



TOTAL PROJECT MANAGEMENT

LEGAL TERMS AND CONDITIONS

Version 9.~~43~~ – January 2024 ~~June 2023~~

PLANNING/ENGINEERING ASSIGNMENTS

ASSIGNMENT NUMBER: *0000-E-0000*

ENTER HIGHWAY PROJECT

ENTER DISTRICT(S)/REGIONS

G.W.P.: *enter number*

*Highway ***, from *** for *** km*

TOTAL PROJECT MANAGEMENT LEGAL TERMS AND CONDITIONS

B E T W E E N:

**HIS MAJESTY THE KING IN RIGHT OF ONTARIO AS
REPRESENTED BY THE MINISTER OF TRANSPORTATION**

(the "**Ministry**")

- and -

[THE SERVICE PROVIDER]

(the "**Service Provider**")

WHEREAS the Ministry intends to contract for the total management of the Project (as herein defined);

AND WHEREAS the Service Provider has represented that it has the knowledge and expertise to design and manage the Project as required by the Ministry and as contemplated in this Agreement;

IN CONSIDERATION OF the covenants and agreements herein contained and for other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged), the parties hereto covenant and agree as follows:

ARTICLE 1 INTERPRETATION

1.1 Definitions

Unless the context otherwise specifies or requires, for the purposes of this Agreement, the following terms shall have the meanings set forth in this **Section**:

- (a) "**Agreement**", "**this Agreement**", "**the Agreement**", "**hereto**", "**hereof**", "**herein**", "**hereby**", "**hereunder**", and similar expressions means this Total Project Management Agreement, together with all Schedules and attachments hereto.
- (b) "**Approval**", "**Approve**", "**Approved**" and similar expressions means the approval of or approved by the Ministry in writing in accordance with the provisions of this Agreement, including **Section 3.3**.
- (c) "**Business Day**" means any day which is not (i) a Saturday or a Sunday or (ii) a day observed as a holiday under the laws of the Province of Ontario or the federal laws of Canada applicable to the Province of Ontario.
- (d) "**Change Order**" has the meaning ascribed thereto in **Section 12.1**.
- (e) "**Change Request**" means a written request prepared by or on behalf of the Service Provider to change or add new work or material in addition to that provided for in the Project Description and the **Schedules** hereto; provided that no such request shall be implemented unless and until it has been Approved by the Ministry.
- (f) "**Claim**" means any claim, demand, liability, damage, liquidated damage, loss, cost, expense, suit, action or cause of action.
- (g) "**Completion Date**" shall be deemed to occur when the Ministry and the Service Provider are satisfied that, to the best of the Service Provider's knowledge at that time, the Contractor has rectified all imperfect work and has discharged all of the Construction Work except any warranty requirements, or as otherwise agreed between the Ministry and the Service Provider.
- (h) "**Conflict of Interest**" has the meaning ascribed thereto in **Section 4.10**.
- (i) "**Construction Contract**" means the written contract between the Contractor and the Ministry for the completion of the Construction Work for the project.

- (j) "**Construction Contract Administration Term**" means the term (number of months/weeks) that the Service Provider will be performing the Construction Contract Administration Services as provided in **Schedule 7**.
- (k) "**Construction Contract Administration Plan**" means the plan developed by the Service Provider to complete the Construction Contract Administration Services and to enable the Service Provider to establish general conformance with the Construction Contract Documents, as set out in **Schedule 7**.
- (l) "**Construction Contract Administration Services**" has the meaning ascribed thereto in **Section 9.1**.
- (m) "**Construction Contract Documents**" means the executed agreement between the Ministry and the Contractor, which includes the tender, the General Conditions of Contract, the Supplemental General Conditions of Contract, standard specifications, special provisions, contract drawings, addenda incorporated in a Construction Contract Document before the execution of such agreement, such other documents as may be listed in such agreement and subsequent amendments to the Construction Contract Documents.
- (n) "**Construction Work**" means the construction work identified in the Construction Contract Documents, as amended in accordance therewith.
- (o) "**Contractor**" means the third party contractor which is successfully awarded the construction contract to complete the Construction Work for the Project, pursuant to **Article 8**.
- (p) "**Daily Expense Rate**" means the daily cost to the Ministry per individual for living and travel expenses.
- (q) "**Default**" means an event or condition (including an act or omission), the occurrence of which would, with the lapse of time or the giving of notice, or both, become an Event of Default.
- (r) "**Deliverables**" means everything developed for or provided to the Ministry in the course of the TPM Services, by the Service Provider or its employees, volunteers, agents or subcontractors, including but not limited to any goods or services or any and all Intellectual Property and any and all concepts, techniques, ideas, information, documentation and other materials, however recorded, developed or provided.
- (s) "**Derivative Work**" means a work based on the Service Provider's Intellectual Property including, without limitation, an adaptation, modification,

translation, expansion, condensation or transformation, that if prepared without authorization, would constitute copyright infringement or infringement of any other Intellectual Property right.

- (t) **"Design Assessment"** means a procedure that the Ministry may use to assess the quality of the Detailed Design Services.
- (u) **"Design Criteria"** means the criteria for the definition of the nature and extent of the Construction Work established as part of the Preliminary Design and Detailed Design Services and Approved by the Ministry.
- (v) **"Detailed Design Plan"** means the plan developed by the Service Provider to complete the Detailed Design Services, as set out in **Schedule 6**.
- (w) **"Detailed Design Services"** has the meaning ascribed thereto in **Section 7.1**.
- (x) **"Encumbrance"** means any mortgage, lien (including any construction lien or certificate of action filed with respect thereto), pledge, charge, security interest, restriction, claim or encumbrance of any nature whatsoever.
- (y) **"Environmental Laws"** means:
 - (i) any and all applicable federal, provincial, or municipal laws, statutes, regulations or by-laws including, but not limited to, the following: the *Environmental Protection Act* (Ontario), the *Environmental Assessment Act* (Ontario), the *Gasoline Handling Act* (Ontario), the *Ontario Heritage Act*, the *Pesticides Act* (Ontario), the *Dangerous Goods Transportation Act, 1992* (Ontario), the *Planning Act* (Ontario), the *Ontario Water Resources Act*, the *Transportation of Dangerous Goods Act* (Canada), the *Canadian Environmental Protection Act*, the *Canadian Environmental Assessment Act*, the *Endangered Species Act* (Ontario), the *Navigable Waters Protection Act* (Canada), the *Fisheries Act* (Canada), the *Conservation Authorities Act* (Ontario), the *Trees Act* (Ontario), the *Forest Fire Prevention Act* (Ontario), the *Lakes and Rivers Improvement Act* (Ontario), the *Provincial Parks Act* (Ontario), the *Funeral, Burial and Cremation Services Act, 2002* (Ontario), the *Canada Wildlife Act* (Canada), the *Migratory Birds Convention Act, 1994* (Canada), the *Pest Control Products Act* (Canada) and the *Environmental Contaminants Act* (Canada);
 - (ii) all applicable rules, regulations, directives, protocols, guidelines, procedures, judgments, concessions, grants, franchises, licenses, agreements or any other government requirements, promulgated under or pursuant to any laws referred to in **paragraph (i)**;

- (iii) all applicable orders, decisions and exemptions rendered by Canada, Ontario or municipal governmental authorities promulgated under or pursuant to any laws referred to in **paragraph (i)** and relating to environmental matters pertaining to the TPM Services; and,
 - (iv) any other applicable laws, rules, regulations, policies, orders or decisions (including, Laws and Regulations) relating to environmental matters pertaining to the TPM Services, and which (with respect to **paragraphs (i), (ii) and (iii)**), would, in the ordinary and usual course of the development, design and/or construction of a King's Highway in the Province of Ontario, be recognized, followed and/or implemented by the Ministry and applicable Provincial Advisors.
- (z) "**Environmental Plan**" means the plan developed by the Service Provider set out as part of **Schedules 4, 5, and 6**.
- (aa) "**Event of Default**" means a Default that has not been remedied within the cure period provided in **Section 18.1** or **Section 18.3**, as the case may be..
- (ab) "**Facility**" means:
- (i) that part of the provincial highway identified and described in the Project Description and all improvements, paving, signage, chattels, machinery, equipment, materials, supplies, tools, appurtenances and fixtures forming part thereof or otherwise relating or ancillary thereto;
 - (ii) all buildings, erections, detours, barriers, supports, work and other structures, whether temporary or permanent, from time to time erected or located on the Facility Lands, or otherwise used or required in connection with the TPM Services;
 - (iii) all other physical plant, fixtures, appurtenances and tangible personal property, including inventories of any nature whatsoever from time to time contained on or attaching to the Facility Lands, or otherwise used or required in connection therewith; and
 - (iv) all mechanical, electrical and other systems installed, used or required in connection with any of the foregoing;
- but shall expressly exclude the Facility Lands.
- (ac) "**Facility Lands**" means the lands on which the Facility is located, and includes the lands, if any, acquired or to be acquired by the Ministry for the Facility.

- (ad) "**Force Majeure**" means any circumstance or act beyond the reasonable control of a party to this Agreement claiming Force Majeure, including but not limited to an intervening act of God or public enemy, war, blockade, civil commotions, fire, flood, tidal wave, earthquake, epidemic, quarantine restriction, a stop-work order or injunction, issued by a court or public authority having jurisdiction, or governmental embargo, which delays the performance of any obligation created by this Agreement beyond its scheduled time, provided such circumstance or act is not expressly dealt with under this Agreement or does not arise by reason of:
- (i) the negligence or wilful misconduct of the party claiming Force Majeure or those for whom it is responsible at law;
 - (ii) any act or omission by the party claiming Force Majeure (or those for whom it is responsible at law) in breach of the provisions of this Agreement;
 - (iii) lack or insufficiency of funds or failure to make payment of monies or provide required security;
 - (iv) delays in obtaining Governmental Authorizations, which shall be dealt with in accordance with the provisions of **Section 4.9**.

provided further that, in the case of an event of Force Majeure affecting the Service Provider, the Service Provider notifies the Ministry as soon as possible and in any event within five (5) Business Days following the date upon which the Service Provider first becomes aware (or should have been aware, using all reasonable due diligence) of such event so that the Ministry may verify same.

- (ae) "**General Conditions of Contract**" means the Ministry of Transportation (Ontario) General Conditions of Contract, as amended by the Ministry from time to time.
- (af) "**Government Systems**" has the meaning ascribed thereto in **Section 23.1**.
- (ag) "**Governmental Authorization**" means any approval, authorization, consent, waiver, variance, exemption, license, filing, registration, permit, notarization, special lease or other requirement of any federal, provincial, or municipal governmental, quasi-governmental, judicial, public or statutory authority, commission, tribunal, agency, department, ministry local board, body or entity pertaining to the TPM Services, which shall be necessary to proceed with the TPM Services or any part thereof which, in the ordinary and usual course of the development, design and/or construction of a King's Highway in the

Province of Ontario, would be recognized, followed and/or implemented by the Ministry and applicable Provincial Advisors.

- (ah) "**Hazardous Substance**" means, but is not limited to, any solid, liquid, gas or other substance or emission which is a contaminant, pollutant, dangerous substance, liquid waste, industrial waste, hazardous material or hazardous substance which is or becomes regulated by Laws and Regulations or which is classified as hazardous or toxic thereunder.
- (ai) "**Hourly Billing Rate**" means the hourly cost to the Ministry per individual for the following costs: salary, benefits, overhead, payroll burden and profit, but shall not include living and travel expenses and equipment costs.
- (aj) "**Intellectual Property**" means any intellectual, industrial or other proprietary right of any type in any form protected or protectable under the laws of Canada, any foreign country, or any political subdivision of any country, including, without limitation, any intellectual, industrial or proprietary rights protected or protectable by legislation, by common law or at equity;
- (ak) "**Laws and Regulations**" means, in addition to Environmental Laws as defined hereunder any and all applicable federal, provincial, or municipal laws, by-laws, codes, orders, rules, regulations or statutes affecting the TPM Services, including, but not limited to, the *Highway Traffic Act (Ontario)*, the *Pay Equity Act (Ontario)*, the *Construction Lien Act (Ontario)*, the *Municipal Act (Ontario)*, the *Aggregate Resources Act (Ontario)*, the *Drainage Act (Ontario)*, the *Public Transportation and Highway Improvement Act (Ontario)*, the *Public Service Works on Highways Act (Ontario)*, the *Labour Relations Act (Ontario)*, the *Occupational Health and Safety Act (Ontario)*, the *Workplace Safety and Insurance Act, 1997 (Ontario)*, the *Bridges Act (Ontario)*, the *Public Utilities Act (Ontario)*, the *Public Lands Act (Ontario)*, the *Criminal Code of Canada* and those relating to fire, safety, land use, health, labour, seismic design, conservation, parking, handicapped access, zoning, building, taxation and financing which, in connection with any of the foregoing, in the ordinary and usual course of the development, design and/or construction of a King's Highway in the Province of Ontario, would be recognized, followed and/or implemented by the Ministry and applicable Provincial Advisors.
- (al) "**Lump Sum Price**" means the aggregate price payable by the Ministry to the Service Provider for the TPM Services, as set out in **Schedule 10**, in accordance with the terms and conditions of this Agreement.
- (am) "**Project Staffing and Organization Plan**" means the project staffing and organization plan (management plan) developed by the Service Provider for the implementation of the TPM Services, as set out in **Schedule 3**.

- (an) "**Ministry**" means His Majesty the King in Right of the Province of Ontario, represented by the Minister of Transportation for the Province of Ontario, and its permitted successors and assignees.
- (ao) "**Monthly Status Report**" means a monthly report of the Service Provider in a form agreed to by the parties from time to time, which shall include the following with respect to each Phase and the Facility as a whole:
- (i) a report on the status of the Project Schedule, including a list of the major activities performed by the Service Provider during the month, a report concerning the status of its Occupational Health and Safety Plan and a report on the status of the TPM Services;
 - (ii) a list of upcoming matters that will be submitted to the Ministry for Approval or will require resolution by the Ministry and a list of major activities to be performed in subsequent months;
 - (iii) a report on all identified deviations from the Technical Standards and Specifications and the Plans;
 - (iv) a list of progress against Deliverables achieved during the month, and the request for payment based on these Deliverables achieved during the month;
 - (v) the status of Construction Work, and any issues for resolution by the Ministry in accordance with the provisions of this Agreement or the Construction Contract;
 - (vi) a list of any deficiencies encountered in the Construction Work during the month, including any known or identified non-compliance with the Environmental Plan and the Construction Contract Documents, and the corrective action(s) taken or to be taken by the Contractor;
 - (vii) a revised overall Project Schedule with an updated project expenditure forecast for the Project; and
 - (viii) a list of any changes (including any change orders or change requests as defined under the Construction Contract) made, or proposed to be made, to the Construction Contract Documents in accordance with the provisions of this Agreement or the Construction Contract, including the Approval status of such changes.
- (ap) "**Newly Created Intellectual Property**" means any Intellectual Property created by the Service Provider in the course of performance of the TPM Services.

- (aq) **“Occupational Health and Safety Plan”** means the occupational health and safety plan as set out in **Schedule 9**.
- (ar) **"Payment Schedule"** means the manner and terms of payment of the Lump Sum Price as contemplated in **Article 13**, and as set out in **Schedule 10**.
- (as) **"Performance Appraisal"** means an interim, annual or final performance appraisal of the TPM Services, or a Post-Construction Engineering Appraisal of the Detailed Design Services.
- (at) **"Person"** means an individual, corporation, partnership, joint venture, association, trust, pension fund, union, governmental agency, board, tribunal, ministry, commission or department and the heirs, beneficiaries, executors, legal representatives or administrators of an individual.
- (au) **"Phases"** means the Planning Study Phase, the Preliminary Design Phase, the Detailed Design Phase, the Tender Phase and the Construction Contract Administration Phase of the Project, in combination, and "Phase" means any one of the Phases or the Phase indicated, as the case may be.
- (av) **"Plans"** means the Project Schedule, Payment Schedule, Ministry Acceptance/Approvals, Project Staffing and Organization Plan, Planning Study Plan, Preliminary Design Plan, Detailed Design Plan, Construction Contract Administration Plan and Quality Control of TPM Services Plan.
- (aw) **“Planning Study Plan”** means the plan developed by the Service Provider to complete the Planning Study Services, as set out in **Schedule 4**.
- (ax) **“Planning Study Services”** has the meaning assigned thereto in **Section 5.1**.
- (ay) **"Preliminary Design Plan"** means the plan developed by the Service Provider to complete the Preliminary Design Services, as set out in **Schedule 5**.
- (az) **"Preliminary Design Services"** has the meaning ascribed thereto in **Section 6.1**.
- (ba) **“Professional Engineer”** means a professional engineer licenced to practice in Ontario.
- (bb) **"Project"** means the planning study, preliminary design, detailed design, tendering and the construction administration of the construction of the Facility all as contemplated in this Agreement.

- (bc) "**Project Description**" means the project description as set out in **Schedule 1**.
- (bd) "**Project Schedule**" means the project schedule attached hereto as **Schedule 2** and as described in **Section 4.2**.
- (be) "**Provincial Advisors**" means, collectively, the respective agents, advisors, consultants, engineers, auditors, employees, representatives, contractors, subcontractors and workmen, as the context may require, of the Ministry.
- (bf) "**Quality Control of TPM Services Plan**" has the meaning ascribed thereto in **Section 4.6** and as set out in **Schedule 8**.
- (bg) "**Rate of Interest**" means the general rate of interest on overpayment of taxes set pursuant to the *Financial Administration Act* in effect on the date that the payment went into arrears.
- (bh) "**Record Documents**" means the documents which form a record of the Project, all prepared in accordance with **Schedule 7**.
- (bi) "**Related Person**" or "**Persons related to each other**" has the meaning ascribed thereto in the *Income Tax Act* (Canada).
- (bj) "**Retention Period**" has the meaning ascribed thereto in **Section 11.3**.
- (bk) "**Scope Change**" means a Change Order or an Approved Change Request.
- (bl) "**Service Provider's Commencement Date**" means the date of execution of the Agreement by all parties.
- (bm) "**Service Provider's Intellectual Property**" means Intellectual Property owned by the Service Provider prior to its performance of the TPM Services or created by the Service Provider during this Agreement but independently of its performance of the TPM Services.
- (bn) "**Site Investigation and Field Testing Plan**" means the plan developed by the Service Provider set out as part of **Schedules 4, 5, and 6**.
- (bo) "**Technical Services**" has the meaning ascribed thereto in **Section 3.7**.
- (bp) "**Technical Standards and Specifications**" means any and all requirements, specifications, standards, directives, protocols, guidelines, policy statements and procedures issued, utilized or adopted from time to time, by the Ministry or any federal, regional, municipal or local government,

public or statutory authority, commission, tribunal, agency, department, ministry, body or other governmental unit or entity applicable to the TPM Services or any part thereof which, in the ordinary and usual course of the development, design and/or construction of a King's Highway in the Province of Ontario, would be recognized, followed and/or implemented by the Ministry and/or applicable Provincial Advisors, including those requirements, specifications and standards set out in **Schedule 11**, as such requirements, specifications and standards may be amended, supplemented or replaced from time to time.

- (bq) "**Tender Documents**" means those documents to be submitted by the Service Provider to the Ministry in order to undertake the Tender Services prepared in accordance with the provisions of **Schedule 1**.
- (br) "**Tender Services**" has the meaning ascribed thereto in **Section 8.1**.
- (bs) "**Third-Party Intellectual Property**" means any Intellectual Property owned by a party other than His Majesty the King in right of Ontario or the Service Provider.
- (bt) "**TPM Services**" means, without duplication, collectively, those functions, duties and services to be performed by the Service Provider provided for in this Agreement, including the Planning Study Services, the Preliminary Design Services, the Detailed Design Services, the Tender Services and the Construction Contract Administration Services, together with all Deliverables provided in accordance with this Agreement, and such deletions or additions made thereto from time to time pursuant to the terms of this Agreement.

1.2 Construction of Agreement

In this Agreement:

- (a) words denoting the singular include the plural and vice versa and words denoting any gender include all genders;
- (b) the word "**including**" shall mean "including without limitation";
- (c) any reference to a statute shall mean the statute in force as at the date hereof, together with all regulations promulgated thereunder, as the same may be amended, re-enacted, consolidated and/or replaced, from time to time, and any successor statute thereto, unless otherwise expressly provided;
- (d) when calculating the period of time within which or following which any act is to be done or step taken, the date which is the reference day in calculating

such period shall be excluded. If the last day of such period is not a Business Day, the period shall end on the next Business Day;

- (e) all dollar amounts are expressed in Canadian Dollars;
- (f) any tender of documents or money under this Agreement may be made upon the parties or their respective counsel and money may be tendered by bank draft drawn upon a Schedule I or Schedule II Canadian chartered bank or by negotiable cheque payable in Canadian Dollars and certified by a Schedule I or Schedule II Canadian chartered bank;
- (g) the division of this Agreement into separate Articles, Sections, Subsections and Schedules, the provision of a table of contents and the insertion of headings is for convenience of reference only and shall not affect the construction or interpretation of this Agreement;
- (h) words or abbreviations which have well known or trade meanings are used herein and in the Construction Contract Documents in accordance with their recognized meanings; and
- (i) all monies due and payable hereunder shall bear interest at the Rate of Interest from the date such monies are due to the date of payment.

1.3 Survival

- (a) All covenants, agreements, warranties and representations set forth in this Agreement or in any certificate or other instrument or document delivered by or on behalf of the Service Provider pursuant to this Agreement shall be deemed to have been relied upon by the Ministry and shall, unless expressly provided otherwise, survive the execution of this Agreement and continue in full force and effect in accordance with the terms of this Agreement notwithstanding investigations heretofore or hereafter made by the Ministry or any payment hereunder, until the later of:
 - (i) performance by the Service Provider of all of its duties and obligations hereunder; or
 - (ii) the expiry of any warranty referred to in **Article 17**.
- (b) All covenants, agreements, warranties and representations set forth herein or in any certificate or other instrument or documentation delivered by or on behalf of the Ministry pursuant hereto shall be deemed to have been relied upon by the Service Provider notwithstanding investigations heretofore or hereafter made by the Service Provider and shall, unless expressly provided otherwise, survive the execution of this Agreement and continue

in full force and effect in accordance with the terms of this Agreement until the later of:

- (i) performance by the Ministry of all of its duties and obligations hereunder; or
- (ii) the termination of this Agreement.

1.4 Schedules

Each of the following plans/documents constitute a “Schedule” and is a part of this Agreement and is incorporated herein by the reference number and is deemed to be a part of hereof.

SCHEDULE	REFERENCE NUMBER
RFP Documents	1
Project Overview and Schedule Plan	2
Staffing and Organization Plan	3
Planning Study – Functional Category Plan(s)	4
Preliminary Design Plan – Functional Category Plan(s)	5
Detailed Design Plan – Functional Category Plan(s)	6
Construction Contract Administration Plan	7
Quality Control Plan	8
Occupational Health and Safety Plan	9
Payment Schedule	10
Technical Standards and Specifications	11
Ministry Acceptance/Approvals	12
Ministry Work and Reimbursable Services	13

In the event of a conflict or inconsistency in the contents of the following documents, such documents shall take precedence and govern in the following order:

- (a) the Legal Terms and Conditions (without the Schedules);
- (b) the portion of a Schedule derived from the Service Provider’s Proposal; and
- (c) the portion of a Schedule derived from the Request for Proposals.

In the event that a Service Provider’s Proposal is silent regarding a requirement set out in the Request for Proposals, the requirement set out in the Request for Proposals shall be deemed to be included in the Proposal.

The foregoing provisions shall apply with alterations when necessary to any amendment, supplement or addendum to this Agreement.

ARTICLE 2 APPOINTMENT AND RELATIONSHIP

2.1 Appointment

Subject to and in accordance with the provisions of this Agreement, the Ministry hereby appoints and retains the Service Provider to perform the TPM Services and act on its behalf for such purposes as are necessary to the Service Provider's rendering of the TPM Services, and the Service Provider hereby accepts and agrees to its appointment and retainer as the Service Provider to perform the TPM Services and agrees to provide and perform the TPM Services in accordance with the terms and conditions hereof, and the Ministry shall compensate the Service Provider in the manner and on the terms and conditions provided for herein.

2.2 Authority of the Service Provider

Subject to the provisions of this Agreement, the Service Provider shall not have any authority to bind the Ministry in respect of the TPM Services or any aspect thereof, except in the manner and on the terms as may be expressly provided for hereunder. The Service Provider's authority is limited to:

- (a) on behalf of the Ministry, carrying out all Ministry duties and obligations under the Construction Contract Documents and all references therein to the Ministry shall mean the Service Provider for the purposes of this Agreement, with the exceptions expressly provided for in this Agreement;
- (b) administering the construction of the Project and the Construction Work in accordance with the Technical Standards and Specifications and the Construction Contract Documents;
- (c) taking any reasonable action the Service Provider deems necessary where, in the opinion of the Service Provider, a matter poses imminent danger to the safety of any Persons or the environment;
- (d) authorizing a change to the Construction Work or to the Approved utility relocation plan, to a value of not more than Thirty Thousand Dollars (\$30,000) per occurrence; and
- (e) dealing with government agencies and the general public to resolve issues that develop throughout the term hereof until the Completion Date; provided that issues of a precedential or novel nature shall be referred for decision to the Ministry along with recommendations on options for resolution of same.

2.3 Non-Exclusivity

The retainer by the Ministry of the Service Provider to perform the TPM Services is not exclusive. The Ministry reserves the right to contract for the performance of identical or similar services by any other Person without limitation or restriction, provided that the Service Provider shall not be liable for its failure to perform a TPM Service to the extent that any such Person prevents, prejudices or compromises the performance of such TPM Services by the Service Provider.

2.4 **No Partnership**

It is understood and agreed that nothing contained in this Agreement shall constitute or be deemed to create a partnership or joint venture between the parties hereto.

2.5 **Performance**

It is understood and agreed that the Service Provider's performance hereunder will be evaluated by the Ministry for future assignment purposes.

ARTICLE 3

DUTIES OF THE MINISTRY

3.1 **Ministry Roles and Responsibilities**

The Ministry shall, on the terms and conditions of this Agreement, provide: (i) such advice and assistance in respect of each Phase of the Project as the Service Provider reasonably requests and that the Ministry is reasonably able to provide; and (ii) if appropriate, as contemplated in **Section 3.3**, such Approvals as are required to be provided by the Ministry pursuant to this Agreement.

3.2 **Other Ministry Work**

Subject to the terms and conditions of this Agreement, the Ministry shall:

- (a) at the Ministry's expense, participate in progress meetings, including the pre-start meeting with the Contractor, such meetings to be organized by the Service Provider, other than the pre-start meeting with the Contractor which shall be organized by the Ministry;
- (b) at the Ministry's expense conduct such audit(s) of any and all aspects of the TPM Services, as the Ministry, in its sole discretion, determines;
- (c) address all public policy issues related to the Project, if any;

- (d) provide access to and the use of the documents listed in **Schedule 1**. The Ministry warrants that the information and data supplied therein is complete and accurate in all material respects subject to the limitations set out therein and can be relied upon with the following limitations and exceptions:
 - (i) any interpretations of data or opinions expressed in any of the reports are subject to the limitations contemplated therein; and
 - (ii) although the raw measured data presented in the same is warranted, the Service Provider must satisfy itself as to sufficiency of the information presented and obtain any updating or additional information, and perform any studies, analysis or investigations the Service Provider deems necessary in order to properly perform the TPM Services;
- (e) approve the Design Criteria and the request for property acquisition produced by the Service Provider as part of the Preliminary Design and Detailed Design Services;
- (f) acquire all property based on the Approved request for property acquisition in accordance with the timetable set out in the Approved request;
- (g) accept the TPM Services;
- (h) decide, in its sole discretion, whether to submit the Planning Study, Preliminary Design and/or the Detailed Design Services to a Design Assessment;
- (i) provide a location for document pickup by tenderers, receive, open and review the tender bids and Approve the award of the Construction Contract and execute the Construction Contract with the successful Contractor;
- (j) approve Change Requests to this Agreement and, subject to **Section 2.2**, any changes to the Construction Contract Documents;
- (k) approve any detailed utility relocation plan subject to **Section 2.2** and pay for the cost of the utility relocations subject to the Ministry cost sharing agreement with the affected utility; and
- (l) print copies of the Construction Contract Documents for tender purposes and arrange for advertising of the tender.

3.3 Approvals and Consents

Wherever the provisions of this Agreement require or provide for an Approval or consent of or to any action, document or other matter contemplated by this Agreement, this Agreement shall (unless the text hereof expressly states otherwise) be deemed to provide that:

- (a) such request for Approval or consent shall be in writing and shall:
 - (i) contain or be accompanied by any documentation or information required for such Approval or consent;
 - (ii) clearly set forth the matter in respect of which such Approval or consent is being sought;
 - (iii) form the sole subject matter of the correspondence containing such request for Approval or consent; and
 - (iv) clearly state that such Approval or consent is being sought;
- (b) such Approval or consent shall be in writing and shall not be unreasonably or arbitrarily withheld or delayed (unless the text hereof expressly states otherwise);
- (c) the Ministry shall, expeditiously after the giving of a notice requesting an Approval or consent, advise the Service Provider by notice in writing either that the Ministry consents or Approves or that it withholds its consent or Approval in which case it shall set forth, in reasonable detail, its reasons for withholding its consent or Approval; and
- (d) if the responding notice mentioned in subsection (c) indicates that the Ministry does not Approve or consent, the Service Provider shall promptly take all steps necessary to satisfy the objections of the Ministry set out in the responding notice and thereupon, shall resubmit such request for Approval or consent from time to time and the provisions of this **Section 3.3** shall again apply until such time as the Approval or consent of the Ministry is finally obtained.

3.4 **Inspection**

The Ministry shall have the right, at all reasonable times, to inspect or otherwise review the TPM Services performed, or being performed, and the premises where the TPM Services are being performed.

3.5 **Ministry Assistance, Inspections and Approvals**

The Service Provider shall not be exempt from any obligation or liability under

this Agreement notwithstanding that the Ministry or Provincial Advisors may provide assistance, services, reviews, approvals or consents to the Service Provider or on its behalf, or that the Ministry or Provincial Advisors may conduct tests. By providing assistance, services, reviews, approvals or consents, or by conducting tests, the Ministry shall not thereby be considered to have waived compliance with any duties or obligations of the Service Provider under this Agreement.

The Ministry agrees that where the Ministry or Provincial Advisors approve changes to Technical Standards and Specifications, the foregoing limitation on Ministry liability shall not apply, if the Ministry or Provincial Advisors were negligent in the approval of such changes.

3.6 **Permit and Agreement Assistance**

Upon the prior written request of the Service Provider, the Ministry shall, subject to availability, retain Provincial Advisors at the expense of the Ministry to provide reasonable assistance to the Service Provider so as to facilitate the obtaining of Governmental Authorizations and the negotiation of agreements with any federal, provincial, regional or local, government, public or statutory authority, commission, tribunal, agency, department, ministry, body or other governmental unit or entity required for the TPM Services and for which the Service Provider is responsible under this Agreement; provided that nothing herein shall be construed as a guarantee or warranty by the Ministry that such assistance will be provided or that such Governmental Authorizations or agreements will be available or as a waiver of the requirement for the Service Provider to obtain same. Any rights or obligations of the Ministry hereunder may be exercised or fulfilled by Provincial Advisors or as the Ministry otherwise considers appropriate, in its sole discretion.

3.7 **Technical Services**

Upon the prior written request of the Service Provider and at the Service Provider's expense in accordance with **Section 3.8**, the Ministry shall, subject to availability, retain Provincial Advisors to provide the Service Provider with reasonable design technical services so as to reasonably facilitate and assist the Service Provider in applying or implementing applicable design standards and procedures (the "**Technical Services**"). The foregoing shall only apply to design technical services which would otherwise be within the scope of the TPM Services, and shall not apply to requests by the Service Provider for the provision of such information, clarifications and related assistance as is normally and customarily incidental to the provision of the TPM Services.

3.8 **Reimbursable Services**

The reasonable costs and expenses incurred by the Ministry relating to those Technical Services provided by or on behalf of the Ministry to the Service Provider and

requested by the Service Provider pursuant to **Section 3.7** shall result in a reduction to the fees in accordance with the provisions of **Schedule 13**.

3.9 **Payment**

The Ministry shall pay the Service Provider pursuant to **Article 13**, subject to **Article 12**.

ARTICLE 4 DUTIES OF THE SERVICE PROVIDER

4.1 **General Duties**

The Service Provider shall provide and perform the TPM Services, including those referred to in this **Article 4** and **Articles 5, 6, 7, 8, 9, 10 and 11**. All TPM Services shall be provided or performed in accordance with all of the terms of this Agreement, including the Project Schedule, and in strict compliance with the Project Staffing and Organization Plan, as amended in accordance with the terms hereof.

4.2 **Project Schedule**

Except in circumstances in which the Contractor otherwise has this responsibility, the Service Provider shall implement the Project Schedule, and provide to the Ministry as part of the Monthly Status Reports an updated Project Schedule. It is understood and agreed that the Project Schedule will be subject to ongoing modification and amendment, except for the milestones set out therein which shall not be modified without Approval of the Ministry, not to be unreasonably withheld, or except as a result of an event of Force Majeure.

4.3 **Approvals**

The Service Provider shall obtain Approvals with respect to each aspect of the TPM Services requiring Approval in accordance with **Schedule 12**, prior to proceeding with that aspect.

4.4 **Standard of Care**

Without limiting the obligations and liabilities of the Service Provider under this Agreement, the Service Provider shall carry out its duties hereunder diligently and expeditiously, in good faith, in a safe, reasonable and prudent manner and in accordance with prevailing good business practices and management techniques.

4.5 **Standards**

The Service Provider shall carry out its duties hereunder, and cause, and take all

steps and actions necessary to cause, each portion of the TPM Services to be performed in compliance with (unless otherwise Approved) and so as to implement:

- (a) all Technical Standards and Specifications, the Project Description and the Plans;
- (b) all applicable Governmental Authorizations;
- (c) all Laws and Regulations, including all Environmental Laws, the *Occupational Health and Safety Act* (Ontario), the *Ontario Human Rights Code*, the *Pay Equity Act* (Ontario) and the *Workplace Safety and Insurance Act, 1997 (Ontario)*;
- (d) all Construction Contract Documents subject to **Sections 2.2 (a) and (b)**; and
- (e) the results of any studies and tests related to the TPM Services and carried out in accordance with the provisions of this Agreement, and the Service Provider shall, upon the request of the Ministry at any time during the term of this Agreement, provide satisfactory proof of compliance with same.

4.6 **Quality Control of TPM Services Plan**

- (a) The Service Provider shall have in place quality assurance, quality control and risk management procedures for the TPM Services (the "**Quality Control Plan**") acceptable to the Ministry acting reasonably. The Quality Control of TPM Services Plan shall become **Schedule 8** to this Agreement.
- (b) Prior to the Ministry's acceptance of the Quality Control Plan as set out in subsection (a), the Service Provider shall implement and cause to be complied with, reasonable quality assurance, quality control and risk management procedures for the TPM Services.
- (c) The Service Provider shall employ generally accepted engineering principles prevailing at the time the TPM Services are performed, principles of quality assurance, quality control and risk management except as otherwise specified in the Agreement and shall skilfully and competently perform the TPM Services and shall employ only skilled and competent staff who will be under the supervision of the Service Provider.

4.7 **Representative**

The Service Provider shall designate a representative who shall represent the Service Provider at all times throughout the currency of this Agreement in accordance with the Project Staffing and Organization Plan. The Service Provider may at any time

and from time to time, replace the designated representative upon receipt of the Ministry's Approval for the new representative, such Approval not to be unreasonably withheld. The Service Provider shall, upon the request of the Ministry, remove any representative of the Service Provider who, in the opinion of the Ministry, acting reasonably, is performing improperly, or is not performing in an acceptable manner and shall replace the representative so removed with another in accordance with the provisions of this **Section 4.7**.

4.8 Professionals, Consultants and Key Personnel

- (a) The Service Provider shall retain or employ those professionals or consultants set out in the Plans and may retain or employ other professionals and consultants to assist the Service Provider in the performance of the TPM Services. The Service Provider shall not engage or permit to be engaged any professional or consultant in connection with the performance of the TPM Services, or any part thereof, other than those qualified and with demonstrated experience in the area of assignment relative to the performance of the TPM Services. The Service Provider shall not replace any individual with an individual who does not possess comparable qualifications and experience as the individual being replaced. The Service Provider shall forthwith notify the Ministry in writing of any such replacement. The Ministry may require the Service Provider to replace any individual retained or employed by the Service Provider, if the Ministry determines such individual to be unacceptable.
- (b) Notwithstanding the retention or employment of any such professionals or consultants, the Service Provider shall be fully responsible for the performance of the TPM Services in accordance with the provisions of this Agreement and such retention or employment shall not relieve or exempt the Service Provider from any obligations or liabilities with respect to the performance of the TPM Services hereunder. Nothing herein contained shall be deemed to create any contractual or agency relationship between the Ministry and any such professionals or consultants and the Service Provider shall be fully responsible for all fees and expenses charged by such professionals or consultants and shall indemnify and save the Ministry harmless therefrom.

4.9 Governmental Authorizations

- (a) Except for the Governmental Authorizations described in **subsection 4.9(b)**, the Service Provider shall make best efforts to cause all other Governmental Authorizations as are necessary in connection with the TPM Services to be obtained, promptly renewed and maintained in good standing. The Service Provider shall also cause such Governmental

Authorizations to be complied with, provided that compliance is within the control of the Service Provider.

- (b) Notwithstanding **subsection 4.9(a)**, if, after due and proper application for a Governmental Authorization necessary in connection with the TPM Services, payment of the prescribed application fees (if any) and the diligent efforts in pursuit thereof, the Service Provider is unable to obtain, comply with, renew or maintain, or cause to be obtained, complied with (provided that compliance is within the control of the Service Provider), renewed or maintained, such Governmental Authorization by reason of:
- (i) the imposition of terms and/or conditions by the relevant governmental authority that cannot be satisfied by the Service Provider, except by taking extraordinary steps or measures or incurring or assuming extraordinary obligations; or
 - (ii) the arbitrary refusal by the relevant governmental authority to provide or grant such Governmental Authorization,

as determined by the Service Provider acting reasonably and as confirmed by the Ministry then the consequences in respect of the Project Schedule and the Lump Sum Price, as the case may be, shall be dealt with as a Scope Change in accordance with the provisions of **Section 13.2** hereof.

4.10 Conflict of Interest

The Service Provider shall (a) avoid any Conflict of Interest in the performance of the TPM Services; (b) disclose without delay any actual or potential Conflict of Interest that arises during the performance of the TPM Services; and (c) comply with any requirements prescribed by the Ministry to resolve any Conflict of Interest. In addition to all other contractual rights or rights available at law or in equity, the Ministry may, at its sole and absolute discretion, immediately terminate this Agreement upon giving notice to the Service Provider where (a) the Service Provider fails to disclose an actual or potential Conflict of Interest; (b) the Service Provider fails to comply with any requirements prescribed by the Ministry to resolve a Conflict of Interest; or (c) the Service Provider's Conflict of Interest cannot be resolved. This paragraph shall survive any termination or expiry of this Agreement.

“Conflict of Interest” includes, but is not limited to, any situation or circumstance where in relation to the performance of the TPM Services, the Service Provider's other commitments, relationships or financial interests (i) could or could be seen to exercise an improper influence over the objective, unbiased and impartial exercise of its independent judgment; or (ii) could or could be seen to compromise, impair or be incompatible with the effective performance of the TPM Services.

4.11 Workplace Safety and Insurance

The Service Provider is responsible for all costs associated with workplace accidents and all premiums or assessments owing to the Workplace Safety and Insurance Board ("W.S.I.B.") or applicable insurance company as related to the TPM Services. Upon request by the Ministry, the Service Provider shall furnish evidence of coverage for its employees and those of its subcontractors, as applicable, as required by the *Workplace Safety and Insurance Act, 1997 (Ontario)* or the applicable insurance policy, as related to the TPM Services. The Ministry may deduct from any monies payable or returnable to the Service Provider under the Agreement, such sums of money sufficient to cover any default of the Service Provider to the W.S.I.B. or insurance company for premiums or assessments and any costs for income replacement, medical aid or rehabilitation, arising from an accident.

The Service Provider shall hold a valid WSIB clearance certificate that is updated as necessary and that shall be made available to the Ministry on request.

4.12 Occupational Health And Safety

- (a) The TPM Service Provider shall carry out all TPM Services in accordance with the Occupational Health and Safety Plan and the *Occupational Health and Safety Act (Ontario)* (the "**OHSA**") and its regulations. With respect to its own workers and subcontractors, if any, the Service Provider will be responsible for meeting all of the obligations under the OHSA. This includes, but is not limited to, the duties to: provide a safe workplace, provide information and educate workers on workplace hazards, appoint a competent supervisor, prepare and provide a health and safety policy, implement a comprehensive health and safety program to support such policy and take every reasonable precaution to protect the health and safety of its workers.
- (b) The Service Provider shall:
 - (i) provide advance notice of the proposed starting date and time, estimated duration, and location of the work to:
 - (I) the Ministry Regional Operations Engineer/Engineering Services Coordinator if there is no ongoing capital construction work in the area, and if there is work in the area the Regional Contracts Engineer/Contract Control Officer responsible for the contract for the work in the area; and
 - (II) the Ministry project manager;

- (ii) ensure that TPM Services do not start, or will stop, if another consultant/service provider is working in the area. An alternate schedule is to be worked out with the Ministry such that the Service Provider's work does not create hazards that impact on another consultant/service provider. This can be accomplished by separating consultants/service providers through time and space, establishing communications plans so that they can work safely together, etc.; and
 - (iii) ensure that TPM Services are not carried out near or within the confines of a construction project without Ministry approval and direction as this action could implicate the Ministry as a constructor for the purposes of the OHSA.
- (c) The Ministry considers worker safety to be an important aspect of this Agreement. The Ministry may conduct audits to monitor compliance with the Occupational Health and Safety Plan and the OHSA as required by this Agreement. The Ministry may terminate this Agreement in the event that the Service Provider (or its subcontractors) demonstrates repeatedly poor performance, which the Ministry shall in its sole discretion determine, with respect to its workers' occupational health and safety on this assignment or complying with the OHSA and applicable regulations thereunder.
- (d) If it appears that the Service Provider or its employees are violating the OHSA or its Regulations, not following safe work practices, or not performing their proper functions the Ministry shall advise the Service Provider immediately, in writing, of the necessary requirements and the Ministry's expectations. The Service Provider shall investigate and correct such default.
- (e) The Ministry may stop the work of the Service Provider if a contravention of the OHSA or its regulations is identified and there is an immediate danger to the health or safety of a worker. This direction will stand until the Service Provider addresses the contravention and reports back to the Ministry. The Service Provider shall be responsible for all costs associated with the stopping of the work and the contravention.
- (f) In the event of:
 - (i) an accident causing death; or
 - (ii) critical injury (as prescribed by O.Reg. 834, R.R.O. 1990, as amended),

the Service Provider shall, in addition to all other legal requirements, notify the Ministry immediately and, within five (5) days of such event, provide the

Ministry with a detailed report which shall include the information listed below:

- (i) employer information, contact name, contact telephone number;
 - (ii) description of the accident/incident (who, what, when, where, how);
 - (iii) description of the injury;
 - (iv) recommendations to prevent a future occurrence; and
 - (v) confirmation that all legislative notification requirements have been fulfilled.
- (g) The Service Provider shall immediately notify the Ministry of any Ministry of Labour ("**MOL**") orders or charges issued to the Service Provider. Copies of all MOL orders or charges shall be provided immediately to the Ministry.
- (h) The Service Provider including all parties hired by the Service Provider shall work in accordance with the OHSA and its regulations. At a minimum, the Service Provider shall include in any of its agreements with subcontractors, the ability to terminate such subcontracts for non-compliance with the OHSA or its regulations, or the rules and policies of the Service Provider or for failing to protect the safety of its workers.

ARTICLE 5 - NA **PLANNING STUDY PHASE**

5.1 Duties

Subject to the provisions of this Agreement, the Service Provider shall perform and complete, or cause to be performed and completed, the planning study services necessary or advisable to complete the planning study phase (the "**Planning Study Services**"), as set out in **Schedules 1 and 4**, the Plans, the Technical Standards and Specifications and the Project Description, and the Service Provider shall conduct the Planning Study Services in accordance with the ordinary and usual course of the planning study phase of a King's Highway.

5.2 Approvals for Planning Study

The Service Provider shall obtain or cause to be obtained Approval from the Ministry for all aspects of the Planning Services in accordance with **Schedule 12**, and subject to the provisions of this Agreement.

5.3 Completion of Planning Study Services

Upon completion of the Planning Study Services, the Service Provider shall prepare and deliver to the Ministry, copies of the complete planning study deliverables for

the Project, in both hard copy and electronic form, in a format acceptable to the Ministry, acting reasonably. The reports and related documentation issued shall be signed by a Professional Engineer.

ARTICLE 6 - NA **PRELIMINARY DESIGN PHASE**

6.1 Duties

Subject to the provisions of this Agreement, the Service Provider shall perform and complete, or cause to be performed and completed, the preliminary design services necessary or advisable to complete the preliminary design phase (the "**Preliminary Design Services**"), as set out in **Schedules 1 and 5**, the Plans, the Technical Standards and Specifications and the Project Description, and the Service Provider shall conduct the Preliminary Design Services in accordance with the ordinary and usual course of the preliminary design phase of a King's Highway.

6.2 Approvals for Preliminary Design

The Service Provider shall obtain or cause to be obtained Approval from the Ministry for all aspects of the Preliminary Design Services in accordance with **Schedule 12**, and subject to the provisions of this Agreement.

6.3 Completion of Preliminary Design Services

Upon completion of the Preliminary Design Services, the Service Provider shall prepare and deliver to the Ministry, copies of the complete preliminary design Deliverables for the Project, in both hard copy and electronic form, in a format acceptable to the Ministry, acting reasonably. The reports and related documentation issued shall be signed by a Professional Engineer.

ARTICLE 7 - NA **DETAILED DESIGN PHASE**

7.1 Duties

Subject to the provisions of this Agreement, the Service Provider shall perform and complete, or cause to be performed and completed, the detailed design services necessary or advisable to complete the detailed design phase (the "**Detailed Design Services**"), as set out in **Schedules 1 and 6**, the Plans, the Technical Standards and Specifications and the Project Description, and the Service Provider shall conduct the Detailed Design Services in accordance with the ordinary and usual course of the detailed design phase of a King's Highway.

7.2 Approvals for Detailed Design

The Service Provider shall obtain or cause to be obtained Approval from the Ministry for all aspects of the Detailed Design Services in accordance with Ministry Acceptance/Approvals and subject to the provisions of this Agreement.

7.3 Completion of Detailed Design Services

Upon completion of the Detailed Design Services, the Service Provider shall prepare and deliver to the Ministry the complete Tender Documents for the Project including the detailed construction drawings, tender quantity forms, material lists, specifications and information to bidders, in both hard copy and electronic form, in a format acceptable to the Ministry, acting reasonably. The detailed construction drawings shall be sealed by a Professional Engineer. Structural and foundation drawings shall be sealed by two Professional Engineers.

ARTICLE 8 - NA TENDER PHASE

8.1 Duties

Subject to the provisions of this Agreement, the Service Provider shall implement and complete the tasks and services necessary or advisable to facilitate the Ministry's award of the Construction Contract as contemplated herein (the "**Tender Services**"), in accordance with the Plans, including the following services:

- (a) provide to the Ministry copies of a complete set of Tender Documents, and one electronic copy;
- (b) prepare addenda to the Tender Documents as required during the Tender Phase and respond to questions at the request of the Ministry;
- (c) attend at and conduct any pre-bid site meetings at the request of the Ministry; and
- (d) implement the Quality Control of TPM Services Plan with respect to the Tender Services.

8.2 Compliance with Ministry Process

The Tender Services shall be performed in accordance with the Plans and in compliance with the Ministry's conventional construction tendering process, the General

Conditions of Contract, and the Supplemental General Conditions of Contract, as the same may be amended from time to time.

ARTICLE 9 - NA **CONSTRUCTION CONTRACT ADMINISTRATION PHASE**

9.1 Duties

Subject to the provisions of this Agreement, the Service Provider shall perform and complete, or cause to be performed and completed, all construction contract administration services necessary or advisable to complete the Construction Phase (the "**Construction Contract Administration Services**"), in accordance with **Schedules 1 and 7**, the Plans, the Technical Standards and Specifications and the Project Description, and the Service Provider shall conduct the Construction Administration Services in accordance with the ordinary and usual course of the construction administration phase of a King's Highway.

Any and all shop drawings submitted by the Contractor to the Service Provider shall be for the sole purpose of ascertaining that the information set forth therein generally conforms with the design concept for the Facility and responsibility for the detail design inherent in the shop drawings shall remain with the Contractor. The performance of the Construction Contract is not the Service Provider's responsibility, nor are the Construction Contract Administration Services under **Article 9** rendered for the Contractor's benefit. No acceptance or approval by the Service Provider of the Contractor's work, whether express or implied, shall relieve the Contractor of its legal, professional and technical responsibility to the Ministry, and, subject to the obligation of the Service Provider hereunder, the Service Provider shall not be responsible for the Contractor's means, methods, techniques, sequences, procedures and equipment of any nature whatsoever, whether reviewed by the Service Provider or not, which are employed by the Contractor in executing or designing or administering any phases of the Construction Work, or placing into operation any plant equipment, or for safety precautions and programs incidental thereto. The Construction Contract Administration Services are rendered for the benefit of the Ministry only.

The Service Provider shall not take any action that would cause itself or the Ministry to be deemed the "constructor" for the purposes of the *Occupational Health and Safety Act* (Ontario). The Service Provider must not direct the Contractor's operation in any way, nor shall they coordinate any of the construction activities nor take any other action that would cause itself or the Ministry to appear to be the "constructor".

9.2 Record Documents

The Record Documents are to be submitted to the Ministry in accordance with **Schedule 7**.

ARTICLE 10 TESTS, STUDIES AND INVESTIGATIONS

10.1 Required Tests

The Service Provider shall perform or cause to be performed all tests referenced in the Site Investigation and Field Testing Plan and any tests, studies and investigations in connection with the TPM Services including, but not limited to, environmental, engineering, geological and hydrological investigations, wind tests, stress tests, structural tests, vibration and noise tests, and moisture and snow accumulation studies as may be required pursuant to and/or to reasonably establish that the design and construction of each portion of the Project are in general compliance with the Construction Contract Documents, all applicable Technical Standards and Specifications, and all Laws and Regulations, and shall provide to the Ministry copies of each report made in connection with such tests, studies or investigations.

10.2 Requested Tests

In addition to the tests, studies and investigations required pursuant to **Section 10.1**, the Service Provider shall perform or cause to be performed such tests, studies and investigations as may be reasonably requested by and at the expense of, the Ministry prior to and during performance of each portion of the TPM Services, and shall provide to the Ministry, copies of each report made in connection with such tests, studies or investigations.

10.3 Ministry May Perform Tests

Without limiting the provisions of **Sections 10.1** and **10.2** hereof and subject to **Section 2.3**, the Ministry shall be entitled, at any time and from time to time, to perform or cause the performance of any test, study, investigation or review in connection with the TPM Services as the Ministry may determine to be reasonably necessary or advisable in the circumstances, at the Ministry's expense, and the Service Provider shall furnish the Ministry with every reasonable assistance in connection with the carrying out of such tests, studies and investigations.

10.4 Inspection of TPM Services/Rejection of TPM Services

The Ministry shall, at all times, have access to the Facility and the Service Provider shall furnish the Ministry with every reasonable assistance for ascertaining that the TPM Services are being performed in accordance with the provisions and requirements of this Agreement.

ARTICLE 11 REPORTS AND RECORDS

11.1 Reports and Certificates

The Service Provider shall submit to the Ministry all Quality and status Reports as prescribed in the Terms of Reference after the Service Provider's Commencement Date.

11.2 Furnish Information

The Service Provider, at any and all reasonable times during normal business hours and upon reasonable notice, at the written request of the Ministry, shall furnish or cause to be furnished to the Ministry all such documents, information or materials regarding the performance of the TPM Services (including any Construction Contract Documents), as may be specified in such request and in the possession or control of the Service Provider.

11.3 Maintenance of Books and Records

The Service Provider shall maintain books, records, reports and other papers referenced in this **Section 11.3** for a period of ten (10) years following the Completion Date or earlier termination of this Agreement or such longer period as the Ministry may require (the “**Retention Period**”) provided prior written notice is given and shall make same available to the Ministry on not more than two (2) Business Days' prior notice. Prior to the expiry of the Retention Period, upon two (2) Business Days prior notice by the Ministry, the Service Provider shall turn over to the Ministry for its keeping the books, records, reports and other papers referenced in this Section and indicated in the notice.

11.4 Copies

Unless the Ministry shall otherwise direct the Service Provider in writing, the Service Provider shall, immediately following the preparation or receipt thereof, provide to the Ministry full and complete copies of all agreements, materials, studies, data, reports, requests, Approvals, notices, test results and other documents prepared or received by it in the course of or in connection with the performance of the TPM Services.

11.5 Additional Reports

The Service Provider shall prepare and submit to the Ministry such additional reports, materials, records, certificates, data and other documents as the Ministry may, from time to time, reasonably require in connection with the performance and completion of the TPM Services and the Ministry shall pay the reasonable costs thereof.

ARTICLE 12 CHANGES TO TPM SERVICES

12.1 Change Orders

- (a) The Ministry shall have the right, acting in good faith, from time to time and at any time, by written notice (the "**Change Order**") to the Service Provider to:
 - (i) prospectively revoke, in whole or in part, on a temporary or permanent basis, the authority granted to the Service Provider to perform any or all of the TPM Services; or
 - (ii) direct:
 - (a) the Service Provider to cause any or all of the TPM Services to be revised and the nature of such revision;
 - (b) new work or material to be added in addition to that provided for in the TPM Services; or
 - (c) the dimensions, character, quantity, quality, description, location or position of any part of the Project or the TPM Services to be dispensed with, deleted or changed; and/or
 - (iii) designate additional duties, functions or services of the Service Provider or Approvals.

In which event such revisions, new work or material changes, additional duties, functions, services or Approvals, as the case may be, shall constitute and form part of the TPM Services for any and all purposes of this Agreement.

- (b) Within ten (10) Business Days following the receipt by the Service Provider of a Change Order, the Service Provider shall advise the Ministry:
 - (i) the impact, if any, such changes will have on the TPM Services;
 - (ii) the cost of such changes;
 - (iii) whether the Service Provider considers that the change will impact the Project Schedule and/or the Lump Sum Price; and
 - (iv) any other impact(s), if any, such changes will have on this Agreement.
- (c) The cost impact of such proposed changes shall be determined by the Service Provider on the basis of the effort required, labour costs,

disbursements and expenses. Such costs, including any increase or reduction in the amount of any Lump Sum Price, shall be negotiated and agreed to in writing by the parties. Subject to **Section 12.1(d)**, if the Service Provider performs any such change prior to the parties agreeing in writing as to the cost of such change, the Service Provider shall only be entitled to claim any fee, cost, expense or disbursement from the Ministry on account of such change upon the parties agreeing in writing as to the cost of such change, and only in accordance with the terms of such agreement.

- (d) If the parties cannot agree as to whether a matter constitutes a change to the Project Schedule or the amount, if any, by which the Lump Sum Price shall be increased or reduced, within ten (10) Business Days of receipt by the Ministry of the information set out in **Section 12.1(b)**, such issue shall be resolved in accordance with the dispute resolution procedures set out in **Article 19**; provided that if in the Ministry's opinion the change is required to be proceeded with, then the Service Provider shall, pending such resolution, nonetheless proceed to perform the services required pursuant to such change. Further pending such resolution, the Service Provider shall be entitled to invoice the Ministry, and the Ministry shall be liable to pay, the actual costs, disbursements and expenses directly attributable to such change together with an allowance for overhead and profit as set forth in **Schedule 10** up to the amount that the Ministry in the first instance, determines to be the cost and/or delay attributable to such change, subject to final resolution in the manner set out in the dispute resolution procedures set out in **Article 19**. Upon final resolution of such dispute concerning the adjustment to the Lump Sum Price, the Ministry shall pay such additional amount, if any, as is determined to be owing in respect of the change, together with interest on such additional amount at the Rate of Interest, calculated from the date of performance of such additional services to the date of payment.
- (e) The Service Provider shall take steps to ensure that Change Orders issued during the performance of the TPM Services are diligently complied with and implemented and in such a manner so that costs and delays relating thereto are minimized to the greatest extent possible in the circumstances.

12.2 Change Requests

- (a) The Service Provider shall submit or cause to be submitted all Change Requests to the Ministry for Approval together with all appropriate supporting documentation. No Change Request shall be implemented or incorporated as part of the TPM Services unless and until such Change Request has been Approved.

- (b) If the parties cannot agree as to whether a matter constitutes a change to the Project Schedule or the amount, if any, by which the Lump Sum Price shall be increased or reduced, within ten (10) Business Days of receipt by the Ministry of the information set out in **Section 12.2(a)**, such issue shall be resolved in accordance with the dispute resolution procedures set out in **Article 19**; provided that if in the Ministry's opinion the change is required to be proceeded with, then the Service Provider shall, pending such resolution, nonetheless proceed to perform the services required pursuant to such change. Further pending such resolution, the Service Provider shall be entitled to invoice the Ministry, and the Ministry shall be liable to pay, the actual costs, disbursements and expenses directly attributable to such change together with an allowance for overhead and profit as set forth in **Schedule 10** up to the amount that the Ministry in the first instance, determines to be the cost and/or delay attributable to such change, subject to final resolution in the manner set out in the dispute resolution procedures, set out in **Article 19**. Upon final resolution of such dispute concerning the adjustment to the Lump Sum Price, the Ministry shall pay such additional amount, if any, as is determined to be owing in respect of the change, together with interest on such additional amount at the Rate of Interest, calculated from the date of performance of such additional services to the date of payment.

ARTICLE 13 PAYMENTS

13.1 Payment

The Lump Sum Price is as set out in **Schedule 10**. For certainty, the Service Provider acknowledges and agrees that save as expressly set out in this Agreement, any and all costs and expenses incurred by or on behalf of the Service Provider for and in respect of the TPM Services shall be for the sole and exclusive account of the Service Provider and the Ministry shall have no liability or obligation to make or provide any payment with respect thereto. The Lump Sum Price listed above does not include HST.

Subject to the provisions of this Agreement, the Ministry shall pay to the Service Provider for and on account of the TPM Services an amount equal to the Lump Sum Price therefore, in the manner and at the times set out in **Schedule 10**. From the times set out in **Schedule 10**, the Ministry shall have ten (10) days to review progress payments, and twenty (20) days to review Deliverables. Should the Ministry, acting reasonably, not Approve the progress payment and/or the Deliverable, the Ministry shall pay the undisputed portion and, with respect to the disputed portion, **Section 13.4(e)** shall apply. Upon the submission by the Service Provider of the additional information/justification requested by the Ministry pursuant to **Section 13.4(e)**, the timelines for the Ministry review and approval set out above shall apply. Payments shall be due and payable by

the Ministry to the Service Provider within thirty (30) days following the Ministry Approval of progress payments and/or Deliverables.

In the event of any delay or default by the Ministry in payment to the Service Provider in the manner and within the times set out above, interest on such sum shall be payable in accordance with **Section 1.2(i)**.

13.2 Adjustments to Prices

Subject to the provisions of **Section 16.1**, the Lump Sum Price shall only be adjusted in accordance with **Sections 12.1 and 12.2** for and in respect of:

- (a) A Change Order;
- (b) An Approved Change Request;
- (c) An event of Force Majeure;
- (d) The failure to obtain Governmental Authorizations, provided that such failure could not have been reasonably prevented by technical and scheduling measures of the Service Provider; and
- (e) Changes to Technical Standards and Specifications, and Laws and Regulations arising after the date of this Agreement which have not been reflected in the TPM Services, or Lump Sum Price.

13.3 Exclusion

Notwithstanding anything to the contrary contained in this Agreement, no fees or other compensation shall be paid to or claimed by the Service Provider for services required to correct deviations, defects, errors, deficiencies or damages attributable to the failure of the Service Provider to perform or observe its obligations or to cause the Service Provider to be in compliance hereunder.

13.4 Conditions to Payment

The Ministry's obligation to pay any amounts to the Service Provider under this Agreement is subject to the following terms and conditions:

- (a) the Service Provider shall have performed the relevant TPM Services in accordance with this Agreement;

- (b) the Ministry shall have received an invoice from the Service Provider relating to the relevant TPM Services containing the information specified in **Schedule 10** as it may be amended from time to time by the Ministry;
- (c) there shall not be an unresolved Event of Default of the Service Provider under **Section 18.1 (b), (c) or (d)**;
- (d) the Service Provider shall not be in Default under **Section 18.1(e), (f), (g), (h) or (i)**; and
- (e) should the Ministry, acting reasonably, determine that the information provided by the Service Provider is not sufficient to justify payment for the progress and/or Deliverable pursuant to **Section 13.1**, the Ministry may require additional information/justification in support of the invoice submitted.

13.5 **Harmonized Sales Tax (HST)**

Canada and Ontario have entered into a Comprehensive Integrated Tax Coordination Agreement whereby Ontario has agreed to pay harmonized sales tax (HST) on its purchases. The supplier shall invoice and collect HST from the Ministry for the Deliverables in accordance with the provisions of the Excise Tax Act, R.S.C. 1985, c.E-15, as amended or replaced from time to time.

13.6 **Set-Off**

The Ministry may hold back payment or set off against payment if, in the opinion of the Ministry acting reasonably, the Service Provider has failed to comply with any requirements of this Agreement.

ARTICLE 14 REPRESENTATIONS AND WARRANTIES

14.1 The Service Provider makes the following representations and warranties to the Ministry and confirms that the Ministry is relying upon such representations and warranties:

- (a) it is validly existing under the laws of its jurisdiction and has all necessary power and authority to own its properties and carry on its business as presently carried on and is duly licensed, registered and qualified in all jurisdictions where the character of its property owned or leased or the nature of the activities conducted by it makes such licensing, registration or qualification necessary;

- (b) no steps or proceedings have been taken or are pending to supersede or amend its constating documents or by-laws in a manner which would impair or limit its ability to carry out its obligations hereunder;
- (c) it has full power, legal right and authority to enter into this Agreement, and to do all acts and things and execute and deliver all other documents as are required hereunder to be done, observed or performed by it;
- (d) it has taken all necessary corporate action to authorize the creation, execution, delivery and performance of this Agreement, and to observe and perform the provisions hereof including holding a valid certificate of authorization issued by the Professional Engineers of Ontario;
- (e) this Agreement constitutes a valid and legally binding obligation of the Service Provider enforceable against it in accordance with its terms, subject only to applicable bankruptcy, insolvency and other similar laws affecting the enforceability of the rights of creditors generally, the general principles of equity and that equitable remedies such as specific performance and injunction are available only in the discretion of a court;
- (f) none of the authorization, creation, execution or delivery of this Agreement, nor compliance with or performance of the terms and conditions of this Agreement:
 - (i) has resulted or will result in a violation of the articles or by-laws of the Service Provider or a breach or violation of any shareholder agreement or any resolutions passed by the board of directors or shareholders of the Service Provider or a breach or violation of any Laws and Regulations;
 - (ii) has resulted or will result in a breach of, or constitute a default under any agreement, undertaking or instrument to which the Service Provider is a party or by which it or its properties or assets are bound;
- (g) as at the date of execution of this Agreement by the Service Provider, and to the Service Provider's reasonable knowledge, no event has occurred which constitutes or which, with the giving of notice, lapse of time or otherwise, would constitute a Default under or in respect of this Agreement;
- (h) there is no suit, action, dispute, civil or criminal litigation, claim, arbitration or legal, administrative or other proceeding or governmental investigation, including appeals and applications for review (collectively, "Suits"), to the best of its knowledge, pending or threatened against it that are related to the TPM Services or that would materially or adversely affect the performance thereof. There are no facts known to it which are likely to give

rise to any such Suits. There is not presently outstanding against the Service Provider any judgment, execution, order, injunction, decree or rule of any court, administrative agency, governmental authority or arbitrator which affects the performance of the TPM Services hereunder; and

- (i) all information, certificates, reports, budgets, schedules and/or statements furnished, or to be furnished, by or on behalf of the Service Provider in connection with the Construction Contract Documents or the TPM Services present, or will present, fairly the information or statements contained therein, and are, or will be, true and accurate in every material respect as at the dates or for the period indicated and omit, or will omit, no material fact necessary to make such information or statements or any of them not misleading.

ARTICLE 15 INSURANCE

15.1 Insurance During the Performance of the TPM Services

The Service Provider covenants and agrees with the Ministry that the Service Provider shall purchase, provide and maintain at all times during the term of this Agreement, or as otherwise set out in this Agreement, the following insurance with respect to the performance of the TPM Services:

- (a) Commercial General Liability - Commercial general liability insurance insuring the Service Provider and naming the Ministry as an additional insured, and any other Person who the Ministry or the Service Provider may reasonably require to be added as additional insureds. Such general liability insurance shall provide coverage in respect of property damage and/or bodily injury (including death) arising out of any and all TPM Services and shall include property damage if the damaged work or the work out of which the damage arises was performed on behalf of the Service Provider by a sub-consultant and shall include bodily injury (including death) if the bodily injury (or death) arises out of work performed on behalf of the Service Provider. Such insurance shall contain a cross liability endorsement.

The policy limit shall be no less than Five Million Dollars (\$5,000,000.00) per occurrence. The coverage under the policy shall be maintained continuously with respect to the performance of any aspect of the TPM Services during the term of this Agreement.

- (b) Professional Liability (Errors and Omissions) – A Professional Liability (Errors and Omissions) Insurance Policy, in an amount not less than Two Million Dollars (\$2,000,000.00) per claim and in the aggregate insuring the Service Provider. The coverage under the policy shall be maintained continuously during the term of this Agreement and for two years after the termination or expiration of this Agreement and shall cover insurable losses arising out of an error or omission in the rendering of or failure to render the TPM Services.
- (c) Automobile Insurance – as per statutory requirements in Ontario and/or other jurisdictions, Ontario Automobile Policy (OAP 1) Owner’s Policy Sections 3 and 4, auto liability for a limit not less than Two Million Dollars (\$2,000,000.00) per occurrence including Accident Benefits and where applicable Section 7, Loss or Damage Coverage.
- (d) Other Insurance - Any other type (e.g., Environmental Insurance), form or as otherwise may be required from time to time provided same is reimbursed by the Ministry. The need for other types and/or forms of insurance can be identified at any time during the TPM Services by either party. The cost of such insurance shall

be reimbursed by the Ministry, provided that it has first been approved as to form and content by the Ministry.

~~(d)~~(e) The Service Provider and naming the Ministry as an additional insured, His Majesty the King in right of Ontario, as represented by the Minister of Transportation; the members of the Executive Council of Ontario; and their directors, officers, advisors, agents, appointees, and employees, or the Service Provider may reasonably require to be added as additional insureds.

15.2 Waivers of Subrogation

Each of the policies of insurance required to be maintained pursuant to this **Article 15** shall contain a waiver of subrogation in favour of the insureds subject to the availability in accordance with insurance industry practice.

15.3 Premiums

The Service Provider shall duly and punctually pay or cause to be duly and punctually paid all premiums and other sums of money payable for maintaining any insurance required to be maintained pursuant to this **Article 15** and shall, if required from time to time by the Ministry, provide or cause to be provided to the Ministry evidence of payment of premiums.

15.4 Non-Cancellation

Each of the policies of insurance required to be maintained pursuant to this **Article 15** shall contain an agreement by the insurer to the effect that it will not cancel such policy prior to its expiration (whether by reason of non-fulfilment of conditions or otherwise except for non-payment) except upon the annual anniversary of each such policy and only upon thirty (30) days' prior written notice to the Ministry.

15.5 Evidence of Insurance

The Service Provider shall deliver or cause to be delivered to the Ministry evidence of the insurance required to be maintained pursuant to subsections 15.1(a), (b) and (c), on or before the execution of this Agreement. The Service Provider shall deliver or cause to be delivered to the Ministry evidence of the insurance required to be maintained pursuant to subsection 15.1(d) within a reasonable period of time following the identification of its need, and approval as to form and content by the Ministry, all in accordance with subsection 15.1(d). The Service Provider shall provide or cause to be provided evidence of the extension of such insurance to the Ministry forthwith upon its receipt by the Service Provider and prior to the expiration of any then current policy, and shall deposit or cause to be deposited promptly with the Ministry a certificate of insurance and subsequent renewals of such insurance (or, at the option of the Ministry, a certified copy thereof). Delivery to and examination by the Ministry of any policy of insurance or certificate thereof or other evidence of insurance shall in no way relieve the Service

Provider of any of its obligations pursuant to the provisions of this **Article 15** and shall in no way operate as a waiver by the Ministry of any of its rights.

15.6 **Co-Insurance**

If any policies of insurance shall contain any co-insurance clause, the Service Provider shall maintain or cause to be maintained at all times a sufficient amount of such insurance to meet the requirements of any such co-insurance clause so as to prevent the Service Provider or the Ministry from becoming a co-insurer under the terms of such policy or policies and to permit full recovery up to the amount insured in the event of loss, less any deductible.

15.7 **Approvals**

All insurance required to be maintained by this **Article 15** shall be Approved by the Ministry, from time to time as to terms, form, premium, amounts, deductibles, loss payees, named and additional insureds and insurers. Each policy of insurance shall be signed by the insurer or insurers responsible for the risks insured against.

15.8 **Liabilities of the Service Provider**

The Service Provider's liabilities and obligations shall not be restricted to any sums mentioned in any of the insurance clauses contained herein and such insurance amounts provided for herein shall not be construed so as to relieve or limit the liability of the Service Provider in excess of such coverage and shall not preclude the Ministry from taking such other actions as are available to it under any provision of this Agreement or otherwise at law or in equity.

15.9 **Ministry's Right to Insure**

The Service Provider shall immediately advise the Ministry of any cancellation, material alteration or lapse of any policies of insurance required to be provided hereunder. If the Service Provider fails to obtain and maintain or cause to be obtained and maintained such insurance or if such insurance is in an amount less than the amount required under this Agreement, the Ministry shall have the right (without any obligation to do so), upon two (2) days' notice to the Service Provider in a non-emergency situation or forthwith in an emergency situation and without assuming any obligation in connection therewith, to effect such insurance and all costs, expenses and other outlays by the Ministry in connection therewith together with interest at the Rate of Interest shall be payable by the Service Provider to the Ministry upon demand without prejudice to any other rights and recourse of the Ministry hereunder. No such insurance taken out by the Ministry shall relieve the Service Provider of its obligations to insure hereunder and the Ministry shall not be liable for any loss or damage suffered by the Service Provider in connection therewith.

15.10 Cooperation

The Ministry and the Service Provider covenant and agree with each other to do all acts, matters and things as may be reasonably necessary or required to expedite the adjustment of any loss or damage covered by insurance hereunder so as to expedite the release and dedication of proceeds of such insurance in the manner and for the purposes herein contemplated.

ARTICLE 16 INDEMNIFICATION

16.1 Service Provider's Indemnity of the Ministry

The Service Provider shall indemnify and save harmless the Ministry, its employees, contractors, agents and assigns (collectively, the "**Indemnities**") from and against any and all Claims of any nature whatsoever and howsoever caused resulting from or relating to:

- (a) any breach, violation or non-performance by or on behalf of the Service Provider of any covenant, obligation or agreement of the Service Provider contained in this Agreement, including any warranty (express or implied);
- (b) any negligent acts or omissions or wilful misconduct by or on behalf of the Service Provider relating to the TPM Services;
- (c) any acts performed or omitted to be performed (including, without limitation, any negligent acts or omissions) by or on behalf of the Service Provider beyond the authority of the Service Provider hereby conferred;
- (d) any inaccuracy in or breach of any of the representations or warranties of the Service Provider contained in this Agreement or any document or certificate prepared by or on behalf of the Service Provider given pursuant to this Agreement;
- (e) any claims for personal injury or property damage by third parties, caused by errors, omissions, negligence, wilful misconduct, recklessness or fraud of the Service Provider, its officers, directors, partners, affiliates, agents or employees in connection with the TPM Services; and/or
- (f) all reasonable costs, expenses and legal fees (on a solicitor and his own client basis) that may be incurred or paid by the Ministry in enforcing the terms, covenants and conditions of this Agreement and/or that may be incurred or paid by the Ministry in connection with any action, suit or proceeding with respect to a matter for which the Service Provider is

obligated to indemnify the Indemnities pursuant to this **Article 16**, provided that the indemnity obligations of the Service Provider hereunder shall not extend to claims attributable to the negligence or wilful misconduct of the Ministry.

16.2 **Survival**

The indemnity of the Service Provider provided for in **Section 16.1** shall survive the expiration or earlier termination of this Agreement for a period of ten (10) years thereafter.

16.3 **Copyright and Patent Indemnity**

The Service Provider shall pay all copyright and/or patent royalties, if any, to any third party in respect of the use of the Service Provider's Intellectual Property. The Service Provider shall defend, at its own expense, in the name and on behalf of the Ministry, any Claim brought against the Ministry, its officers, personnel or agents, and any negotiations for their settlement, to the extent that any such Claim is based on a claim that the Service Provider's Proprietary Information, or any part thereof, infringe on any patent or copyright or any other industrial or intellectual property right, including trade secrets, provided the Service Provider is notified promptly in writing and given authority, information and assistance (at the Service Provider's expense) sufficient to permit the Service Provider to defend same. The Service Provider shall pay all damages and costs awarded against the Ministry, its officers, personnel and agents, in any such suit or proceeding; but the Service Provider shall not be responsible for any damages, costs or expense where a settlement has been incurred by or on behalf of the Ministry without the Service Provider's prior written consent or where the Ministry's conduct in any way compromises the defence of such suit or proceeding.

16.4 The Service Provider shall promptly discharge all settlement expenditures, if any, and all liabilities, damages, monetary awards and costs awarded against the Ministry by a court or tribunal of competent jurisdiction, arising out of or in connection with such alleged infringement or misappropriation, together with all related legal fees and expenses; provided however, that the Service Provider shall not be responsible for any such liabilities, damages, monetary awards, costs and expenses (including any related legal fees and expenses) where a settlement has been incurred by or on behalf of the Ministry without the Service Provider's prior written consent or where the Ministry's conduct in any way compromises the defence of such suit or proceeding.

16.5 In the event that the Service Provider's Intellectual Property or part thereof constitutes an infringement or violation and the use thereof is enjoined, the Service Provider shall be in breach of this Agreement and, without prejudice to such other legal

rights and remedies that may be available to the Ministry, the Service Provider shall, at its expense:

- (a) procure for the Ministry the right to continue using either the Service Provider's Intellectual Property or part thereof;
- (b) replace same with a non-infringing substitute or part thereof; or
- (c) modify either the Service Provider's Intellectual Property or part thereof to the Ministry's satisfaction so it becomes non-infringing.

16.6 If the Service Provider is unable to make available any of the remedies specified in **Section 16.5**, the Service Provider shall, at its sole expense, promptly upon the Ministry's demand de-install and remove the Service Provider's Intellectual Property and refund all amounts paid by the Ministry to the Service Provider with respect to such Service Provider's Intellectual Property without prejudice to such other legal rights and remedies as may be available to the Ministry. In such event any financial obligations of the Ministry with respect to further support, maintenance and services relating to the Service Provider's Intellectual Property cease at the date the Ministry ceases to use the Service Provider's Intellectual Property.

ARTICLE 17 WARRANTY

17.1 Warranty

In addition to any representation or warranty applicable at law to the TPM Services or any part thereof, the Service Provider represents and warrants that the TPM Services will be completed and performed in compliance with **Sections 4.4, 4.5 and 4.6**.

The Service Provider represents and warrants that, following completion of the TPM Services, the TPM Services are complete and accurate in all material respects and can be relied on.

The Service Provider shall, at its own expense, rectify and make good or cause to be rectified and made good any errors, omissions, defects or deficiencies in respect of the TPM Services or any part thereof due to the negligence of the Service Provider.

ARTICLE 18 DEFAULT, TERMINATION AND REMEDIES

18.1 Default by the Service Provider

The occurrence of any one or more of the following events shall constitute a Default by the Service Provider under this Agreement but shall not be considered an Event of Default unless such Default is not remedied prior to the expiry of the relevant notice period (if any) and the relevant cure period (if any) applicable to such Default as hereinafter set out:

- (a) if the Service Provider fails to perform or observe any of its obligations under this Agreement on its part to be observed and performed and such failure shall continue unremedied for a period of five (5) Business Days following notice thereof (giving particulars of the failure in reasonable detail) from the Ministry to the Service Provider, or such longer period as may be reasonably necessary, in the sole discretion of the Ministry, to cure such failure; provided that the Service Provider has demonstrated to the satisfaction of the Ministry that (i) it is proceeding with all due diligence to cure or cause to be cured such failure, (ii) its proceedings can be reasonably expected to cure or cause to be cured such failure within a time frame acceptable to the Ministry, and (iii) it shall thereafter cure such failure with all due diligence and within a time frame acceptable to the Ministry;
- (b) if there is a default by the Service Provider under any agreement, undertaking or instrument relating to the performance of the TPM Services which is not cured prior to the expiry of the applicable notice and cure period, if any, relating thereto;
- (c) if any representation or warranty made by the Service Provider in this Agreement or in any document or certificate given pursuant to this Agreement shall prove to have been incorrect in any material respect when made or at anytime during the term of the Agreement and such incorrect representation or warranty if capable of being remedied, has not been remedied within fifteen (15) Business Days following notice thereof (giving particulars of the incorrect representation, warranty or covenant in reasonable detail) from the Ministry to the Service Provider;
- (d) if the Service Provider fails to comply with the requirements of **Section 4** hereof;
- (e) if any proceedings are commenced or taken for the dissolution, liquidation or winding-up of the Service Provider or for the suspension of operations of the Service Provider, whether by extra-judicial means or under any statute of any applicable jurisdiction or otherwise unless such proceedings have been stayed within thirty (30) Business Days of commencement and have been withdrawn or dismissed within thirty (30) Business Days of commencement;

- (f) if the Service Provider becomes insolvent, commits an act of bankruptcy, acknowledges its insolvency, makes an assignment in bankruptcy or any other assignment for the benefit of creditors, makes any proposal, indicates its intentions to do so or files for relief under the *Bankruptcy and Insolvency Act* (Canada), the *Companies Creditors Arrangement Act* (Canada), the *Winding-Up Act* (Canada) or any other bankruptcy, insolvency or analogous law or is adjudged bankrupt, or consents to or acquiesces in the appointment of a trustee, receiver, receiver and manager, interim receiver, custodian, sequestrator, agent or a Person with similar powers, in respect of the Service Provider or all or a substantial portion of its property or assets, or any proceedings are commenced in respect of the Service Provider seeking a reorganization, arrangement, compromise, composition, compounding, extension of time, moratorium or readjustment under any applicable bankruptcy, insolvency, moratorium, reorganization or other similar law affecting creditors' rights, and any such decree or order continues unstayed and in effect for a period of thirty (30) Business Days from its issuance and is not withdrawn or discharged within thirty (30) Business Days of issuance, or if a trustee, receiver, receiver and manager, interim receiver, custodian or other person with similar powers is appointed in respect of the Service Provider or in respect of all or a substantial portion of its property or assets and any such appointment continues unstayed and in effect for thirty (30) Business Days.
- (g) if there is a change in the financial condition, business or affairs of the Service Provider which has a material and adverse effect on the ability of the Service Provider to meet its obligations under this Agreement;
- (h) if the Service Provider ceases to carry on all or substantially all of its business or makes a sale in bulk, or except as Approved by the Ministry acting reasonably, transfers all or substantially all of its undertakings and assets; and/or
- (i) if any of the insurance policies required to be obtained and maintained by the Service Provider under this Agreement are terminated or cancelled, or amended in a manner which is materially adverse to the Ministry as a result of any matter in respect to which the Service Provider is obligated to indemnify the Ministry.

18.2 Remedies of the Ministry

Upon the occurrence of an Event of Default by the Service Provider under this Agreement, the Ministry may terminate this Agreement, without prejudice to the right of the Ministry to sue for damages (including (i) all administrative and staffing costs of the Ministry; (ii) all costs of retaining a third party to complete the TPM Services and any costs of delay incurred on the Construction Contract; and (iii) all costs of remediation required or appropriate) and its costs and expenses thereof (including legal and other professional

fees). The Ministry may withhold further payment to the Service Provider pending a determination of damages, following which the Ministry shall pay to the Service Provider the balance remaining, if any, of amounts due as at the date of termination.

18.3 Default by the Ministry

In addition to the remedy provided in **Section 13.1**, failure by the Ministry to make timely payment to the Service Provider of amounts properly due and owing pursuant to **Section 13.1** shall constitute a Default by the Ministry under this Agreement, but shall not be considered an Event of Default unless such Default shall continue unremedied for a period of ten (10) Business Days following notice thereof from the Service Provider to the Ministry, or such longer period as may be reasonably necessary, provided that the Ministry has demonstrated that (i) it is proceeding with all due diligence to cure or cause to be cured such non-payment, (ii) its proceedings can be reasonably expected to cure or cause to be cured such non-payment within a time frame acceptable to the Service Provider, and (iii) it shall thereafter cure such non-payment with all due diligence and within a time frame acceptable to the Service Provider.

Upon the occurrence of an Event of Default by the Ministry, the Service Provider may (a) suspend the performance of further TPM Services, in which event the time for performance shall be deemed to be extended for the period of such suspension of TPM Services; or (b) terminate this Agreement, without prejudice to the right of the Service Provider to sue for damages and its costs and expenses thereof (including legal and other professional fees).

18.4 Responsibility for Errors, Omissions, Faulty Design and Latent Defects

The Service Provider shall, notwithstanding the acceptance and approval by the Ministry of any work performed or completed under the terms of the Agreement, continue to be responsible and liable under this Agreement for any expenses or damages incurred by the Ministry in remedying errors, omissions, faulty design and latent defects in any part of the work performed under this Agreement due to the negligence of the Service Provider. In this regard, the Ministry may, in its sole discretion, seek recovery of all Ministry costs, including Ministry staff time, incurred above what the Ministry would have incurred without the errors, omissions, faulty design or latent defects. The Service Provider shall not object to the Ministry seeking to recover costs associated with Ministry staff managing the errors, omissions, faulty design and latent defects of the Service Provider, but the Service Provider may dispute the quantum of the costs.

The Ministry shall notify the Service Provider of any errors, omissions, faulty design and latent defects discovered by the Ministry in the Service Provider's performance of the Agreement. The Ministry may, in its sole discretion, allow the Service Provider the opportunity to remedy or correct same at the Service Provider's

expense and cost. The Ministry will estimate the actual additional cost to the Ministry as a result of the errors, omissions, faulty design and latent defects and notify the Service Provider of its liability for the additional cost. The failure of the Ministry to provide such notices shall not be a bar to any remedy the Ministry may seek against the Service Provider.

The provisions of **Article 19** relating to dispute resolution shall be applicable to the resolution of the Service Provider's responsibility and liability in this regard.

18.5 Suspension of TPM Services or Termination Other Than for Default

The Ministry reserves the right and entitlement to suspend performance of the TPM Services or terminate this Agreement at any time, without cause but acting in good faith, by giving written notice to that effect to the Service Provider, in which event the Ministry will pay to the Service Provider an amount equal to the aggregate of:

- (a) the value of the TPM Services performed to the date of suspension or termination; and
- (b) the reasonable cost of cancellation of contracts and agreements (including relevant employment severance costs),

which payments shall be paid by the Ministry to the Service Provider within thirty (30) Business Days following the determination of the amount of such payments. Such suspension or termination shall be effective in the manner specified in the notice and shall be without prejudice to any claims which either party may have against the other.

In the event that any suspension of this Agreement lasts for longer than one hundred and eighty (180) days, the Service Provider shall have the right to terminate this Agreement by providing the Ministry with written notice of such termination.

18.6 Liability Continues

Notwithstanding the suspension or termination of this Agreement, whether as a result of the Service Provider's Default or otherwise, the Service Provider shall remain liable to the Ministry for any breach or Default committed by the Service Provider hereunder prior to such suspension or termination. In addition, subject to **Section 20.12**, the Service Provider's obligations under this Agreement as to quality, correction and warranty of the TPM Services performed by the Service Provider up to the time of suspension or termination shall continue in full force after such termination.

18.7 Delivery of Documents and Assignment of Rights

Upon the suspension or termination of this Agreement, for any reason whatsoever, the Service Provider shall deliver or cause to be delivered to the Ministry copies of all Construction Contract Documents and all documents, records, instruments and

agreements relating to the TPM Services which are in the possession or control of the Service Provider, and shall use its best efforts to deliver or cause to be delivered any and all documents, records, instruments and agreements relating to the TPM Services which are in the possession or control of any the Service Provider's advisors and subcontractors. Such delivery shall be at the Service Provider's expense if the suspension or termination is as a result of the default of the Service Provider, otherwise it shall be at the expense of the Ministry.

ARTICLE 19 DISPUTE RESOLUTION

19.1 Issue Resolution

- (a) In the event of any issue, other than with respect to an Event of Default, [the right or entitlement of the Ministry to give a notice of suspension or termination pursuant to Section 18.5](#), or a Performance Appraisal, arising between the Service Provider and the Ministry under this Agreement, the Ministry and the Service Provider shall use their best efforts to resolve such issues and shall follow the Issue Resolution process outlined in this Article.
- (b) The Service Provider shall immediately begin keeping Work Records as indicated within this Article.
- (c) The Service Provider shall immediately provide written notification (the Site Notice) to the Ministry's designated representative when they are aware of or ought to have become aware of any aspects of the Agreement that relate to the issue. The notification shall include a clear description of the situation including all impacts to the Service Provider including specific references to the Service Provider Agreement and any relevant supporting documentation.
- (d) Prior to the expiry of 30 Business Days from the date of receipt of the site notice, the Ministry's designated representative shall provide a written response to the Service Provider. This response shall provide the rationale of the Ministry's evaluation of the site notice. This response shall be deemed as the site response.

19.2 Dispute Resolution

In the event that an issue remains unresolved and the Service Provider wishes to elevate the matter, the Service Provider shall submit a written notice ("Dispute Notice") within 15 Business Days of receipt of the Ministry's designated representative response to a dispute, the Service Provider shall submit the Dispute Notice in accordance with this Article. Such Dispute Notice

shall be in sufficient detail to identify the specific work or services affected, the reasoning for, and quantity of any/all changes to the assignment duration or the costs or payments in respect thereof. Details of the Dispute Notice shall be provided under the following headings:

- i. Agreement Information:
 - a) the Service Provider Assignment Number,
 - b) any other related work project designations,
 - c) names of Service Provider and Ministry staff with knowledge of the dispute including individuals aware of the dispute,
- ii. Chronology: dates and times (as applicable) with a brief, factual summation of how the dispute unfolded and when related correspondence was received and/or sent,
- iii. Detailed description of the dispute, including:
 - a) provisions of the Service Provider Assignment that are relevant to the dispute;
 - b) Service Provider's reasoning supporting additional compensation;
 - c) reference to applicable supporting documentation as well as how/why it applies to the dispute.
- iv. Quantum: provide a detailed accounting of the time and/or cost related to the disputed event including a breakdown of actual costs or estimated costs if actual costs not fully known at the time. If estimated costs were provided, actual cost information is to be provided as it becomes available; and all applicable supporting documentation, invoices, records, etc.

19.3 Proceeding with the Services and Deliverables

Unless the Agreement has already been terminated or completed, the Service Provider shall, unless specifically directed otherwise by the Ministry, after serving a Dispute Notice, continue to proceed with the Services and Deliverables with all due diligence and expedition.

19.4 Negotiation Levels

- (a) If a Dispute Notice is delivered by the Service Provider, the Ministry and the Service Provider shall undertake best efforts to resolve the dispute on the

- following two (2) successive levels of negotiations (the "Negotiation Levels") between the Service Provider and:
- i. the Ministry's area office senior management level ("Area Office Negotiations"); and
 - ii. the Ministry's provincial Contract Claims Office ("PO Negotiations").
- (b) Following receipt of the Dispute Notice, negotiations shall be completed as soon as possible and are limited to:
- i. sixty (60) Business Days at the Area Office Negotiations Level; and
 - ii. sixty (60) Business Days at the PO Negotiations Level
- (c) Prior to the expiry of the review period at each of the Negotiation Levels, the Ministry shall provide the Service Provider with a written decision on the Dispute.
- (d) The Service Provider shall then be permitted up to 10 Business Days from the receipt of the decision to accept or reject the decision regarding the Service Provider's Notice of Dispute.
- (e) If the Service Provider rejects the decision at the previous level, then the Service Provider can elect to have the Dispute Notice submitted to the next level. The submission shall:
- i. Provide written notice of their elevation to the next level.
 - ii. Include the originally submitted Dispute Notice,
 - iii. Any other supporting documentation or information requested/provided at the previous level.
 - iv. Any updates to the actual Dispute quantum.
- (f) Any review period may be extended as the Ministry, acting reasonably, deems appropriate. However, the Ministry shall make every effort to complete its review and evaluation within the time limits specified within this Article. The Ministry's designated representative shall consider the Service Provider's request(s) to extend such review periods when a written request to extend is provided with rationale for the extension.
- (g) Any offer of settlement becomes null and void when either party requests that the dispute be elevated to the next level in the process, or when the respective time limitations have passed as detailed herein.

19.5 Alternative Dispute Resolution

If a dispute is not resolved satisfactorily through the Negotiation Levels described above, the parties, upon mutual agreement, may seek to undertake other forms of Dispute Resolution.

19.6 Work Records

(a) The Service Provider shall begin to keep work records/status reports immediately upon becoming aware of any situation which may result in a request for additional payment. Each record/status report, shall be compiled weekly and contain the minimal details below for each single situation in dispute:

- i. Name and position of each individual working on the disputed matter
- ii. Description of the work related to the specific situation carried out by each individual
- iii. Date and time each individual worked on the dispute within the week
- iv. If applicable, include details of any owned/rented equipment or third party services used for the disputed work as well as clearly marked paid invoices
- v. Signature of the Service Provider's Project Manager indicating the provided information is fulsome and accurate

(b) The Service Provider shall make available such Work Records to the Ministry for the Ministry's review as and when so reasonably required. Further, any requested supporting records are to be provided promptly upon request to the Ministry from the Service Provider. Failure to provide the Work Records or any requested supporting records in a timely manner may result in forfeiture of remuneration, even if principle is validated.

(c) The keeping of Work Records by the Service Provider and the process of reviewing those records shall not be construed to be acceptance of the dispute for additional payment to which they relate, or any acknowledgement by the Service Provider that such claim for additional payment shall necessarily be restricted to a dispute calculated on a time and material basis.

(d) The Service Provider's failure to keep or deliver Work Records or to keep complete Work Records may limit the Service Provider's ability to recover its costs.

ARTICLE 20 OWNERSHIP AND COPYRIGHT

20.1 Ministry Intellectual Property

The Service Provider agrees that all Intellectual Property and every other right, title and interest in and to all concepts, techniques, ideas, information and materials, however recorded, (including images and data) provided by the Ministry to the Service Provider in the performance of the TPM Services shall remain the sole property of His Majesty the King in right of Ontario at all times.

20.2 No Use of Ontario Government Insignia

The Service Provider shall not use any insignia or logo of His Majesty the King in right of Ontario except where required to provide the Deliverables, and only if it has received the prior written permission of the Ministry to do so.

20.3 Ownership of Intellectual Property

The Ministry shall be the sole owner of any Newly Created Intellectual Property. The Service Provider irrevocably assigns to and in favour of the Ministry and the Ministry accepts every right, title and interest in and to all Newly Created Intellectual Property in the Deliverables, immediately following the creation thereof, for all time. To the extent that any of the Deliverables include, in whole or in part, the Service Provider's Intellectual Property, the Service Provider grants to the Ministry a licence to use that Service Provider Intellectual Property in the manner contemplated in this Article. The Service Provider shall provide the Deliverables to the Ministry: (a) at the point of completion of the TPM Services; or (b) upon termination of this Agreement; or (c) at any time upon the request of the Ministry.

20.4 Presumption Governing Ownership

The presumption governing this Agreement shall be that the Ministry shall be the sole owner of any Intellectual Property in any form contained in any of the Deliverables. If the Service Provider's Intellectual Property forms any part of the Deliverables, the Service Provider shall notify the Ministry as such prior to the delivery of the particular Deliverable containing any such Service Provider Intellectual Property. In the absence of any such notice the presumption shall remain that the Ministry is the sole owner of any Intellectual Property contained in the Deliverables.

20.5 Service Provider's Grant of Licence

For those parts of the Deliverables that are Service Provider Intellectual Property, the Service Provider grants to the Ministry, a perpetual, world-wide, non-exclusive, irrevocable, transferable, royalty-free, fully paid-up right and licence: (a) to use, execute, display, distribute, perform and reproduce, in any form, copies of those Deliverables and to practice and have practised any process or method (or both) associated with such Deliverables; and (b) to use, execute, make, have made, have used, display, distribute, perform, reproduce and prepare, in any form, Derivative Work based on those Deliverables and to practise and have practised any process or method (or both)

associated with such Derivative Work; and (c) authorize other Persons including agents, contractors or subcontractors to do any of the former on behalf of the Ministry.

20.6 No Restrictive Material in Deliverables

The Service Provider shall not incorporate into any Deliverables anything that would restrict the right of the Ministry to modify, further develop or otherwise use the Deliverables in any way that the Ministry deems necessary, or that would prevent the Ministry from entering into any contract with any contractor other than the Service Provider for the modification, further development of or other use of the Deliverables.

20.7 Service Provider Representation and Warranty Regarding Third-Party Intellectual Property

The Service Provider represents and warrants that the provision of the Deliverables shall not infringe or induce the infringement of any Third-Party Intellectual Property rights. The Service Provider further represents and warrants that it has obtained assurances with respect to any Third-Party Intellectual Property that any rights of integrity or any other moral rights associated therewith have been waived.

20.8 Moral Rights

The Service Provider shall obtain waivers of all rights of integrity and any other moral rights in relation to the Deliverables from its employees, volunteers, agents and subcontractors and from any other party in the position to assert such rights in relation to any of the Deliverables, which waivers may be invoked without restriction by any person authorized by the Ministry to use the Deliverables.

20.9 Copyright Notice

The Service Provider shall place a copyright notice on all recorded Deliverables it provides to the Ministry under this Agreement in the following form:

“© King’s Printer for Ontario”

20.10 Further Assurances Regarding Copyright

For the purposes of the *Copyright Act* (Canada), the Service Provider acknowledges that the copyright for all Intellectual Property shall belong to the Ministry. At the request of the Ministry, at any time or from time to time, the Service Provider shall execute and agrees to cause anyone in the position to assert rights of integrity or any other moral right (including its employees, volunteers, agents and subcontractors) to execute a written assignment of copyright and waiver of moral rights in the applicable Deliverable to the Ministry. The Service Provider shall assist the Ministry in preparing any Canadian copyright registration that the Ministry considers appropriate. The

Service Provider will obtain or execute any other document reasonably required by the Ministry to protect the Intellectual Property of the Ministry.

20.11 Ministry May Prescribe Further Compliance

The Ministry reserves the right to prescribe the specific manner in which the Service Provider shall perform its obligations relating to this Article.

20.12 Warranty of Fitness

The Ministry acknowledges that there shall be no implied warranty of fitness by the Service Provider for any agreements, materials, studies, reports, requests, approvals, notices or other documents which:

- (i) have not been given or prepared by the Service Provider or its subcontractors or agents;
- (ii) are incomplete due to early termination or suspension of this Agreement;
- (iii) have been altered or revised without the prior participation or consent of the Service Provider; and/or
- (iv) are used or applied for any purpose outside of the express limitations set out therein.

20.13 Copies

The Service Provider may retain one copy of each such document solely for record-keeping purposes.

20.14 Software Viruses

All software or software media (“**Software**”) provided to the Ministry by the Service Provider or vice versa, directly or by way of a third party, shall be free of software viruses. In the event that a virus is found in the Software and without prejudice to any other rights or remedies of either party the relevant party shall at its own expense either immediately remove such virus from the Software to the satisfaction of the other party and replace the infected Software and remedy the resulting damage.

With respect to any access to or use of Government Systems, as may be permitted under this Agreement, the Service Provider shall make reasonable efforts so that no software viruses are introduced to the Government Systems by the Service Provider.

20.15 Survival

The obligations contained in this Article shall survive the termination or expiry of this Agreement.

ARTICLE 21 CONFIDENTIALITY

21.1 Use of Intellectual Property

The Service Provider shall not use or allow to be used the Intellectual Property for any purpose other than that provided for under this Agreement.

21.2 Ministry Property

The Service Provider acknowledges and agrees that the Intellectual Property is the property of the Ministry and is highly valuable, confidential and material to the interests, business and affairs of the Ministry and that disclosure thereof would be detrimental to the interests, business and affairs of the Ministry. The Service Provider agrees that it will maintain the confidentiality of the Intellectual Property and that, except as specifically permitted by the terms of this Agreement, the Service Provider shall not disclose the Intellectual Property to any person for any reason whatsoever other than to those persons who actually need to have knowledge of the Intellectual Property for the purposes of this Agreement. The confidentiality obligations of the Service Provider shall not apply to those elements of the Intellectual Property which are currently or hereafter become generally available to the public, provided such public availability has not occurred as a result of disclosure by the Service Provider in contravention of this Agreement.

21.3 Use of Service Provider's Intellectual Property

The Ministry shall not use or allow to be used the Service Provider's Intellectual Property for any purpose other than that provided for under this Agreement.

21.4 Service Provider's Property

The Ministry acknowledges and agrees that the Service Provider's Intellectual Property is the property of the Service Provider and is highly valuable, confidential and material to the interests, business and affairs of the Service Provider and that disclosure thereof would be detrimental to the interests, business and affairs of the Service Provider. The Ministry agrees that it will maintain the confidentiality of the Service Provider's Intellectual Property and that, except subject to a court order and/or as specifically permitted by the terms of this Agreement, the Ministry shall not disclose the Service Provider's Intellectual Property to any person for any reason whatsoever other than to those persons who actually need to have knowledge of the Service Provider's Intellectual Property for the purpose of this Agreement. The confidentiality obligations of the Ministry shall not apply to those elements of the Service Provider's Intellectual Property which are currently or hereafter become generally available to the public, provided such public availability has not occurred as a result of disclosure by the Ministry in contravention of this Agreement.

21.5 Exclusion

Confidential material and information shall not include any information which was required to be disclosed by law or court order.

ARTICLE 22 DISCLOSURE

22.1 Disclosure

Subject to the provisions and disclosure requirements of the *Freedom of Information and Protection of Privacy Act* (Ontario), any disclosure required by law or any disclosure required in the course of enforcement or arbitration proceedings, or any disclosure permitted hereunder, no public disclosure of any kind shall be made or permitted in respect of the subject matter of this Agreement by any party without consultation with and the consent of the other parties (such consent not to be unreasonably withheld). Any press release to be issued by the Service Provider relating to this Agreement, its subject matter or any agreement or transaction contemplated herein shall be in form and substance as mutually agreed upon by the Ministry and the Service Provider. The Service Provider shall not make or facilitate any public announcement or hold or facilitate any ceremony in connection with the TPM Services without Approval of the Ministry.

ARTICLE 23 GOVERNMENT SYSTEMS

23.1 Access to Government Systems

Where the Service Provider is permitted access under this Agreement to any computer, data, network facility, systems, software, including email and internet, telephones, facsimile and other equipment of the Ministry or the Ontario Government (collectively “**Government Systems**”), the Service Provider shall, in the access to and use of Government Systems, shall comply with Ontario Government and Ministry information technology policies, standards, procedures and best practices including as described in any Ministry security policies and in Corporate Management Directives such as the *Information and Information Technology Security Directive*; *Information and Information Technology: Operating Procedure on Usage of I.T. Resources*; and *Information and Information Technology: Operating Procedure on Internet, Intranets and Extranet* (“Directives”).

23.2 Approved Use

The Service Provider shall use Government Systems only for the purpose of

performing the TPM Services and shall not use Government Systems for any other purpose without prior Approval. The Service Provider shall not use the Government System for any unauthorized purposes. Without limiting the generality of the foregoing, the Service Provider shall not use the Government System for any illegal or unacceptable activity as described in the Directives, policies, standards and/or procedures or used in any manner that will be detrimental to the commercial, financial, operational or legal interests of the Ministry.

The Service Provider acknowledges and agrees that Government Systems are the property of the Ontario Government, are highly valuable, confidential and material to the interests, business and affairs of the Ontario Government and that improper use thereof would be detrimental to the interests, business, affairs and obligations of the Ontario Government. The Service Provider agrees not to grant access to Government Systems for any reason whatsoever other than to those of its employees who actually need to have access to Government Systems for the purpose of enabling the Service Provider to perform the TPM Services. In this event, the Service Provider may grant access to such Government Systems to those employees as is reasonably necessary.

The Service Provider shall issue appropriate directions to those employees who have been granted access to Government Systems hereunder to satisfy its obligations hereunder, and shall obtain their agreement in writing to use Government Systems only as permitted by the Service Provider and only in accordance with the Service Provider's obligations herein.

23.3 Subcontractors

No access to or use of Government Systems shall be granted to any subcontractors of the Service Provider without the prior written consent of the Ministry which consent may be granted in the Ministry's sole discretion subject to such terms and conditions which may be specified by the Ministry in writing. Where the Ministry permits such access or use, the Service Provider shall require each subcontractor to whom such access or use is granted to agree in writing, for the benefit of the Ministry, to be bound by the covenants of the Service Provider hereunder with respect to the access and use. The Service Provider shall ensure that each representative of the subcontractors who have been granted access to Government Systems execute an agreement in writing.

23.4 Service Provider's Responsibility

The Service Provider shall be responsible to the Ministry for the breach of this Agreement by it or its employees and its other representatives, its subcontractors or the representatives of the subcontractors, including without limitation, any unauthorized access to or use of Government Systems by any of its representatives or its subcontractors or the representatives of subcontractors. Upon the request of the Ministry, the Service Provider shall provide the Ministry with a current list of the

subcontractors and their representatives to whom access to Government Systems has been granted.

23.5 **Survival**

These provisions survive the expiration or termination of this Agreement.

ARTICLE 24 GENERAL

24.1 **Notice**

All notices, documents, deliveries and Approvals required or permitted by this Agreement shall be in writing and delivered to the addresses provided in the Terms of Reference/Proposal or at such other address of which the addressee may from time to time have notified the addressor. Notices shall be sent by personal delivery, facsimile ("**Fax**") or by registered mail. Notices by regular mail shall be deemed to have been received on the fourth Business Day after the date of mailing. Notices by personal delivery or by Fax shall be deemed to have been received at the time of delivery or transmission, unless delivered or transmitted on a weekend or holiday, in which case such notice shall be deemed to have been received on the next Business Day. In the event of an interruption in postal service, notice shall be given by personal delivery or Fax.

24.2 **Costs**

Except as otherwise provided in this Agreement, each party shall be responsible for its own fees, expenses, and other costs incurred in connection with carrying out its obligations under this Agreement.

24.3 **Time of the Essence**

Time is of the essence of every provision of this Agreement. Extension, waiver or variation of any provision of this Agreement shall not be deemed to affect this provision and there shall be no implied waiver of this provision.

24.4 **Further Acts**

The parties shall do or cause to be done all such further acts and things as may be reasonably necessary or desirable to give full effect to this Agreement. Without limiting the foregoing, the Service Provider will at any time and from time to time execute and deliver or cause to be executed and delivered such further instruments and take such further actions as may be reasonably requested by the Ministry in order to cure any defect in the execution and/or delivery of this Agreement.

24.5 **Jurisdiction**

This Agreement shall be governed by the laws of the Province of Ontario and the laws of Canada applicable therein. Each party hereby irrevocably attorns to the exclusive jurisdiction of the courts of the Province of Ontario.

24.6 **Amendment**

This Agreement may be amended only by written agreement of the parties.

24.7 **Waiver**

No waiver of any provision of this Agreement shall be binding unless it is in writing. No indulgence or forbearance by a party shall constitute a waiver of such party's right to insist on performance in full and in a timely manner of all covenants in this Agreement. Waiver of any provision shall not be deemed to waive the same provision thereafter, or any other provision of this Agreement at any time.

24.8 **Entire Agreement**

This Agreement and the Schedules attached to this Agreement constitute the entire agreement between the parties pertaining to all the matters herein. This Agreement supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, of the parties.

24.9 **Severability**

If any provision of this Agreement or portion thereof or the application thereof to any Person or circumstances shall to any extent be invalid or unenforceable, (a) the remainder of this Agreement or the application of such provision or portion thereof to any other Person or circumstance shall not be affected thereby, and (b) the parties hereto will negotiate in good faith to amend this Agreement to implement the intentions set forth herein. Each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

24.10 **Counterparts**

This Agreement may be executed in one or more counterparts which, together, shall constitute one and the same Agreement. This Agreement shall not be binding upon any party until it has been executed by each of the parties and delivered to all other parties.

24.11 **Assignment**

The Service Provider shall not sell, convey, charge, mortgage, pledge, encumber, assign, transfer or otherwise dispose of whether by operation of law or otherwise ("**Transfer**") any of its interest, in whole or in part, in and to the TPM Services, this

Agreement and/or any other document, agreement or instrument relating to any of the foregoing, without Approval of the Ministry, which Approval is in the Ministry's sole discretion.

The Ministry may Transfer any or all of its interest in and to this Agreement upon notice to the Service Provider and from and after the delivery of such notice, provided that the Ministry has caused the transferee to be bound by the terms of this Agreement, the Ministry shall be released from its obligations hereunder to the extent that same have been assigned.

24.12 **Subcontracting**

Except as provided herein, the Service Provider shall cause every person with whom it subcontracts to be bound by the terms of this Agreement including, but not limited to, the conflict of interest provision as set out in **Section 4.10**, the Occupational Health and Safety provisions as set out in **Section 4.12(h)**, in so far as they apply to the services to be performed by the subcontractor. No subcontract entered into by the Service Provider shall impose any obligation or liability upon the Ministry. This provision survives the expiration or termination of this Agreement.

The Service Provider shall not subcontract for the provision of legal services pertaining to the Deliverables without the express and prior written authorization of the Ministry's Legal Services Branch.

24.13 **Enurement and Binding Effect**

This Agreement shall enure to the benefit of the parties hereto and their respective permitted successors and permitted assigns and be binding upon the parties hereto and their respective successors and permitted assigns.