relevant Principal Insured Risk is or is about to become Uninsurable and that the Principal Insured Risk being Uninsurable is not and will not be caused by the actions or omissions of Project Co or any Project Co Person or the Owner or any Owner Person contrary to Section 4.10 of Schedule 5 [Insurance Requirements], then the parties together with their respective insurance advisors will meet to discuss the means by which such Principal Insured Risk should be managed (including considering the feasibility of self-insurance by either or all parties).

## 6.14 Consequences of Risks Becoming Uninsurable

If the requirements of Section 6.13 are satisfied but the parties cannot agree within 20 Business Days on how to manage a Principal Insured Risk that becomes Uninsurable (the “**Uninsurable Risk**”):

- (a) if the Uninsurable Risk is third party liability, if and for so long as the Uninsurable Risk is Uninsurable, the Owner may by notice to Project Co terminate this Agreement whereupon Project Co will be entitled to compensation on termination as provided in Section 4 of Schedule 9 [Compensation on Termination];
- (b) if the Uninsurable Risk is not third party liability or if (and for as long as) the Owner has not terminated this Agreement under Section 6.14(a), then this Agreement will continue, but neither Project Co nor the Owner will be obligated by this Agreement to maintain insurance in respect of the Uninsurable Risk and references in this Agreement to the insurance required by this Section 6 (Insurance, Damage and Destruction) or Schedule 5 [Insurance Requirements] will be construed accordingly. In such event the parties will agree upon an appropriate adjustment payment or payments to be paid in accordance with Section 10.1 (Payments) by agreement of the parties acting reasonably or, failing such agreement, by the Dispute Resolution Procedure, from the date upon which the Uninsurable Risk became Uninsurable, to reflect any savings in Project Co’s insurance cost as a result of Project Co not having to insure against the Uninsurable Risk; and
- (c) subject to Section 6.15, on the occurrence of the Uninsurable Risk the Owner will either:
  - (1) pay to Project Co an amount equal to the insurance proceeds that would have been payable directly to Project Co or the Design-Builder under the relevant policies in respect of the Uninsurable Risk had the relevant insurance continued to be available and in effect, and this Agreement will continue; or
  - (2) by notice to Project Co, terminate this Agreement whereupon Project Co will be entitled to compensation on termination as provided in Section 4 of Schedule 9 [Compensation on Termination],

except that the Owner may not in any such case terminate this Agreement pursuant to Section 6.14(c)(2) if Project Co releases the Owner from all obligations under Section 6.14(c)(1) and deposits to the Insurance Account an amount equal, in the reasonable opinion of the Owner, to the insurance proceeds, and all amounts in respect of deductibles and waiting periods that would have been the responsibility of Project Co under Section 4.7 of Schedule 5 [Insurance Requirements], that would have been payable in



respect of the Uninsurable Risk that occurred had the relevant insurance continued to be available and in effect.

#### **6.15 Third Party Liability Insurance as an Uninsurable Risk**

If this Agreement is terminated pursuant to Section 6.14(c)(2) and at the date of such termination third party liability is an Uninsurable Risk, and if:

- (a) there is an outstanding third party claim against Project Co or a Project Co Person at the Termination Date; or
- (b) following the Termination Date a third party claim is subsequently made against Project Co or a Project Co Person in respect of an event or circumstance that occurred before the Termination Date,

which in either case would have been covered by the third party liability insurance that either the Owner or Project Co would have been required to carry had that risk not been an Uninsurable Risk, then the Owner will pay to Project Co or Project Co Person the amount for which Project Co or such Project Co Person becomes liable in respect of such claim in addition to the compensation payable pursuant to Section 6.14(c)(2).

#### **6.16 Subrogation**

If the Owner makes any payment to Project Co pursuant to Section 6.14(c)(1) or Section 6.15, then the Owner, to the extent of the amount paid, will be subrogated to Project Co's rights against any third party in respect of the occurrence or claim as a result of which the payment was made, other than any third party that was an insured under the last policy of insurance to cover the Uninsurable Risk before it became Uninsurable, to the extent the insurers did not have a right of subrogation against such third party.

#### **6.17 Continuing Attempts to Insure Uninsurable Risks**

When there is an Uninsurable Risk for which Project Co or the Owner, as applicable is responsible to obtain insurance under Schedule 5 [Insurance Requirements] Project Co or the Owner, as applicable, will approach the insurance market on a regular basis and in any event at regular intervals of no longer than six months to establish whether the Uninsurable Risks remain Uninsurable.

#### **6.18 Uninsurable Risks Becoming Insurable**

Where a risk that was previously an Uninsurable Risk ceases to be so and either party becomes aware or is informed by the other party that this is the case, the party responsible for obtaining the insurance under Schedule 5 [Insurance Requirements], will forthwith take out, maintain and pay for or cause to be taken out, maintained and paid for insurance in accordance with the requirements of this Agreement in respect of the risk, and in any case:

- (a) Sections 6.13, 6.14, 6.15 and 6.17 will no longer apply to the risk so long as it is not an Uninsurable Risk; and
- (b) the parties will agree upon an appropriate adjusting payment or payments to be paid pursuant to Section 10.1 (Payments) by agreement of the parties acting reasonably or, failing such agreement, by the Dispute Resolution Procedure, from the date upon which the Uninsurable Risk became insurable, to reflect any increase in Project Co's insurance cost as a result of having to insure the risk that ceased to be an Uninsurable Risk.

## 7. CHANGES

### 7.1 Changes Required by the Owner

The Owner may require Changes in accordance with Schedule 6 [Changes].

## 8. SUPERVENING EVENTS

### 8.1 Supervening Events

If:

- (a) a Compensation Event or Relief Event occurs, Project Co may; or
- (b) a Force Majeure Event or Eligible Change in Law Event occurs, either party may,

apply for relief from its obligations, extensions of time, claim compensation or claim a termination right under this Agreement to the extent provided in this Section 8 (Supervening Events). The “**Applicant**” means the party making such application.

### 8.2 Procedures Upon the Occurrence of a Supervening Event

The following procedure will apply if a Supervening Event occurs:

- (a) as soon as practicable, and in any event within five Business Days after the Applicant Has Knowledge that the Supervening Event has caused, or is reasonably likely to cause, an entitlement under this Section 8 (Supervening Events), the Applicant will give to the other party a notice (“**Supervening Event Notice**”) identifying the particular Supervening Event and summarizing, to the extent the Applicant Has Knowledge, the consequences and the nature of the Applicant’s claim;
- (b) within 10 Business Days after delivery by the Applicant of a Supervening Event Notice, to the extent the Applicant Has Knowledge, the Applicant will give to the other party:
  - (1) additional details, including available supporting documentation, in support of its claim; and
  - (2) if applicable, a detailed breakdown of all Direct Losses incurred or which will be incurred or other compensation or relief sought by Project Co, if it is the Applicant, as a result of the Supervening Event;
- (c) from time to time thereafter the Applicant will notify the other party if at any time it receives or becomes aware of any further information relating to the Supervening Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading. In particular, a party claiming relief as a result of a Force Majeure Event will notify the other as soon as the Force Majeure Event has ceased and of the time when performance of its affected obligations can be resumed;
- (d) a party may make multiple but not duplicative claims in respect of a Supervening Event and both parties may make claims in respect of the same Supervening Event;
- (e) where the Owner is claiming the benefit of an Eligible Change in Law Event, Project Co will provide the Owner information reasonably requested in order to make its claim;

- (f) the Applicant must demonstrate:
- (1) it could not have avoided such occurrence or the consequences of the Supervening Event by steps which it might reasonably be expected to have taken provided that, in the case of the Owner, the Owner is not required to take any steps that are referred to in Sections 2.6(a), 2.6(b) or 2.6(c);
  - (2) if applicable, the Supervening Event caused or will cause the Applicant to incur a Direct Loss, a delay in the Project Schedule or the need for relief from other obligations under this Agreement; and
  - (3) in the case of Project Co, it has complied with its mitigation obligations pursuant to Section 2.5 and in the case of the Owner, it has complied with its mitigation obligations pursuant to Section 2.6;
- (g) the Applicant will advise whether, in the Applicant's opinion, any amendments should be considered to this Agreement, any Material Contract or any Senior Financing Agreement as a result of the Supervening Event; and
- (h) the parties will meet within 15 Business Days of delivery of the Supervening Event Notice to consult and seek to agree to the effect of the Supervening Event and if the parties, within 10 Business Days following the meeting, have not agreed to the occurrence or the effect of the Supervening Event, either party may refer the question of whether a Supervening Event has occurred, whether the conditions in Section 8.2(f) above have been satisfied or the extent of relief or compensation to which the affected party is entitled, for resolution in accordance with the Dispute Resolution Procedure.

### **8.3 Project Co's Entitlements Upon Occurrence of a Compensation Event**

Subject to Section 8.11, if at any time a Compensation Event has occurred and Project Co has given the Owner a Supervening Event Notice related thereto:

- (a) Project Co is relieved from any liability or consequence (including termination by the Owner) under this Agreement arising from any delay or failure in performing any of its obligations under or in connection with this Agreement;
- (b) the Owner will pay to Project Co compensation in respect of a Compensation Event calculated on the basis that Project Co will be placed in no better or worse position than it would have been in had a Compensation Event not occurred and taking into consideration the following (without duplication):
  - (1) any Direct Losses (including the amount of any applicable insurance deductibles and calculated without netting out Insurance Receivables) resulting from the Compensation Event; and
  - (2) any net increase or decrease in the costs of Project Co performing its obligations under this Agreement resulting from the Compensation Event,

except that:

- (3) Avoidable Costs and applicable Insurance Proceeds and insurance proceeds which Project Co would have recovered as a result of the Compensation Event if it had complied with the requirements of this Agreement or any policy of insurance maintained or required to be maintained under this Agreement will be deducted therefrom;

- (4) no Indirect Losses will be taken into consideration; and
  - (5) Project Co will not be entitled to any mark-ups for overhead, profit or otherwise on any amounts payable by Project Co to the Design-Builder;
- (c) concurrent with the payment of any compensation by the Owner under Section 8.3(b), Project Co will assign to the Owner its rights to all applicable Insurance Receivables (whether or not Project Co has made a claim); and
  - (d) if the Compensation Event occurs prior to the Service Commencement Date, the Project Schedule will be amended and the Target Service Commencement Date and the Longstop Date will be postponed by such time as is reasonable in the circumstances to take account of the effect of the delay caused by the Compensation Event.

#### **8.4 Project Co's Entitlements Upon Occurrence of a Relief Event**

Subject to Section 8.11, if at any time a Relief Event has occurred and Project Co has given the Owner a Supervening Event Notice related thereto:

- (a) Project Co is relieved from any liability or consequence (including termination by the Owner, except as provided for in this Section 8.4) under this Agreement arising from any delay or failure in performing any of its obligations under this Agreement;
- (b) if the Relief Event occurs prior to the Service Commencement Date:
  - (1) the Project Schedule will be amended and the Target Service Commencement Date and the Longstop Date will be postponed by such time as is reasonable in the circumstances to take account of the effect of the delay caused by the Relief Event;
  - (2) for the period that Service Commencement is delayed to a date after the Target Service Commencement Date (as it was prior to having been postponed pursuant to Section 8.4(b)(1) as a result of one or more of the Relief Events described in (b), (c), (h) or (j) of the definition of Relief Event the Owner will pay to Project Co an amount equal to the Senior Debt Interest Amount for such period less applicable Insurance Proceeds and insurance proceeds which Project Co would have recovered as a result of the Relief Event if it had complied with the requirements of this Agreement or any policy of insurance maintained or required to be maintained under this Agreement; and
  - (3) concurrent with the payment of any amount by the Owner pursuant to Section 8.4(b)(2), Project Co will assign to the Owner its rights to all applicable Insurance Receivables (whether or not Project Co has made a claim);
- (c) if the Relief Event, or its effects, persists or is likely to persist for more than 180 days after the date a Supervening Event Notice is delivered by the Applicant, either party may at any time so long as such Relief Event is, or such effect is, continuing and subject to Section 14.2, terminate this Agreement by notice to the other party;
- (d) if the Owner gives notice to Project Co under Section 8.4(c) terminating this Agreement, Project Co will have the option either to accept such notice or to respond in writing on or before the date falling 10 Business Days after the date of receipt of such notice stating that it requires this Agreement to continue, in which case Project Co's rights to relief under this Section 8.4 in respect of the Relief Event will cease and the Owner's termination notice will be deemed null and void;

- (e) if Project Co gives notice to the Owner under Section 8.4(c) terminating this Agreement, the Owner will have the option either to accept such notice or to respond in writing on or before the date falling 10 Business Days after the date of receipt of such notice stating that it requires this Agreement to continue. If the Owner gives Project Co such response then:
- (1) Project Co's termination notice will be deemed null and void and Project Co, insofar as it is able to do so, will continue to perform its obligations in accordance with the provisions of this Agreement;
  - (2) the Relief Event will be deemed to constitute a Compensation Event occurring as of the date on which the Relief Event first occurred;
  - (3) at any time so long as the Supervening Event referred to in Section 8.4(e)(2) is continuing, the Owner may terminate this Agreement by notice to Project Co; and
  - (4) Project Co may at any time so long as the Supervening Event referred to in Section 8.4(e)(2) is continuing after a further period of 180 days after the date on which Project Co delivered the termination notice pursuant to Section 8.4(c) terminate this Agreement by notice to the Owner; and
- (f) if this Agreement is terminated pursuant to this Section 8.4, Project Co will be entitled to compensation on such termination in accordance with Section 4 of Schedule 9 [Compensation on Termination].

#### **8.5 Parties' Entitlements Upon Occurrence of a Force Majeure Event**

Subject to Section 8.11, if at any time a Force Majeure Event has occurred and the Applicant has given the other party a Supervening Event Notice related thereto:

- (a) the Applicant is relieved from any liability or consequence (including termination by the Owner except as provided for in this Section 8.5) under this Agreement arising from any delay or failure in performing any of its obligations under this Agreement;
- (b) if the Applicant is Project Co and the Force Majeure Event occurs prior to the Service Commencement Date, the Project Schedule will be amended and the Target Service Commencement Date and the Longstop Date will be postponed by such time as is reasonable in the circumstances to take account of the effect of the delay caused by the Force Majeure Event;
- (c) if a Force Majeure Event occurs and it, or its effects, persists or is likely to persist for more than 180 days after the date a Supervening Event Notice is delivered by the Applicant, either party may at any time so long as such Force Majeure Event is, or such effect is, continuing, terminate this Agreement by notice to the other party;
- (d) if Project Co gives notice to the Owner under Section 8.5(c) terminating this Agreement, the Owner will have the option either to accept such notice or to respond in writing on or before the date falling 10 Business Days after the date of receipt of such notice stating that it requires this Agreement to continue. If the Owner gives Project Co such response then:
  - (1) Project Co's termination notice will be deemed null and void and Project Co, insofar as it is able to do so, will continue to perform its obligations in accordance with the provisions of this Agreement;
  - (2) the Force Majeure Event will be deemed to constitute a Compensation Event occurring as of the date the Force Majeure Event first occurred;

- (3) at any time so long as the Compensation Event referred to in Section 8.5(d)(2) is continuing, the Owner may terminate this Agreement by notice to Project Co; and
- (4) Project Co may at any time so long as the Compensation Event referred to in Section 8.5(d)(2) is continuing after a further period of 180 days after the date on which Project Co delivered the termination notice pursuant to Section 8.5(c), terminate this Agreement by notice to the Owner; and
- (e) if this Agreement is terminated pursuant to Section 8.5(c) or Sections 8.5(d)(3) or 8.5(d)(4), Project Co will be entitled to compensation on such termination in accordance with Section 4 of Schedule 9 [Compensation on Termination].

### **8.6 Parties' Entitlements Upon Occurrence of an Eligible Change in Law Event**

Subject to Section 8.11, if at any time an Eligible Change in Law Event has occurred and the Applicant has given the other party a Supervening Event Notice related thereto:

- (a) subject to Section 8.6(c), in the case of a Relevant Change in Law, a COVID-19 Change in Law or an Epidemic Change in Law, Project Co will be entitled to compensation for Direct Losses;
- (b) subject to Section 8.6(c), in the case of a Discriminatory Change in Tax Law Project Co or the Owner will be entitled to compensation for any revenue loss or revenue gain for Project Co (as the case may be);
- (c) subject to Section 8.6(d), any compensation payable in respect of an Eligible Change in Law Event will be calculated on the basis that Project Co will be placed in no better or worse position than it would have been in had such Eligible Change in Law Event not occurred and taking into consideration the following (without duplication):
  - (1) any Direct Losses (calculated without netting out Insurance Receivables) resulting from the Eligible Change in Law Event,

except that:

- (2) Avoidable Costs and applicable Insurance Proceeds and insurance proceeds which Project Co would have recovered if it had complied with the requirements of this Agreement or any policy of insurance maintained or required to be maintained under this Agreement will be deducted therefrom;
- (3) no Indirect Losses will be taken into consideration other than as set out in Section 8.6(b); and
- (4) Project Co will not be entitled to any mark-ups for overhead, profit or otherwise on any amounts payable to the Design-Builder,

and concurrent with the payment of any compensation by the Owner under this Section 8.6(c), Project Co will assign to the Owner its rights to all applicable Insurance Receivables (whether or not Project Co has made a claim);

- (d) in the case of an Input Tax Recoverability Change in Law:
  - (1) the Owner will pay Project Co, and Project Co will be entitled to, any Additional Irrecoverable Tax resulting from the Input Tax Recoverability Change in Law; and

- (2) Project Co will pay the Owner, and the Owner will be entitled to, any Additional Recoverable Tax resulting from the Input Tax Recoverability Change in Law,

but in each case only to the extent necessary to leave Project Co in no better or worse position than before the Input Tax Recoverability Change in Law, provided however that Section 8.6(c) will not apply to an Input Tax Recoverability Change in Law; and

- (e) the entitlements under this Section 8.6 are in addition to but not in duplication of the entitlements of Project Co under Section 8.4 for a Change in Law that is an Eligible Change in Law Event.

### **8.7 Parties' Entitlements Upon Occurrence of a Change in Law**

Without limiting Section 8.4 or Section 8.6:

- (a) if compliance by Project Co with a Change in Law is outside the scope of, or inconsistent with, Project Co's obligations under this Agreement, or would mean a change in Project Co's obligations under this Agreement or a change in the scope or manner of carrying out the Project, such Change in Law will be deemed to constitute a Change having effect from the time that such Change in Law takes effect, except that Project Co will not be entitled to any payment or other compensation other than as set out in Section 8.4 and Section 8.6;
- (b) except as otherwise provided in this Agreement, including in Section 8.4 or Section 8.6, Project Co will not be entitled to any other payment or compensation or relief in respect of any Change in Law or the consequences thereof; and
- (c) nothing in Section 8.4 or Section 8.6 will be interpreted as relieving Project Co of its obligation, following any and all Changes in Law, to perform its obligations under this Agreement in compliance with all Laws.

### **8.8 Labour Disputes**

If Project Co Has Knowledge of an actual or potential labour dispute that may affect any of the Design or the Construction, Project Co will promptly:

- (a) give notice thereof to the Owner, including all relevant information related to the dispute of which Project Co Has Knowledge; and
- (b) take all reasonable steps to mitigate the effects of such labour dispute on the performance of any of the Design or the Construction including by applying for relief to appropriate tribunals or courts.

Project Co acknowledges that if the labour dispute involves workers of the Design-Builder or a Sub-Contractor, or of anyone employed by or through them, the Owner will not be required to provide any facilities, space or assistance in the Facility or on the Lands for the purposes of such workers or any applicable union.

### **8.9 Payments in Respect of Supervening Events**

Payments between the parties in respect of Supervening Events will be made in accordance with Section 10 (Payments).

### 8.10 Supervening Events Mitigated by Change

Nothing in this Agreement will limit the right of the Owner to perform or mitigate its obligations in respect of Supervening Events or the consequences of a Supervening Event by requiring a Change or Changes.

### 8.11 Delay in Notification

If the Supervening Event Notice or any required information is provided by an Applicant to the other party after the dates referred to in Section 8.2 (Procedures Upon the Occurrence of a Supervening Event), then without prejudice to any other rights or remedies of the other party under this Agreement:

- (a) the Applicant will not be entitled to any compensation, extension of time or relief from its obligations under this Agreement to the extent that the amount thereof was increased or the ability to mitigate was adversely affected as a result of such delay in providing such notice or information; and
- (b) if the period of delay is 6 months or more, the rights of the Applicant with respect to the applicable Supervening Event will be of no further force or effect.

### 8.12 Equivalent Project Relief

The parties acknowledge that Project Co will share with the Design-Builder, who will in turn share with Sub-Contractors, in accordance with the Design-Build Agreement, certain benefits to Project Co derived from the rights of Project Co under, and subject to the obligations and limitations under, this Agreement including rights of Project Co under Section 8 (Supervening Events) (such rights, as qualified by such obligations and limitations, are in this Section collectively "**Project Co's Rights**"). Accordingly:

- (a) any circumstance affecting the Design-Builder or a Sub-Contractor which, if such circumstance had affected Project Co directly would have given rise to a claim by Project Co pursuant to Project Co's Rights will, for the purpose of this Agreement, be deemed to be a circumstance affecting Project Co in respect of which Project Co may claim under and subject to Project Co's Rights; and
- (b) amounts claimed by the Design-Builder or Sub-Contractor against Project Co in respect of any circumstance referred to in Section 8.12(a) above may be claimed by Project Co against the Owner under and subject to Project Co's Rights, but whether or not the Owner is liable for such amounts will be determined under this Agreement as if the circumstance had affected Project Co directly,

provided that:

- (c) all such claims will be made and administered by Project Co and none of the Design-Builder or a Sub-Contractor will have any rights against the Owner, including under this Section 8.12;
- (d) in no event will the liability of the Owner under this Section 8.12 be greater than it would have been if Project Co had been directly affected by the circumstance referred to in Section 8.12(a) above; and
- (e) in no event will the Owner be liable under this Section 8.12 for any Direct Losses or other compensation that the Owner would not have been liable for if Project Co had been directly affected by the circumstance referred to in Section 8.12(a) above.



## 9. INDEMNITIES, LIMITS ON LIABILITIES, REMEDIES, WARRANTIES AND PERFORMANCE SECURITY

### 9.1 Project Co's Obligation to Indemnify

Project Co will indemnify and keep the Owner and each Owner Indemnified Person indemnified at all times from and against all Direct Losses that any such Person may sustain in connection with:

- (a) any loss of or physical damage to property or assets of the Owner or any Owner Indemnified Person, or any claim made by one or more third parties (including for loss of or physical damage to property or assets), or any claim for, or in respect of, the death, personal injury, disease or illness of any Person, including any Owner Indemnified Person, arising by reason of any:
  - (1) negligent act or omission of Project Co;
  - (2) wilful misconduct of Project Co; or
  - (3) non-compliance by Project Co with any of the provisions of this Agreement or any document, instrument or agreement delivered to the Owner as required under this Agreement;
- (b) breach of any representation or warranty by Project Co under this Agreement;
- (c) any Project Co Hazardous Substances;
- (d) breach by Project Co of, or non-compliance by Project Co with, Permits or Laws, or the failure of Project Co to obtain all necessary Permits in accordance with this Agreement; or
- (e) any infringement or misappropriation of Intellectual Property rights of any Person by Project Co,

except to the extent caused, or contributed to, by non-compliance by the Owner with any provision of this Agreement or any document, instrument or agreement delivered to Project Co as required under this Agreement or any negligent act or omission, or any wilful misconduct, of the Owner or any Owner Person. For greater certainty, Section 4.4 applies to this Section 9.1. This Section 9.1 may be relied upon by the Owner Indemnified Persons and may be enforced directly by any of them against Project Co in the same manner and for the same purpose as if pursuant to a contractual indemnity directly between them and Project Co.

### 9.2 Conduct of Third Person Claims

This Section 9.2 will apply to the conduct of claims made by a third Person against a party having or claiming to have with respect to such third Person claim, the benefit of an indemnity or a right to compensation under this Agreement. The party having, or claiming to have, the benefit of the indemnity or right to compensation is referred to as the "**Beneficiary**" and the party from whom the indemnity or compensation is sought is referred to as the "**Indemnifier**". Accordingly, subject to the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Agreement:

- (a) if the Beneficiary receives any notice, demand, letter or other document concerning any claim for which it appears that the Beneficiary is, or may become entitled to, indemnification or compensation under this Agreement in respect of the entire claim, the Beneficiary will give notice in writing to the Indemnifier as soon as reasonably practicable and in any event within 10 Business Days of receipt thereof;

- (b) the Indemnifier will be entitled to dispute the claim in the name of the Beneficiary at the Indemnifier's own expense and take conduct of any defence, dispute, compromise, or appeal of the claim and of any incidental negotiations. The Beneficiary will give the Indemnifier all reasonable co-operation, access and assistance for the purposes of considering and resisting such claim;
- (c) in defending any claim described in Section 9.2(b) in which there is a conflict of interest between the Indemnifier and the Beneficiary, the Beneficiary may appoint independent legal counsel in respect of such claim and, if it is determined that the Beneficiary is entitled to indemnification by or compensation from the Indemnifier, all reasonable costs and expenses incurred by the Beneficiary in so doing will be included in the indemnity or compensation from the Indemnifier;
- (d) with respect to any claim conducted by the Indemnifier pursuant to Section 9.2(b) the Indemnifier will:
  - (1) keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;
  - (2) demonstrate to the Beneficiary, at the reasonable request of the Beneficiary, that the Indemnifier has sufficient means to pay all costs and expenses that it may incur by reason of conducting the claim; and
  - (3) not pay or settle such claims without the consent of the Beneficiary, such consent not to be unreasonably withheld or delayed;
- (e) the Beneficiary may take conduct of any defence, dispute, compromise or appeal of the claim and of any incidental negotiations if:
  - (1) the Indemnifier is not entitled to take conduct of the claim in accordance with Section 9.2(b); or
  - (2) the Indemnifier fails to notify the Beneficiary of its intention to take conduct of the relevant claim within 10 Business Days of the notice from the Beneficiary under Section 9.2(a) or notifies the Beneficiary that it does not intend to take conduct of the claim; or
  - (3) the Indemnifier fails to comply in any material respect with Section 9.2(d) above.

In the case of (3) above the Beneficiary may pay or settle any claim on such terms as it thinks fit (provided such settlement is in monetary terms only) and without prejudice to its rights and remedies under this Agreement. Otherwise the Beneficiary will not pay or settle such claims without the consent of the Indemnifier, such consent not to be unreasonably withheld or delayed;
- (f) the Beneficiary may at any time give notice to the Indemnifier that it is retaining or taking over, as the case may be, the conduct of any defence, dispute, compromise, settlement or appeal of any claim, or of any incidental negotiations, to which Section 9.2(b) above applies. On receipt of such notice the Indemnifier will promptly take all steps necessary to transfer the conduct of such claim to the Beneficiary, and will provide to the Beneficiary all reasonable co-operation, access and assistance for the purposes of considering and resisting such claim. If the Beneficiary gives any notice pursuant to this Section 9.2(f) (for the sake of clarity, for reasons other than as provided in Sections 9.2(e)(2) or 9.2(e)(3)), then the Indemnifier will be released from any liability under its indemnity under Section 9.1 or its obligation to provide compensation, as the case may be; and

- (g) in response to any claim of infringement or misappropriation or alleged infringement or misappropriation of the Intellectual Property rights of any Person, Project Co may replace such infringing or allegedly infringing item provided that:
- (1) the replacement is performed without additional cost to Owner; and
  - (2) the replacement has at least equal quality performance capabilities when used in conjunction with the Facility.

### 9.3 General Obligation to Pursue Third Person Recovery

If a party (the “**Paying Party**”) has paid to the other party (the “**Receiving Party**”) an amount in respect of any indemnity, Supervening Event or other liability hereunder (a “**Liability Payment**”), and the Receiving Party has a *bona fide* claim for recovery of any such Liability Payment from a third Person or under any insurance required pursuant to this Agreement, the Receiving Party will:

- (a) as directed by the Paying Party either:
  - (1) promptly make all reasonable efforts to pursue and recover such claim and provide evidence of such efforts to the Paying Party; or
  - (2) assign to the Paying Party the right to pursue and recover such claim and, at the Paying Party’s cost, provide reasonable cooperation in connection with the pursuit and recovery of such claim; and
- (b) if it subsequently recovers, or the Paying Party makes recovery on its behalf, (whether by payment, discount, credit, saving, relief or other benefit or otherwise) an amount which is directly referable to the fact, matter, event or circumstances giving rise to the payment of the Liability Payment, forthwith repay to the Paying Party an amount equal to the lesser of:
  - (1) an amount equal to the sum recovered (or of the value of the recovery whether by discount, credit, saving, relief or otherwise) less any out of pocket costs and expenses properly incurred by the Receiving Party in recovering such sum; and
  - (2) the Liability Payment,

provided that the Paying Party will be repaid only to the extent that the amount of such recovery plus the Liability Payment exceeds the total loss or liability of the Receiving Party in respect of the fact, matter or circumstance giving rise to the Liability Payment.

For greater certainty, the above reference to a “third Person” will not include, in the case where the Owner is the Paying Party, Project Co and Project Co Persons and their respective employees, directors, officers and agents and will not include, in the case where Project Co is the Paying Party, the Owner and the Owner Indemnified Persons.

### 9.4 Waiver of Remedies

No failure to exercise, and no delay in exercising, any right or remedy under this Agreement will be deemed to be a waiver of that right or remedy. No waiver of any breach of any provision of this Agreement will be deemed to be a waiver of any subsequent breach of that provision or of any similar provision.

## 9.5 Remedies Cumulative

Subject to Sections 9.6, 9.7 and 9.8:

- (a) the rights and remedies of the parties under this Agreement are cumulative and are in addition to and not in substitution for any other rights and remedies available at law or in equity or otherwise;
- (b) a party will not be prevented from enforcing a right or remedy on the basis that another right or remedy hereunder deals with the same or similar subject matter; and
- (c) no single or partial exercise by a party of any right or remedy precludes or otherwise affects the exercise of any other right or remedy to which that party may be entitled.

## 9.6 Limitation on Owner's Remedies

The Owner's remedies in respect of any failure by Project Co to achieve Service Commencement by the Target Service Commencement Date or the Longstop Date will be limited to the Owner's rights pursuant to Section 9.14 (Delay Liquidated Damages) and Section 12.4 (Owner Termination Right), provided that nothing in this Section 9.6 will limit the Owner's right to:

- (a) claim, on or after a termination of this Agreement, costs, losses, damages and expenses suffered or incurred by the Owner as a result of rectifying or mitigating the effects of any breach of this Agreement by Project Co except to the extent recovered by the Owner under this Agreement or taken into account to reduce any compensation payable by the Owner pursuant to Schedule 9 [Compensation on Termination];
- (b) make a claim for indemnification pursuant to Section 9.1;
- (c) deliver to Project Co a Dispute Notice or a notice of default or termination pursuant to Section 12 (Project Co Events of Default) and pursue all remedies in respect thereof;
- (d) make Deductions in respect of Compliance Failure Events in accordance with Appendix 2B [Compliance Failure Events]; or
- (e) pursue any other express remedy available to the Owner under this Agreement or any equitable remedy, including injunctive relief and specific performance.

## 9.7 Limitation on Project Co's Remedies

To the extent Project Co has claimed for relief or compensation for a Supervening Event, pursuant to Section 8, Project Co may not make any further claim against the Owner for costs, losses, damages or expenses incurred by Project Co, or for any other relief, in respect of any such events provided that nothing in this Section 9.7 will limit Project Co's right to:

- (a) deliver to the Owner a Dispute Notice or a notice of default or termination pursuant to Section 13 (Owner Events of Default) and pursue all remedies in respect thereof; or
- (b) pursue any other express remedy available to Project Co under this Agreement or any equitable remedy, including injunctive relief and specific performance.

## 9.8 Limits on Monetary Compensation

Every right to claim compensation or indemnification or reimbursement under this Agreement will be construed so that recovery is without duplication to any other amount recoverable under this Agreement.

Neither party will be entitled to make any claim against the other party for compensation, indemnification or reimbursement other than as provided under this Agreement.

#### **9.9 No Liability for Indirect Losses**

Unless specifically allowed in this Agreement, neither party to this Agreement will be liable to the other party, whether in contract or in tort or on any other basis whatsoever, for any Indirect Losses suffered or incurred by that other party.

#### **9.10 Owner's Right of Set Off**

The Owner may set off any amounts owing by Project Co to the Owner under this Agreement against payments due by the Owner to Project Co under this Agreement provided that in respect of Termination Payments payable under Sections 2 or 4 of Schedule 9 [Compensation on Termination] such set off will be only to the extent that after any such amount has been set off, such Termination Payment made would be an amount not less than the Senior Debt Termination Amount.

#### **9.11 Project Co's Right of Set Off**

Project Co may set off any amounts owing by the Owner to Project Co under this Agreement against any payments due by Project Co to the Owner under this Agreement.

#### **9.12 Undisputed Amounts and Interest on Disputed Amounts**

A party will pay any undisputed portion of any disputed amount payable to the other party in accordance with this Agreement but any disputed portion or amount will not be payable until the Dispute is resolved in accordance with the Dispute Resolution Procedure.

If payment of any amount payable under this Agreement is delayed while the matter is in Dispute, upon resolution of the Dispute, interest will be payable on any amount determined payable pursuant to the Dispute Resolution Procedure and will be calculated at the Prime Rate compounded monthly from the time such amount became payable under this Agreement until paid.

#### **9.13 Interest on Overdue Amounts**

If payment of any amount payable under this Agreement is not made when due (including Termination Payments payable pursuant to Schedule 9 [Compensation on Termination]), interest will be payable on such amount at the Default Rate and will be calculated from the date due under this Agreement until paid, compounded monthly. The party to whom payment is owed and overdue will notify the other party at least monthly of the overdue amount and the accrued interest on that amount.

#### **9.14 Delay Liquidated Damages**

The Owner and Project Co acknowledge and agree that:

- (a) Project Co will pay the Owner damages in the amounts specified in this Section 9.14 ("**Delay Liquidated Damages**") as a genuine pre-estimate of the damages suffered by the Owner as a result of a delay by Project Co in achieving Service Commencement by the then scheduled Target Service Commencement Date (as updated from time to time as a result of a Change or a Supervening Event);
- (b) Project Co will pay Delay Liquidated Damages of \$70,000 per day from the then scheduled Target Service Commencement Date (as updated from time to time as a result of a Change or a Supervening Event) until the first to occur of Service Commencement, the Longstop Date and the date of termination of this Agreement (provided, for greater certainty, that no

claim in respect of any unpaid Delay Liquidated Damages outstanding as at the time of termination will be extinguished as at such relevant time); and

- (c) payment by Project Co of Delay Liquidated Damages and any other amount contemplated in this Section 9.14 is subject to the limitation of liability under this Agreement including the Delay LD Subcap; but neither such payment nor the existence of any limitations of liability under this Agreement will relieve Project Co of its obligations to carry out and complete the Design and Construction.

### 9.15 Maximum Aggregate Liability

- (a) Subject to Section 9.15(b), the maximum aggregate liability of Project Co under this Agreement (including for Delay Liquidated Damages, LEED LD Amount, Deductions and indemnities under this Agreement) will not exceed 40% of the Contract Price (the “**Liability Cap**”).
- (b) The Liability Cap will not apply (either in the context of any claim or upon termination of this Agreement) in respect of:
  - (1) claims arising from, in connection with or as a result of any fraud by Project Co, the Design-Builder or any Subcontractor retained directly by the Design-Builder;
  - (2) claims arising from, in connection with or as a result of any gross negligence, wilful misconduct, abandonment, reckless disregard of applicable Laws or deliberate acts of wrong doing by Project Co, the Design-Builder or any Subcontractor retained directly by the Design-Builder;
  - (3) liability for losses relating to any event or circumstance in respect of which Project Co is required to maintain insurance in accordance with this Agreement up to the amount of the required insurance and deductibles thereon;
  - (4) any amounts paid pursuant to an indemnity under this Agreement respecting liability to third parties, including for death or personal injury;
  - (5) any liabilities arising out of any encumbrances caused by Project Co and not removed or paid by Project Co in accordance with this Agreement;
  - (6) any amounts paid by Project Co that are subsequently repaid to it by the Owner or received by Project Co from insurance proceeds that Project Co is required to maintain in accordance with this Agreement (or that would have been recovered by insurance proceeds up to the amount of the required insurance but in respect of which insurance proceeds are not available due to a failure, act or omission on the part of the Project Co);
  - (7) any Cost Overruns incurred by Project Co in carrying out the Design and Construction; and
  - (8) liability for third party claims with respect to Intellectual Property relating to the Design and Construction.

The Owner will not be obliged to exhaust its remedies against any insurer or surety before being entitled to make a claim against Project Co hereunder.

- (c) Project Co’s maximum aggregate liability for Delay Liquidated Damages under this Agreement will be limited to 12 months of Delay Liquidated Damages (the “**Delay LD**”).

**Subcap**). For greater certainty, the Delay LD Subcap is a subset of the Liability Cap and the Delay LD Subcap and the Liability Cap are not additive.

#### 9.16 Warranties and Liability for Defects

- (a) Project Co will at its expense correct and make good all Defects that are discovered during the Warranty Period (including any Deficiencies in accordance with Schedule 2 [Design and Construction Protocols]).
- (b) In addition to the obligation to correct and make good Defects during the Warranty Period in accordance with Section 9.16(a), Project Co will at its expense correct and make good any Construction Latent Defects until:
  - (1) in the case of any Construction Latent Defect in the foundations, footings, support columns, structural roofing beams and structural support walls (which for greater certainty are the unclad frame of the Facility and which provide actual structural support to the Facility and do not include, among other things, materials contained within or behind walls, windows, curtain walls, gyproc or internal partitions) of the Design and Construction, the expiry of the 15 year ultimate limitation period pursuant to the *Limitation Act* (British Columbia) in force on the Effective Date; and
  - (2) in the case of any other Construction Latent Defect not described in Section 9.16(b)(1), the date that is 10 years after the Service Commencement Date,

provided, however, that Project Co will only be required to correct any such Construction Latent Defect if it has received written notice thereof within 120 days of the date upon which the Owner knew or reasonably ought to have known of the Construction Latent Defect.

- (c) If Project Co does not promptly and diligently, and in any event within thirty (30) days of a request by the Owner (or such other period of time as may be acceptable to the Owner, acting reasonably), remedy a Defect or Construction Latent Defect pursuant to Section 9.16(a) or Section 9.16(b), as the case may be, the Owner, after notice to Project Co, will have the right to perform or have performed by third parties the necessary remedy, and Project Co will within fifteen (15) Business Days of demand by the Owner reimburse the Owner for direct costs and expenses reasonably incurred by the Owner exercising its rights hereunder and an additional mark-up of 20% of such costs and expenses in respect of indirect costs and overhead not otherwise directly attributable to the exercise of such rights.
- (d) Subject to Section 9.6, the sole obligations of Project Co with respect to Defects are set out in this Agreement, and the remedies of the Owner with respect to any Defects are limited to enforcement of the obligations of Project Co under this Agreement.

#### 9.17 Terms of Contractor Warranties

Without limiting or derogating from any warranty obligations of Project Co contained in this Agreement, Project Co will:

- (a) ensure that the Design-Build Agreement contains provisions which:
  - (1) impose on the Design-Builder the same warranties as are contained in this Agreement in relation to all Design and Construction provided, performed or carried out and materials and equipment supplied by the Design-Builder;

- (2) cause the Design-Builder to obtain any extended warranties specified in Schedule 3 [Design and Construction Specifications], including in respect of roofing as set out in Section 6.7.6 of Schedule 3 [Design and Construction Specifications]; and
  - (3) acknowledge that such warranties are for the benefit of the Owner and its assignees as well as Project Co and are assignable in accordance with the terms of this Agreement.
- (b) transfer any industry standard warranties which may be available and which exceed the requirements of this Section 9.17 (including in respect of the term of such warranties) but without any obligation on Project Co to obtain any such warranties which exceed the requirements of this Section 9.17, including warranties against defects in materials and workmanship from the Design-Builder and each Sub-Contractor in respect of the Design and Construction provided, performed or carried out and materials and equipment supplied by the Design-Builder under the Design-Build Agreement or by a Sub-Contractor under its Sub-Contract; and
  - (c) at the request of the Owner, cooperate with and assist the Owner in the enforcement of any claims under warranties contained in the Design-Build Agreement or any Sub-Contract or otherwise given by the Design-Builder or any Sub-Contractor.

#### **9.18 Assignment of Warranties to Owner**

- (a) Project Co:
  - (1) hereby absolutely assigns, on the terms set out in Section 9.18(b), to the Owner all warranties contained in the Design-Build Agreement;
  - (2) will cause, by ensuring that the Design-Builder or any Sub-Contractor includes relevant provisions in all Sub-Contracts, all warranties contained in any such Sub-Contract to be absolutely assigned to the Owner, on the terms set out in Section 9.18(b).
- (b) Notwithstanding the provisions of Sections 9.17(a)(1) and 9.17(a)(2), Project Co or the Design-Builder that is the beneficiary of any warranties contained in the Design-Build Agreement or any Sub-Contract, as the case may be, will be permitted to enjoy the benefit of and enforce the warranties referred to in, respectively, Sections 9.17(a)(1) and 9.17(a)(2) as if the assignment made in 9.17(a)(1) and any assignments made pursuant to 9.17(a)(2) had not been made until (subject to and without prejudice to the rights of the Senior Lenders under, and as defined in, the Lenders' Remedies Agreement) the earlier of (i) the date on which the Owner gives Project Co or the relevant Sub-Contractor, as the case may be, a written notice stating that a Project Co Event of Default has occurred and that the Owner is exercising its rights pursuant to the relevant assignment, (ii) the Termination Date and (iii) the Expiry Date.
- (c) Without limiting the provisions of Section 17.8 (Further Assurances), Project Co will:
  - (1) cause to be included in the Design-Build Agreement a notice from Project Co to the Design-Builder of the assignment made in Section 9.17(a)(1) and an acknowledgement of such notice from the Design-Builder; and
  - (2) cause to be included in any Sub-Contracts a notice from the Design-Builder or Sub-Contractor that is the beneficiary of any warranties contained in the relevant Sub-Contract to the Sub-Contractor that is the provider of such warranties of the



assignment made pursuant to Section 9.18(a)(2) and an acknowledgement of such notice from the Sub-Contractor that is the provider of such warranties.

### **9.19 Performance Guarantee of Construction Guarantor**

At all times during the Term and, in respect of the provisions described in Section 17.11 (Survival), following the Term, Project Co will ensure that a valid and binding Performance Guarantee of Construction Guarantor in favour of the Owner from the Construction Guarantor (or a party of comparable financial strength, capacity and stability, as determined by the Owner acting in its sole discretion) and in the form of guarantee attached as Schedule 15 [Performance Guarantee of Construction Guarantor], is in place and enforceable by the Owner.

## **10. LUMP SUM PAYMENTS**

### **10.1 Payments**

To the extent a party:

- (a) is entitled to payment from the other party under this Agreement, including in respect of a Change under Section 7 (Changes), a Supervening Event under Section 8 (Supervening Events) or an indemnification claim under Section 9 (Indemnities, Limits on Liabilities, Remedies, Warranties and Performance Security); or
- (b) is entitled to share in a benefit and to receive payment from the other party under this Agreement, including in respect of a Refinancing Gain under Section 5 (Financing of the Project) or Eligible Change in Law Event under Section 8 (Supervening Events),

the affected or entitled party may make written demand for such payments from time to time after being entitled to payment and in respect of any Direct Losses, after such Direct Losses have been incurred and in respect of any shared benefit, after receipt by the other party of the shared benefit, and payment will be made in accordance with this Section 10.

If the Owner is obligated to compensate, reimburse or otherwise pay Project Co, the Owner may in its discretion make such payment by lump sum payment or by payments that reasonably match the cash outlays of Project Co.

If Project Co is obligated to compensate, reimburse or otherwise pay the Owner, the Owner may in its discretion, require Project Co to make such payment:

- (c) by a lump sum payment, up to a maximum lump sum payment of \$1,000,000 without the consent of Project Co, and any greater amount with the consent of Project Co, acting reasonably; or
- (d) by payments that reasonably match the cash inflows to Project Co or the averted cash outlays.

Lump sum payments and payments that reasonably match cash inflows, cash outlays or averted cash outlays will be due and payable within 30 days of delivery of written demand supported by all relevant information.

The parties may agree to any other basis for payment.

## 10.2 Financing of Lump Sum Payment Amounts

If the Owner is obligated to compensate, reimburse or otherwise pay Project Co and exercises its discretion to do so by a lump sum payment in accordance with Section 10.1 (Payments), at the Owner's request Project Co will use all reasonable efforts to obtain the financing required to make such payment on the best terms reasonably available and, to the extent that Project Co is able to obtain such financing, there will be a corresponding increase made to the Contract Price payable to Project Co in accordance with Schedule 8 [Payments]. The Owner will:

- (a) promptly pay to Project Co an amount equal to the reasonable out-of-pocket expenses incurred by Project Co in seeking such financing provided that the Owner approved such expenses prior to Project Co incurring them; and
- (b) provide concurrent interim financing of any expenditures and costs to be incurred by Project Co until the earlier of the date on which such financing is obtained or payment is made pursuant to Section 10.1 (Payments).

The Owner acknowledges that the Senior Lenders have no obligation to provide the financing referred to in this Section 10.2 or to subordinate or share their security.

## 11. OWNER'S STEP-IN RIGHTS

### 11.1 Owner's Step-in Rights

If:

- (a) the Owner reasonably considers that a breach by Project Co of any obligation under this Agreement:
  - (1) is likely to create an immediate and serious threat to the health or safety of any Owner Person, any property, the environment or the reputation, integrity of, or public confidence in, the Facility or any operations related to the Facility; or
  - (2) is prejudicial to the ability to carry on Owner Activities and the Intended Uses to a material degree,

then the Owner, acting reasonably may either:

- (b) if it considers that there is sufficient time and that it is likely that Project Co will be willing and able to provide assistance, require Project Co by notice to take such steps as are necessary or expedient to mitigate or rectify such state of affairs including, if applicable due to breach of the Design-Build Agreement or Sub-Contract, suspension of the Design-Builder or Sub-Contractor, and Project Co will use all reasonable efforts to comply with the Owner's requirements as soon as reasonably practicable; or
- (c) if it considers there is not sufficient time, or that Project Co is not likely to be willing and able to take the necessary steps, take such steps as it considers are appropriate (either itself or by engaging others) to mitigate or rectify such state of affairs to the standards required by this Agreement (or as close as possible to those standards as the circumstances permit). The Owner will carry out such steps as quickly as is practicable, and in such manner as will minimize interference with Project Co's performance of its obligations under this Agreement.

Project Co will ensure that the provisions contained in all applicable Sub-Contracts will not prevent or inhibit the Owner from exercising its rights under this Section 11.

## 11.2 Owner's Rectification Rights

If the Owner gives notice to Project Co under Section 11.1(b) and Project Co either:

- (a) does not confirm, within five Business Days of such notice, or such shorter period as is appropriate in the case of an emergency, that it is willing to take such steps as are required in such notice or present an alternative plan to the Owner to mitigate, rectify and protect against such circumstances that the Owner may, within a further five Business Days, accept or reject, acting reasonably; or
- (b) fails to take the steps as are referred to or required in such notice or accepted alternate plan within such time as set out in such notice or accepted alternate plan or within such time as the Owner, acting reasonably, will stipulate,

then the Owner may take such steps as it considers necessary or expedient to mitigate, rectify or protect against such circumstances either itself or by engaging others to take any such steps. Such steps may include the partial or total suspension of the right and obligation of Project Co to carry out the Design and/or the Construction, but only for so long as the circumstances referred to in Section 11.1(a) subsist. If the circumstances referred to in Section 11.1(a) no longer subsist, any suspension of the right and obligation of Project Co to carry out any Design and/or Construction will cease and such right and obligation will once again be in full force and effect.

## 11.3 No Effect on Project Co's Design and Construction Responsibility

The exercise by the Owner of any of its rights under this Section 11 will not reduce or affect in any way Project Co's responsibility under Section 4.1 of Schedule 2 [Design and Construction Protocols].

## 11.4 Allocation of Costs for Owner Actions

To the extent that any of the circumstances set out in Section 11.1 arise as a result of any breach by Project Co of its obligations under this Agreement, then Project Co will pay the Owner the amount of all direct costs and expenses reasonably incurred by the Owner in exercising its rights under Section 11.1 or Section 11.2 and an additional mark-up of 20% of such costs and expenses in respect of indirect costs and overhead not otherwise directly attributable to the exercise of such rights. In all other cases, any actions of the Owner under Sections 11.1 and 11.2 will constitute a Compensation Event.

## 12. PROJECT CO EVENTS OF DEFAULT

### 12.1 Project Co Events of Default

For the purposes of this Agreement, "**Project Co Event of Default**" means any of the following events or circumstances:

- (a) the occurrence of a Project Co Material Breach that is not remedied in accordance with Section 12.3 including in accordance with the program for remediation under that Section, or the occurrence of such Project Co Material Breach for which a program for remediation has not been produced by Project Co in accordance with Section 12.3;
- (b) the occurrence of a Project Co Insolvency Event;
- (c) Project Co abandons the Project, other than pursuant to its right to suspend performance under Section 13.3 (Project Co's Options) or due to a Supervening Event;
- (d) Service Commencement does not occur on or before the Longstop Date;

- (e) at any time after 12 months prior to the Longstop Date it is finally determined pursuant to the Dispute Resolution Procedure that the Service Commencement Date is not reasonably expected to occur on or before the Longstop Date;
- (f) Project Co breaches Section 16.1 or a Change in Control occurs which is prohibited by Section 16.2; or
- (g) if such consent is required under Section 5.3 (Consent Required for Refinancing), Project Co carries out a Refinancing without the Owner's consent,

unless caused by non-compliance by the Owner with any provision of this Agreement or any document, instrument or agreement delivered to Project Co as required under this Agreement or any negligent act or omission, or any wilful misconduct, of the Owner or any Owner Person.

## **12.2 Notification**

Project Co will notify the Owner of the occurrence, and details, of any Project Co Event of Default and of any event or circumstance which is likely, with the passage of time or otherwise, to constitute or give rise to a Project Co Event of Default, in either case promptly when Project Co Has Knowledge of its occurrence.

## **12.3 Project Co Material Breach Cure and Remedial Program**

After the occurrence of a Project Co Material Breach and while it is subsisting, the Owner may serve a notice on Project Co specifying in reasonable detail the type and nature of the Project Co Material Breach and:

- (a) Project Co will remedy such Project Co Material Breach referred to in such notice (if it is continuing) within 20 Business Days of such notice; or
- (b) if either the Owner (as set out in its notice) or Project Co reasonably considers that a Project Co Material Breach cannot reasonably be remedied within 20 Business Days of such notice, Project Co will deliver to the Owner within 10 Business Days of such notice a reasonable program (set out, if appropriate, in stages) for remedying the Project Co Material Breach. The program will specify in reasonable detail the manner in, and the latest date by, which the Project Co Material Breach is proposed to be remedied.

If Project Co puts forward a program in accordance with Section 12.3(b), the Owner will have 10 Business Days from receipt of the program within which to notify Project Co that the Owner, acting reasonably, does not accept the program, failing which the Owner will be deemed to have accepted the program. If the Owner notifies Project Co that it does not accept the program as being reasonable, the parties will use all reasonable efforts within the following five Business Days to agree to any necessary amendments to the program put forward. In the absence of an agreement within such five Business Days, the question of whether the program (as it may have been amended by agreement) will remedy such Project Co Material Breach in a reasonable manner and within a reasonable time period (and, if not, what would be a reasonable program) may be referred by either party for resolution in accordance with the Dispute Resolution Procedure.

## **12.4 Owner Termination Right**

If:

- (a) a Project Co Material Breach is not remedied before the expiry of the period referred to in Section 12.3(a) and no program has been put forward by Project Co under Section 12.3(b);

- (b) Project Co puts forward a program pursuant to Section 12.3(b) which has been accepted by the Owner (including after agreement under Section 12.3 to amendments to the program) or has been determined to be reasonable pursuant to the Dispute Resolution Procedure and Project Co fails to achieve any material element of the program or the end date for the program, as the case may be;
- (c) any program put forward by Project Co pursuant to Section 12.3(b) is rejected by the Owner as not being reasonable, and, if such rejection is disputed by Project Co, the Dispute Resolution Procedure does not find against that rejection; or
- (d) any Project Co Event of Default other than a Project Co Material Breach occurs,

then the Owner may (if the Project Co Event of Default continues unwaived and unremedied), subject to the terms of the Lenders' Remedies Agreement, terminate this Agreement by notice to Project Co. The right of the Owner to terminate this Agreement under this Section 12.4 is in addition, and without prejudice, to any other right which the Owner may have in connection with Project Co's defaults hereunder.

For the purposes of Section 12.4(b), if Project Co's performance of the program is adversely affected by the occurrence of a Supervening Event or a breach by the Owner of its obligations under this Agreement, then, subject to Project Co complying with the mitigation and other requirements in this Agreement concerning such events, the time for performance of the program or any relevant element of it will be deemed to be extended by a period equal to the delay caused by such events which is agreed by the parties or determined in accordance with the Dispute Resolution Procedure.

## 12.5 The Owner's Costs

Project Co will reimburse the Owner for all reasonable costs incurred by the Owner in exercising any of its rights (including any relevant increased administrative expenses and actual legal expenses) under this Section 12 (Project Co Events of Default).

## 13. OWNER EVENTS OF DEFAULT

### 13.1 Owner Events of Default

For the purposes of this Agreement, "**Owner Event of Default**" means any of the following events or circumstances:

- (a) a failure by the Owner to pay any amount due and owing to Project Co under this Agreement on the due date (which amount is not being disputed in good faith) and the Owner has not remedied such failure to pay within 10 Business Days' of notice from Project Co;
- (b) except as provided for in Section 13.1(a), a breach, or series of breaches, by the Owner of any term, covenant or undertaking to Project Co, or any representation or warranty made by the Owner to Project Co in this Agreement is incorrect when made, the consequence of which:
  - (1) has an adverse effect on the performance of the Design or the Construction; or
  - (2) results in any provision of this Agreement being unenforceable against the Owner,

and as a result thereof Project Co is reasonably likely to be materially deprived of the benefit of this Agreement;

- (c) if any material part of the Facility, the portion of the Lands on which the Facility is situated, or any interest in Project Co is expropriated by any Governmental Authority and as result thereof Project Co is reasonably likely to be materially deprived of the benefit of this Agreement;
- (d) if a Governmental Authority requires a sum of money to be set aside or otherwise paid pursuant to Section 48 of the *Hospital Act* (British Columbia) with the result that Project Co does not have sufficient funds to fulfill its obligations under Section 6.3 or 6.4 and the Owner does not pay a like sum to Project Co within five Business Days of demand therefor in order for Project Co to carry out such obligations;
- (e) if the Guarantee is or becomes, or is held to be, unenforceable, invalid, void or otherwise ceases to be in full force and effect; or
- (f) the Owner breaches Section 16.3 (Limitations on Assignment of Project by Owner).

### 13.2 Notification

The Owner will notify Project Co of the occurrence, and details, of any Owner Event of Default and of any event or circumstance which is likely, with the passage of time or otherwise, to constitute or give rise to an Owner Event of Default, in either case promptly on the Owner Having Knowledge of its occurrence.

### 13.3 Project Co's Options

After the occurrence of an Owner Event of Default and while an Owner Event of Default is continuing, Project Co may, at its option exercise one or more of the following, as applicable:

- (a) in respect of the Design and the Construction prior to the Service Commencement Date, suspend performance by it of its obligations under this Agreement until such time as the Owner has demonstrated to the reasonable satisfaction of Project Co that it will perform and is capable of performing its obligations under this Agreement and the Target Service Commencement Date and the Longstop Date will be extended by the time such suspension is in effect;
- (b) in the case of an Owner Event of Default under Section 13.1(a), suspend performance by it of its obligations under this Agreement until the Owner has remedied such Owner Event of Default and the Target Service Commencement Date and the Longstop Date will be extended by the time such suspension is in effect and such additional time as may be reasonably required to return to normal operations following such suspension;
- (c) in the case of an Owner Event of Default under Sections 13.1(a), 13.1(b) or 13.1(c), serve notice on the Owner of the occurrence specifying details of such Owner Event of Default and if the relevant matter or circumstance has not been rectified or remedied by the Owner or otherwise within 20 Business Days of such notice (or in the case of an Owner Event of Default under Section 13.1(b) or 13.1(c) such longer period as is reasonably required for the Owner to rectify or remedy such Owner Event of Default as long as the Owner is diligently pursuing such rectification or remedy), Project Co may serve a further notice on the Owner terminating this Agreement with immediate effect; or
- (d) in the case of an Owner Event of Default under Section 13.1(d), 13.1(e) or 13.1(f), terminate this Agreement by notice to the Owner.

### 13.4 Project Co's Costs

The Owner will reimburse Project Co for all reasonable costs incurred by Project Co in exercising any of its rights (including any relevant increased administrative expenses, interest expenses during Construction and actual legal and other expenses) under this Section 13 (Owner Events of Default).

## 14. PROCEDURE ON TERMINATION

### 14.1 Compensation on Termination

If this Agreement is terminated pursuant to its terms, the Owner will pay compensation to Project Co in accordance with Schedule 9 [Compensation on Termination].

### 14.2 Transfer to the Owner of Assets, Contracts, etc.

On or promptly after the Termination Date:

- (a) if prior to the Service Commencement Date:
  - (1) in so far as any transfer will be necessary to fully and effectively transfer property to the Owner, Project Co will transfer to, and there will vest in, the Owner (or any New Project Co as may be appointed by the Owner) free from all financial encumbrances:
    - (A) such part of the Facility as has been constructed on or has become affixed to the Lands; and
    - (B) all construction materials on-hand to be affixed to the Lands or otherwise used in the Facility; and
  - (2) if the Owner so elects:
    - (A) the construction plant and equipment will remain available to the Owner or the New Project Co for the purposes of completing the Design and Construction; and
    - (B) all other Project related plant and all materials on or near the Lands will remain available to the Owner or the New Project Co for the purposes of completing the Design and Construction,

subject to payment by the Owner of the Design-Builder's reasonable charges, and
- (b) if the Owner so elects, Project Co will cause the Design-Build Agreement to be novated or assigned to the Owner, provided that:
  - (1) Project Co will not be obligated to assign to the Owner any of Project Co's rights to claim against the Design-Builder that arose under the Design-Build Agreement prior to the date of such novation or assignment; and
  - (2) if termination occurs under Section 13.3 (Project Co's Options) the consent of the Design-Builder will be required;
- (c) Project Co will, or will cause any Material Contract Party to, offer to sell to the Owner at the Fair Market Value, free from any security interest all or any part of the stocks of material and other assets, road vehicles, spare parts and other moveable property owned by Project

Co or any Material Contract Party and reasonably required by the Owner in connection with the operation of the Facility;

- (d) Project Co will deliver to the Owner (to the extent not already delivered to the Owner):
  - (1) all existing designs, plans and other documents produced in connection with the Facility and in the control of Project Co; and
  - (2) one complete set of existing "as built drawings",
 subject to reasonable generally applicable third party licensing terms;
- (e) Project Co will use all reasonable efforts to ensure that the benefit of existing Project Intellectual Property and all warranties in respect of mechanical and electrical plant and equipment used or made available by Project Co under this Agreement and included in the Facility but not previously assigned or licensed to the Owner are assigned, licensed or otherwise transferred to the Owner;
- (f) to the extent permitted by Law, Project Co will assign to the Owner (or any New Project Co as may be appointed by the Owner) all Permits;
- (g) Project Co will deliver to the Owner all records required to be kept by Project Co hereunder (Project Co having the right to retain copies thereof) unless such documents are:
  - (1) required by Law to be retained by Project Co or the Design-Builder or any Sub-Contractor, in which case complete copies will be delivered to the Owner; or
  - (2) privileged from production pending resolution of any outstanding Dispute, in which case such records will be delivered forthwith upon resolution of such Dispute, provided that any records that are necessary for the performance of the Design or the Construction will be delivered to the Owner no later than the Termination Payment Date; and
- (h) return to the Owner all Confidential Information of the Owner within the possession or control of Project Co or the Design-Builder or any Sub-Contractor.

Project Co will ensure that provision is made in all applicable contracts to ensure that the Owner will be in a position to exercise its rights, and Project Co will be in a position to comply with its obligations, under this Section 14.2 without additional payment or compensation to any Person.

### **14.3 Transitional Arrangements**

Project Co will:

- (a) as soon as practicable following the Termination Date remove from the Lands all property of Project Co or any Project Co Person that is not acquired by the Owner pursuant to Section 14.2 (or not belonging to the Owner) and if it has not done so within 60 days after any notice from the Owner requiring it to do so the Owner may (without being responsible for any loss, damage, costs or expenses) remove and sell any such property and will hold any proceeds less all costs incurred to the credit and direction of Project Co;
- (b) on the Termination Date deliver to the Owner:
  - (1) all keys, access codes or other devices required to access or operate the Facility in the control of Project Co; and



- (2) any Project Intellectual Property required to be delivered by Project Co pursuant to Section 14.2(e); and
- (c) as soon as practicable after the Termination Date, vacate, and cause the Project Co Persons to vacate, those parts of the Facility and of the Lands over which Project Co has control and occupation and will leave such parts of the Lands and the Facility in a safe, clean and orderly condition;

#### **14.4 Continued Performance**

Subject to Project Co's rights of suspension under Sections 13.3(a) and 13.3(b) (Project Co's Options) and subject to the provisions of this Section 14, the parties will continue to perform their obligations under this Agreement notwithstanding the giving of any notice of default or notice of termination.

### **15. DISPUTE RESOLUTION**

#### **15.1 Procedure**

Except as otherwise provided in this Agreement, any Dispute will be resolved in accordance with, and the parties will comply with, the Dispute Resolution Procedure set out in Schedule 13 [Dispute Resolution Procedure].

#### **15.2 Undisputed Amounts**

A party will pay any undisputed portion of any disputed amount to the other party in accordance with this Agreement but any disputed portion or amount will not be payable until the Dispute is resolved as aforesaid.

### **16. ASSIGNMENT/CHANGE IN CONTROL**

#### **16.1 Limitations on Assignment of Project by Project Co**

Project Co will not assign, transfer or otherwise dispose of any interest in this Agreement or the Design-Build Agreement except:

- (a) as security, substantially in a form approved by the Owner, acting reasonably, prior to its grant for any loan made to Project Co under any Senior Financing Agreement and provided the Senior Lenders enter into the Lenders' Remedies Agreement;
- (b) in connection with the exercise of rights of the Senior Lenders under the Senior Financing Agreements in accordance with the Lenders' Remedies Agreement; or
- (c) otherwise with the written consent of the Owner, which may be given or withheld in the Owner's discretion,

provided that in the case of an assignment, transfer or disposal permitted by Sections 16.1(b) or 16.1(c) above the assignee or transferee assumes all the obligations of Project Co under this Agreement.

Notwithstanding any other provision of this Agreement, Project Co will not assign, transfer or otherwise dispose of any interest in this Agreement or a Material Contract to a Person who is a Restricted Person.

## 16.2 Limitations on Change in Control

No Change in Control of Project Co will be permitted (whether by Project Co or otherwise) to occur except:

- (a) in connection with the exercise of rights of the Senior Lenders under the Senior Financing Agreements in accordance with the Lenders' Remedies Agreement;
- (b) arising from any bona fide open market transaction in any shares or other securities of Project Co or of any Holding Company of Project Co effected on a recognized public stock exchange; or
- (c) otherwise with the written consent of the Owner, which may be given or withheld in the Owner's discretion.

Notwithstanding any other provision of this Agreement:

- (d) Project Co will not be, nor will it become at any time, a Restricted Person; and
- (e) except as a result of a transaction referred to in Section 16.2(b) above, a Person who is a Restricted Person will not acquire any ownership interest (whether directly or indirectly) in Project Co or in any Person that has control of Project Co.

## 16.3 Limitations on Assignment of Project by Owner

The Owner will not assign, transfer or otherwise dispose of any interest in this Agreement unless:

- (a) the Province of British Columbia confirms that the Guarantee will remain in full force and effect notwithstanding such action; and
- (b) the assignee assumes all the obligations of the Owner under this Agreement.

## 16.4 Costs of Request for Consent

If Project Co requests consent to an assignment, transfer or disposition pursuant to Section 16.1 or to a Change in Control pursuant to Section 16.2, Project Co will pay the Owner's reasonable internal administrative and personnel costs and all reasonable out-of-pocket costs in connection with considering any such request. At the time of such request, Project Co will make a payment to the Owner in the amount of \$35,000 against its obligation under this Section 16.4. After the Owner renders its decision, the Owner will either refund any over payment or invoice Project Co for any additional amounts owing under this Section 16.4 and Project Co will promptly pay such amount to the Owner.

## 17. GENERAL

### 17.1 Confidentiality

- (a) Subject to Section 17.1(b), each party will hold in confidence any Confidential Information received from the other party, except that this Section 17.1 will not restrict:
  - (1) Project Co from disclosing or granting access to such information to its professional advisers and consultants, to the extent necessary, to enable it to perform (or to cause to be performed) or to enforce its rights or obligations under

this Agreement and provided further that Project Co may, subject to obtaining confidentiality restrictions similar to those set out in this Agreement:

- (A) provide to the Senior Lenders and other potential lenders, equity providers, underwriters, arrangers, investment dealers and their respective advisors such documents and other information as are reasonably required by them in connection with raising financing for the Project or complying with the terms of the Senior Financing Agreements or related agreements; and
- (B) provide to the Design-Builder and its advisors, or provide or cause to be provided to other third parties, Confidential Information which is necessary to enable Project Co to perform (or to cause to be performed) its obligations under this Agreement;

and Project Co will remain fully liable for any breach of confidentiality by any Person to whom Project Co has disclosed or granted access to Confidential Information pursuant to this Section; and

- (2) the Owner from disclosing or granting access to such information to any provincial ministry, Infrastructure British Columbia Inc. and any other Governmental Authority which requires the information in relation to the Project.
- (b) Subject to any restrictions on the Confidential Information which are imposed by a third party that may own any Confidential Information, the obligation to maintain the confidentiality of the Confidential Information does not apply to Confidential Information:
- (1) which the party that disclosed the Confidential Information confirms in writing is not required to be treated as Confidential Information;
  - (2) which is or comes into the public domain otherwise than through any disclosure prohibited by this Agreement;
  - (3) to the extent any Person is required to disclose such Confidential Information by Law, including without limitation, a disclosure required under the *Freedom of Information and Protection of Privacy Act* (British Columbia);
  - (4) to the extent consistent with any Owner's policy concerning the Owner's Confidential Information, the details of which have been provided to Project Co in writing prior to the disclosure; or
  - (5) that the Owner may be entitled to receive from Project Co pursuant to this Agreement for the operation, maintenance or improvement of the Facility in the event of, or following, termination of this Agreement.
- (c) Without prejudice to any other rights and remedies that the other party may have, each of the parties agrees that damages may not be an adequate remedy for a breach of Section 17.1(a) and that the other party will, in such case, be entitled to the remedies of injunction, specific performance or other equitable relief for any threatened or actual breach of Section 17.1(a), subject, in the case of a claim for any such remedy against the Owner, to the provisions of the *Crown Proceeding Act* (British Columbia).

## 17.2 Personal Information

Project Co will, and will require the Design-Builder and Sub-Contractors to, only collect, hold, process, use, store and disclose Personal Information:

- (a) with the prior consent of the Owner; or
- (b) to the extent necessary to perform Project Co's obligations under this Agreement and in circumstances where the Owner itself could collect, hold, process, use, store and disclose Personal Information if the Owner itself performed the Design and the Construction, and

in accordance with applicable Laws, including the *Freedom of Information and Protection of Privacy Act* (British Columbia) as if the provisions of such Laws applied directly to Project Co, the Design-Builder and any Sub-Contractors.

Project Co acknowledges that it is a "service provider" as defined in the *Freedom of Information and Protection of Privacy Act* (British Columbia).

Project Co will allow the Owner on reasonable notice to inspect the measures of Project Co, the Design-Builder and any Sub-Contractors to protect Personal Information.

The Owner may from time to time provide guidance to Project Co on the requirements of this Section 17.2, including the circumstances set out in Section 17.2(b). For greater certainty, the provisions of this Section 17.2 that refer to the *Freedom of Information and Protection of Privacy Act* (British Columbia) will apply to the Design-Builder and any Sub-Contractors only to the extent necessary to fulfil the Owner's obligations under the *Freedom of Information and Protection of Privacy Act* (British Columbia).

## 17.3 Public Communications

Unless expressly provided in this Agreement or otherwise required by any Laws (but only to that extent), neither party will make or permit to be made any public announcement or disclosure whether for publication in the press, radio, television or any other medium of any Confidential Information or any matters relating thereto, without the consent of the other party (which will not be unreasonably withheld or delayed).

Except to the extent necessary to fulfil its obligations under Schedule 16 [Communication Roles] or otherwise required by any Laws (but only to that extent), Project Co will not make any public announcement or disclosure whether for publication in the press, radio, television or any other medium about any matter related to the Owner or the Project without the consent of the Owner (which will not be unreasonably withheld or delayed).

The parties will comply with Schedule 16 [Communication Roles].

## 17.4 Law of Agreement

This Agreement will be deemed to be made pursuant to the laws of the Province of British Columbia and the laws of Canada applicable therein and will be governed by and construed in accordance with such laws.

## 17.5 Attornment

For the purposes of any legal actions or proceedings brought by any party hereto against the other party, the parties hereby irrevocably submit to the exclusive jurisdiction of the courts of the Province of British Columbia and acknowledge their competence and the convenience and propriety of the venue and agree to be bound by any judgment thereof and not to seek, and hereby waive, review of its merits by the courts of any other jurisdiction.

## 17.6 Entire Agreement, Waivers and Consents in Writing

This Agreement and the instruments and documents to be executed and delivered pursuant to it constitute the entire agreement between the parties, expressly superseding all prior agreements and communications (both oral and written) between any of the parties hereto with respect to all matters contained herein or therein, and except as stated herein or the instruments and documents to be executed and delivered pursuant hereto, contains all the representations and warranties of the respective parties. In addition:

- (a) no waiver of any provision of this Agreement; and
- (b) no consent required pursuant to the terms of this Agreement,

is binding or effective unless it is in writing and signed by the party providing such waiver or consent.

## 17.7 Notices

Any notice or communication required or permitted to be given under this Agreement will be in writing and will be considered to have been sufficiently given if delivered by hand or transmitted by electronic transmission to the address or electronic mail address of each party set out below:

if to the Owner:

Providence Health Care Society  
c/o St. Paul's Hospital  
1081 Burrard Street  
Vancouver, BC V6Z 1Y6

Attention: Office of the CEO  
E-mail: officeofthceo@providencehealth.bc.ca

if to Project Co:

PCL NSP 2021 Ltd.  
9915 56 Ave NW  
Edmonton, AB T6E 5L7

Attention: Lee Clayton  
E-mail: lclayton@pcl.com

or to such other address or electronic mail address as any party may, from time to time, designate in the manner set out above. Any such notice or communication will be considered to have been received:

- (a) if delivered by hand during business hours (and in any event, at or before 3:00 pm local time in the place of receipt) on a Business Day, upon receipt by a responsible representative of the receiver, and if not delivered during business hours, upon the commencement of business hours on the next Business Day; and
- (b) if delivered by electronic mail during business hours (and in any event, at or before 3:00 pm local time in the place of receipt) on a Business Day, upon receipt, and if not delivered during business hours, upon the commencement of business hours on the next Business Day provided that:
  - (1) the receiving party has, by electronic mail or by hand delivery, acknowledged to the notifying party that it has received such notice; or

- (2) within 24 hours after sending the notice, the notifying party has also delivered a copy of such notice to the receiving party by hand delivery.

### **17.8 Further Assurances**

The parties will do, execute and deliver, or will cause to be done, executed and delivered, all such further acts, documents (including certificates, declarations, affidavits, reports and opinions) and things as the other may reasonably request for the purpose of giving effect to this Agreement or for the purpose of establishing compliance with the representations, warranties and obligations of this Agreement.

### **17.9 Counterparts**

This Agreement may be executed in any number of counterparts, each of which will be deemed to be an original, and this has the same effect as if the signatures on the counterparts were on a single copy of this Agreement so that it will not be necessary in making proof of this Agreement to produce or account for more than one such counterpart.

### **17.10 No Partnership, etc.**

Nothing contained in this Agreement nor any action taken pursuant hereto or thereto will be deemed to constitute the Owner and Project Co a partnership, joint venture or any other similar such entity.

### **17.11 Survival**

- (a) Notwithstanding any other provision of this Agreement, the provisions of Section 6.15 (Third Party Liability Insurance as an Uninsurable Risk), Section 8 (Supervening Events) (if and to the extent a Compensation Event relates to a claim made by a third party against Project Co after the Termination Date), Section 9 (Indemnities, Limits on Liabilities, Remedies, Warranties and Performance Security), Section 14 (Procedure on Termination), Section 15 (Dispute Resolution), Section 17.1 (Confidentiality), Section 17.2 (Personal Information), Schedule 9 [Compensation on Termination] and Schedule 13 [Dispute Resolution Procedure] will survive the expiry or any earlier termination of this Agreement.
- (b) For greater certainty and without limiting Section 17.11(a), the requirements referenced in paragraphs (a)(1), (2) and (3) of the definition of Total Completion, being all work to be performed under Section 9.16 relating to correction of Defects and Construction Latent Defects, achievement of the LEED credits/points and LEED Gold Certification under Section 4.6 of Schedule 2 [Design and Construction Protocols] and training required to be provided after Service Commencement in accordance with Section 16.1 of Schedule 2 [Design and Construction Protocols], will survive the expiry of this Agreement.
- (c) Termination of this Agreement will be without prejudice to, and will not affect, the Performance Guarantee of Construction Guarantor, which will survive the termination of this Agreement, including termination on the Expiry Date, in respect of any and all of such surviving provisions of this Agreement.

[signature pages follow]

IN WITNESS WHEREOF the parties hereto have executed this Agreement as of the day and year first above written.

**PROVIDENCE HEALTH CARE SOCIETY**

Per: \_\_\_\_\_  
Name: Fiona Dalton  
Title: President & Chief Executive Officer

**PCL NSP 2021 LTD.**

Per: \_\_\_\_\_  
Name: Gordon Stephenson  
Title: President

Per: \_\_\_\_\_  
Name: Brent Sharpe,  
Title: Vice-President & Secretary



## SCHEDULE 1

### DEFINITIONS AND INTERPRETATIONS

#### 1. DEFINITIONS

In this Agreement:

**“Acceptance Protocol”** has the meaning set out in Appendix 2E [Equipment and Furniture];

**“Additional Irrecoverable Tax”** means GST or PST incurred by Project Co in respect of the supply of any property or service to the Owner which is consumed, used or supplied, or to be consumed, used or supplied, exclusively by Project Co in the course of carrying out the Design or Construction to the extent that Project Co is unable to recover or be credited with input tax credits, refunds, rebates or exemptions for such GST or PST that Project Co would have recovered or been credited with prior to the applicable Change in Law;

**“Additional Recoverable Tax”** means GST or PST incurred by Project Co in respect of the supply of any property or service to the Owner which is consumed, used or supplied, or to be consumed, used or supplied, exclusively by Project Co in the course of carrying out the Design or Construction to the extent that Project Co is able to recover or be credited with input tax credits, refunds, rebates or exemptions for such GST or PST that Project Co would not have recovered or been credited with prior to the applicable Change in Law;

**“Affiliate”** in respect of a Person means any other Person that, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such first Person where **“control”** means, with respect to the relationship between or among two or more Persons, the possession, directly or indirectly or as trustee, personal representative or executor, of the power to direct or cause the direction of the affairs or management of a Person, whether through the ownership of voting securities, as trustee, personal representative or executor, by statute, contract, credit arrangement or otherwise, including the ownership, directly or indirectly, of securities having the power to elect a majority of the board of directors or similar body governing the affairs of such Person;

**“Agent”** means The Bank of Nova Scotia as agent under the Credit Agreement;

**“Agreement”** means this agreement, including any recitals, schedules, appendices and attachments to this agreement, as amended or restated from time to time;

**“Applicant”** has the meaning set out in Section 8.1 (Supervening Events);

**“Apprenticeship Policy”** has the meaning set out in Schedule 2 [Design and Construction Protocols];

**“Approved Energy Modeller”** has the meaning set out in Appendix 2D [Energy];

**“Architect”** means HDR Architecture Associates Inc., which firm has been engaged by the Design-Builder to undertake the Design;

**“Asset Register”** has the meaning set out in Schedule 2 [Design and Construction Protocols];

**“Avoidable Costs”**, when used in relation to an event or circumstance, means all costs and expenditures which:

- (a) are saved or avoided as a result of the event or circumstance or its effects; or
- (b) if Project Co acted reasonably and in accordance with this Agreement (including Section 2.5), would have been saved or avoided as a result of the event or circumstance or its effects;

“**Base Date**” means June 30, 2020;

“**Beneficiary**” has the meaning set out in Section 9.2 (Conduct of Third Person Claims);

“**Building Energy Modeling Professional (BEMP)**” has the meaning set out in Appendix 2D [Energy];

“**Business Day**” means a day other than a Saturday, Sunday or statutory holiday in British Columbia;

“**CaGBC Experienced Modellers List**” has the meaning set out in Appendix 2D [Energy];

“**Capital Expenditure**” means an expenditure related to the Project which is treated as a capital expenditure in accordance with GAAP;

“**Carbon Emissions**” has the meaning set out in Appendix 2D [Energy];

“**Carbon Guarantee**” has the meaning set out in Appendix 2D [Energy];

“**Carbon Target**” has the meaning set out in Appendix 2D [Energy];

“**Cash Allowance Equipment**” has the meaning set out in Appendix 2E [Equipment and Furniture];

“**Category A Equipment**” has the meaning set out in Appendix 2E [Equipment and Furniture];

“**Category B Equipment**” has the meaning set out in Appendix 2E [Equipment and Furniture];

“**Category C Equipment**” has the meaning set out in Appendix 2E [Equipment and Furniture];

“**Category D Equipment**” has the meaning set out in Appendix 2E [Equipment and Furniture];

“**Category E Equipment**” has the meaning set out in Appendix 2E [Equipment and Furniture];

“**Category F Equipment**” has the meaning set out in Appendix 2E [Equipment and Furniture];

“**Category G Equipment**” has the meaning set out in Appendix 2E [Equipment and Furniture];

“**Category G1 Equipment**” has the meaning set out in Appendix 2E [Equipment and Furniture];

“**Category G2 Equipment**” has the meaning set out in Appendix 2E [Equipment and Furniture];

“**Certificate of Service Commencement**” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“**Certificate of Total Completion**” has the meaning set out in Schedule 2 [Design and Construction Protocols]

“**Change**” has the meaning set out in Schedule 6 [Changes];

“**Change Certificate**” has the meaning set out in Schedule 6 [Changes];

“**Change Directive**” has the meaning set out in Schedule 6 [Changes];

**“Change in Control”** means with respect to a relevant Person:

- (a) any direct or indirect change by contract or otherwise (other than as set out in (b)) which results in a Person or group of Persons having the ability to direct or cause the direction of the management, actions or policies of the relevant Person; or
- (b) any direct or indirect change in the ownership or control of any legal, beneficial or equitable interest in any or all of the shares, units or equity in the relevant Person (including the control over the exercise of voting rights conferred on equity share capital, unit interests or equity interests or the control over the right to appoint or remove directors, a general partner or other managers), including changes arising from assignment or transfer of existing shares, units or equity, issuance of new shares, units or equity or amalgamation, merger consolidation, amendment of a limited partnership certificate or other reorganization, or any other direct or indirect change which results in a Person or group of Persons, other than the equity holders of the relevant Person immediately prior to the change, directly or indirectly:
  - (1) controlling the composition of the majority of the board of directors of the relevant Person or of a general partner or manager of the relevant Person;
  - (2) controlling the decisions made by or on behalf of the relevant Person, including by controlling the voting power of the board of directors or by controlling the voting power of any class of shareholders or equity holders of any of the relevant Person, a general partner of the relevant Person or a manager of the relevant Person or otherwise;
  - (3) holding equity (either beneficially or otherwise) of the relevant Person with a subscribed value (taking into account contributions to be made in the case of a limited partnership) of more than one half of the subscribed value (taking into account contributions to be made in the case of a limited partnership) or equity (either beneficially or otherwise) of the relevant Person with more than one half of the voting rights; or
  - (4) having the ability to direct or cause the direction of the management, actions or policies of the relevant Person;

**“Change in Law”** means the coming into effect in Canada after the Financial Submission Date of:

- (a) any new Law; or
- (b) any modification (including repeal) of any Law existing on such date,

which is binding on Project Co or the Owner, but excluding in each such case:

- (c) any lawful requirements of any Governmental Authority (unless resulting from a Change in Law);
- (d) any change in the interpretation of any legislation other than a judgment of a relevant Court which changes binding precedent in British Columbia;

- (e) any new Law or modification arising from or in any way connected to or having substantially the same effect as any Law which as of the Financial Submission Date:
  - (1) had been introduced as a Bill in the Legislative Assembly of British Columbia or the Parliament of Canada or in a draft statutory instrument published or issued by a Governmental Authority; or
  - (2) had been published in the Canada Gazette or in a draft bill as part of a Governmental Authority discussion or consultation paper;

**“Change Mark-Up”** has the meaning set out in Schedule 6 [Changes];

**“Change Report”** has the meaning set out in Schedule 6 [Changes];

**“Change Report Costs”** has the meaning set out in Schedule 6 [Changes];

**“Charge”** has the meaning set out in Schedule 7 [Lands];

**“City”** means the City of Vancouver;

**“Clinical Specifications”** has the meaning set out in Schedule 3 [Design and Construction Specifications];

**“Commissioning”** has the meaning set out in Appendix 2E [Equipment and Furniture], and is defined solely for purposes of the Equipment;

**“Commissioning Plan”** has the meaning set out in Schedule 2 [Design and Construction Protocols];

**“Compensation Event”** means any of the following events or circumstances if and to the extent that it interferes adversely with, or causes a failure of, the carrying out of the Design or the Construction or causes Direct Losses to Project Co or any Project Co Person:

- (a) breach by the Owner of any of its obligations under this Agreement;
- (b) breach of any representation or warranty by the Owner under this Agreement;
- (c) wilful misconduct of the Owner or an Owner Person;
- (d) a negligent act or omission of the Owner or an Owner Person;
- (e) the existence of Undisclosed Environmental Liabilities;
- (f) a Permit which is the obligation of the Owner to obtain or maintain is declared invalid or defective by a court of competent jurisdiction;
- (g) the existence as at the Effective Date of any encumbrance enforceable against or affecting the Lands or the Facility other than the Encumbrances;
- (h) the discovery of any human remains, relics or other articles or structures of historical, antiquarian or archaeological interest on or adjacent to the Lands;
- (i) a claim asserting infringement of aboriginal rights (including duty to consult) or aboriginal treaty rights or aboriginal title by any first nation(s);
- (j) a Protest Action;

- (k) the actions referred to in Section 11.4 (Allocation of Costs for Owner Actions) as constituting a Compensation Event;
- (l) the event referred to in Section 8.4(e)(2) (Project Co's Entitlements Upon Occurrence of a Relief Event);
- (m) the event referred to in Section 8.5(d)(2) (Parties' Entitlements Upon Occurrence of a Force Majeure Event);
- (n) the events referred to in Sections 6.12 (a) and (c) of Schedule 2 [Design and Construction Protocols];
- (o) Project Co's compliance with a direction from the Owner under Section 3.3 of Schedule 13 [Dispute Resolution Procedure] when the matter in dispute is subsequently resolved, or settled, in Project Co's favour;
- (p) if part of the Facility or part of the portion of the Lands on which the Facility is situated or any interest of Project Co is expropriated by any Governmental Authority and such expropriation is not an Owner Event of Default as set out in Section 13.1(c); or
- (q) any other event which is expressly stated in this Agreement to constitute a Compensation Event,

except to the extent that any of such events arise or are contributed to, directly or indirectly, as a result of any wilful misconduct, negligent act or omission or non-compliance with the terms of this Agreement by Project Co or any Project Co Person;

**"Compliance Failure Event"** has the meaning set out in Appendix 2B [Compliance Failure Events];

**"Confidential Information"** means Personal Information, and information of a party that the party has designated as confidential at the time of disclosure and which is supplied, or to which access is granted, to or on behalf of the other party (whether before or after the Effective Date), either in writing, or in any other form, directly or indirectly pursuant to discussions with the other party and includes all analyses, compilations, studies and other documents whether prepared by or on behalf of a party which contain or otherwise reflect or are derived from such designated information;

**"Construction"** means everything (other than Design) required to achieve Service Commencement, including the construction of the Facility, temporary works and the supply of all labour and materials, construction equipment, management, supervision and support of any kind or nature whatsoever required for the construction of the Facility and the supply, installation, testing and commissioning of all Equipment;

**"Construction CGL Policy"** has the meaning set out in Schedule 5 [Insurance Requirements];

**"Construction Completion Payment"** has the meaning set out in Schedule 8 [Payments];

**"Construction Guarantor"** means PCL Constructors Westcoast Inc.;

**"Construction Latent Defect"** means any Defect that could not reasonably have been ascertained by a competent Person in accordance with Good Industry Practice during a visual, site or maintenance inspection of the work in respect of the Facility at any time before the expiry of the Warranty Period;

**"Construction Payments"** has the meaning set out in Schedule 8 [Payments];

**"Construction Period"** means the period commencing on the Effective Date and ending on the Service Commencement Date;

**“Construction Period Joint Committee”** has the meaning set out in Schedule 2 [Design and Construction Protocols];

**“Construction Property Policy”** has the meaning set out in Schedule 5 [Insurance Requirements];

**“Contract Price”** has the meaning set out in Schedule 8 [Payments];

**“Contract Year”** means each of:

- (a) the period from the Effective Date to the next March 31st;
- (b) each subsequent period of 12 calendar months commencing on April 1st; and
- (c) the period from the April 1st immediately prior to the Termination Date to and including the Termination Date;

**“Coordination”** has the meaning set out in Appendix 2E [Equipment and Furniture];

**“Cost Overruns”** means any amount by which Project Co’s actual cost of performance of the Design and Construction exceeds the Contract Price;

**“COVID-19 Change in Law”** means a Change in Law which imposes, modifies or removes measures to minimize or mitigate the spread of, and human health effects from, the novel coronavirus COVID-19;

**“COVID-19 Event”** means an event , including a COVID-19 Change in Law, arising after the Financial Submission Date and caused by the COVID-19 Pandemic;

**“COVID-19 Pandemic”** means the novel coronavirus COVID-19 pandemic declared March 11, 2020 by the World Health Organization until such time as the World Health Organization designates or declares the COVID-19 post-pandemic phase;

**“Credit Agreement”** mean the credit agreement dated as of the Effective Date between Project Co, the Senior Lenders and the Agent;

**“CSRC”** has the meaning set out in Schedule 2 [Design and Construction Protocols];

**“Debt”** of any Person at any date means, without duplication:

- (a) all obligations of such Person for borrowed money;
- (b) all obligations of such Person evidenced by bonds, debentures, notes or other similar instruments;
- (c) all obligations of such Person to pay the deferred purchase price of property or services, except trade accounts payable arising in the ordinary course of business;
- (d) all obligations of such Person under leases which are or should be, in accordance with GAAP, recorded as capital leases in respect of which such Person is liable, except leases arising in the ordinary course of business;
- (e) all obligations of such Person to purchase securities (or other property) which arise out of or in connection with the sale of the same or substantially similar securities (or property);
- (f) all deferred obligations of such Person to reimburse any bank or other Person in respect of amounts paid or advanced under a letter of credit or other similar instrument;

- (g) all Debt (as otherwise defined in this definition) of others secured by a Charge on any asset of such Person, provided such Debt (as otherwise defined in this definition) is assumed by such Person; and
- (h) all Debt (as otherwise defined in this definition) of others guaranteed directly or indirectly by such Person or as to which such Person has an obligation substantially the economic equivalent of a guarantee;

**“Deduction”** has the meaning set out in Schedule 8 [Payments];

**“Deemed Corporate Project Co”** has the meaning set out in Schedule 9 [Compensation on Termination];

**“Default Rate”** on any day means      per annum over the Prime Rate;

**“Defect”** means any defect or fault, including omission, in the Facility which occurs due to a failure by Project Co to comply with the Design and Construction obligations under this Agreement;

**“Deficiency”** has the meaning set out in Schedule 2 [Design and Construction Protocols];

**“Deficiency Deadline”** has the meaning set out in Schedule 2 [Design and Construction Protocols];

**“Deficiency Holdback”** has the meaning set out in Schedule 8 [Payments];

**“Delay LD Subcap”** has the meaning given to it in Section 9.15(c) of this Agreement;

**“Delay Liquidated Damages”** has the meaning set out it in Section 9.14(a) of this Agreement;

**“Delivery”** has the meaning set out in Appendix 2E [Equipment and Furniture];

**“Design”** means everything required for the design of the Facility except for any design that is expressly excluded from Project Co’s responsibility under this Agreement;

**“Design and Construction Protocols”** means the provisions of Schedule 2 [Design and Construction Protocols];

**“Design and Construction Specifications”** mean the provisions of Schedule 3 [Design and Construction Specifications];

**“Design-Build Agreement”** means the design and construction agreement between Project Co and the Design-Builder, a certified copy of which has been delivered by Project Co to the Owner, as amended or replaced from time to time in accordance with this Agreement;

**“Design-Builder”** means PCL Constructors Westcoast Inc. or any assignee or replacement permitted under this Agreement;

**“Design-Builder Breakage Costs”** means the amount payable by Project Co to the Design-Builder under the terms of the Design-Build Agreement as a direct result of the termination of the Design-Build Agreement as a consequence of the termination of this Agreement but reduced (without duplication) to the extent that:

- (a) Project Co, the Design-Builder and any Sub-Contractors fail to take all reasonable steps to mitigate such amount;
- (b) such amount relates to any agreements or arrangements entered into by Project Co, the Design-Builder or the Sub-Contractors other than in the ordinary course of business and on commercial arm’s length terms;

- (c) such amount is a Distribution; and
- (d) such amount includes any loss of overhead or profit of the Design-Builder or any Sub-Contractors relating to any period or costs after the Termination Date (except to the extent they are properly included in any reasonable commercial breakage fee set out in the Design-Build Agreement or applicable Sub-Contract);

**“Design-Builder Collateral Agreement”** means the agreement to be entered into between the Owner, the Design-Builder and Project Co in the form set out in Schedule 11 [Design-Builder Collateral Agreement], as amended or replaced from time to time in accordance with this Agreement;

**“Design Integration”** has the meaning set out in Appendix 2E [Equipment and Furniture];

**“Design Professionals”** means the Architect, the Architect’s subconsultants and the design consultants engaged directly by the Design-Builder or Project Co, including engineers and technical experts, who provide services with respect to the Design;

**“Direct Losses”** means in respect of a condition, event or omission, without duplication, all damages, losses, liabilities, penalties, fines, assessments, claims (including by third parties), actions, costs (including increased Capital Expenditures), expenses (including the reasonable cost of legal or professional services), proceedings, demands and charges, whether arising under statute, contract or at common law, which result directly from such condition, event or omission:

- (a) net of related Insurance Proceeds and Insurance Receivables and any amount which the relevant party would have recovered (in respect of such condition, event or omission) if it had complied with the requirements of this Agreement or any policy of insurance maintained or required to be maintained under this Agreement; and
- (b) excluding any Indirect Losses, except to the extent included in a third party claim,

and in calculating any amount of any additional Capital Expenditure, labour or similar cost claimed by Project Co under this definition of “Direct Losses”, Project Co will be entitled to add to such amounts the mark-ups referred to in Section 2.11 of Schedule 6 [Changes];

**“Disclosed Data”** means any information, data and documents made available or issued to Project Co or the Design-Builder or any Sub-Contractor in connection with the Project by or on behalf of the Owner, including the Geotechnical Reports and any information relating to the Lands or the requirements of any Governmental Authority, whether before or after the execution of this Agreement;

**“Discriminatory Change in Tax Law”** means a Change in Law which results in the imposition of Taxes or a change in Taxes which specifically apply to discriminate against:

- (a) the Project or health care-related projects whose design, construction and financing are procured on a basis similar to that of the Project and not to other projects;
- (b) Project Co or the Design-Builder or Persons that have contracted on similar health care-related projects procured and contracted with the Owner or other statutory or public body on a basis similar to the Project and not to other Persons; or
- (c) Persons holding shares or other evidences of ownership in Persons whose principal business is contracting on other similar health care-related projects procured and contracted on a basis similar to the Project and not to other Persons;

**“Dispute”** means any disagreement, failure to agree or other dispute between the Owner and Project Co arising out of or in connection with this Agreement, including in respect of the interpretation, breach,



performance, validity or termination of this Agreement, whether in the law of contract or any other area of law;

“**Dispute Notice**” has the meaning set out in Schedule 13 [Dispute Resolution Procedure];

“**Dispute Resolution Procedure**” has the meaning set out in Schedule 13 [Dispute Resolution Procedure];

“**Distribution**” means, without duplication or double counting:

- (a) whether in cash or in kind, any:
  - (1) distribution in respect of equity interests in Project Co;
  - (2) redemption or purchase of any equity interest in Project Co;
  - (3) [Intentionally Deleted];
  - (4) payment, loan, contractual arrangement, including any management agreement or payment in respect thereof, or transfer of assets or rights, in each case to the extent made or entered into after the Effective Date and not in the ordinary course of business or not on commercially reasonable terms including to any current or former Affiliate of Project Co;
  - (5) conferral of any other benefit which is not conferred and received in the ordinary course of business or is not conferred or received on commercially reasonable terms, including to any current or former Affiliate of Project Co; and
  - (6) other payment to any current or former Affiliate of Project Co howsoever arising and whether made pursuant to the terms of an agreement or otherwise or by way of gift or in respect of any equity interest in Project Co or other securities of or interests in Project Co if, in any such case, such payment would not have been made were it not for the occurrence of any Refinancing or Change in Control; or
- (b) [Intentionally Deleted],

and where any such Distribution is not in cash, the equivalent cash value of such Distribution will be calculated. A Distribution will be calculated in a manner that is consistent with the calculation of the Threshold Equity IRR in the Financial Model;

“**Draft Reinstatement Plan**” has the meaning set out in Section 6.4(a) (Project Co’s Obligations –Material Damage or Destruction);

“**Effective Date**” means the date of this Agreement;

“**Eligible Change in Law Event**” means the occurrence of:

- (a) a Relevant Change in Law;
- (b) a Discriminatory Change in Tax Law;
- (c) an Input Tax Recoverability Change in Law;
- (d) a COVID-19 Change in Law; or
- (e) an Epidemic Change in Law;

“**Employee Information**” has the meaning set out in Schedule 9 [Compensation on Termination];

“**Employee Payments**” means any liability that has been reasonably incurred by Project Co arising as a result of termination of this Agreement under collective agreements, employment agreements or under any other agreements with employees of Project Co, including severance (whether accrued or not), vacation pay and sick pay accrued but excluding any Distribution;

“**Encumbrances**” has the meaning set out in Schedule 7 [Lands];

“**Energy**” has the meaning set out in Appendix 2D [Energy];

“**Energy Consumption**” has the meaning set out in Appendix 2D [Energy];

“**Energy Dashboard**” has the meaning set out in Appendix 2D [Energy];

“**Energy Model**” has the meaning set out in Appendix 2D [Energy];

“**Energy Modeller**” has the meaning set out in Appendix 2D [Energy];

“**Energy Target**” has the meaning set out in Appendix 2D [Energy];

“**Environmental Laws**” means all Laws relating to the protection of human health and all plant, animal, land, water and air resources that may be affected by the Project;

“**Epidemic**” means an epidemic or pandemic of infectious disease of humans, including an epidemic or pandemic declared by the World Health Organization or a “regional event” as defined in the *Public Health Act* (British Columbia) for which the Provincial Health Officer gives notice under Section 52 of that Act, but excluding the COVID-19 Pandemic;

“**Epidemic Change in Law**” means a Change in Law which in respect of an Epidemic imposes, modifies or removes measures to minimize or mitigate the spread of, and human health effects from relevant infectious disease;

“**Epidemic Event**” means an event, including an Epidemic Change in Law, arising after the Financial Submission Date and caused by an Epidemic;

“**Equipment**” has the meaning set out in Appendix 2E [Equipment and Furniture];

“**Equipment Cash Allowance**” has the meaning set out in Appendix 2E [Equipment and Furniture];

“**Equipment Cash Allowance Account**” has the meaning set out in Appendix 2E [Equipment and Furniture];

“**Equipment Committee**” has the meaning set out in Appendix 2E [Equipment and Furniture];

“**Equipment Consultant**” has the meaning set out in Appendix 2E [Equipment and Furniture];

“**Equipment Cut Sheets**” has the meaning set out in Appendix 2E [Equipment and Furniture];

“**Equipment Layout**” has the meaning set out in Appendix 2E [Equipment and Furniture];

“**Equipment List**” has the meaning set out in Appendix 2E [Equipment and Furniture];

“**Equipment Move Plan**” has the meaning set out in Schedule 2 [Design and Construction Protocols];

**“Equipment Procurement Schedule”** has the meaning set out in Appendix 2E [Equipment and Furniture];

**“Equity IRR”** means being Project Co’s Nominal blended equity internal rate of return calculated on an after tax basis at the level of Project Co in accordance with the Financial Model, having regard to Distributions made and projected to be made;

**“Exempt Refinancing”** means:

- (a) a change in taxation or change in accounting treatment pursuant to changes in Laws or GAAP or International Financial Reporting Standards;
- (b) the exercise of rights, waivers, consents and similar actions which relate to day to day administrative and supervisory matters that are solely in respect of:
  - (1) breach of representations, warranties, covenants or undertakings;
  - (2) movement of monies between the Project Accounts (as defined in the Senior Financing Agreements) in accordance with the terms of the Senior Financing Agreements;
  - (3) late or non-provision of information or consents;
  - (4) amendments to the Design-Build Agreement;
  - (5) approval of revised technical and economic assumptions for financial model runs (to the extent required for forecasts under the Senior Financing Agreements);
  - (6) restrictions imposed by the Senior Lenders on the dates at which the financing provided by the Senior Lenders under the Senior Financing Agreements can be advanced to Project Co under the Senior Financing Agreements, and which are given as a result of any failure by Project Co to ensure that the Design and the Construction are carried out in accordance with the Project Schedule and which are notified in writing by Project Co or the Senior Lenders to the Owner prior to being given;
  - (7) changes to milestones for drawdown set out in the Senior Financing Agreements and which are given as a result of any failure by Project Co to ensure that the Design and the Construction are carried out in accordance with the Project Schedule and which are notified in writing by Project Co or the Senior Lenders to the Owner prior to being given;
  - (8) failure by Project Co to obtain any consents from Governmental Authorities required by the Senior Financing Agreements; or
  - (9) voting by the Senior Lenders and the voting arrangements between the Senior Lenders in respect of the levels of approval required by them under the Senior Financing Agreements;
- (c) an amendment of an agreement approved by the Owner as part of any Change;
- (d) a sale of Units in Project Co or securitization of the existing rights or interests attaching to Units in Project Co;
- (e) a Qualifying Bank Transaction;

- (f) [Intentionally Deleted]; or
- (g) any secondary transaction in the bond market;

**“Expiry Date”** means the date that Total Completion is achieved;

**“Facility”** means the buildings, related structures, utility connections, landscaping and other improvements to be constructed by Project Co pursuant to this Agreement;

**“Facility Threat and Risk Assessment”** has the meaning set out in Schedule 2 [Design and Construction Protocols];

**“Facility Users”** means the Owner, Owner Persons, physicians, patients, visitors, students and volunteers who will be using or present at the Facility after Service Commencement;

**“Fair Market Value”** means the amount at which an asset or a liability would be exchanged in an arm's length transaction between informed and willing parties, other than in a forced or liquidation sale;

**“Financial Model”** means Project Co's financial model for the Project, a copy of which has been delivered to the Owner in electronic format, as updated or amended from time to time in accordance with the terms of this Agreement;

**“Financial Submission Date”** means November 25, 2020;

**“Force Majeure Event”** means the occurrence after the Effective Date of:

- (a) war, civil war, armed conflict or terrorism;
- (b) nuclear, radioactive, chemical or biological contamination, except to the extent that such contamination arises or is contributed to, directly or indirectly, as a result of any wilful misconduct, negligent act or omission or non-compliance with the terms of this Agreement by Project Co or a Project Co Person;
- (c) earthquake or tidal wave;
- (d) flood, except to the extent that such flood arises or is contributed to, directly or indirectly, as a result of any wilful misconduct, negligent act or omission or non-compliance with the terms of this Agreement by Project Co or a Project Co Person; or
- (e) pressure waves caused by devices traveling at supersonic speeds,

which directly causes a party to be unable to comply with all or a material part of its obligations under this Agreement;

**“GAAP”** means generally accepted accounting principles in effect in Canada including the accounting recommendations published in the Handbook of the Canadian Institute of Chartered Accountants;

**“Geotechnical Reports”** has the meaning set out in Schedule 2 [Design and Construction Protocols];

**“Good Industry Practice”** means using standards, practices, methods and procedures to a good commercial standard, conforming to Law and exercising that degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a qualified, skilled and experienced Person engaged in a similar type of undertaking under the same or similar circumstances;

**“Governmental Authority”** means any federal, provincial, territorial, regional, municipal or local governmental authority, quasi-governmental authority, court, government or self-regulatory organization, commission, board, tribunal, organization, or any regulatory, administrative or other agency, or any political or other subdivision, department or branch of any of the foregoing, having jurisdiction in any way over or in respect of any aspect of the performance of this Agreement or the Project;

**“GST”** means the goods and services tax imposed pursuant to Section IX of the *Excise Tax Act* (Canada);

**“Guarantee”** means the guarantee dated as of the Effective Date, provided by the Province of British Columbia to Project Co guaranteeing payment by the Owner hereunder;

**“Has Knowledge”, “Have Knowledge” or “Having Knowledge”** means:

- (a) for an individual, when information is acquired by the individual;
- (b) for a corporation, when information has come to the attention of:
  - (1) a director or officer of the corporation; or
  - (2) a senior employee of the corporation with responsibility for matters to which the information relates,
- (c) for a partnership other than a limited partnership, when any partner Has Knowledge under the other Sections of this definition or under this Section (c) or Section (d) below for any partner that is itself a partnership or when any member of a director-level or officer-level or similar position of the partnerships or a senior employee of the partnership with responsibility for matters to which the information relates;
- (d) for a limited partnership, when any general partner Has Knowledge under the other Sections of this definition or under this Section (d) or Section (c) above for any partner that is itself a partnership or when any member of a director-level or officer-level or similar position of the partnerships or a senior employee of the partnership with responsibility for matters to which the information relates; or
- (e) for the Owner, when information has come to the attention of:
  - (1) a director or officer of the Owner; or
  - (2) a senior employee of the Owner with responsibility for matters to which the information relates,

under circumstances in which a reasonable individual would take cognizance of it;

**“Hazardous Substance”** means any hazardous waste, hazardous product, contaminant, toxic substance, deleterious substance, dangerous good, pollutant, waste, reportable substance, and any other substance, in respect of which the storage, manufacture, handling, disposal, treatment, generation, use, transport, remediation or release into or presence in the environment is prohibited, controlled or regulated under Environmental Laws;

**“Hazardous Substance Reports”** has the meaning set out in Schedule 2 [Design and Construction Protocols];

**“HCPP”** has the meaning set out in Schedule 5 [Insurance Requirements];

**“Health Campus”** has the meaning set out in Schedule 3 [Design and Construction Specifications];

**“Holding Company”** means, with respect to a corporation, another corporation of which the first corporation is a “subsidiary” as defined in the *Business Corporations Act* (British Columbia) as at the date of this Agreement;

**“IMIT”** or **“IM/IT”** has the meaning set out in Schedule 2 [Design and Construction Protocols];

**“Income Tax”** means any tax imposed on the income of a Person by any Canadian (whether federal, provincial or otherwise) Governmental Authority;

**“Indemnifier”** has the meaning set out in Section 9.2 (Conduct of Third Person Claims);

**“Independent Certifier”** has the meaning set out in Schedule 2 [Design and Construction Protocols];

**“Independent Energy Consultant”** has the meaning set out in Appendix 2D [Energy];

**“Indirect Losses”** means any loss of revenue, loss of profits, loss of use, loss of contract, loss of goodwill, loss of production, loss of business, loss of business opportunity or any exemplary, punitive or special damages or any consequential or indirect loss or damages of any nature claimed, suffered or allegedly suffered by:

- (a) Project Co or any Project Co Person (other than a Person who is a Project Co Person solely by virtue of being an invitee of Project Co or any Project Co Person); or
- (b) the Owner or any Owner Person (other than a Person who is an Owner Person solely by virtue of being an invitee of the Owner or any of Owner Persons) or an Owner Indemnified Person;

and shall be deemed not to include any loss of Construction Payments, the Service Commencement Payment or any other amounts expressly payable by the Owner to Project Co under this Agreement;

**“Initiating Party”** has the meaning set out in Schedule 13 [Dispute Resolution Procedure];

**“Input Tax Recoverability Change in Law”** means a Change in Law, other than a Discriminatory Change in Tax Law, which results in Additional Irrecoverable Tax or Additional Recoverable Tax.

**“Installation”** has the meaning set out in Appendix 2E [Equipment and Furniture];

**“Insurance Account”** has the meaning set out in the Credit Agreement;

**“Insurance Proceeds”** means the amount of any insurance proceeds received by a Person in respect of a claim made under any policy of insurance required to be maintained under this Agreement other than:

- (a) any policy of insurance maintained by the Owner solely for the benefit of the Owner;
- (b) for the purposes of Sections 6.7, 6.9 and 6.10, insurance proceeds received by Project Co or the Senior Lenders from the delay in start-up insurance described in Section 2.2(f) of Schedule 5 [Insurance Requirements];

**“Insurance Receivables”** means the amount of any insurance proceeds which a Person is entitled to receive pursuant to policies of insurance required to be maintained under this Agreement other than:

- (a) any policy of insurance maintained by the Owner solely for the benefit of the Owner;

- (b) for the purposes of Sections 6.7, 6.9 and 6.10, insurance proceeds receivable by Project Co or the Senior Lenders from the delay in start-up insurance described in Section 2.2(f) of Schedule 5 [Insurance Requirements]

**“Insuring Party”** has the meaning set out in Schedule 5 [Insurance Requirements];

**“Intellectual Property”** means any or all of the following and all rights, arising out of or associated therewith:

- (a) national, international and foreign patents, utility models, mask works, and applications therefor and all reissues, divisions, renewals, extensions, provisionals, continuations and continuations-in-part thereof;
- (b) inventions (whether patentable or not), invention disclosures, improvements, trade secrets, proprietary information, know-how, technology, technical data and customer lists, product formulations and specifications, and all documentation relating to any of the foregoing throughout the world;
- (c) copyrights, copyright registrations and applications therefor, and all other rights corresponding thereto throughout the world;
- (d) industrial designs and any registrations and applications therefor throughout the world;
- (e) rights in any internet uniform resource locators (URLs), domain names, trade names, logos, slogans, designs, common law trade-marks and service marks, trade-mark and service mark registrations and applications therefor throughout the world;
- (f) data bases and data collections and all rights therein throughout the world;
- (g) moral and economic rights of authors and inventors, however denominated, throughout the world; and
- (h) any similar or equivalent rights to any of the foregoing anywhere in the world;

**“Intended Uses”** has the meaning set out in Schedule 2 [Design and Construction Protocols];

**“Key Individuals”** has the meaning set out in Section 2.8 (Key Individuals);

**“Lands”** has the meaning set out in Schedule 7 [Lands];

**“Laws”** means all laws (including the common law), statutes, regulations, treaties, judgments and decrees and all official directives, by-laws, rules, consents, approvals, authorizations, guidelines, orders and policies of any Governmental Authority having the force of law from time to time, including, for greater certainty, those related to the issuance of Permits, and any building codes;

**“LEED Certifier”** has the meaning set out in Schedule 2 [Design and Construction Protocols];

**“LEED Gold Certification”** has the meaning set out in Schedule 2 [Design and Construction Protocols];

**“LEED Holdback”** has the meaning set out in Schedule 8 [Payments];

**“LEED LD Amount”** means the amount of Project Co’s liability for liquidated damages for failing to achieve LEED Gold Certification in accordance with Section 4.6 of Schedule 2 [Design and Construction Protocols];

**“LEED Rating System”** has the meaning set out in Schedule 2 [Design and Construction Protocols];

**“Lender Endorsements”** has the meaning set out in Schedule 5 [Insurance Requirements];

**“Lenders’ Remedies Agreement”** means the agreement between the Owner, the Senior Lenders and Project Co in the form set out in Schedule 10 [Lenders’ Remedies Agreement], as amended or replaced from time to time in accordance with this Agreement;

**“Liability Cap”** has the meaning given to it in Section 9.15(a) of this Agreement;

**“Liability Payment”** has the meaning set out in Section 9.3 (General Obligation to Pursue Third Person Recovery);

**“Licence”** has the meaning set out in Schedule 7 [Lands];

**“Longstop Date”** means June 25, 2027, as adjusted in accordance with this Agreement;

**“Material Contract Party”** means a party to a Material Contract, other than Project Co;

**“Material Contracts”** means:

- (a) the Design-Build Agreement; and
- (b) any agreement for products, services or management to Project Co between Project Co and a current or former Affiliate of Project Co;

**“Megawatt hour”** or **“MWh”** has the meaning set out in Appendix 2D [Energy];

**“Modelled Weather Data”** has the meaning set out in Appendix 2D [Energy];

**“Net Change Value”** has the meaning set out in Schedule 6 [Changes];

**“Net Present Value”** means the aggregate of the discounted values, calculated as of the estimated date of the Refinancing, of each of the relevant projected Distributions, in each case discounted using the Threshold Equity IRR;

**“New Project Agreement”** means an agreement on substantially the same terms and conditions as this Agreement (including any agreements entered into pursuant to this Agreement as at the Termination Date) but with the following amendments:

- (a) if this Agreement is terminated prior to the Service Commencement Date, the extension of the Target Service Commencement Date and the Longstop Date by such reasonable period as is agreed by the Owner and the New Project Co to meet such extended Target Service Commencement Date and Longstop Date;
- (b) any accrued Deductions pursuant to Schedule 8 [Payments] will be cancelled;
- (c) the Owner may not terminate such agreement for reasons which arose prior to the Termination Date so long as the New Project Co is using all reasonable efforts to remedy any breach of this Agreement that arose prior to the Termination Date and which is capable of being remedied; and
- (d) any other amendments as may be specified by the Owner that do not adversely affect any compensation which would otherwise be payable to Project Co pursuant to Schedule 9 [Compensation on Termination];



**“New Project Co”** means the Person who has entered into or who will enter into the New Project Agreement with the Owner;

**“Nominal”** means calculated in nominal terms at current prices recognizing adjustment for indexation in respect of forecast inflation;

**“Non-Insuring Party”** has the meaning set out in Schedule 5 [Insurance Requirements];

**“Non-Targeted Carbon Emissions”** has the meaning set out in Appendix 2D [Energy];

**“Non-Targeted Energy Consumption”** has the meaning set out in Appendix 2D [Energy];

**“Notice of Intention to Arbitrate”** has the meaning set out in Schedule 13 [Dispute Resolution Procedure];

**“Notice of Objection to Arbitration”** has the meaning set out in Schedule 13 [Dispute Resolution Procedure];

**“Order of Magnitude Estimate”** has the meaning set out in Schedule 6 [Changes];

**“Owner”** means Providence Health Care Society;

**“Owner Activities”** means any activities carried on or to be carried on by the Owner, or other Persons permitted by the Owner, in the Facility, related to the provision of clinical and non-clinical services;

**“Owner Event of Default”** has the meaning set out in Section 13.1 (Owner Events of Default);

**“Owner Indemnified Person”** means:

- (a) any contractor or subcontractor (of any tier) of the Owner;
- (b) any representative, agent or advisor (including legal and financial advisors) of the Owner or any Person referred to in (a) above, in each case acting in such capacity; and
- (c) any director, officer or employee of the Owner or of any Person referred to in (a) or (b) above, in each case acting in such capacity;

**“Owner Person”** means:

- (a) any director, officer, employee or agent of the Owner;
- (b) any representative, advisor (including any legal and financial advisor), contractor or subcontractor (of any tier) of the Owner in any such Person’s capacity as a provider of services directly or indirectly to the Owner in connection with the Project, other than Project Co, the Design-Builder or Sub-Contractors; or
- (c) any invitee of the Owner or any of the Owner Persons referred to in (a) or (b) above who enters upon the Lands,

provided that none of the CSRC developer or contractor nor any of its sub-contractors nor any contractor jointly retained by the Owner and Project Co will be considered to be an Owner Person, including for the purposes of Supervening Events;

**“Paying Party”** has the meaning set out in Section 9.3 (General Obligation to Pursue Third Person Recovery);

“**PDS**” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“**Performance Guarantee of Construction Guarantor**” means a performance guarantee given by the Construction Guarantor in the form set out in Schedule 15 [Performance Guarantee of Construction Guarantor];

“**Performance Indicators**” means the performance indicators identified as such in Appendix 2B [Compliance Failure Events];

“**Permanent PDS Record**” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“**Permits**” means all permissions, consents, approvals, certificates, permits, licences, statutory agreements, zoning and by-law amendments and variances, and authorizations required from any Governmental Authority, and all necessary consents and agreements from any third parties, needed to carry out the Project in accordance with this Agreement;

“**Permitted Debt**” means:

- (a) trade or other similar indebtedness incurred in the ordinary course of business;
- (b) Taxes and governmental charges, salaries, related employee payments and trade payables;
- (c) contingent liabilities relating to the endorsement of negotiable instruments received in the normal course of business or incurred with respect to any Permit, the Design-Build Agreement or this Agreement; and
- (d) [Intentionally Deleted],

but does not include any Senior Debt;

“**Persistent Breach**” means a breach or series of breaches by Project Co of any term, covenant or undertaking to the Owner which, due to the fact that such breach has:

- (a) continued for 60 days or more after notice thereof from the Owner to Project Co; or
- (b) occurred 3 or more times in the previous 12 months,

demonstrates either a persistent inability, or a persistent unwillingness, to comply with its obligations under this Agreement;

“**Person**” means an individual, legal personal representative, corporation, body corporate, firm, partnership, trust, trustee, syndicate, joint venture, limited liability company, association, unincorporated organization, union or Governmental Authority;

“**Personal Information**” means ‘personal information’ as defined in the *Freedom of Information and Protection of Privacy Act*, (British Columbia), which is collected, acquired, obtained by Project Co or the Owner in relation to or in the course of providing the Design or the Construction under this Agreement, and includes any information about an identifiable individual other than contact information, which is the name, position name or title, business telephone number, business address, business email or business fax number of the individual, or as otherwise defined in the *Freedom of Information and Protection of Privacy Act*, (British Columbia);

“**Phasing Plan**” has the meaning set out in Schedule 2 [Design and Construction Protocols];

**“Post Service Commencement Equipment Work”** has the meaning set out in Appendix 2E [Equipment and Furniture];

**“Preliminary Change Instruction”** has the meaning set out in Schedule 6 [Changes];

**“Preliminary Estimate”** has the meaning set out in Schedule 6 [Changes];

**“Pre-Refinancing Equity IRR”** means the Equity IRR calculated immediately prior to the Refinancing but without taking into account the effect of the Refinancing and using the Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing;

**“Prime Rate”** means the annual rate of interest announced by Canadian Imperial Bank of Commerce (or its successor), or any other Canadian chartered bank agreed to by the parties, from time to time as its “prime” rate then in effect for determining interest rates on Canadian dollar commercial loans made by it in Canada;

**“Principal Insured Risk”** means a risk that would be insured against by policies for the insurance referred to in Section 2 of Schedule 5 [Insurance Requirements];

**“Procurement”** has the meaning set out in Appendix 2E [Equipment and Furniture];

**“Project”** means the design, construction, financing, testing and commissioning of the Facility and all other works and ancillary services in accordance with this Agreement;

**“Project Co Event of Default”** has the meaning set out in Section 12.1 (Project Co Events of Default);

**“Project Co Hazardous Substances”** means those Hazardous Substances for which Project Co is responsible pursuant to Schedule 7 [Lands];

**“Project Co Insolvency Event”** means any of the following events:

- (a) a receiver, receiver manager or other encumbrance holder taking possession of or being appointed over, or any distress, execution or other process being levied or enforced upon, the whole or any material part of the assets of Project Co; or
- (b) any proceedings with respect to Project Co being commenced under the *Companies' Creditors Arrangement Act* (Canada) and if such proceedings are commenced against Project Co and are disputed by Project Co, such proceedings are not discontinued, withdrawn, dismissed or otherwise remedied within 30 Business Days; or
- (c) Project Co making an assignment for the benefit of its creditors, being declared bankrupt or committing an act of bankruptcy, becoming insolvent, making a proposal or otherwise taking advantage of provisions for relief under the *Bankruptcy and Insolvency Act* (Canada) or similar legislation in any jurisdiction, or any other type of insolvency proceedings being commenced by or against Project Co under the *Bankruptcy and Insolvency Act* (Canada) or similar legislation in any jurisdiction and, if proceedings are commenced against Project Co and are disputed by Project Co, such proceedings are not stayed, dismissed or otherwise remedied within 30 Business Days; or
- (d) Project Co ceasing to carry on business;

**“Project Co Material Breach”** means:

- (a) a failure by Project Co to pay any amount due and owing to the Owner under this Agreement on the due date (which amount is not being disputed in good faith) and Project

Co has not remedied such failure to pay within 10 Business Days following notice from the Owner;

- (b) a failure by Project Co to:
  - (1) maintain the policies of insurance required to be maintained by Project Co under this Agreement;
  - (2) maintain such policies on the terms required under this Agreement (including a failure to comply with its obligation under Schedule 5 [Insurance Requirements] to name the Owner as an insured party); or
  - (3) provide evidence to the Owner as required by the terms of this Agreement that such policies have been taken out, maintained, paid for and renewed in accordance with the terms of this Agreement;
- (c) a Persistent Breach;
- (d) except as provided for in (a) through (c) above, a breach, or series of breaches, by Project Co of any agreement, covenant or undertaking made to the Owner, or any representation or warranty made by Project Co to the Owner in this Agreement (or any ancillary certificate, statement or notice issued hereto) being incorrect when made, the consequence of which is:
  - (1) a risk to the safety of the public;
  - (2) a risk of material liability of the Owner to third Persons;
  - (3) an adverse effect on the performance of the Design or the Construction and as a result thereof that the Owner is reasonably likely to be materially deprived of the benefit of this Agreement; or
  - (4) any material provision of this Agreement being unenforceable against Project Co; or
- (e) a breach by Project Co of Section 5 (Financing of the Project), other than a breach described in Section 12.1(g); or
- (f) any other fact or circumstance designated as a "Project Co Material Breach" under this Agreement, including those specified in Sections 9.4 and 10.3 of Schedule 2 [Design and Construction Protocols];

**"Project Co Person"** means:

- (a) any director, officer, employee or agent of Project Co in each case acting as such;
- (b) the Design-Builder, any Sub-Contractor and any representative, advisor (including any legal and financial advisor) or contractor of Project Co, in any such Person's capacity as a provider of services, work or materials, directly or indirectly to Project Co in connection with the Project; or
- (c) any invitee of Project Co or any of the Project Co Persons referred to in (a) or (b) above who enters upon the Lands;

**“Project Co’s Quality Consultant”** has the meaning set out in Schedule 2 [Design and Construction Protocols];

**“Project Co’s Rights”** has the meaning set out in Section 8.12 (Equivalent Project Relief);

**“Project Intellectual Property”** means the Intellectual Property which is created, brought into existence, acquired, licensed or used by Project Co, the Design-Builder, any Sub-Contractor or any other third party, directly or indirectly, for the purposes of the Design or Construction of the Facility, or otherwise for the purposes of this Agreement but does not include the Financial Model;

**“Project Schedule”** has the meaning set out in Schedule 2 [Design and Construction Protocols];

**“Proposal Extracts (Design and Construction)”** has the meaning set out in Schedule 2 [Design and Construction Protocols];

**“Protest Action”** means any civil disobedience, protest action, riot, civil commotion, blockade or embargo, including any action taken or threatened to be taken, by any Person or Persons protesting or demonstrating against:

- (a) the carrying out of any part of the Project (including the construction of the Facility); or
- (b) the construction of public health care facilities in general, occurring after the Effective Date,

but excluding any lawful or unlawful strike, lockout, go-slow or labour or other industrial relations dispute or job action;

**“PST”** means the Tax imposed pursuant to the *Provincial Sales Tax Act* (British Columbia);

**“Qualified Insurers”** means reputable insurers of good standing in Canada, the United States, the United Kingdom, Europe or Australia having a credit rating of (1) A- or better with AM BEST or (2) the equivalent thereof by any other recognized insurance rating agency;

**“Qualifying Bank Transaction”** means:

- (a) the disposition by a Senior Lender to a Qualifying Institution of any of its rights or interests in the Senior Financing Agreements;
- (b) the grant by a Senior Lender to a Qualifying Institution of any rights of participation in respect of the Senior Financing Agreements; or
- (c) the disposition or grant by a Senior Lender to a Qualifying Institution of any other form of benefit or interest in either the Senior Financing Agreements or the revenues or assets of Project Co, whether by way of security or otherwise;

**“Qualifying Institution”** means any of the following, provided it is not a Restricted Person, and provided none of its Affiliates is a Restricted Person for any reason other than by reason of Section (d) of the definition of Restricted Person:

- (a) a bank listed in Schedule I, II or III of the *Bank Act* (Canada);
- (b) a Canadian trust company, insurance company, investment company, pension fund or other institution which has or manages at least \$500 million in securities, including entities wholly owned by any of the foregoing;

- (c) a bank regulated by the Board of Governors of the Federal Reserve System of the United States, a U.S. bank, saving and loan institution, insurance company, investment company, employee benefit plan or other institution that has or manages at least \$500 million in assets and would be a “qualified institutional buyer” under U.S. securities legislation, including entities wholly owned by any of the foregoing;
- (d) an institution which is recognised or permitted under the law of any member state of the European Economic Area (“EEA”) to carry on the business of a credit institution pursuant to Council Directive 2000/12/EC relating to the taking up and pursuit of the business of credit institutions or which is otherwise permitted to accept deposits in the United Kingdom or any other EEA member state;
- (e) an institution which is recognized or permitted under the law of any member state of the Organization for Economic Cooperation and Development (in this definition, the “**OECD**”) to carry on within the OECD member states the business of a credit institution, insurance company, investment company or pension fund and which has or manages at least \$500 million in assets, including entities wholly owned by any such institution; or
- (f) any other institution consented to in writing by the Owner as a “Qualifying Institution”.

“**Qualifying Refinancing**” means any Refinancing that will give rise to a Refinancing Gain greater than zero that is not an Exempt Refinancing;

“**Quality Assurance Plan**” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“**Quality Assurance Program**” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“**Quality Monitor**” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“**Quality System**” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“**Receiving Party**” has the meaning set out in Section 9.3 (General Obligation to Pursue Third Person Recovery);

“**Referee**” has the meaning set out in Schedule 13 [Dispute Resolution Procedure];

“**Referee Agreement**” has the meaning set out in Schedule 13 [Dispute Resolution Procedure];

“**Referee Notice**” has the meaning set out in Schedule 13 [Dispute Resolution Procedure];

“**Refinancing**” means:

- (a) Project Co incurring, creating, assuming or permitting to exist any Debt other than Permitted Debt;
- (b) any transaction in which the Owner, with the consent or at the request of agreement of Project Co, grants rights to any Person under an agreement similar to the Lenders’ Remedies Agreement or any other agreement that provides for step-in rights or similar rights to such Person, other than the Lenders’ Remedies Agreement entered into on the Effective Date;
- (c) any amendment, variation, novation, supplement or replacement of any Senior Debt or Senior Financing Agreement;

- (d) the exercise of any right, or the grant of any waiver or consent, under any Senior Financing Agreement;
- (e) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, the Senior Financing Agreements or Senior Debt or the creation or granting of any other form of benefit or interest in the Senior Financing Agreements, the Senior Debt or the contracts, revenues or assets of Project Co whether by way of security or otherwise; or
- (f) any other arrangement put in place by Project Co or another Person which has an effect which is similar to any of (a) through (e) above or which has the effect of limiting Project Co's ability to carry out any of the actions referred to in (a) through (e) above,

but excluding any financing pursuant to Section 10.2 (Financing of Lump Sum Payment Amounts);

**“Refinancing Gain”** means an amount equal to the greater of zero and  $[(A - B) - C]$ , where:

A = the Net Present Value of Distributions (calculated on an after tax basis at the level of Project Co in a manner consistent with the Financial Model) projected immediately prior to the Refinancing (taking into account all effects (including the costs and expenses of the Owner pursuant to Section 5.8) of the Refinancing and using the Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made over the remaining term of this Agreement following the Refinancing;

B = the Net Present Value of Distributions (calculated on an after tax basis at the level of Project Co in a manner consistent with the Financial Model) projected immediately prior to the Refinancing (but taking into account only those effects of the Refinancing that were fully reflected in the Financial Model as of the Effective Date and no other effects (including the costs and expenses of the Owner pursuant to Section 5.8) of the Refinancing, and using the Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made over the remaining term of this Agreement following the Refinancing; and

C = any adjustment required to raise the Pre-Refinancing Equity IRR to the Threshold Equity IRR calculated as a single payment to be paid as a Distribution on the date of the Refinancing;

**“Reinstatement Plan”** has the meaning set out in Section 6.4(c) (Project Co's Obligations – Material Damage or Destruction);

**“Reinstatement Works”** has the meaning set out in Section 6.4(a) (Project Co's Obligations – Material Damage or Destruction)

**“Relevant Change in Law”** means a Change in Law (other than a Discriminatory Change in Tax Law) which specifically applies to:

- (a) the Project or health care-related projects whose design, construction and financing are procured on basis similar to that of the Project and not to other projects;
- (b) Project Co or the Design-Builder or Persons that have contracted on similar health care-related projects procured and contracted with the Owner or other statutory or public body on a basis similar to the Project and not to other Persons; or
- (c) Persons holding shares or other evidences of ownership in Persons whose principal business is contracting on other similar health care-related projects procured and contracted on a basis similar to the Project and not to other Persons,

and compliance with which would require a variation (as applicable) in the design, quality, scope, methodology or cost of the Design or the Construction;

**“Relief Event”** means any of the following events or circumstances if and to the extent it interferes adversely with, or causes a failure of, the carrying out of the Design or the Construction:

- (a) fire, explosion, lightning, storm (including snow storm), flood, bursting or overflowing of water tanks, apparatus or pipes, ionising radiation, earthquake or any act of God similar to the foregoing, in each case to the extent it does not constitute a Force Majeure Event;
- (b) failure by any utility company, local authority or other like body to perform works or provide services required to be provided by them in a reasonably timely manner or any unreasonable interference with the Construction by any such body as a result of maintenance and other work;
- (c) lawful or unlawful strike, lockout, work-to-rule, job action or other labour dispute generally affecting the construction industry or a significant sector thereof;
- (d) any delay of more than 3 days in respect of any critical path matter in the Project Schedule caused by compliance by Project Co with an order or direction by police, fire officials, medical health officer or any comparable public authority having the legal authority to make such order or give such direction;
- (e) a Change in Law;
- (f) unreasonable delay in the payment of any Insurance Receivables;
- (g) accidental loss or damage to the Facility or any roads servicing the Site;
- (h) blockade or embargo to the extent it does not constitute a Force Majeure Event;
- (i) failure or shortage of fuel or transport;
- (j) a COVID-19 Event; and
- (k) an Epidemic Event; and
- (l) any other event which is stated in this Agreement to constitute a Relief Event,

except to the extent that any of such events arise or are contributed to, directly or indirectly, as a result of any wilful misconduct, negligent act or omission or non-compliance with the terms of this Agreement by Project Co or any Project Co Person;

**“Renewable Energy”** has the meaning set out in Appendix 2D [Energy];

**“Representative”** has the meaning set out in Schedule 2 [Design and Construction Protocols];;

**“Request for Payment Approval”** has the meaning set out in Appendix 2E [Equipment and Furniture];

**“Responding Party”** has the meaning set out in Schedule 13 [Dispute Resolution Procedure];



**“Restricted Person”** means any Person who (or any member of a group of Persons acting together, any one of which):

- (a) has, directly or indirectly, its principal or controlling office in a country that is subject to any economic or political sanctions imposed by Canada for reasons other than its trade or economic policies;
- (b) has as any part of its business the illegal manufacture, sale, distribution or promotion of narcotic substances or arms, or is or has been involved in the promotion, support or carrying out of terrorism;
- (c) in the case of an individual, he or she (or in the case of a legal entity, any of the members of the board of directors or its senior executive managers) has been sentenced to imprisonment or otherwise given a custodial sentence (other than a suspended sentence) for any criminal offence (other than minor traffic offences or misdemeanours) less than 5 years prior to the date at which the determination of whether the individual falls within this definition is being made;
- (d) has as its primary business the acquisition of distressed assets or investments in companies or organizations which are or are believed to be insolvent or in a financial standstill situation or potentially insolvent;
- (e) is subject to any claim of the Owner or the Province of British Columbia in any proceedings (including regulatory proceedings) which have been concluded or are pending at the time at which the determination of whether the Person falls within this definition is being made and which (in respect of any such pending claim, if it were to be successful) would, in the Owner’s view, in either case, be reasonably likely to materially affect the ability of Project Co to perform its obligations under this Agreement;
- (f) has a material interest in the production of tobacco products;
- (g) has been convicted of an offence under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (Canada), or has been convicted of the commission of a money laundering offence or a terrorist activity financing offence under the *Criminal Code* (Canada); or
- (h) has an Affiliate that is a Restricted Person for any reason other than by reason of (d) above, provided that this paragraph (h) only applies if such Person Has Knowledge that the Affiliate is a Restricted Person other than by reason of (d);

**“Reviewed Drawings and Specifications”** has the meaning set out in Appendix 2C [User Consultation and Design Review];

**“Room Data Sheets”** means the room data sheets prepared by Project Co pursuant to Schedule 3 [Design and Construction Specifications] and in accordance with Appendix 2C [User Consultation and Design Review];

**“Schedule of Values”** has the meaning set out in Schedule 8 [Payments];

**“Selection”** has the meaning set out in Appendix 2E [Equipment and Furniture];

**“Senior Debt”** means:

- (a) all amounts of principal and interest outstanding, including interest and default interest accrued, from Project Co to the Senior Lenders under the Senior Financing Agreements,

provided that default interest will not include any increased interest, fees or penalty amounts payable by Project Co for any reason other than a failure by Project Co to pay any amount when due;

- (b) cost of early termination of interest rate or currency hedging arrangements and other breakage costs or make-whole amounts payable by Project Co to the Senior Lenders as a result of a prepayment under the Senior Financing Agreements; and
- (c) all other fees, costs and expenses for which Project Co is responsible under the Senior Financing Agreements;

**“Senior Debt Interest Amount”** means, for any period, the interest payable by Project Co to the Senior Lenders in the normal course (including, for greater certainty, any default interest or additional interest which may result from the delay of any scheduled principal repayments) under the Senior Financing Agreements;

**“Senior Debt Termination Amount”** has the meaning set out in Schedule 9 [Compensation on Termination];

**“Senior Financing Agreements”** means:

- (a) the Credit Agreement;
- (b) the Security Documents, as defined in and entered into pursuant to the Credit Agreement; and
- (c) the Hedging Agreements, as defined in and entered into pursuant to the Credit Agreement,

certified copies of each of which have been delivered by Project Co to the Owner, and as amended from time to time in accordance with the terms of this Agreement;

**“Senior Lenders”** means the lenders and/or hedge providers to whom Senior Debt is owed;

**“Service Commencement”** means that all of the following have been achieved in relation to the Facility:

- (a) the Architect has certified that “substantial performance” of the Facility, as defined in the *Builders’ Lien Act* (British Columbia), has been achieved;
- (b) the Deficiency Holdback (as calculated in Schedule 8 [Payments] at two times the reasonably estimated costs to fully correct any Deficiencies), less any portion of the Deficiency Holdback for training or for Post-Service Commencement Equipment Work, is less than 1% of the Contract Price;
- (c) an occupancy permit has been issued for the Facility or the City has issued a temporary occupancy permit or other written permission that is sufficient for occupancy of the Facility by the Owner for the Owner Activities at the Facility;
- (d) Project Co has delivered to the Owner the LEED Project Checklist and written opinion as required by and in accordance with Section 4.7 of Schedule 2 [Design and Construction Protocols];
- (e) Project Co has delivered to the Owner a report from the Commissioning Authority (as that term is defined in Schedule 3 [Design and Construction Specifications]) confirming completion of all commissioning activities scheduled in the Commissioning Plan to be completed before Service Commencement;

- (f) Project Co has completed the training of Owner staff as required by Section 12.2 of Schedule 2 [Design and Construction Protocols];
- (g) Project Co has transferred and delivered to the Owner all guidance material and manuals for Cash Allowance Equipment as required by Section 3.20 of Appendix 2E [Equipment and Furniture];
- (h) Project Co has provided an updated Energy Model prepared by the Energy Modeller that demonstrates that the Energy Guarantee will be met as required by Section 5.2 of Appendix 2D [Energy];
- (i) Project Co has provided an updated Energy Model prepared by the Energy Modeller that demonstrates that the Carbon Guarantee will be met as required by Section 6.2 of Appendix 2D [Energy];
- (j) Project Co has made available all maintenance manuals, specifications, warranties and related information, in written and electronic form, for all the equipment and systems that have been included in the Design and Construction of the Facility for review by the Owner's Representative as required by Section 6.23(b) of Schedule 2 [Design and Construction Protocols];
- (k) Project Co has delivered to the Owner everything that is required to be provided prior to Service Commencement under the BIM Execution Plan pursuant to Section 2.5 of Schedule 3 [Design and Construction Specifications]; and
- (l) Project Co has provided all documentation, coordination and information required by Service Commencement pursuant to the Submittal identified in 2.5.1.1.2(a).3 of Schedule 3 [Design and Construction Specifications] (subject to obtaining the comment "REVIEWED" pursuant to the review procedure described in Appendix 2C [User Consultation and Design Review]) for permits, certificates, accreditation and other requirements for Owner Activities, including accreditation for diagnostic imaging, laboratory medicine, neurodiagnostics and pulmonary function completed by CPSBC Diagnostic Accreditation Program (DAP);

**“Service Commencement Date”** means the later of:

- (a) the date when all criteria for Service Commencement that have not been waived have been satisfied as certified by the Independent Certifier in accordance with Schedule 2 [Design and Construction Protocols]; and
- (b) the last Target Service Commencement Date;

**“Service Commencement Payment”** has the meaning set out in Schedule 8 [Payments];

**“Setup”** has the meaning set out in Appendix 2E [Equipment and Furniture];

**“Site”** has the meaning set out in Schedule 2 [Design and Construction Protocols];

**“Specification”** has the meaning set out in Appendix 2E [Equipment and Furniture];

**“Sub-Contract”** means any contract entered into by the Design-Builder (except the Design-Build Agreement), or a sub-contractor of the Design-Builder of any tier, with one or more Persons in connection with the carrying out of Project Co's obligations under this Agreement, as amended or replaced from time to time;

**“Sub-Contractor”** means any Person that enters into a Sub-Contract;

**“Submittal”** has the meaning set out in Appendix 2C [User Consultation and Design Review];

**“Submittal Schedule”** has the meaning set out in Appendix 2C [User Consultation and Design Review];

**“Suitable Substitute Project Co”** has the meaning given to it in the Lenders’ Remedies Agreement;

**“Supervening Event”** means any of a Compensation Event, Relief Event, Force Majeure Event or Eligible Change in Law Event;

**“Supervening Event Notice”** has the meaning set out in Section 8.2(a) (Procedures Upon the Occurrence of a Supervening Event);

**“Target Service Commencement Date”** means the date, as set out in the Project Schedule (as updated from time to time in accordance with Schedule 2 [Design and Construction Protocols]), that Project Co estimates Service Commencement will occur;

**“Targeted Carbon Emissions”** has the meaning set out in Appendix 2D [Energy];

**“Targeted Energy Consumption”** has the meaning set out in Appendix 2D [Energy];

**“Tax”** or **“Taxes”** means, from time to time, all taxes, surtaxes, duties, levies, imposts, rates, payments, assessments, withholdings, dues and other charges of any nature imposed by any Governmental Authority (including income, capital (including large corporations), withholding, consumption, sales, use, transfer, goods and services or other value-added, excise, customs, anti-dumping, countervail, net worth, stamp, registration, franchise, payroll, employment, health, education, business, school, property, local improvement, development, education development and occupation taxes, surtaxes, duties, levies, imposts, rates, payments, assessments, withholdings, dues and charges) together with all fines, interest, penalties on or in respect of, or in lieu of or for non-collection of, those taxes, surtaxes, duties, levies, imposts, rates, payments, assessments, withholdings, dues and other charges;

**“Taxable Shareholder Portion”** has the meaning set out in Schedule 9 [Compensation on Termination];

**“Term”** has the meaning set out in Section 2.1 (Term and Termination);

**“Termination Date”** means the earlier of the Expiry Date or the date of earlier termination referred to in Section 2.1 (Term and Termination);

**“Termination Payment”** means the amount owing by the Owner to Project Co pursuant to Schedule 9 [Compensation on Termination];

**“Termination Payment Date”** means the date on which the Owner must make the Termination Payment as provided for in Schedule 9 [Compensation on Termination];

**“Threshold Equity IRR”** means \_\_\_\_\_ being the Equity IRR as set out in the Financial Model;

**“Total Completion”** means that all of the following have been achieved in relation to the Facility:

(a) the entire Design and Construction has been performed to the requirements of this Agreement other than:

(1) work required to be performed under Section 9.16 relating to correction of Defects and Construction Latent Defects;

- (2) achievement of the LEED credits/points and LEED Gold Certification under Section 4.6 of Schedule 2 [Design and Construction Protocols]; and
  - (3) training required to be provided after Service Commencement in accordance with Section 16.1 of Schedule 2 [Design and Construction Protocols];
- (b) all Deficiencies specified in the deficiency list(s) have been rectified or completed to the Owner's satisfaction, acting reasonably; and
- (c) the following items have been submitted by Project Co and are acceptable to the Owner, acting reasonably:
- (1) a statutory declaration of an officer or senior management employee of Project Co stating that all accounts for labour, subcontracts, materials, construction machinery and equipment and other indebtedness which may have been incurred by Project Co in performing the Design and Construction and for which the Owner might in any way be held responsible have been paid in full, except for amounts properly retained as a holdback or as an identified amount in dispute, dated at least 45 days after the date of substantial performance under the *Builders Lien Act* (British Columbia);
  - (2) a written statement of Project Co that all claims for payment for Design and Construction done under this Agreement including claims and Changes have been presented to the Owner;
  - (3) a clearance letter from the Workers' Compensation Board indicating that all current assessments due from Project Co and all Subcontractors have been paid; and
  - (4) certification, acceptable to the Owner, that all taxes, employment assistance payments, Canada Pension Plan contributions, duties, royalties and all other monies required to be paid by law or statute have been paid in full.

**“Undisclosed Environmental Liabilities”** means all Hazardous Substances located in, on, below or adjacent to the Lands, other than Project Co Hazardous Substances;

**“Uninsurable”** means, in relation to a risk:

- (a) insurance as required under this Agreement is not available in respect of the Project with Qualified Insurers; or
- (b) the insurance premium payable or the terms and conditions for insuring such risk at the levels and on the terms required by this Agreement are such that contractors, concessionaires, owners or others having a substantially similar interest in a project such as the Project in Canada are not generally insuring against such risk with Qualified Insurers;

**“Uninsurable Risk”** has the meaning set out in Section 6.14 (Consequences of Risks Becoming Uninsurable);

**“Units”** means units or other equity interests of any class in the capital of Project Co;

**“Updated Project Schedule”** has the meaning set out in Schedule 2 [Design and Construction Protocols];

**“User Consultation Group”** has the meaning set out in Schedule 2 [Design and Construction Protocols];

“**Warranty Holdback**” has the meaning set out in Schedule 8 [Payments];

“**Warranty Period**” means the period commencing on the Service Commencement Date and ending on the date that is two years after the Service Commencement Date; and

“**Work Plan**” has the meaning set out in Schedule 2 [Design and Construction Protocols].

## 2. INTERPRETATION

This Agreement will be interpreted according to the following provisions, except to the extent the context or the express provisions of this Agreement otherwise require:

- (a) the parties waive the application of any rule of law which otherwise would be applicable in connection with the construction of this Agreement that ambiguous or conflicting terms or provisions should be construed against the party who (or whose counsel) prepared the executed agreement or any earlier draft of the same;
- (b) the table of contents, headings and sub-headings, marginal notes and references to them in this Agreement are for convenience of reference only, do not constitute a part of this Agreement, and will not be taken into consideration in the interpretation or construction of, or affect the meaning of, this Agreement;
- (c) each reference to a Section, Schedule, Appendix or Attachments is a reference to a Section of, Schedule to, Appendix to a Schedule to this Agreement; or each Attachment to an Appendix, and each Appendix is uniquely designated by using the number of the Schedule to which the Appendix is attached followed by an alphabetical designator in sequence (for example, Appendix 2A [Independent Certifier Agreement]) means the first Appendix (excluding any that may not be used) attached to Schedule 2 [Design and Construction Protocols]. A Schedule includes all of the Appendices attached to that Schedule. An Appendix includes all the Attachments attached to that Appendix;
- (d) each reference to an agreement, document, standard, principle or other instrument includes (subject to all relevant approvals and any other provision of this Agreement expressly concerning such agreement, document, standard, principle or other instrument) a reference to that agreement, document, standard, principle or instrument as amended, replaced, novated or assigned, and a reference to an “amendment” and similar terms (including “amend” and “amended”) include a reference to supplement, alteration, substitute, variation, change and any other modification and similar terms;
- (e) each reference to a statute or statutory provision (including any subordinate legislation) includes any statute or statutory provision which amends, extends, consolidates or replaces the statute or statutory provision or which has been amended, extended, consolidated or replaced by the statute or statutory provision and includes any orders, regulations, by-laws, ordinances, orders, codes of practice, instruments or other subordinate legislation made under the relevant statute;
- (f) unless the context otherwise requires, each reference to the “main body” of this Agreement refers to the portion of this Agreement starting with the title page through to and including the execution page or pages of this Agreement;
- (g) each reference to time of day is a reference to Pacific Standard time or Pacific Daylight Saving time, as the case may be;
- (h) words importing the singular include the plural and vice versa;

- (i) words importing a particular gender include all genders;
- (j) each reference to a public organization is deemed to include a reference to any successor(s) to such public organization or any organization or entity or organizations or entities which has or have taken over the functions or responsibilities of such public organization;
- (k) unless the context otherwise requires, each reference to “parties” means the parties to this Agreement and each reference to a “party” means any one of the parties to this Agreement, provided however that a reference to a third party does not mean a party to this Agreement;
- (l) all monetary amounts are expressed in Canadian Dollars;
- (m) whenever this Agreement obliges a party (the “**Payor**”) to pay any amount to the other party (the “**Payee**”) in respect of any costs, expenses, fees, charges, liabilities, losses, claims or other sums incurred by the Payee:
  - (1) such obligation will be construed as applying only to so much of such sums as have been properly incurred on an arm’s length commercial basis or, where not incurred on an arm’s length commercial basis (including when the payment is made to an Affiliate of the Payee), so much of them as are proper and reasonable; and
  - (2) the Payee will, when requested by the Payor, provide supporting evidence of such costs, expenses, fees, charges, liabilities, losses, claims or other sums;
- (n) the Owner will not be imputed with knowledge of any fact, matter or thing unless that fact, matter or thing is within the actual knowledge of those of its employees or agents (including the Owner’s Representative) who have responsibilities in connection with the Project;
- (o) without limiting the extent of its actual knowledge, Project Co will for all purposes of this Agreement be deemed to have such knowledge in respect of the Design and the Construction as is held (or ought reasonably to be held) by those employees or agents of Project Co, or the Design-Builder or Sub-Contractor, who have responsibilities in connection with the carrying out of the Design or the Construction to which the fact, matter or thing relates or is applicable;
- (p) each requirement for a thing or action to be “in accordance with” or “in compliance with” any standard, code or specification or other requirement or stipulation means that such thing or action is to exceed or at least equal that standard, code, specification or other requirement or stipulation;
- (q) the words “include”, “includes” and “including” are to be construed as meaning “include without limitation”, “includes without limitation” and “including without limitation”, respectively;
- (r) when a party has “discretion”, it means that party has the sole, absolute and unfettered discretion, with no requirement to act reasonably or provide reasons unless specifically required under the provisions of this Agreement;
- (s) any consent contemplated to be given under this Agreement must be in writing;

- (t) general words are not given a restrictive meaning:
  - (1) if they are introduced by the word “other”, by reason of the fact that they are preceded by words indicating a particular class of act, matter or thing; or
  - (2) by reason of the fact that they are followed by particular examples intended to be embraced by those general words;
- (u) words or abbreviations which have well-known trade meanings are used in accordance with those meanings;
- (v) the expression “all reasonable efforts” and expressions of like import, when used in connection with an obligation of either party, means taking in good faith and with due diligence all commercially reasonable steps to achieve the objective and to perform the obligation, including doing all that can reasonably be done in the circumstances taking into account each party’s obligations hereunder to mitigate delays and additional costs to the other party, and in any event taking no less steps and efforts than those that would be taken by a commercially reasonable and prudent Person in comparable circumstances but where the whole of the benefit of the obligation and where all the results of taking such steps and efforts accrued solely to that Person’s own benefit, provided that the foregoing will not require the Owner to:
  - (1) take any action which is contrary to the public interest, as determined by the Owner in its discretion; or
  - (2) undertake any mitigation measure that might be available arising out of its status as a public body that would not normally be available to a private commercial party;
- (w) the expressions “by Project Co” and “by or through Project Co” and expressions of like import are synonymous and mean by Project Co or by anyone employed by or through Project Co, including Project Co and all contractors, sub-contractors and suppliers of any tier and their respective officers, employees, consultants and agents;
- (x) all accounting and financial terms used herein are, unless otherwise indicated, to be interpreted and applied in accordance with GAAP, consistently applied;
- (y) where this Agreement requires the calculation of something that is calculated in the Financial Model, including Net Present Value of Distributions and Equity IRR but not including Payments and Deductions, the calculation will be done in a manner consistent with the calculation methodology in the Financial Model;
- (z) if the time for doing an act falls or expires on a day that is not a Business Day, the time for doing such act will be extended to the next Business Day;
- (aa) each provision of this Agreement will be valid and enforceable to the fullest extent permitted by law. If any provision of this Agreement is held to be invalid, unenforceable or illegal to any extent, such provision may be severed and such invalidity, unenforceability or illegality will not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Agreement. If any such provision of this Agreement is held to be invalid, unenforceable or illegal, the parties will promptly endeavour in good faith to negotiate new provisions to eliminate such invalidity, unenforceability or illegality and to restore this Agreement as nearly as possible to its original intent and effect; and
- (bb) each release, waiver of liability and indemnity in this Agreement expressed to be given in favour of a party is and will be interpreted as having been given in favour of and may be



enforced by that party and, in the case of the Owner, by the Owner Indemnified Persons, and, in the case of Project Co, by Project Co Persons.

### **3. PRIORITY OF AGREEMENTS AND SCHEDULES**

In the event of ambiguities, conflicts or inconsistencies between or among any of the provisions of this Agreement, the provisions will prevail in the following order of precedence with each taking precedence over those listed subsequently:

- (a) the provisions establishing the higher quality, manner or method of performing the Design or Construction, using the more stringent standards, will prevail, with the intent that the provisions which produce the higher quality with the higher levels of safety, reliability, durability, performance and service will prevail;
- (b) the provisions of the main body of this Agreement will prevail over any of the Schedules hereto other than Schedule 11 (Design-Builder Collateral Agreement) or Schedule 10 (Lenders' Remedies Agreement);
- (c) the provisions of the Lenders' Remedies Agreement will prevail over the Design-Builder Collateral Agreement;
- (d) the provisions of this Agreement (other than the provisions of Appendix 2G [Proposal Extracts (Design and Construction)]) will prevail over the provisions of Appendix 2G [Proposal Extracts (Design and Construction)]; provided however that in determining whether an ambiguity, conflict or inconsistency exists between Appendix 2G [Proposal Extracts (Design and Construction)] and any other provisions in this Agreement, to the extent that Appendix 2G [Proposal Extracts (Design and Construction)] include additional requirements for higher standards of quality or performance or additional requirements for more extensive scope of design, work or services than otherwise required, no such ambiguity, conflict or inconsistency will be deemed to exist and Project Co's obligations hereunder will include compliance with all such additional requirements; and
- (e) if the ambiguity, conflict or inconsistency is between a provision of general application and a provision that applies only to a specific part of the Design or Construction, the provision that applies to the specific part of the Design or Construction shall prevail for that specific part of the Design or Construction.

### **4. FINANCIAL MODEL**

Except where expressly referred to, the Financial Model and its contents will not be used to interpret, and will not affect the meaning of, this Agreement.